

# CANS: Public International Law

## PART I: THE INTERNATIONAL LEGAL 'SYSTEM'

### Introduction

- Challenges of international law:
  - No enforcement mechanism
  - Sovereignty of states; 'horizontal' system
  - States can refuse to consent
  - Incoherence/blurriness of rules
- Canada is a "middle power"
  - Unable to act effectively alone but can have systemic impact in small group or through int'l institution
  - 2 preoccupations:
    - Levelling effect of int'l law (constrains great powers)
    - Collective action over unilateralism
  - More devoted to int'l law than great powers; exercise power most effectively this way

### Ch. 1: Concept of Int'l Law in Context

#### Defining International Law

- **What is international law?**
  - The law between states (a separate legal system)
    - vs Domestic law = within the state
  - International law is the system of principles and rules designed to govern relations between sovereign states, and between sovereign states and other actors in the international legal system, such as international organizations.
  - No subject area in domestic law that isn't covered in int'l law
- **What isn't international law?**
  - *Not* synonymous with foreign law = the law of another state
  - *Not* conflict of laws between two domestic jurisdictions (e.g. which law applies in cross-border transactions) – private int'l law
- **Are international laws universal?**
  - Not necessarily; the rules are not all applied universally
  - General (bind many states), universal (bind all states), and particular application (bind only a few states – e.g. NAFTA)
- "The law among states"
  - State vs nation
    - Nation: group of peoples; large aggregate of communities united by culture, language, history, occupation of same territory
    - State: body politic as organized for supreme civil rule and government
  - Int'l law tends to conflate the two concepts, but remains largely the law among *states*
  - Classically, international law was not the law governing relations between "nations" (of peoples), but the law among States, those centralized political institutions able to claim "sovereignty" over a fixed piece of territory

- **Is it law?**
  - Harrington: separate legal system; shouldn't be compared to domestic law
  - Is there an enforcement mechanism? Sanctions for breach?
    - Just b/c breaches of law occur does not mean there is no law
    - "States often violate international law, just as individuals often violate municipal law ..." JL Brierly (1881-1955)
  - Some believe just ethical and moral compulsions on states
  - Others believe int'l law is whatever powerful states say it is
    - But powerful – even dominant states – do not always dictate outcomes
- **Characteristics of international legal system**
  - Diff from domestic law in terms of function, determination, and enforcement
  - Key actor is a state, not person
  - No central lawmaker/political sovereign
    - UNGA is not a world gov't (only 192 states)
  - No central enforcement machinery
    - There is no international police force
    - UN Security Council is the closest, but veto issue
    - WTO has enforcement abilities but mandate limited to trade
  - Normative system; not as rigid as domestic law
    - Some lack of certainty as a result
  - Direct link b/n int'l law and int'l relations/politics
    - Impact of power and politics is more immediately recognizable and directly relevant than domestic law
  - Most int'l disputes resolved by negotiations (state sovereignty)
- **Why is international law binding?**
  - States believe it is a law, ergo it is
  - "almost all nations observe almost all principles of international law almost all of the time": Louis Henkin, 1979
  - Two general theses:
    - Natural law: the rules reflect inherent reason in the system
      - I.e. based on objectively correct moral principles
      - 'Reasonableness' concept
    - Positive law: states give implied or express consent to rules
      - I.e. Hand over of Hong Kong between UK and China
      - Countries that don't even exist at time of agreement are bound to follow rules (e.g. South Sudan)
  - Practical application: rules provide order and benefit states
    - Often states invoke rules of int'l law to show they are in the right
    - Breaches of int'l law can undermine a state's legitimacy or standing
    - Self-interest; can avoid conflict b/n states
    - Countries like Canada can tout moral position despite not having economic or military power of other states
- **How are international legal rules enforced?**
  - Economic sanctions, self-help, name and shame, cut off diplomatic relations
  - Arbitral and judicial processes available on consent
    - Trade agreement may set up dispute resolution mechanism for breach of rules
  - Peacekeeping or use of force

- Enforcement through a nation's domestic law - most imp't
- SCC will often look to int'l law to interpret domestic obligations (i.e. Charter)
  - Criminal Code amended to include anti-torture provisions
  - Most nations have legal bureau in foreign/global affairs department
  - In Canada, DOJ deals with domestic laws and Department of Foreign Affairs, Trade and Development deals with international laws

## Historical Development of Int'l Law

### Phase 1: 1648 – Peace of Westphalia

- Created the modern nation state
- Ended 30 years war
- Dissolved Holy Roman Empire
- Created sovereign states; fixed territory; pop'n
- Led to notion of non-interference with other states
- Characteristics: laissez-faire; states not bothering each other; all legally equal; little normative content; only rule is non-interference
- Power, Euro-centric, free-market, Christian

### Phase 2: WWI – WWII (1918-1945)

- After WWI (the Great War); major death tolls, secret Alliances
- Impact: no more secret treaties; world demands to know who friends/enemies are
- League of Nations; attempt at having int'l org which encourages normative behavior
- International public order
- Objective: get rid of war
- Weaknesses: No enforcement; US not part of League of Nations
- All states were equal; everyone gets 1 vote
- Set-up ILO (International Labour Organization) and Permanent Court of International Justice
- Positives: Emergence of minority protection (minority education/language rights) b/c borders were changing; beginning of HR
- Negatives: appeasement, rise of nationalism, fascism, rise of Hitler, communism, descent into WWII

### Phase 3: 1945 – 1989

- In less than 2 months, three things happened:
  1. June 1945: UN created; huge impact on IL
  2. August 1945: Atomic Bombs dropped on Hiroshima, Nagasaki (does IL prohibit nuclear weapons?)
  3. August 1945: Nuremberg is established (crimes against humanity, war crimes)
- Genocide, 1948
- World Court, Security Council (most powerful organ in UN, can create no-fly zones), PCIJ- Hague court, Bands of Unilateral Use of Force
- IL becomes global, decolonization in 1960s produces many new members
- 150 are developing (less developed); affects views of rules for engagement of int'l legal system
- Major changes in Science and Technology – now need rules about space
- Rules about demilitarizing space b/c its beyond borders of any state UN needed to develop rules

#### Phase 4: 1989 – Sept 11

- Collapse of Soviet Union, fall of Berlin Wall, end of Cold War
- New states emerge
- Emergence of 1 superpower (hegemonic power): US
- Are China and EU (27 states) other powers? What about Russia?
- Explosive growth and trade/globalization
- International Finance Law
- Greater awareness of hunger/poverty
- What do you do about natural disasters, eg. Burma – what do you do when a group of Generals decide they don't want foreigners/Red Cross workers to help?

#### Phase 5: Sept. 11, 2001

- International terrorism
- Power of non-state actors
- More regionalism coming in
- Treaties, desire to write down rules - these days it is almost impossible to write down rules b/c there are so many players

### **International Relations Theory**

- 5 main theoretical approaches:
  1. Realist: nations only conform conduct to int'l law when sufficiently coerced
  2. Rational choice (interest-based) economic theory: Int'l law is result of states acting logically to maximize their interests; goal-seeking behaviour
  3. Constructivist (norm-based): states comply with int'l law b/c of commitment to norms embodied in it
  4. Communitarian: commonality of values/identity within 'international society'
  5. Legal process: encouragement of other nations within discursive, horizontal legal process (treaty regimes); internalization into domestic system
- Importance of legitimacy to secure compliance with int'l law
  - States appeal to int'l law to legitimize their own policies or delegitimize others
    - I.e. US argued that Resolution 1441 (2002) could justify use of force against Iraq
- Predictability: depoliticizes private conflict and sets ground rules for encounters b/n states

### **About the United Nations**

- The UN is an international organization (IO)
  - Term used in international law to refer to an inter-governmental organization
    - aka body established by states
    - NOT the same as an NGO
- Established in 1945 by 51 countries committed to preserving peace through international cooperation and collective security
  - Today the UN membership consists of 193 states
  - All area states with a few exceptions or challenges
  - Canada is a UN member state; has a permanent Mission to the UN
  - Our permanent representative to UN is an Ambassador
- UN operates in 6 official languages

## Legal Framework of UN

- Indiv's who practice UN law typically work for legal dept's in national ministries of foreign affairs
- Treaty text that established UN: the *Charter of the United Nations*
  - Fundamental instrument underpinning how the UN works
  - Provides legal basis for the UN's structure, operating principles, powers and functions
  - UN Charter is akin to a Constitution
  - "UN Law" is the law of the UN Charter and other instruments, such as the rules of procedures adopted by the various UN organs
- **Purposes** (art 1): to promote inter-nation cooperation, maintain peace and security, encourage respect for human rights
- **Principles** (art 2): UN shall act in accordance with the following principles:
  - sovereign equality of all members (all states get one vote)
  - fulfill obligations in good faith
  - settle their international disputes peacefully
  - refrain from the threat or use of force against the territorial integrity or political independence of any state
    - i.e. discussions related to North Korea
    - Issue when states use chemical weapons against their own people; art 2(6) non-intervention in domestic affairs
  - give assistance to the UN and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action
  - non-intervention in the domestic jurisdiction of any state
- Art 7 of Charter sets out the **six main organs** of the UN
  - General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice and Secretariat
  - Resolution passed by subsidiary body is reported to main body who has official records
  - One of the organs is no longer operating; no one reports to them
    - Trusteeship council looked at trust/mandate territories (former colonies that were being assisted in becoming independent)
    - Last country in 1994 ended their work

\*\*See Subjects for info about six organs of UN\*\*

## Ch. 2: Sources of Int'l Law

### General

- Not synonymous with universal law; not all states bound by same rules
- Starting point: Statute of the International Court of Justice, in force Oct 24, 1945
  - Art 38(1) - The ICJ shall apply:
    - a) International conventions (treaties); rules expressly recognized by states
    - b) International custom as evidence of general practice accepted as law
    - c) General principles of law recognized by civilized nations
    - d) Judicial decisions and academic teachings (subsidiary means for determining rules of law)

## Customary Int'l Law

- **General customary int'l law:**
  - Oldest source of rules; 'evidence of general practice accepted as law'
  - Power of custom is the presumption of universal application
    - A rule of custom binds all, even those states who later become part of the UN
    - Once estab, universally binding on all states subj. to limited exceptions
      - Exceptions: regional (particular) CIL and persistent objectors
  - Requires 2 elements (doctrinal test):
    1. Widespread and uniform state practice – objective
    2. Sense of legal obligation or *opinio juris* (belief practice is mandatory) – subjective

### France v Turkey (Case of SS 'Lotus') [1927 PCIJ]

- **Ratio:** Customary int'l law requires state practice and sense of obligation
- **Facts:** France sued Turkey for breach of a customary rule
  - Collision on high seas b/n French and Turkish ship
  - Turkish ship sank; 8 passengers and crew members killed
  - French ship damaged but reached Constantinople
  - One French officer charged with manslaughter; convicted of various offences
  - France brought claim against Turkey for violating customary limitation on state jurisdiction in cases of high seas collisions
- **Issue(s):** Is there a rule/custom for collision cases that criminal proceedings come exclusively within jurisdiction of state of offending vessel?
- **Arguments:** France: prosecutions only occur before that state's court; proof of tacit consent
- **Held:** Rejected France's argument; Turkey has not violated principles of int'l law
  - No rule of international law in regard to collision cases that criminal proceedings are exclusively within jurisdiction of state whose flag is flown
  - No rule requiring French officer to be tried under French law in French court
  - Why? Limited state practice and no sense of obligation
- **Reasoning:** Fact alleged by France does not allow inference that states are conscious of having such a duty, just shows they have in practice abstained from instituting criminal proceedings

### UK v Norway (Fisheries Case) [1951 ICJ Rep]

- **Ratio:** CIL may be shown by general tolerance of states and constant/sufficiently long practice. Silence may be seen as acquiescence (state acceptance of a custom).
- **Facts:** Norway claimed it was entitled on basis of historical practice to use straight baselines as starting point for measuring territorial sea, thus enclosing coastal waters as internal waters
  - UK objected, claiming customary int'l law obliged Norway to use baselines that followed low-water mark along indented coasts
- **Arguments:** UK argued Norwegian system lacked notoriety essential to ground historic title
  - Norway declared it had Royal Decree, have been doing it for long time with no objection
- **Held:** Rejected UK's argument; use of straight baselines is consistent with customary int'l law
- **Reasoning:** Norway's method was consolidated by a constant and sufficiently long practice which was not considered contrary to int'l law by other gov'ts
  - Norway's enforcement of system against UK is warranted by:
    - Notoriety of facts
    - General toleration of int'l community (UK did not contest for over 60 years)
    - UK's position in North Sea

- Interest in the question
- Prolonged abstention

### **North Sea Continental Shelf [1969 ICJ Rep]**

- **Ratio:** Evidence of specific motivation for state practice is required to give rise to rule of customary int'l law
- **Facts:** West Germany, Denmark, and Netherlands sought ruling as to int'l law governing remaining delimitation of their continental shelves
  - D and N party to 1958 Convention on Continental Shelf (Art 6 sets out rules); G was not
- **Arguments:** D and N argue Art 6 crystallized emerging customary law (accepted rule of int'l law)
  - Even if Art 6 did not crystallize such a rule on delimitation, it has come into being since Convention by its impact and subsequent state practice
- **Held:** Rejected argument
  - The Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law
  - If Convention was not declaratory of rule of customary int'l law, its subsequent effect and state practice have not been constitutive of such a rule
- **Reasoning:** Customary rules must have equal force for all members of int'l community and cannot be subject of any unilateral exclusion
  - Requirements for conventional rule to be considered int'l law:
    - Fundamentally norm-creating character (NO)
    - Widespread and representative participation (NO)
    - Over the period, state practice was extensive and virtually uniform, showing general recognition of rule of law (NO)
  - 2 conditions to constitute the *opinio juris*:
    - Act must amount to settled practice, AND
    - Be carried out as evidence of belief that practice is rendered obligatory by existence of a rule of law requiring it
- **Dissent (Lachs J):** Acceptance of Convention by those who subsequently followed it in agreements or legislation is evidence of a widespread practice = general rule of law
  - Rule of int'l law cannot be established by a few, but need not be universally accepted
  - Frequency of application should not apply to delimitation (a one-time act)
- **Dissent (Tanaka J):** First factor (usage/practice) is quantitative
  - Second factor (*opinio juris*) is qualitative; must be ascertained from external existence of custom and its necessity felt, rather than subjective motives
  - Contextual, dynamic process; not formulaic
- **Analysis:** How to establish state motivation for behaving in particular ways?

### **Nicaragua v US (Military and Paramilitary Activities in Nicaragua) [1986 ICJ Rep]**

- **Ratio:** Widespread and consistent state practice does not in itself give rise to rule of customary int'l law (CIL); must be accompanied by *opinio juris*
- **Facts:** Nicaragua claimed US unlawfully used force against it contrary to Art 2(4) of UN Charter
- **Issue(s):** Whether Art 2(4) prohibition also existed as matter of int'l customary law
  - Whether principle of non-intervention in internal affairs of states is customary int'l law
- **Held:** Shared view of parties on content of rule is not enough; existence of rule in *opinio juris* of the states must be confirmed by practice
- **Reasoning:** Conduct of states should be generally consistent with rules

- Inconsistencies should be treated as breaches, not recognition of new rule
- Perfect consistency with rule not required
- Opinio juris of states can be deduced from attitude of states toward certain GA resolutions, and other int'l instruments expressing states' views
- No general right of intervention in another state exists in int'l law
- **Analysis:** GA resolutions do not *per se* create binding int'l law; evidence of *opinio juris*

### **Restatement of Foreign Relations Law, US**

- Evidence of practice of states includes: diplomatic acts/instructions, gov't acts, official policy statements, state inaction
- But disconnect between official state policy and empirical reality (e.g. condemn torture)
- Difficulty of quantifying sufficiency of practice (must be "widespread", "settled")
- Confusing relationship b/n state practice and *opinio juris*
- Importance of scholarly and judicial writings in influencing emerging CIL

### **Interaction of Treaty and Customary Int'l Law**

- Treaties may crystallize or give rise to wholly new CIL, codify or contradict existing CIL
  - Two sources exist side-by-side
  - A rule of international law can be sourced by treaty and by custom (similar to a rule being found in the common law and then codified in statute)
  - New treaty rules can lead to new rules of custom
  - Treaties and custom have separate existences
  - No hierarchy between sources listed in ICJ Statute, art 38(1) (a)-(c)
    - Sources are equal in legal importance and relevance

### **Nicaragua v US (Military and Paramilitary Activities) [1986 ICJ Rep]**

- **Ratio:** CIL continues to exist and apply separate from treaty law, even where the two categories of law have identical content
- **Issue(s):** Does customary bar on use of force persist given similar prohibition in UN Charter?
- **Held:** Court must determine if parties are bound by customary rules in question, but need not uphold those rules only insofar as they differ from the treaty rules US has reserved from
- **Reasoning:** Just because treaty and customary norm are same rule doesn't make customary norm inapplicable; retains separate existence
  - Distinguishable by reference to methods of interpretation and application
- **Analysis:** Reiterates need for such a belief (i.e. existence of subjective element)
  - do states 'feel' it's obligatory?

### **Exceptions to Universality of Customary Int'l Law**

- Custom: rebuttable presumption of universality
- 3 exceptions:
  1. Treaty rule that is inconsistent with rule of CIL will generally prevail as b/n parties to that treaty (see above case)
  2. Rules of "regional" CIL may displace, as b/n states within relevant region, rules of general CIL
    - See Colombian-Peruvian Asylum case and Portugal v India
  3. Persistent objectors may unilaterally escape reach of CIL

- State that has *actively and consistently denied existence or applicability* to it of CIL since emergence of rule escapes its binding effect
  - Based on principle of sovereign autonomy
  - Silence, or a failure to object, is viewed as consent or acquiescence
- Must object when rule is in nascent stage and continue to object after
- Evidence of objection must be clear, and objector must rebut presumption of silence (otherwise interpreted as consent)
  - What if several states object, including the most influential states?
  - E.g. Should the 5 official nuclear weapon states be considered persistent objectors to a non-proliferation CIL rule reflected in state practice and *opinio juris* of the great majority of states?

### **Colombian-Peruvian Asylum Case [1950 ICJ Rep]**

- **Ratio:** Basic criteria for **regional CIL**: consent of regional states, in addition to practice and *opinio juris*. But **silence or inaction is not considered acquiescence** to practice; a state taking no position on a practice is excluded from its potential binding effect
- **Facts:** Peruvian fugitive granted asylum as refugee in Colombian embassy in Peru
  - C claimed it had unilateral right to grant ‘diplomatic asylum’ within Latin America, but this interfered with P’s territorial jurisdiction
- **Held:** C has not proved existence of such a regional custom
- **Reasoning:** Party relying on regional custom must prove it is established in such a manner that it has become binding on other party
  - Not possible to discern constant and uniform usage, accepted as law

### **Portugal v India (Right of Passage over Indian Territory) [1960 ICJ Rep]**

- **Ratio:** Long continued practice b/n **only two states**, accepted as regulating their relations, can form basis of mutual rights and obligations (regional CIL)
- **Facts:** P claimed I’s suspension of right of passage over I’s territory violated rule of regional CIL
- **Issue(s):** Does regional CIL require participation of more than two states? (No)
- **Arguments:** I argued no local custom could be estab b/n only two states
- **Held:** Regional CIL exists permitting free non-military passage, but India did not violate it
- **Reasoning:** Where court finds practice clearly established by two states and governing their relations, must attribute decisive effect to it for purpose of determining rights and obligations

### **Other Sources of Int’l Law**

- Art 38(1) of ICJ Statute also refers to other sources:
  - “Judicial decisions and [academic] teachings, as subsidiary means”
    - Meant to elucidate, but not create, content of int’l law
  - “General principles of law recognized by civilized nations”

### **General Principles of Law**

- ‘Civilized nations’ is legacy of colonial period
  - Notion now incompatible with UN Charter (racist, biased, Eurocentric)
- Tie this concept to basic legal principles commonly found in domestic legal systems
  - Example of a trust or trust-like concept; a tutelle: International Status of South-west Africa Adv Op 1950

- Also applicable to procedural requirements such as hearing both parties (audi alteram partem)
- Fills gaps not otherwise filled by treaty or custom
- How general must the occurrence of principles in domestic law be?
  - Comparativism: tease common principles from as many domestic legal systems as possible, or consider whether principle receives support of representative sample
  - Categorism: invoke as general principles domestic norms that are, in eye of decision maker, inherently good and necessary ingredients of any legal system
- No mechanical system of borrowing from domestic law
  - Int'l tribunal chooses, edits, and adapts elements from other systems

### **International Status of South-West Africa, Advisory Opinion [1950 ICJ Rep]**

- **Ratio:** Private law may be used as indication of principles but not directly imported into int'l law
- **Facts:** After WWI, S. Africa granted mandate over SW Africa (later Namibia) to govern it under Art 22 of Covenant of League of Nations
  - Following League's demise, S. Africa argued it could dispose of SW Africa as it wished
- **Held:** Rejected S. Africa's argument; mandate had survived dissolution of the League
- **Reasoning:** Court should regard private law as indication of policy and principles rather than directly importing these rules and institutions
  - Words "Sacred trust of civilization" must be informed by principles of English trust law
  - General principle of trust analogous to the mandate system
    - Limited control
    - Legal obligation for the benefit of the weak
    - To do otherwise=illegal

### **Judicial Decisions**

- Judicial decision by ICJ only binds parties to that judgment; consent-based court
- Subsidiary persuasive source
- No doctrine of *stare decisis* like domestic legal system
- ICJ is highly persuasive source though
- Other persuasive sources:
  - Decisions of other int'l courts and tribunals
    - e.g. EU Court of Human Rights, Int'l Criminal Court
  - Significant domestic/national court decisions
    - e.g. High Court of Aus, UK House of Lords leading cases on immunity/torture, SCC's *Reference Re Secession of Quebec* leading case on self-determination)
  - Find decisions at [www.worldlii.org](http://www.worldlii.org)

### **Academic Writings**

- Must be cautious; possibly persuasive but can be controversial to view academic as lawmaker
- Many say it must be most highly qualified experts; difficult to determine
- May include writings of the ILC (International Law Commission)
  - Body of experts created in 1977 tasked with:
    - Codifying existing rules of int'l law
    - Developing new rules of int'l law (clarify and formulate)
  - Some question the 'expert' status
  - States are nervous about treaties b/c it leads to compromise and negotiation

## Unilateral Declarations

- One other way in which states can bind themselves in int'l law
- Famous Nuclear Tests Case; ICJ trying to guide understanding of unilateral declarations

### Nuclear Tests Case (Australia v France) [1974 ICJ Rep]

- **Ratio:** Declarations made by way of unilateral acts, concerning legal or factual situations, *may* have effect of creating legal obligations if given **publicly, with intent** to be bound.
- **Historical context:** US conducted first nuclear test in 1945
  - Over 2000 tests carried out between 1945-1966
  - Movement to ban testing of nuclear weapons (PTBT)
    - Then to comprehensively ban all nuclear weapons (CTBT)
  - Goal of moratorium not reached (India, Pakistan, North Korea)
  - CTBT not in force b/c it required states which had nuclear capabilities in 1966 to ratify it
    - Held back by China, Egypt, India, Iran, Israel, Pakistan, USA, North Korea
    - Most are signatories but not parties
- **Facts:** France was conducting atmospheric testing
  - Downwind countries (Aus & NZ) concerned about impact of testing; joined two cases
  - Aus and NZ sought order from Court requiring France to cease atmospheric testing in South Pacific, based on statements made by French President and ministers stating that this round of atmospheric tests would be the last of its type
- **Held:** Statements by President constitute an undertaking possessing legal effect, based on substance and circumstances
- **Reasoning:** France made public its intention to cease conduct of atmospheric testing following 1974 series of tests
  - No requirement of *quid pro quo* or acceptance of declaration b/c of unilateral nature
  - Key aspects: intention and circumstances
    - Intention ascertained by interpretation of act
      - Does language reveal clear intention?
    - Form is not decisive; need not be written; look at circumstances
      - Object and subject of statements
      - E.g. statements made by Head of State are significant
  - Binding character of int'l obligation from unilateral declaration is based on good faith
    - Not all unilateral acts imply obligation
      - Examine circumstances, keeping in mind principle of good faith and public nature of statements (sense of detrimental reliance)
- **Analysis:** Which state representatives can bind a state by unilateral declaration? What is basis for finding intention absent explicit statement?
  - Detrimental reliance: unilateral promise may become binding if it induces someone to rely upon it to their detriment (but court did not insist on evidence of *actual* reliance)
    - Criticized for exposing states to liability for every gratuitous promise, no matter how contradictory or even if no clear intent to be bound

### Frontier Dispute (Burkina Faso v Mali) [1986 ICJ Rep]

- **Ratio:** Requirements for unilateral declaration: 1) State must clearly *intend* to bind itself, having regard to all surrounding factual circumstances; 2) Courts reluctant to discern intent where subject matter of declaration is amenable to process of negotiation of agreement b/n states.

- **Facts:** B and M submitted border dispute to adjudication by ICJ
- **Issue(s):** Whether statement made by M's head of state, related to border dispute but conveyed outside of negotiations over dispute, had legal significance
- **Held:** No grounds to interpret declaration made by M as unilateral act with legal implications
  - Nothing to hinder parties from manifesting intention to accept binding character of these conclusions by normal method (formal reciprocal agreement)
- **Analysis:** UN General Assembly: **"Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations"** (ILC Report)
  1. Declarations may create legal obligations if public and manifest will to be bound
  2. Any state possesses such capacity
  3. Must take account of content, factual circumstances, reactions to declaration
  4. Only binding if made by authority vested with power to do so
  5. Can be oral or in writing
  6. May be addressed to int'l community or one state only
  7. Obligations only if stated in clear and specific terms
  8. Void if in conflict with peremptory norm of general int'l law
  9. No obligations for other states unless clearly accepted
  10. Cannot be revoked arbitrarily

#### **"Soft Law" and Other Influences on Int'l Law**

- Principles of political, practical, humanitarian, or moral nature that can influence state behavior but do not create strict legal obligations or rights
  - Similar to use of non-legally binding materials in domestic law, but more influential role in int'l law
- Gov'ts negotiate non-legally binding instruments for many reasons:
  - First step toward binding agreement, more easily adapted, difficult to reach binding agreement, lower transaction costs, ability to respond to changes
- Examples
  - Manuals prepared by expert bodies such as UN Refugee Agency, Civil Aviation Org
  - Work of ILC may be considered influential soft law
    - 2 roles: promote progressive development of int'l law and its codification
  - Studies, guidelines, opinions from gov'ts, NGOs, scholars, think-tanks, litigants, etc
    - May also include ILC reports
- Not binding treaty law or CIL; considered "soft law"
  - NOT sources of current law (*lex lata*)
  - Could argue evidence of emerging practice or future law (*lex ferenda*)
  - But if this is all you have, uphill battle
- UN Resolutions
  - Not generally source of int'l legal obligations, but must distinguish b/n UN organs
    - GA may make recommendations; at most, soft law or evidence of custom (to show state practice or opinio juris)
    - But Security Council can impose legally binding obligations on states for maintenance of int'l peace and security
      - Affects lawyers in banking, airline, trade of goods and services
      - *United Nations Act* (Canada): application of Security Council decisions
      - Art 41; allows Governor in Council to make orders necessary to enable measure to be applied

- Doesn't need to go through Parliament; how we create sanctions

### ***Jus Cogens Norms and Erga Omnes Obligations***

- *Jus cogens*: higher principle of int'l law from which no derogation is permitted, except by rule which has also achieved jus cogens status (VCLT art 53)
  - Poorly developed; no readily acceptable test for identifying
  - States cannot contract out of jus cogens rule by treaty (VCLT)
  - Focused on substance
  - ILC has identified: prohibitions against slavery, genocide, racial discrimination, apartheid, torture (must define), *pacta sunt servanda* (treaties must be performed in good faith)
- *Erga omnes*: duty that all states can be held to have legal interest in protecting
  - Obligation owed to all states
  - Focused on procedure
  - *Barcelona Traction*: bans on aggression and genocide, rules concerning basic human rights, prohibition of slavery and racial discrimination

### **Legal Consequences of Construction of Wall in Occupied Palestinian Territory (Advisory Opinion) [2004 ICJ Rep]**

- **Ratio**: Right to self-determination and int'l human right obligations may constitute erga omnes
- **Held**: Construction of wall by Israel in occupied Palestinian territory is contrary to int'l law
- **Reasoning**: Obligations violated by Israel include certain *erga omnes* (by their very nature the "concern of all states")
  - i.e. right of self-determination of Palestinians and certain int'l human rights obligations
  - By building it there, essentially using coercive force to take more territory that is currently under dispute (part of negotiations)
  - All states under obligation not to recognize, aid or assist construction of wall
- **Analysis**: Enforcement mechanism for obligations owed to "all states"?
  - In theory a concern to all states, but only affected states will bring a claim for breach
  - E.g. "everyone has the right to life" – peremptory norm?
    - No; not absolute, there are exceptions
    - Many states allow life to be taken in circumstances like riots, war, self-defence, abortion, assisted dying, death penalty
    - If it is a *jus cogens*, must be defined more specifically
    - Illustrates difficulty of agreeing on jus cogens
    - One of reasons France is not party to VCLT

### **Interaction of Int'l and Canadian Domestic Law**

#### **International/Domestic Legal Juncture**

- Relevance of int'l law to individuals, corporations, courts, municipalities in Canada?
  - Turns on extent to which Canadian legal system gives domestic legal effect to int'l law
  - State sovereignty; every state has its own "reception" rules

#### **Canadian Domestic Law's Treatment of Treaties**

- Monism vs Dualism

- **Monist view:** int'l treaty law automatically incorporates into domestic law
  - assumes it's all part of one legal system (E.g. France)
  - Need national rules for when int'l law conflicts with domestic
- **Dualist view:** treaty law not enforceable by domestic courts unless first transformed into domestic law (usually through enacting legislation)
  - Sees as two separate bodies of law (E.g. Canada)
  - Must balance idea of making laws on int'l plane with domestic elected legislature
  - As a result, rules requiring domestic transformation or incorporation
- *Oppenheim's International Law*
  - Dualist theory:
    - 3 major diff's b/n municipal and int'l law:
      - Sources
        - Municipal law is from custom *within* boundaries of states and statutes
        - Int'l law is from custom *among* states and law-making treaties
      - Relations
        - Municipal law regulates relations b/n individuals, and b/n states and individuals
        - Int'l law regulates relations b/n states
      - Substance
        - Municipal law is sovereign over individuals (stronger)
        - Int'l law is between sovereign states (weaker)
    - Where municipal law has not adopted int'l law by custom or statute, courts are not bound by it
  - Monist view: Rejects all 3 premises of dualism
    - Both systems of law are regulating conduct of individuals
    - Both spheres involve command binding upon subjects independent of their will
    - Both are manifestations of single conception of law; superior legal order
- Canada has traditionally taken dualist approach to treaty law
  - Only becomes part of Canadian law if received by statute of Parliament or a legislature

### **Capital Cities Communications Inc v Canadian Radio-TV Commission [1978 SCC]**

- **Ratio:** Generally treaties must be transformed before they have domestic legal effect in Canada
- **Facts:** Rogers was replacing US ads with Canadian content
  - Allowed by CRTC; Canadian administrative tribunal
  - US TV broadcasters challenged CRTC decision permitting substitution of ads in signals originating from US, claiming *Broadcasting Act* conflicted with Inter-American Radio Communications Convention from 1937 (both C and US were parties)
- **Arguments:** US argued: 1) CRTC was agent of fed gov't and 2) Act should be interpreted in light of Convention (or in a way so as not violate Canada's int'l obligations)
- **Issue:** When domestic and int'l law conflict, which prevails?
- **Held (Laskin CJ):** Wording of legislation failed to implement relevant provisions of Convention in such a way as to provide basis for US broadcasters' claim
  - strict dualist approach
- **Reasoning:** Domestic law governs domestic administrator's body
  - CRTC is not arm of Canadian gov't; not bound by Convention provisions in same way

- No ambiguity requiring resort to Convention
- Convention cannot prevail against express stipulations of Act
- Only exception would be if that treaty had been transformed into Canadian law
- **Dissent:** Commission cannot properly issue authorizations in violation of Canada's treaty obligations; appellants had legal interest in use of channels entitled to protection
  - Oversimplification to say treaties have no legal effect unless implemented by legislation
  - Cited British case; rebuttable presumption that gov't does not intend to break int'l law through domestic law
    - Implies that int'l obligation becomes integrated into domestic law
- **Analysis:** What if legislative branch fails to fully harmonize domestic law with treaty law?

### **Francis v Canada [1956 SCC]**

- **Ratio:** No need for statutory implementation by legislative branch in cases where: 1) subject matter of treaty comes within powers of federal executive branch, 2) necessary legal framework already exists, or 3) treaty's terms do not relate to domestic legal matters.
- **Facts:** F was Indian; paid duties and taxes under protest to get appliances from US into Canada
  - Applied for return of moneys under Treaty of Amity, Commerce, and Navigation of 1794 b/n UK and US ("Jay Treaty")
  - Gives rights to Indians dwelling on either side of boundary to freely pass and no duty on entry shall ever be levied
- **Held (Kerwin, Taschereau, Fauteux):** Appeal dismissed; no rights under treaty can be enforced by courts except insofar as they have been incorporated in municipal law
- **Held (Rand, Cartwright):** Appeal dismissed; legislation necessary to bring w/in municipal law
  - Treaty is primarily executive act, but implementation may require both legislative and judicial action
  - Some treaties by nature do not need domestic implementation
  - Provisions dealing with exclusively sovereign matters do not require legislative confirmation (e.g. treaties of peace or cease-fire)
  - Provisions affecting municipal law matters must be supplemented by statutory action
  - Prerogative does not extend to enactment of fiscal provisions
- **Analysis:** Is the rule applicable to all treaties?
  - Similar claim made later in *Mitchell v MNR* (2001 SCC) and *Grand Chief Mitchell v Canada* (2008 Inter-America Commission on HR)
  - Still a live issue; Minister's special rep appointed in 2016 to engaged with FN on Canada-US border crossing issues

### **Labour Conventions Case (Canada (AG) v Ontario (AG) [1937 JCPC]**

- **Ratio:** There is no corresponding authority by Parliament to implement treaties that mirrors federal executive's exclusive authority to make treaties
- **Facts:** Fed's trying to enact 3 statutes implementing int'l labour conventions (ratified by Canadian gov't), but matter fell within prov jurisdiction
  - Parliament's authority was challenged by prov's
- **Issue(s):** 1) Does fed executive have exclusive power to *conclude* treaties on Canada's behalf?  
2) Does fed Parliament have exclusive authority to *implement* treaties by way of legislation, even on provincial s.92 matters?
- **SCC:** Federal executive had treaty-making power, but evenly divided on second issue
- **Held (Lord Atkin):** The Act is *ultra vires* the Parliament of Canada

- For purposes of ss.91 and 92 distribution of power, no such thing as treaty legislation
- Fed govt cannot avoid division of powers by relying on treaty-making power
  - Fed govt can enter into treaties and prov govt may have power to implement
- When Canada incurs int'l obligations dealing with prov subject, must be dealt with by cooperation b/n the Dominion and the Provinces
- This legislation comes within property and civil rights in s.92
- **Analysis:** Issue - do unimplemented treaties have any direct effects in Canadian law?
  - Different legal position adopted in Australia
    - If you have power to make treaty, you have power to implement it
      - Tasmanian Dam Case: expanded federal powers
      - Difference is Aus has express treaty-making provision in Constitution

### **National Corn Growers Assn v Canada (Import Tribunal) [1990 SCC]**

- **Ratio:** Treaty can be interpretive aid to interpreting similar domestic legislation
- **Facts:** Potential inconsistency b/n s.42 of *Special Import Measures Act* (SIMA) and *General Agreement on Tariffs and Trade* (GATT), to which Canada was a party.
- **Issue(s):** Must the Canadian Import Tribunal interpret s.42 as enacted or can corresponding GATT obligation assist in interpretation?
- **Held:** 4-3 decision
- **Majority (Gonthier J):** Broader view
  - Not unreasonable for Tribunal to consult GATT in interpreting legislation
  - In circumstances where domestic legislation is unclear, it is reasonable to examine underlying int'l agreement
    - Where ambiguity in legislation exists, linked treaty can be interpretive aid
  - Can even reference int'l agreement as part of preliminary inquiry to determine if any ambiguity exists in domestic legislation, even if 'clear in itself'
- **Minority (Wilson J):** Agreeing in result; different reasons (narrower view)
  - Not Court's role to enforce GATT; courts have no expertise in int'l matters
  - If Tribunal's interpretation is not consistent with Canada's obligations under GATT, that is a matter for legislature

### **Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998 SCC]**

- **Ratio:** Where treaty and domestic legislation are clearly linked, treaty interpretation rules may apply
- **Facts:** Appellant denied refugee status on basis of exclusion clause Art 1(F)(c) in Convention Relating to Status of Refugees, which was given domestic legal effect in *Immigration Act*
  - He was convicted of conspiracy to traffic in a narcotic
- **Issue(s):** Correct interpretation of expression "acts contrary to purposes and principles of UN"
- **Held (Bastarache J):** Appellant's conviction not a violation of Art 1(F)(c)
- **Reasoning:** Court must adopt interpretation of Act consistent with Canada's obligations under Convention
  - Purpose and object of treaty, plus purpose of provision as suggested by *travaux preparatoires*, indicates signatories wished to ascribe special meaning to phrase
  - Court saw legislation and treaty as inherently linked
    - Treaty interpretation issue, not domestic issue
- **Analysis:** suggests SCC is not strictly dualist where there is clear link b/n treaty and legislation

### **Baker v Canada (Minister of Citizenship and Immigration) [1999 SCC]**

- **Ratio:** Values of int'l human rights law may inform domestic statutory interpretation
- **Facts:** Jamaican national with Canadian-born children was ordered deported from Canada
  - Applied for exemption under *Immigration Act* for humanitarian and compassionate (H&C) considerations; denied
- **Argument:** it would be breach of Convention on Rights of the Child to deport her back to Jamaica given interests of her four younger children in Canada
- **Issue(s):** Given the *Immigration Act* does not expressly incorporate Canada's obligations under International Convention on Rights of Child, is 'best interests of the child' the primary consideration in assessing an applicant?
- **Majority (L'Heureux-Dube J):** A reasonable exercise of power under the Act requires focus on interests and needs of children
  - Ratification by Canada of Convention recognizes children's rights
  - Convention has not been implemented by Parliament and provisions have no direct application within Canadian law
  - BUT may inform contextual approach to domestic statutory interpretation
  - Values reflected in treaty could be used for interpreting statutes and judicial review
- **Iacobucci J:** well-settled law that convention must be incorporated into domestic law
  - Federal immigration authorities need not treat 'best interests of child' as primary consideration in assessing application
  - *Capital Cities:* int'l convention is of no force in Canada until provisions incorporated into domestic law by implementing legislation
  - By allowing reference to unincorporated convention in process of statutory interpretation, appellant achieves indirectly what can't be done directly
  - Primacy accorded to rights of children in int'l law are irrelevant until such provisions are subject of legislation enacted by Parliament
  - Note: result would be different if claim fell within Charter protected right (must accord with int'l human rights norms)
- **Analysis:** Majority shows SCC departing from strict dualist approach
  - Alternative approach could have been to rely on 'best interest' principle as CIL
    - Could be sourced as a custom as well as treaty
    - Use widely ratified treaty as evidence that there is enough buy-in among states to make it a customary rule

### **R v Hape [2007 SCC]**

- **Ratio:** Conformity with int'l law is an interpretive principle of domestic law
- **Held:** Presumption of conformity: In deciding b/n possible interpretations, court will avoid construction that would place Canada in breach of int'l obligations
  - Rebuttable; Courts may give effect to unequivocal legislative intent by Parliament to default on int'l obligation
  - Applies equally to CIL and treaties
  - Courts may look to prohibitive rules of CIL to aid in interpretation of Canadian and common law
- **Analysis:** Turns more on whether Canada has become party to treaty than whether it has been implemented domestically

### **Merck Frosst Canada Ltd v Canada (Health) [2012 SCC]**

- **Ratio:** To extent possible, domestic law should be interpreted in accordance with int'l obligations. But not necessarily required to adopt mirroring definitions of terms in treaty.
- **Facts:** Interpretation of trade secrets exemption under federal *Access to Information Act*
- **Arguments:** In absence of definition of "trade secrets" in Act, should be interpreted consistently with NAFTA
- **Held (Cromwell J):** Domestic legislation should be interpreted consistently with Canada's int'l obligations to extent possible
  - But need not adopt treaty defn of 'trade secrets' to fulfill obligations
  - No evidence of intention by Parliament to mirror the NAFTA defn

### **Canadian Domestic Law's Treatment of CIL**

- Generally, Canada takes monist approach
  - Presumption of direct incorporation of CIL into domestic common law in absence of conflicting legislation
  - Can be displaced by irreconcilably contrary Canadian statute or binding precedent
  - Doctrine of adoption; no need for legislative action
  - *R v Hape*: justified on basis that int'l custom is also law of Canada unless, in valid exercise of sovereignty, Canada declares its laws to contrary
  - Result: Canada is dualist with respect to treaties and monist with respect to custom

### **Relevance of Int'l Law in Interpreting Canadian Charter**

- Canada's int'l human right obligations are important indicia of meaning of Charter protections
- ***Slaight Communications*** (1989 SCC): minimum content approach
  - Charter generally presumed to provide at least as much protection as similar int'l human rights documents which Canada has ratified
  - Many int'l conventions precede the Charter (1982); clearly in mind of Charter drafters to comply with Canada's int'l obligations at the time

### **Suresh v Canada (Minister of Citizenship and Immigration) [2002 SCC]**

- **Ratio:** Treaties may inform Charter interpretation (important indicia), but are not decisive
- **Facts:** Appellant, refugee from Sri Lanka, ordered deported by minister under *Immigration Act* b/c 'danger to security of Canada' (alleged member of terrorist organization)
  - Appellant challenged section permitting deportation on basis that it violated Charter
- **Arguments:** S argued couldn't return to Sri Lanka b/c reasonable risk of torture (breach of s.7)
- **Issue(s):** Whether deportation under s.53 of *Immigration Act*, 'to country where person's life or freedom would be threatened' (i.e. torture), violates s.7 of Charter?
- **Held:** Required constitutional standards not met
  - Appellant entitled to new deportation hearing
- **Reasoning:** 'Everyone' includes refugees; deportation to torture may deprive refugee of liberty, security, and perhaps life – but is it in accordance with the PFJs?
  - Provisions of Act and s.7 of Charter must be considered in int'l context
  - Deportation to torture prohibited by both ICCPR and CAT (Convention Against Torture) which Canada has ratified; reflects prevailing int'l norm
  - Int'l law rejects deportation to torture, even where national security interests at stake
    - No s.1 justification escape hatch; right to be free from torture is one of only absolute rights internationally

- But deportation to torture may be justified in exceptional circumstances
- **Analysis:** Repudiation of minimum-content approach in *Slaight Communications?*
  - *cf R v Hape*: courts should seek to enforce compliance with Canada's int'l obligations where express words of Charter are capable of supporting such construction
  - *Health Services v BC (2007)*: Charter should be presumed to provide at least same level of protection found in int'l human rights documents

## Treaties

### A) Concept of treaties:

- Best known source of int'l law
  - Goes by various names: convention, statute, agreement, covenant, charter
    - Don't be confused by title; look at substance over form
    - Canada likes 'convention'; we only use 'treaty' for things like peace or water
  - Legal effect does not vary depending on word used
  - Can be bilateral or multilateral
  - Need not be all in one codified statute form (may need to update or amend older treaty)
    - E.g. UN Framework Convention on Climate Change supplanted by Kyoto Accord
  - Treaty vs contract
    - No obligation for consideration in treaty; just offer and acceptance
      - Nothing must pass from one party to another; no peppercorn
    - Contract is domestic legal instrument
    - Treaties must be concluded b/n states and governed by int'l law
- **Vienna Convention on the Law of Treaties (VCLT)** – the “treaty on treaties”
  - Codifies most imp't rules governing formation, effects, and termination of treaties
  - Despite not being universally adhered to (US, France, India not included), VCLT seen as reflecting rules of customary int'l law which is binding on all states
  - Codified partly to address concern about ambiguities in custom
    - Customs and treaties are equally valid sources, but treaties have added clarity from having terms negotiated and written down
  - Adopted in 1969; came into force in 1980
    - Treaties often negotiated over years in diff working groups; lengthy process
    - Final text is date of adoption
    - Most treaties have gap; time for states to review and decide to ratify (final test)
    - Most treaties won't enter into force on first ratification
      - Treaties only bind parties from date they enter into force
  - Canada is a party to Vienna Convention
    - France is not (well-known objection to vague provision)

### B) Legal essence of treaties:

- Defn in VCLT, art 2(1)(a): Int'l agreement concluded b/n states in written form and governed by int'l law, whether embodied in single instrument or in 2 or more related instruments and whatever its particular designation
  - Every state has capacity to conclude treaties
  - Some inter-governmental organizations have been given power to be parties to treaties
  - Int'l law does not recognize agreement b/n state and individual, corporate or non-state entity as “treaty”

## Capacity to Make Treaties

- Every state possesses capacity to 'conclude' a treaty (VCLT art 6)
  - If you get recognized as a state you have this benefit (e.g. Palestine wants this recognition as legal player with ability to choose which treaties it ratifies)
  - A state cannot make a treaty with non-state actor, corporation, or NGO
    - See *UK v Iran* 1952 ICJ case; UK brought against Iran
  - If state enters into agreement with indigenous peoples, not technically a treaty by def'n
    - Doesn't make them less sacred or binding
- States have free will to choose which agreements to enter into
  - Often oral exchange, negotiation

## *UK v Iran (Anglo-Iranian Oil Co Case)* [1952 ICJ]

- **Ratio:** Contract between a corporation and gov't is NOT a treaty governed by int'l law
- **Facts:** Gov't of Iran undertook program of nationalization of oil in 1951
  - Adversely affected Anglo-Iranian oil, company incorporated in UK
  - UK brought claim against Iran to ICJ
- **Issue(s):** Preliminary: whether company's claim arose out of treaty to which Iran was a party
- **Arguments:** UK: 1933 agreement b/n oil company and Iran was such a treaty (had double character), and Iran's policy violated that treaty
- **Held:** Rejected UK's argument; concessionary contract b/n gov't and foreign corporation
  - Does not have double character; does not regulate relations b/n Iran and UK gov'ts

## Form of treaties:

- Flexible form; VCLT defn says 'written' but doesn't affect force of agreements that are not in written form
- No formal requirements for treaty
  - Could be simply memo's of meeting, exchange of diplomatic notes, oral statements
  - Typically lawyers want it written exactly; more formality today
  - Look at intent of the parties to determine if it is a treaty
  - *Qatar v Bahrain* 1994 ICJ; do they intend to be bound by int'l law, or just domestic law (intended it to be a K)? p. 52-53
  - Free will/laissez faire system based on parties' freedom to enter into treaties

## *Qatar v Bahrain (Maritime Delimitation and Territorial Questions)* [1991 ICJ]

- **Ratio:** Written record of agreement, even informal, can give rise to binding treaty relations.
- **Facts:** Qatar and Bahrain agreed to third-party mediation of maritime boundary dispute
  - Agreed that if negotiations failed, the parties would submit matter to ICJ in accordance with Bahraini formula, accepted by Qatar
- **Issue(s):** Do Minutes constitute an int'l agreement?
- **Arguments:** Bahrain: meeting minutes do not rank as int'l agreement; never intended to conclude agreement and subsequent conduct shows it was never considered to be
- **Held:** Rejected Bahrain's arguments; minutes constitute int'l agreement creating rights and obligations for the parties
- **Reasoning:** int'l agreements may take number of forms and have many names
  - Court must have regard to actual terms and circumstances
  - Non or late registration does not affect validity of agreement; remains binding

### **Denmark v Norway (Legal Status of Eastern Greenland) [1933 PCIJ]**

- **Ratio:** Exchange of oral statements may give rise to binding treaty relations
- **Facts:** Norway proclaimed sovereignty over East Greenland in 1931
  - Denmark claimed whole of Greenland, saying Norway had recognized Danish sovereignty by treaty or otherwise
  - Declaration following WWI: Norway Min. of For. Aff. assured Danish Min. that their gov't would not make any difficulty in settlement of Greenland question
- **Issue(s):** Can exchange of oral statements give rise to binding treaty relations?
- **Held:** Reply of this nature given by For. Aff. Min. on behalf of gov't to request by diplomat of foreign power, in regard to question within his province, is binding upon Minister's country
- **Analysis:** Implications for predictability of legal obligations? Consequences for state representatives?

### **C) Treaty-Making:**

- VCLT contemplates multi-step process for creation of treaties
  - Most requirements are "default" practices that will govern in absence of special agreement by negotiation parties
  - Subject to modification by consent of parties
  - But departure must not compromise essential treaty elements
- Doctrine of intertemporal law
  - Validity of bygone treaty practice is to be assessed according to law of treaties that governed at time of that practice
  - Do not apply today's rules to the past; interpret by rules existing at time of document

### **Right of Passage over Indian Territory (Portugal v India) [1960 ICJ]**

- **Ratio:** Treaty concluded in past should not be judged on basis of present practices
- **Facts:** Portugal relied on 1779 treaty by which India conferred sovereignty on Portugal over enclaves and passage; India objected on basis that treaty not validly concluded
- **Issue(s):** How should a treaty from past be assessed in modern times?
- **Held:** Treaty concluded in 18<sup>th</sup> C should not be judged on basis of practices and procedures which have since developed only gradually
- **Analysis:** This legal rule not just applicable to treaty law

### **Vienna Convention on Law of Treaties**

Negotiations -----> Acceptance/adoption/signature/approval -----> Ratification/accession

#### **i) Accreditation of state representatives**

- First step: negotiation of treaty
- Legal issue: ensuring proper individuals are present
- State representative (Art 7): heads of state, Ministers of Foreign Affairs, heads of diplomatic missions, etc are considered representatives of state
  - Other persons are considered to represent state for purpose of adopting or expressing consent to be bound by treaty IF:
    - Produces appropriate full powers
    - Intention of state is that person represents state and has 'full powers'

- Art 8: concluding act of treaty performed by person not considered state rep under art 7 is without legal effect unless confirmed afterwards by state
- In Canada, only fed gov't (executive branch) can enter into treaties on behalf of country
  - Part of prerogative power in field of foreign affairs
  - Fed foreign minister has primacy over int'l relations and treaty-negotiation
  - But Queb argues it should have role in treaty negotiation
    - Sometimes Queb given separate seat as sub-national unit by permission
    - Prov's do NOT have treaty-making power (impt in Canada)

## ii) Finalization of treaty text (once negotiations complete)

- Adoption (Art 9): Adoption of text is by full consent of all participating states, unless at int'l conference (2/3 consent)
- Authentication (Art 10): Text established as authentic and definitive by procedure defined in text, OR signatures/initialing

## iii) Expression of consent to be bound

- Art 11: consent may be expressed by signature, exchange of instruments, ratification, acceptance, approval, accession, or any other means agreed to
- Art's 12-15: Must be established that negotiating states agreed it would have that effect
- Vast majority fall into 3 classes:
  - Single-state expression of consent by negotiating state
    - Usually **signature**; common in bilateral treaties
  - Two-stage expression of consent by negotiating state
    - Usually signature, then instrument of **ratification**/acceptance/approval; common in multilateral treaties
  - Single-state expression of consent by non-negotiating state
    - If permitted by parties or treaty text, state becomes party to treaty by instrument of **accession**
    - If state is not signatory but becomes bound later, it accedes to the treaty
      - Same legal effect as ratifying
- Signatory vs party
  - Typically treaty-making is two-step process
    - Treaty is concluded (accepted/signed/adopted), but later on ratified (states indicate their consent to be bound)
    - Most multilateral treaties do NOT enter into force on signature
    - Only treaties that come into force upon signing are usually bilateral treaties, although there can still be gap in the process
  - Interplay with constitutional law
    - If treaty affects provincial responsibility it needs to be discussed with prov officials before being committed to by all of Canada
    - Treaties must be performed if they are in force
    - If you sign and ratify a treaty and don't implement it, looks bad
    - Must first have discussions with all 10 prov's and 3 territories before indicating Canada is willing to be bound
- "Party" to a treaty means that state has consented to be bound by it
  - Instrument must be deposited, exchanged or notified before state is considered to be bound by treaty
  - In US, 2/3 Senate approval required unless President uses executive order

- In Canada, executive branch can sign and ratify int'l treaties without Parliament's approval (voluntary practice to seek parliamentary endorsement)
  - 2008 policy requiring tabling of treaties for 21 days in HoC (but exceptions for urgent or bilateral treaties, and no legal force)
  - Doesn't change constitutional treaty-making power
  - Order-In-Council must authorize gov't representative to express Canada's consent to be bound by treaty
- **"Signatory" to treaty:** states have obligations in relation to prospective treaty regimes
  - Art 18: Obligated to refrain from acts which would defeat object and purpose of a treaty when a state has signed or expressed consent to be bound (gap in time)
  - 'Un-signing' a treaty
    - E.g. US 2002 letter saying it did not intend to be bound by Rome Statute of ICC (will not ratify) and therefore has no legal obligations
    - But you can't take back being a signatory to a treaty

### **North Sea Continental Shelf [1969 ICJ Rep]**

- **Ratio:** Where a particular method of expressing consent to be bound is provided for in a convention, and a state has not carried out those formalities though able to do so, it will not be lightly presumed to be bound in another way.
- **Facts:** West Germany, Denmark, and Netherlands sought ruling as to int'l law governing remaining delimitation of their continental shelves
  - D and N party to 1958 Convention on Continental Shelf (Art 6 sets out rules); G was not
- **Issue(s):** If a state fails to follow steps by which consent to be bound may be expressed, does it have obligations under the treaty?
- **Arguments:** D and N argue G's conduct shows acceptance/assumption of Convention obligations
- **Held:** Rejected D and N's argument
- **Reasoning:** Not possible to draw positive inference that G, although not party to Convention, had accepted regime as binding
  - Only situation of estoppel could lend substance to D and N's contention; not present
  - General application of doctrine advanced by D and N would be dangerous

#### **iv) Entry into force, provisional application, and registration**

- Entry into force may be delayed with agreement of negotiating states
  - Happens when state parties decide it does, just like a contract
  - Typically negotiated after the substantive parts of a treaty
    - Look at end of treaty for Entry Into Force provisions
  - Common e.g.'s
    - Come into force once certain threshold number of states have ratified
    - Come into force on certain date so negotiating states can take steps
    - States can also make it more complicated
    - Kyoto Protocol; required certain types/quality of states must ratify first (major greenhouse gas emitters)
- Treaty may also be applied provisionally
  - International Law Commission currently studying legal rules of provisional application
- How can a treaty not yet in force have legal effects on states?

- Art 24(4): Matters arising necessarily before entry into force of a treaty apply from time of the adoption of text
- Art 102, UN Charter: every int'l agreement shall as soon as possible be registered with and published by UN Secretariat
  - If not registered, cannot be relied on before any organ of UN (including ICJ)
  - Attempt to deter making of secret treaties (but is punishment sufficient?)
    - 'The law nobody knows'; goes back to WW1 secret treaties and alliances
  - Now must be registered and published by the Secretariat
    - But not their job to ensure it is well-written, valid, or fair
  - If state does not register a treaty, it's a breach of that obligation but doesn't make treaty invalid
  - Variety of treaty depositaries: UNTS, regional
    - Global Affairs Canada (official, certified, final copies of treaties to which Canada is a party, not just signatory): [www.treaty-accord.gc.ca](http://www.treaty-accord.gc.ca)

#### D) Reservations

- VCLT art 2(1)(d): Unilateral statement purporting to exclude or modify legal effect of certain provisions in application to that state
  - Made by a state when signing, ratifying, accepting, approving, or acceding
    - must be done before becoming party
    - Once you become a party, you've given consent to be bound to those terms
  - 'However phrased or named'; substance over form
    - States may try to be sneaky and hide a reservation
    - Focus on actual content; does it meet test of a reservation?
- Issues of reservations encountered more in human rights treaties
  - Intended as min standards; reservations can undermine aim of universal protection
  - One of most reserved treaties is women's rights
    - E.g. for matrimonial property, we reserve right to apply Sharia law
  - Where do you check? Official treaty depositary
- Policy considerations
  - Better to have certain states in the treaty than not at all
  - May need certain number of signatories/parties
  - But some treaties have general prohibition on reservations
    - E.g. UN Convention on Law of the Sea, Rome Convention on ICC
  - If not expressly prohibited in the treaty, states can usually do what they like
- Reservation vs statement of understanding/interpretive declaration
  - Public statement that one state interprets a provision a certain way
    - E.g. Canada: In assessing rights recognized in Convention for aboriginal children, due regard must be paid to not denying their right to culture/language
  - Substance over form; reservation only if it intends to modify or exclude part of treaty
- Objections by other states
  - Another state may object to your reservation; e.g. contrary to human rights law
  - CIL: Silence equals acquiescence/acceptance, so states want to raise their views, put their opinion on the record, formal response
  - E.g. Convention on Rights of Child; Somalia reserved and Hungary objected
- Validity of reservations
  - Doesn't make treaty relationship invalid

- Just affects relationship b/n objecting state and reserving state
  - Used to be position of League of Nations (pre-WWII) that if you put down a reservation other parties had to accept it, otherwise impermissible
    - Practical problem is veto/holdout; can be held hostage by one state
    - Plus if everyone agrees why wouldn't it be part of treaty terms?
- Treaty law traditionally hostile to reservations; changes deal negotiated b/n states
  - Relaxed in ICJ's advisory opinion

### **Reservations to Convention on Genocide (Advisory Opinion) [1951 ICJ]**

- **Ratio:** Reservation is permissible/valid unless it **defeats the object and purpose** of the treaty
  - 1) Reserving state (objected to by some but not all other parties) may be party ONLY IF reservation is compatible with object and purpose of Convention. 2) Objecting states may consider reserving state not to be party to Convention if incompatible with object and purpose.
- **Facts:** UN General Assembly sought advisory opinion from the Court
- **Issue:** Are reservations allowed in a humanizing, civilizing treaty such as this?
- **Questions: 1)** Can a reserving state, while still maintaining it, be regarded as a party to Convention, when some parties object to reservation and others accept it?
  - 2)** If yes, what is effect of reservation on parties that object and parties that accept it?
- **Reasoning:** The appraisal of reservation and effect of objections depend on particular circumstances of each case.
  - General principle of multilateral treaties: no party is entitled to frustrate or impair, by unilateral decisions or agreements, purpose and *raison d'être* of convention
    - 1) Traditional contracts principle:** no reservation was valid unless accepted by *all* contracting parties without exception
      - More flexible application needed
      - Majority principle makes it necessary for certain states to make reservations
      - Where no article is included in Convention on making of reservations, the validity and effect of reservations determined by considering character, purpose, provisions, preparation and adoption of multilateral convention
      - Special characteristics of Genocide Convention; humanitarian and civilizing purpose; common interest; no indiv advantages or disadvantages to states
      - Making or objecting to reservation should be based on compatibility of reservation with object and purpose of Convention
      - Concept of absolute integrity is NOT a rule of int'l law
      - There was no definite practice adopted; divergence of views
      - Some states attached to absolute integrity, others favoured flexibility
    - 2) No state may be bound by reservation to which it has not consented**
      - State objecting to reservation may or may not consider treaty effective b/n itself and reserving state, based on assessment of object and purpose
      - Disadvantages mitigated by common duty of states to purpose of Convention
- **Analysis:** Adopted/codified by VCLT
  - compatibility with treaty's "object and purpose" is factor controlling permissibility and effect of reservations; open door effect
  - Art 19 (formulation of reservations); Art 20 (acceptance/objection); Art 21 (legal effects)
  - Enables a bilateralization of multilateral treaties (customized regime)
    - Difficult concept to apply

### **“General Comment 24” on reservations by UN Human Rights Committee:**

- Number and scope of reservations may undermine effective implementation of Covenant and weaken respect for obligations
- Lack of prohibition on reservations does not mean any reservation is permitted
  - “Object and purpose”: create legally binding human rights standards and provide supervisory machinery
- B/c of special character of human rights treaties, falls to Committee to determine whether specific reservation is compatible with object and purpose
  - Must be estab. objectively with reference to legal principles
- Unacceptable reservation may be severable
  - Covenant is operative for reserving party without benefit of reservation
  - If we determine it’s invalid, we can sever it
- Reservations should be transparent and specific (refer to particular provision)
  - Should consider overall effect of group of reservations and effect on integrity of Covenant; should not lead to non-attainment of int’l HR standards
  - Reservations should be periodically reviewed and withdrawn at earliest moment
- France, UK, US publicly criticized Committee’s approach (goes too far)
  - Dispenses with established procedures and divests states of any role in determining treaty obligations
  - Goes to issue of state consent/sovereignty

### **“Guide to Practice on Reservations to Treaties”, ILC Report**

- Treaty monitoring body may assess permissibility of reservations
- States that have formulated reservations shall give consideration to that body’s assessment
- Reservation is incompatible with object and purpose IF it affects essential element of treaty in way that impairs *raison d’etre* of the treaty
- Recent treaties have banned reservations entirely or signaled which reservations are permissible
  - e.g. Int’l Convention on Elimination of Racial Discrimination

### **E) Amendment and Modification**

- Parties can change treaty terms with mutual consent
- Proposal for amendment of multilateral treaty
  - Applies to potentially all parties
  - Only binds parties that express consent to be bound by it
  - Treaty which amends an earlier treaty is often called a ‘protocol’
    - Multilateral treaties: often end up with a ‘mother treaty’ and side agreements (‘protocols’ or amending treaty)
    - Substance over form
    - Protocols are no less binding, still intended to be governed by int’l law
    - E.g. Framework Convention was ‘mother treaty’; Kyoto Protocol amended the nature of obligations for certain states re greenhouse gas emissions
    - Human Rights Convention now has 50+ protocols
  - State consent; not all states that are parties to treaty need to be parties to protocol
    - An amendment is another treaty; up to indiv states to choose if they want to consent to be bound to additional treaty
    - Means lawyers must check ratification record for mother treaty AND indiv ratification for amendments; more complex network of obligations
  - VCLT default rules confirms that states can amend treaties, but must give notice to other parties of proposal for amendment

- Modification of multilateral treaty
  - Sub-group of state parties to treaty agree to modify treaty rules as b/n themselves, without infringing rights of others (less elaborate)
  - Permissible as long as it doesn't impede treaty's object and purpose or affect rights and obligations of parties not participating in modification

## F) Treaty Rights and Obligations

### Performance of treaty rights

- General rules in VCLT:
  - Pacta sunt servanda: pacts must be performed in good faith
  - Rule of CIL also codified in treaty law (art 26 of VCLT)
  - Doesn't necessarily dictate one type of performance unless specified in treaty
  - Corollary obligation: Art 26 and 27 are linked
    - State's internal laws do not excuse failure to perform treaty obligations
    - Domestic/national/municipal law is no excuse
    - You cannot ratify a treaty, then say we can't perform because prov's or constitution are making it difficult
    - Longstanding rules; jurisprudence from 1930s
    - Major problem for federations with internal division of powers
    - How to reduce risk of non-performance for federal states?
      - Cooperation: invite representative from sub-national units to bargaining table when it involves their province (at negotiation stage)
      - Federal state clause: draft escape hatch for possibility that state may not be able to get everyone on side
        - See Art 28 from American Convention on Human Rights:
 

**Article 28. Federal Clause**

1. Where a State Party is constituted as a federal state, the national government of such State Party *shall* implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, ... that the competent authorities of the constituent units may adopt appropriate provisions

          - There are many federal states, but they are not the majority
          - Why should unitary states allow federal states an escape hatch? What is bargaining chip? Often not interested
      - Reservations: modify terms of treaty by saying this treaty does not apply in AB or Queb
        - Legal technique but political implications; can look bad

### Treatment of Polish Nationals, Advisory Opinion [1932 PCIJ]

- Ratio: A state cannot rely on its own Constitution against another state, or use its own Constitution to evade obligations under int'l law.
- **Facts**: Danzig was 'free city' estab under peace treaty after WWI dispute with Poland re treatment of Polish nationals. Requested opinion.
- **Issue(s)**: Whether treatment could be justified by reference to Constitution of Danzig

- **Held:** Question of treatment of Polish nationals must be settled exclusively on bases of rules of int'l laws and treaty in force b/n Poland and Danzig.

### **“Canada’s Approach to Treaty-Making”, Laura Barnett**

- Cannot ratify int'l treaty until measures in place to ensure terms enforceable in Canadian law
- If prov or territorial legislation implicated, executive will not ratify until all jurisdictions indicate support for ratification (not required, but govt policy)
- Fed gov't cannot use treaty obligations as justification for encroaching on prov jurisdiction
  - These provisions may be implemented only by provincial legislatures
  - But presumption that Canada will comply with treaty in good faith still falls on fed govt
- “Federal state clause”: informs other parties that govt may have difficulty implementing b/c of securing cooperation of provinces

### **Scope of treaty obligations**

- VCLT default rules on temporal and geographic scope
  - Non-retroactive (art 28): treaties not retroactive unless parties want them to be
  - Binding over entire territory (art 29)
    - Unless state when it ratifies puts down express provision saying it does not apply to dependent territories or colonies (e.g. NZ exclusion of Tokelau)
- Generally, treaty cannot create rights or obligations for non-parties (VCLT Art 34)
  - Privity of contract; can't bind a non-party
    - Basic rule is the same for treaties; fundamental principle is state consent
  - 3 ways treaties can affect non-parties:
    - VCLT Art 35: Can create obligations if third state expressly accepts in writing
    - VCLT Art 36: Can create rights if third state assents, which can be presumed from circumstances unless the contrary is indicated
    - VCLT Art 38: Rules in treaty can become binding on third states through CIL

### **Case of Free Zones of Upper Savoy (France v Switzerland) [1932 PCIJ]**

- **Ratio:** Effect of treaty provisions generally doesn't extend to non-parties, unless the states intended to create that right and third state has accepted it.
- **Facts:** France was party to Art 435 of Treaty of Versailles; Switzerland was not. France tried to rely on Art 435 to abrogate status of customs-free zones along French-Swiss border.
- **Held:** Art 435 is not binding on Switzerland (non-party), *except* to the extent to which that country accepted it
  - Difference b/n benefit vs burden; obligation vs right
  - Cannot be lightly presumed that stipulations favourable to third state have been adopted, but nothing to prevent will of sovereign states from having this object and effort
  - What are intentions of parties to this treaty?

### **G) Treaty Interpretation**

- VCLT Art 31(1): treaties shall be interpreted in good faith in accordance with the ordinary meaning, in their context, and in light of its object and purpose
  - General rule of interpretation
  - Context can include agreement or instrument or treaty
  - Can also consider subsequent practice, agreement, or rule of int'l law

- External evidence such as *travaux préparatoires* can also be considered when general rule leaves meaning ambiguous/obscure, or leads to absurd/unreasonable result
  - In trying to find aim and purpose, helps to look at notes of negotiation
  - Knowing this, as strategic tactic, lawyers must ensure imp't things get read into the record and certain things don't
- More similar to constitutional interpretation than statutory, but don't overuse 'living tree' interpretation (unless treaties had evolution as their intention)
  - Doctrine of intertemporal law; don't apply rules of today to the past

### **France v US (Rights of Nationals of USA in Morocco) [1951 ICJ Rep]**

- **Ratio:** In treaty interpretation, must look at meaning of word at time treaty was concluded
- **Facts:** Treaty b/n US and Morocco in 1836 said American consul in Morocco had jurisdiction to resolve 'any dispute' b/n citizens rather than local authorities
- **Issue(s):** Does 'any dispute' include civil and criminal, or just civil disputes?
- **Held:** Necessary to construe 'dispute' as referring both to criminal and civil
  - Must take into account meaning of 'dispute' at times when treaties were concluded
  - At that time, distinction b/n civil and criminal matters not developed in Morocco

### **Greece v Turkey (Aegean Sea Continental Shelf) [1978 ICJ Rep]**

- **Ratio:** Where parties have used generic terms in treaty, with understanding that meaning is likely to evolve over time, and treaty is "of continuing duration", presumption that parties intended those terms to have evolving meaning
- **Facts:** Greece had reserved from ICJ's jurisdiction "disputes relating to territorial status of Greece" in 1928 treaty to which both G and T were parties
- **Issue(s):** Had parties agreed to submit dispute over extent of continental shelves to the Court?
- **Arguments:** Greece argued cont shelf did not exist at time so couldn't be incl in meaning of territory reservation; presumption that meaning was intended to evolve with law?
- **Held:** Restrictive view must be taken of reservation b/c of historical context
  - Convention was designed to be general and of continuing duration
  - Parties did not *intend* treaty to be frozen in time but rather interpreted in accordance with modern realities

### **Costa Rica v Nicaragua (Dispute Re Navigational and Related Rights) [2009 ICJ Rep]**

- **Ratio:** Treaty's terms to be interpreted by parties' common *intention* at time of concluding, but where term has *evolved*, can also take account of meaning at time of interpretation
- **Facts:** Dispute over interpretation of 1858 treaty b/n C and N permitting C to make navigational use (for purpose of 'comercio') of part of N's territory
- **Issue(s):** Should word 'comercio' be limited to 1858 meaning?
- **Arguments:** Nicaragua argued 'comercio' should be restricted to 1858 meaning, which included trade in goods but not services
- **Held:** Present meaning of 'comercio' must be accepted; applies to both goods and services
- **Reasoning:** Relied on ruling in *Aegean Sea*
  - 'Comercio' is generic term and 1858 Treaty was entered into for unlimited duration

## **H) Invalidity, Suspension, and Termination of Treaties**

- 2 categories of rules permitting states to evade treaty obligations:
  - Invalidity: binding obligations were never validly created in first place

- Suspension or termination: valid obligations created but should now be
- VCLT reflects treaty laws' general hostility toward these rules
  - Don't want to make it easy for other states, who are bound to perform obligations in good faith, to walk away and say treaty is invalid
- Unilateral act of repudiation of treaty by a party to terminate its obligations under a treaty:
  - Denunciation: bilateral context
  - Withdrawal: multilateral context

## Invalidity

- **8 grounds for invalidating a treaty** (VCLT Art's 46-53)
  - Domestic bases of invalidity:
    - In limited circumstances, domestic law may prevent valid *creation* of treaty obligations
      - But conflict with domestic law cannot excuse failure to *perform* obligations
      - Limits on state rep's authority to express consent to be bound
  - External bases of invalidity:
    - Void if based on error
    - Void if consent procured by coercion, corruption of representative, fraud, bribery, threat or use of force
    - Conflict with higher principles of int'l law (peremptory norm/*jus cogens*)
      - France is not party to VCLT because they disagree with *jus cogens* concept; too vague; what rules meet this higher standard?
- If invalidity of treaty established, it is void and has no legal force
  - If acts were performed in reliance on the treaty:
    - Each party may require other to establish position that would have existed had acts not been performed, as far as possible
    - Acts performed in good faith not rendered unlawful by reason only of invalidity

## Cambodia v Thailand (Case Concerning Temple of Preah Vihear) [1923 ICJ Rep]

- **Ratio**: Treaty may be void if based on error, but *only* if error relates to fact assumed by that state to exist at time treaty was concluded and it formed essential basis of consent to be bound.
- **Facts**: Dispute over sovereignty of Temple close to T-C border. Treaty said boundary to follow watershed. Maps showed it was on C's side, but later found out following watershed would have placed it in T's territory.
- **Arguments**: T: any consent to C's sovereignty was vitiated on error in map on which it relied
- **Held**: Sovereignty of Temple belongs to Cambodia
- **Reasoning**: Principle of error as vitiating consent applied strictly
  - T was not under any misapprehension as to maps; relied on skill and good faith of French officers in producing maps; made no objection
  - In absence of question of lack of good faith, the legal effect of reliance on the skill of an expert is that one must abide by the results (akin to *caveat emptor*)

## Termination and Suspension of Operation

- VCLT Art's 54-59
- May occur in conformity with provisions of treaty or by consent of parties after consultation
  - Right to withdraw or denounce may be implied, but this should be resisted

- Can you withdraw if a treaty is silent?
  - Int'l Covenant on Civil Rights; everyone has right to life and right to be free from torture
    - Notice to withdraw by North Korea; what does this mean?
    - No express withdrawal provision in that treaty
    - Practice says there is no prohibition unless expressly in treaty
    - If silent, look to VCLT; suggests you can withdraw but must give 12 mths notice
    - Look at intention of treaty

### **UK v Iceland (Fisheries Jurisdiction) [1973 ICJ Rep]**

- **Ratio:** Agreement concluded under threat or use of force is void, but accusation of this serious nature requires evidence in support (high threshold).
- **Facts:** Iceland wanted to increase fisheries on coast; UK submitted to ICJ under 1961 treaty
  - Iceland disputed Court's jurisdiction; argued extreme circumstances (British force) constituted improper duress, vitiating treaty
- **Held:** Rejected I's argument
  - History of negotiations reveals these instruments were freely negotiated by the parties on basis of equality and freedom

## **Ch. 3: International Legal Persons (Subjects)**

### **States as Ultimate Legal Persons**

- **Why is personhood imp't?**
  - Domestic legal persons may have ability to bring claims under domestic law
  - Int'l legal person has standing to bring a 'claim' (typically against another state)
  - Int'l legal subjects are capable of:
    - Possessing rights and duties under int'l law
    - Entering into int'l legal relations
    - Maintaining rights by bringing int'l claims
  - States are subjects of int'l law as of right
    - Traditionally states were only actor in int'l plane
    - Now other organizations are gaining personhood, but at the consent of states

### **1) Prerequisites of Statehood in Int'l Law**

- State vs sub-national units (components of state)
  - PEI, Queb and Texas are not states (but Texas was at one time)
  - Neither are Mohawk Nation, Greenland, and Puerto Rico
- 1933 Convention on Rights and Duties of States (**Montevideo**) - considered to reflect CIL
  - **Prerequisites of statehood:**
    1. Permanent population (significant number of permanent inhabitants)
    2. Defined territory (even if boundary in dispute or occupied)
    3. Government (some authority exercising gov't functions)
    4. Capacity to conduct int'l relations (including political, technical and financial capabilities)
  - Criteria are sourced in both treaty and custom
    - Not all states are parties to Montevideo Convention

- UN membership is NOT one of the criteria, but must be a state to be a member
  - Switzerland was a state for many years but not UN member
  - Fact that Olympic accepts you as a country does not make you an official state
- **Illegality** may override other four criteria of statehood
  - E.g. When Iraq seized Kuwait in 1990, other countries said they weren't recognizing it despite having defined territory, gov't, etc
  - Illegal use of force led to creation
- Charter of UN limits membership to states but doesn't establish criteria for statehood
- Some ambiguities:
  - Non-member state permanent observers
    - **Holy See**; many contest their statehood status
      - Roman Catholic Church administration worldwide
      - Has a gov't, Ecclesiastical courts, banking and manufacturing
      - Is it a state?
        - Arguably lacks permanent population
        - It is a gov't but isn't represented by a gov't
        - Located in Vatican City (defined territory?) but claiming to be representative of church worldwide
        - Enters into various treaties; party to non-proliferation of nuclear weapons, convention on rights of child
          - Has embassy in Canada; we trade ambassadors
      - De facto vs de jure
    - **Palestine** is only other
      - Is it a state?
        - Gov't – PLO claims to be legitimate gov't but contentious among Palestinians
          - Int'l law doesn't require 'good' or democratic gov't, but must be effective
        - Defined territory – 3 distinct sections; not set or agreed
          - Int'l law doesn't impose minimum size
          - Territory doesn't have to be connected (Alaska)
        - Permanent population – refugees, migrants, who is considered citizens?
          - Int'l law doesn't impose minimal number
          - No requirement that population is made up of nationals or one ethnicity
        - Capacity to enter into int'l relations – gov't not legitimate on int'l plane
          - Large number of member states have recognized it as a state (over 130); Canada does not
          - Was non-member permanent observer, now has observer 'state' status
          - Applied to form membership but unsuccessful
      - **Status of Palestine in UN** [GA Res 2013]: recognizing Palestine is seen as a state by 132 countries and working toward statehood

- Hopes Security Council will consider Palestine's application favourably
    - Notes that UN Charter does not address requirements of permanent observer status
  - **Report of Committee on Admission of New Members Concerning Palestine** [UN Doc 2011]
    - Concerns with Palestine's admission
    - 4 Montevideo factors, 'peace-loving'?
- Legal test with political considerations
  - If enough states treat an entity like a state by entering into relations with it, for all practical purposes it acquires legal personality of a state

### Difficult Cases: Effective Gov't

#### Aaland Islands Case [1920 League of Nations OJ]

- **Ratio:** No statehood is achieved until public authorities are strong enough to assert themselves throughout territories of state without assistance of foreign troops
- **Facts:** Council assessed status and future of Aaland Islands, historically tied to Finland, Sweden, Russia; required to determine when Finland emerged as indep state after Russian Revolution
- **Held:** Finland should retain sovereignty over islands, but treated as autonomous zone
- **Reasoning:** Conditions required for formation of sovereign state didn't exist for some time
  - After civil war ended and foreign troops left, gradually reestablished order
- **Analysis:** Applying this standard, neither Congo nor Bosnia and Herzegovina could be viewed as states at point of recognition by UN and other states
  - Policy reason for early recognition of statehood: a state inherits int'l legal rights *and obligations* (i.e. to respect human rights and refrain from using force)

#### **"Policy Responses to State Failure", Sebastian von Einsiedel**

- Failed state = basic functions of state are no longer performed
  - Dramatically increases likelihood of civil war
  - Ethnic nationalism more likely to prevail over civic concepts of nationalism
- Causes for state failure can be located at level of the system, state, or indiv leaders
  - Key factor is imposition of colonial rule (and in some cases withdrawal of resources)
  - Some argue European model of sovereign nation-state is ill-suited for Africa's demography, geography, political culture, and social structure
- Strong presumption in favour of continuance, and against extinction, of established state
  - States do not appear to lose status b/c of breakdown of effective gov't

### Difficult Cases: Capacity to Enter into Foreign Relations

#### Customs Regime B/n Germany and Austria, Advisory Opinion [1931 PCIJ]

- **Ratio:** Only int'l obligations which actually place a state under the legal authority of another state are inconsistent with a state's independence/sovereignty
- **Facts:** Peace treaty signed after WWI (Saint-Germain, 1919) stated independence of Austria is inalienable other than with consent of League of Nations
  - In Protocol, Austria agreed to abstain from granting any special regime or advantage
  - In 1931, Austria agreed to establish customs union with Germany

- **Issue(s):** Does treaty b/n G and A violate Treaty of Saint-Germain or its Protocol?
- **Held:** Customs union is consistent with Treaty and maintenance of Austria's independence
  - However, inconsistent with Protocol b/c special regime granting exclusive advantages to Germany, calculated to threaten Austria's economic independence
- **Reasoning:** Meaning of "independence": continued existence within present frontiers with sole right of decision in all matters economic, political, financial or other
  - Meaning of "alienation": any voluntary act causing state to lose independence or by which sovereign will is subordinated to will of another power
  - Legal concept of independence has nothing to do with state's subordination to int'l law
  - No matter how extensive its obligations, a state remains independent

### **France v USA (Case Concerning Rights of Nationals of USA in Morocco) [1952 ICJ Rep]**

- **Ratio:** A state willingly choosing to rely on another state exercising powers over it does not necessarily undermine statehood/independence
- **Facts:** Treaty was concluded b/n US and Morocco in 1836 on consular and trade issues
- **Issue(s):** Whether establishment of French Protectorate over Morocco by subsequent treaty (b/n France and Morocco) affected 1836 US-Moroccan agreement
- **Held:** Morocco retains its personality as a state in int'l law
- **Reasoning:** Remained sovereign but made arrangement of contractual character whereby France exercises certain sovereign powers on behalf of Morocco
  - France is bound by provisions of this treaty, and all obligations to which Morocco was subject before protectorate which have not been terminated or suspended
- **Analysis:** How can Morocco be considered a state after assigning its int'l relations to France?

### **So-called Independent Transkei and Other Bantustans, GA Res [1976]:**

- UN condemned establishment of bantustans by racist regime of South Africa to:
  - consolidate inhuman policies of apartheid
  - destroy territorial integrity of country
  - perpetuate white minority domination
  - dispossess African people of inalienable rights
- Rejected declaration of 'independence' of Transkei and declared it invalid
- Called upon all gov'ts to deny any form of recognition and refrain from dealing with Transkei
- **S v Banda:** Bophuthatswana military met each of criteria in Montevideo Convention and therefore could be charged with treason after coup attempt
  - If capacity hinges purely on *de jure* constitutional or legal independence from another state, Bantustans may have qualified
    - *Bophuthatswana* became independent in 1977 under South African statute
  - But exclusive focus on *de jure* capacity is problematic; independence cannot exist where foreign control oversees decision-making on wide range of matters on continuing basis
  - Actual behavior of int'l community with putative state is perhaps dispositive
    - No other state other than South Africa recognized Bantustans

### **Parent v Singapore Airlines Ltd [2003 QCCS]**

- **Ratio:** *x*
- **Issue(s):** Was Taiwan a state and thus entitled to state immunity under Canadian law?
- **Held:** Taiwan has right to benefit from immunity under law
- **Reasoning:** Island of Taiwan meets four constitutive elements for statehood:

1. Defined territory
  2. Occupied by permanent population
  3. Effective gov't exists
  4. Gov't enters into relations with other states
- **Analysis:** Canadian gov't has a "one-China policy"; no diplomatic relations with Taiwan
    - Taiwan arguably has *de facto* capacity to enter into int'l relations (although with small number of states), but lacks *de jure* sovereignty
    - Presumption against statehood created by universal non-recognition is rebuttable
    - Capacity is prerequisite of statehood, but depends on willingness of other states to treat entity as a state and enter into relations with it in first place
    - Background: Taiwan was at one point part of China
      - PRC still views as sub-national unit (rogue province)
      - Claims to be China but more countries recognize PRC as China
      - Concern that Taiwan claiming recognition as special state will prompt military action by China
      - Desire to be a state and what other powerful states see you as are key factors
      - Taiwan has entered into legal relations; exchanges trade bureaus, missions, etc with poor Latin American countries
      - Canada does trade with Taiwan and has office there; careful about phrasing it

## 2) Recognition of States and Governments

### Recognition of States

- Legally, no fixed number of recognitions at which a country becomes internationally accepted
- 2 competing theories in int'l law:
  - Declaratory: entity that satisfies requirements of Montevideo Convention is a state with all corresponding rights and duties
  - Constitutive: entity is not a state in int'l law unless generally recognized by other states
    - Fits with traditional conception of int'l law (voluntary practice of states)
    - Issues: How many states must recognize it? What if it clearly satisfies criteria but certain states refuse to recognize (i.e. Israel)?
    - *Realpolitik* considerations; state recognition is inherently political
    - More about a country's interest than whether they meet legal test
    - Int'l law is horizontal in nature; practically, other states decide if you're a state
  - Majority view is that recognition is discretionary
    - Can be implicit in exchange of ambassadors, opening of trade or cultural mission
    - Can be explicit – E.g. in 2000, Canada issued press release announcing recognition of North Korea following productive meeting
- Recent issue: Crimea declaration of independence in 2014
  - Argument of self-determination
  - Referendum; Russia said Crimeans want to be part of Russian Federation, Ukraine claims referendum was illegal (not an act of self-determination but illegal taking by force)
  - UNSC unable to act (Russia has veto power)
  - So UNGA took action; voted in support for Ukraine
    - Violation of territorial integrity of Ukraine and referendum has no validity
    - Huge number of abstentions
    - E.g. of collective non-recognition despite it arguably having four factors

### **Memorandum from Acting Secretary of State for External Affairs to Cabinet, Ottawa, 1952**

- Recognition of Vietnam, Laos, and Cambodia
  - Factors for: support for France (NATO); implicit recognition by Canada through dealing with rep's; plans to support their admission to UN
  - Factors against: do not meet legal requirements for states (not independent); weaken Canada's position as 'neutral' to other Asian and Middle East states
  - Recommendation: extend recognition as 'associate state' within French Union

### **Declaration on "Recognition of New States in Eastern Europe and Soviet Union" (1992 ILM):**

- Recognize new states, subject to int'l practice and political realities, which have:
  - constituted themselves on democratic basis
  - accepted appropriate int'l obligations
  - committed in good faith to peaceful negotiations
- Recognition requires guarantees for rights of ethnic groups, regard for rule of law and human rights, and acceptance of disarmament and non-proliferation commitments
- European recognition criteria shows trend to create states through recognition process
- Would effectively impose new criteria for statehood (respect for human rights)

### **Recognition of Governments**

- Relates to recognition of *new* governments of *existing* states
- 2 issues:
  - Legal question or purely political?
    - Conventional view: recognition, as public act of state, is an optional and political act; no legal duty
  - Meaning of "recognition" (no unequivocal criteria)?
    - States are not to interfere in internal affairs of other states; but refusing to recognize another gov't is a statement on validity of a state's political order
- **Estrada Doctrine of Recognition [1931]:**
  - Declaration of Secretary of Foreign Relations of Mexico relating to express recognition of gov'ts, published in press
    - Gov't of Mexico will issue no declarations of recognition
    - Insulting practice which offends sovereignty of other nations
    - Confined to maintenance or withdrawal of diplomatic agents
    - Will continue to use formulas accepted by int'l law
  - Represents most common approach in modern int'l relations
    - Recognition of a gov't should be based on its *de facto* existence, rather than its legitimacy
    - No adverse inference can be drawn from failure to endorse a foreign gov't
- **Cf Tobar Doctrine:**
  - Ecuador's foreign minister, Julio Tobar Donoso, expressed doctrine of non-recognition of de facto, revolutionary gov'ts created contrary to constitution
    - E.g. would refusal to recognize Taliban gov't have any practical effect?
      - Most states express disapproval by refusing diplomatic relations
      - But no direct effect on legal existence of states controlled by such gov'ts
- "Canada's New Policy" (1988): will no longer recognize gov'ts that come to power by unconstitutional means; will only recognize states
  - Estrada-doctrine inspired

- Shows general practice emerging
- But sometimes opposite is done for political purposes
  - E.g. In 2013, US recognized gov't of Somalia for first time since 1991

### Changes in State and Governments

- State succession: body of int'l law dealing with consequences of state demise and emergence
  - Which obligations, rights, territory pass from State A to State B?
  - Legal consequences when state is absorbed, extinguished, breaks up, merges, secedes, evolves into plural existences, or transformed into new state
  - Occurs often in context of decolonization
  - Many examples:
    - East and West Germany became one
      - Germany Unification Treaty (1990)
      - Criticism of this approach; much more powerful West Germany
    - Various countries came out of former Yugoslavia
  - CIL is presumptively binding on all states, old and new
    - To avoid binding effect of CIL, must persistently object from rule's inception
  - Vienna Convention on Succession of States in Respect of Treaties (1978)
    - Set out default rules for more difficult cases
    - Non-transmissibility or "clean slate" approach to newly indep state (i.e. former colonies); not automatically party to treaties of colonial rulers
      - Art 16: newly indep state not bound to maintain or be party to treaty by reason only that at date of succession the treaty was in force
      - Obligations of predecessor state do not necessarily become obligations of successor state (widely accepted)
      - Cf transmissibility approach to new states other than former colonies
        - Not widely accepted (likely doesn't reflect CIL)
      - Also controversial: former colonies can unilaterally declare themselves parties to multilateral treaties of former rulers
        - For other new states, unilateral declarations do not suffice to "transmit" those treaties (considered CIL to all states)
    - Note: only 19 signatories and 22 parties to this treaty (not widely ratified)
      - States don't like diff rules for former colonies than all other new states
- Distinction in Vienna Convention b/n former colonies and other new states NOT reflected in state practice
  - New state is free to become party to treaty in accordance with terms and general law of treaties
  - For bilateral, may require consent (tacit or express) of other parties
  - For multilateral, new state need merely communicate intention
- Exceptions to non-transmissibility rule for boundary or territorial regimes
  - Art 11: succession does NOT affect a boundary estab by treaty
    - Art 12 extends to other territorial regime
    - "Territory" is not just land; includes water boundaries
  - Well-established in CIL

### **Danube Dam (Hungary/Slovakia; Gabčíkovo-Nagymaros Project) [1997 ICJ Rep]**

- **Ratio:** “Treaties of a territorial character” are unaffected by a succession of states
- **Facts:** Signature by H and Czechoslovakia of treaty providing for construction and operation of a system of locks as a ‘joint investment’ aimed at production of hydroelectricity, improvement of navigation and protection of banks against flooding
  - Slovakia became an independent state in 1993
- **Issue(s):** Did Slovakia become a party to the 1977 treaty as successor to Czechoslovakia?
- **Arguments:** H argues no rule of int’l law providing for automatic succession to bilateral treaties on disappearance of a party; absence of consent; did not sign or ratify Vienna Convention and not a statement of general int’l law
  - S argued treaty attaches to territory within meaning of Art. 12 of Vienna Convention
- **Held:** The 1977 treaty became binding upon Slovakia in 1993
  - These treaties are unaffected by succession; automatic transmission
- **Reasoning:** Commission indicated that treaties concerning water rights or navigation are commonly considered territorial treaties
  - 1977 treaty must be regarded as establishing territorial regime within Art 12 of 1978 Vienna Convention; therefore, cannot be affected by a succession

### **Libyan Arab Jamahiriya/Chad (Territorial Dispute) [1994 ICJ Rep]**

- **Ratio:** Continued existence of a boundary established by treaty is not dependent on continuing life of that treaty
- **Facts:** Border dispute b/n Libya and Chad
- **Issue(s):** What is the impact of 1955 Treaty of Friendship b/n France (predecessor to Chad, former colony) and Libya on the dispute?
- **Held:** Treaty must be taken to have determined a permanent frontier
- **Reasoning:** Nothing in treaty indicates boundary was to be provisional or temporary
  - Any other approach would vitiate fundamental principle of stability of boundaries
  - Treaty can cease to be in force without affecting continuance of boundary established
  - Here, parties have not exercised option to terminate treaty, but boundary remains
  - However, parties can mutually agree to vary border
- **Analysis:** Applies two transmissibility rules: 1) for treaty provisions establishing boundary and 2) for boundary itself, independent of subsequent fate of treaty
  - Doctrine of *uti possidetis juris* (“as you possess under law”)
    - Once agreed, the border stands
    - Newly formed sovereign states should have same borders that preceding dependent area had before independence
    - Has been applied to elevate former colonial administrative borders to int’l boundaries when territories achieve independence
    - In many parts of world, colonial masters drew borders wherever they wanted; often through middle of ethnic/geographic territories
    - Came up originally in Spanish America to avoid fratricidal battles
    - Something different about boundary treaties than others
    - ICJ did adopt this principle
      - But has not played out in Africa in the same way; not all countries agree
      - Finding recent resonance in boundaries of former Yugoslavia

### **Burkina Faso/Republic of Mali (Frontier Dispute) [1986 ICJ Rep]**

- **Ratio:** By becoming independent, a new state acquires sovereignty with the territorial base and boundaries left to it by the colonial power
  - Principle of *uti possidetis juris* recognized as rule of int'l law applicable generally
- **Facts:** Both parties were former colonies of France; submitted boundary dispute to adjudication
- **Reasoning:** Starting point = respect for intangibility of frontiers inherited from colonization
  - Principle of *uti possidetis juris*; purpose is to prevent independence and stability of new states being endangered by frontier disputes
  - Fact that new African states have respected boundaries shows it is rule of general scope
  - Appears to conflict with right of peoples to self-determination
  - But need for stability has caused African states to consent to principle
  - Applies not with retroactive effect, but immediately and from that moment on
- **Analysis:** Human rights treaties may have a similar "localized" character as treaties establishing boundaries and territorial regimes (but state practice does not support this view)
  - Opposing argument: no gap to be filled
    - new state still has legal obligations under custom

### **Vienna Convention on Succession of States in Respect of State Property, Archives and Debts**

- Very poor ratification record; only 7 parties
- There was an effort to codify rules that would apply, but now just a matter of negotiation
- Result: state succession to property and debt is uncertain
  - States will rely on negotiations rather than bright-line legal rule in any case

### **State Continuity**

- Even where a change in gov't occurs, state persists
  - A country doesn't lose all its obligations after an election occurs
  - E.g. Harper gov't withdrew Canada from desertification convention but new gov't has re-ratified Canada
- What about a revolutionary or illegal change in gov't? (e.g. coup)
  - Famous case worldwide: **Tinoco**
    - Brought by Great Britain against Costa Rica
    - Arbitrator William Taft; only US President who was also Chief Justice
    - Issue was transactions b/n Royal Bank of Canada (at that time, a British company) and Frederico Tinoco of Costa Rico (took charge illegally)
    - Holding: Extra-legal changes in gov't do not affect existence of a state
      - Includes revolutions and coups
      - Contrast to change in the sovereignty of the territory of a state
    - See this reflected in Rodriguez case (IACHR judgement)
      - Responsibility of Honduras for disappearances
      - Issue of student radicals being 'disappeared'
      - Violations of presumably right to life, torture, detention continued to be owned by state, even if change in gov't
        - Responsibility continues independently of changes in gov't and continuously from time of the act
- Changes in gov't may have domestic law considerations, but not int'l succession issues

## Key Corollaries of Statehood

- Once entity becomes a state, it has full range of int'l legal rights, obligations, capacities
  - Some are “derivative” (exist by virtue of the will of states)
  - Some are “core precepts” or corollaries of statehood
- Key sources:
  - UN Charter (widely ratified)
  - 1949 ILC Draft Declaration
    - Soft-law source; experts studied practice and views of states, codified
  - GA “Friendly Relations” Declaration
    - Resolution of non law-making body but adopted by consensus
    - Invoked as accurate summary of state views; normative quality
- 1949 ILC “Draft Declaration on Rights and Duties of States”
  - Not legally binding, but has had long-term effect on development of int'l law
  - **Doctrine of sovereignty:**
    - Art 1: right to independence and free exercise of legal powers without dictation by other states
    - Art 2: right to exercise jurisdiction over territory and persons
  - **Equality:**
    - Art 5: right to equality in law with every other state
      - Similar principle in UN Charter (art 2(1)) and GA’s Friendly Relations Declaration, widely considered to reflect CIL
      - Equality enables weaker states to make treaties with powerful states and expect they will be upheld; also equal votes and equal benefits
      - De jure or formal equality
      - Practically, principle is limited
        - Only 5 permanent veto-holding members of Security Council
        - Votes of economically powerful states may have greater weight
        - Bargaining issues, negotiation arenas, incentives
        - Int’l trade law regime favours interests of powerful nations
    - 238: equality includes a-f (territorial integrity is inviolable)
  - **Duty of non-intervention:**
    - Must refrain from intervention in internal or external affairs of other states
    - Articulated in Friendly Relations Declaration
      - No state can use econ or political measures to subordinate sovereign rights or interfere in civil strife in a state
    - China often invokes this; can do what they want subject to int’l law prohibitions
    - Duty not to use force against another state flows from this
      - Sourced in Art 2(4) of UN Charter
    - Duty of non-aggression:
      - Goes further for parties to Rome Convention - Int’l Criminal Court
      - We can hold head of state responsible for breach of this duty
      - Cannot use force against territorial indep of another state

## **Nicaragua v USA (Military and Paramilitary Activities) [1986 ICJ Rep]**

- **Ratio:** Duty of non-intervention is supported by *opinio juris* and established state practice
- **Facts:** Claim by N that US had been intervening in internal affairs including through use of force, contrary to principles of CIL reflected in UN Charter

- **Held:** To find that non-intervention principle is CIL, *opinio juris* must exist
  - May deduce from attitude of states towards GA resolutions, incl Friendly Relations
  - *Opinio juris* of states of principle of non-intervention is backed by established and substantial practice; corollary of principle of sovereign equality
  - Principle forbids all states from interfering directly or indirectly (through coercion or support for subversive activities) in internal or external affairs of another state
  - No exception where intervening state objects to domestic policies, ideology, level of armaments or direction of foreign policy of that state
- **Analysis:** Closely tied to obligation to refrain from threat or use of force against territorial integrity or political independence of any state
  - Also articulated in Friendly Relations Declaration
  - ICJ held that adoption by states of this text indicates their *opinio juris* as to CIL
- **Duty to respect international law**
  - Obligated to observe rules of treaties, CIL, other sources of int'l legal obligation
  - For treaties, captured by principle *pacta sunt servanda* (good faith)
  - Suggests that duty to perform goes beyond treaties; general good faith obligation
  - Impt reminder that sovereignty entails freedom from subjection to other state's will, but not from int'l law itself
- **Protection of int'l human rights without distinction**
  - Key is non-discrimination
  - Draft Declaration and UN Charter outline duty to treat all persons under jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, religion
  - Followed by Universal Declaration of Human Rights and many HR treaties
  - Radically alters a state's sovereign affairs

## International Organizations

### **Int'l Legal Personality of Int'l Organizations**

- Second major type of actor in int'l law
- UN is pre-eminent int'l organization
- Other e.g.'s of IO's:
  - Universal Postal Union (UPU)
  - Organization of the Petroleum Exporting Countries (OPEC)
  - European Union (EU); African Union (AU)
  - Organization of American States (OAS)
  - Organization on Security and Cooperation in Europe (OSCE)
  - International Civil Aviation Organization (ICAO)
  - North Atlantic Treaty Organization (NATO)
- In some cases, int'l org's have standing in the int'l legal system (rights and obligations)
- Organizations formed by States operating in international arena are **inter-governmental** organizations
  - Note: NGOs, even those with an int'l reach are not IOs. TNCs and MNEs are not IOs.
  - IOs emerged in 20<sup>th</sup> C; huge growth in their numbers since WWII
- Legal question: are they int'l subjects? Are they "persons" under int'l law?

### **Reparation for Injuries Suffered in UN Service, Advisory Opinion [1949 ICJ Rep]**

- **Ratio:** UN is an int'l legal person with capacity to bring claim against non-member state
- **Facts:** UN mediator in Palestine after 1947 Partition Plan; assassinated Sept 1948
  - UN personnel killed in territory of newly established state of Israel (not yet admitted to membership in the UN); could UN seek reparations from Israel for the deaths?
  - One of individuals killed was honorable person who was acting as a mediator
- **Issue(s):** Does UN, as an organization, have capacity to bring int'l claim against responsible gov't to obtain reparation for damage caused to UN and victims?
- **Held:** Yes; UN has capacity
  - Competence to bring int'l claim is the capacity to resort to customary methods recognized by int'l law for establishment, presentation, settlement of claims
  - If organization possesses int'l personality, it is an entity capable of availing itself of obligations incumbent upon its members
  - Question not answered by actual terms of UN Charter; must consider intention
    - Political body with special tasks, privileges and immunities in member territories
    - Could not carry out intentions of founders without int'l personality
    - Members clothed it with competence required to effectively discharge functions
  - Conclusion: UN organization possesses objective int'l personality
    - Subject of int'l law, capable of possessing int'l rights and duties
    - Has Capacity to maintain rights by bringing int'l claims, even against state which is not a member of the organization
- **Analysis:** How to reconcile this holding with basic rule of treaty law that no obligations are created for non-parties without their consent?
  - NOT situation of Sweden espousing a claim for the loss of a Swedish national
  - UN Staff Rules do provide for death benefits
- **Legal test for determining whether particular IO has international legal personality:**
  - The IO must be a permanent association of States, equipped with organs
  - There must be a distinction between the organization and its members
  - Organization must have legal powers exercisable on the international plane
- Where do you look to see if these criteria are met?
  - Treaty establishing organization (AKA constituting or constitutive instrument)

### **United Nations System**

- Does not make laws; provides means to help resolve int'l conflicts and formulate policies on matters affecting us all
- **6 main organs:**
  - **General Assembly**
    - All member states are represented, each with one vote
    - Matters decided by two-thirds majority, simple majority, or consensus
    - Annual session from Sep-Dec; may hold emergency sessions
  - **Security Council**
    - Responsible for maintaining int'l peace and security
    - 15 members; 5 permanent, 10 elected by GA for two-year terms
    - Adoption of decision requires 9 votes in favour and no veto from P5
    - Enforcement measures: economic sanctions, arms embargo, military action
  - **Economic and Social Council**

- Fosters int'l cooperation for development
- Maintains link with civil society by consulting with NGO's
- 54 members, elected by GA for three-year terms
- Major session held in July
- Subsidiary bodies and regional commissions
- **Trusteeship Council**
  - All Trust Territories achieved autonomy by 1994; last was Pacific Islands (Palau)
  - Now only meets as and when the occasion may require
- **International Court of Justice**
  - Main judicial organ of UN
  - 15 judges elected by GA and Security Council
  - Decides disputes b/n states who voluntarily participate; bound to comply with decision
  - Gives advisory opinions to UN and specialized agencies
- **Secretariat**
  - Carries out substantive and administrative work of UN as directed by GA, Security Council and other organs
  - Headed by Security-General
  - Total staff of 44,000 drawn from 180 countries
- **UN system/'family'**
  - Specialized agencies linked to UN through cooperative agreements
    - i.e. IMF, World Bank, World Health Organization
    - UN offices and funds that report to GA or ESC: UNICEF, UNHCR
  - See Charter of the United Nations, in force Oct 24, 1945
    - Disputable whether purposes in Art 1 are legally binding
- **Membership**
  - UN Charter (1945): Chapter II Membership
    - Art 3: Original members are those who participated in San Francisco Conference or previously signed declaration, and now sign and ratify Charter
    - Art 4: membership is open to others (5 obligations):
      - 1) peace-loving 2) states which 3) accept obligations in present Charter and are 4) able and 5) willing to carry them out
    - Admission effected by decision of GA upon recommendation of Security Council
  - Original membership in UN did not strictly adhere to classic prerequisites for statehood
    - India and Philippines ratified and became members before fully independent
    - B/n 1946-1962, many applicants' statehood called into question for alleged lack of independent gov't or sufficiently defined territory
    - Decolonization led to broadening of spectrum of statehood
  - But not every entity with claim to statehood can readily obtain UN membership
    - E.g. Taiwan, Holy See, Palestine, Kosovo, Western Sahara
    - Art 4 limits grounds for resisting membership application
      - But admission procedure elevates politics over law
      - E.g. As permanent member, China can veto Security Council decisions so Taiwan's lack of membership never reaches GA agenda
  - Suspension/expulsion
    - Art 5: member against which enforcement action has been taken may be suspended from exercise of rights upon Security Council recommendation



- Usual session Sept – Dec
- Everything the UN does is reported in 6 official languages
  - Can be found in UN GAOR
- UN Charter says little about organization's financing
  - Expenses borne by the members, taking into account capacity to pay
  - Contributions are scaled (US pays 22%; Canada 3%)
  - Budgetary questions are among those requiring two-thirds vote
- Art 10: GA limited to general power of discussion and recommendation
  - Also encompasses right to investigate
  - Not a formal source of int'l law, although resolutions may evidence or influence development of CIL or lead to treaty negotiation
  - May make binding decisions in certain UN organizational areas
  - "Resolutions" vs "declarations"
    - Resolutions: Assembly expresses collective will on specific recommendations (broader)
    - Declarations: those resolutions that purport to reflect political or legal principles of general significance
- Art 11: GA may make recommendations re maintenance of int'l peace and security, disarmament, regulation of armaments to members/Security Council
- Art 12: While Security Council is exercising its functions assigned in Charter, GA shall not make any recommendation on same matter unless Council requests
  - But ICJ has emphasized evolving interpretation of Art 12

### **Legal Consequences of Construction of Wall in Occupied Palestinian Territory (Advisory Opinion) [2004 ICJ Rep]**

- **Ratio:** Limitation in Art 12 restricts GA's power to make recommendations following a discussion, but NOT its power to engage in such discussions
- **Facts:** UNGA asked Court to assess legal consequences from construction of wall by Israel in occupied Palestinian territory, including East Jerusalem, considering rules of int'l law
- **Arguments:** Israel alleged that given active engagement of Security Council with Middle East situation, GA acted *ultra vires* under Charter in requesting advisory opinion
- **Held:** GA, in seeking advisory opinion, did not contravene provisions of Art 12 of Charter
- **Reasoning:** Art 14 gives UNGA power to recommend measures for peaceful adjustment
  - Only restriction is Art 12: Assembly should not recommend measures while Security Council is dealing with same matter unless Council requests it
  - But interpretation has evolved; increasing tendency for GA and Security Council to deal in parallel with same matter re maintenance of int'l peace and security
    - SC has *primary* responsibility for the maintenance of peace and security (suggests they do not have *exclusive* responsibility)
  - Often GA takes broader view, considering humanitarian, social, economic aspects
  - Accepted practice of GA, as it has evolved, is consistent with Art 12
- **Analysis:** Often at end of UNSC resolution: "Decides to remain actively seized of the matter."
  - Art 13: assigns GA specific responsibilities to initiate studies and make recommendations for promoting int'l cooperation and development of int'l law
    - Int'l Law Commission (ILC) was created in 1947 to give effect to Art 13 (development and codification of int'l law)

- Art 21: GA shall adopt its own rules of procedure
  - GA set out six committees to carry out detailed business
  - E.g. Social, humanitarian and cultural; legal; economic
- Art 22: GA may establish subsidiary organs as necessary for performance of functions
  - E.g. UNICEF, UNDP, UNHCR, UNEP
- Art 15: GA shall receive and consider reports from SC and other UN organs
  - Art 24(3): Security Council shall submit annual and, when necessary, special reports to GA for its consideration
  - This apparent accountability regime does not subordinate SC to the GA
    - SC has 'sovereign freedom of decision'
- **Security Council (UNSC)**
  - Most powerful organ; has ability to order 'all necessary measures'
    - Principal UN organ with coercive legal authority
  - Not every member state is directly represented at any one time
  - 5 permanent members (P5): US, UK, China, France, Russia
    - Pre-eminent powers of immediate post-WWII era
  - 10 nonpermanent members (E10) elected for two years
    - Regard paid first to contribution of members to maintenance of int'l peace and security and other purposes of organization; then to equitable geographic distribution
    - 'Important matter' requiring two-thirds majority under Art 18(2)
    - 1963 GA resolution set out formula for member election:
      - 5 from Africa/Asia
      - 1 from Eastern Europe
      - 2 from Latin America
      - 2 from Western Europe and other states
    - Election within these categories is intensely politicized, especially WEOG
      - Broad national reputation is not guarantee of success
      - Convincing themes can help a campaign (e.g. Canada in 1998)
      - Strongest country does not necessarily win
    - Canada failed in its bid to secure SC seat in 2010 for first time since 1946
      - CANZ (Canada, Aus and NZ rotate being on the council)
      - Sometimes rotate as JUSCANZ (Japan, US, Canada, Aus, NZ)
      - Africa has one of biggest blocs (won't usually run against e/o)
  - Composition of SC is most controversial component of UN Charter
    - Member states have been unable to reach agreement, by consensus or otherwise, on reform of SC structure
    - Art 108 & 109: Amendments to Charter require two-thirds members of UN including all SC permanent members
  - Art 31 & 32: states affected or parties to dispute under consideration may be invited to participate, without vote, by SC to discussion
  - Art 27: Each member, whether permanent or not, has one vote
    - **Procedural matters** made by affirmative vote of 9 members
    - **Other matters** made by affirmative vote of 9 members, including concurring votes of permanent matters (= veto power)
      - Concurring = affirmative OR abstaining vote

- I.e. permanent member abstaining does not veto the resolution
- This procedure followed by SC has been generally accepted by UN members and evidences a general practice
- Veto exercised most by Russia in early years and most by US between 1976-2012
- Many recent veto e.g.'s involving Syria (China or Russia)
- Pacific settlement of disputes; party to dispute shall abstain from voting
- Rationale for requiring both super-majority and concurring P5 votes?
  - SC holds extraordinary powers
  - Art 24: UN members confer on SC primary responsibility for maintenance of int'l peace and security
  - **Chapter VI (settlement of disputes):** SC may –
    - investigate any dispute which might lead to int'l friction
    - recommend appropriate procedures or methods of adjustment
    - if parties to dispute fail to settle through ICJ, shall refer to SC
    - decide whether to take action or recommend settlement
  - **Chapter VII (threats to peace and acts of aggression):** SC may –
    - Art 39: Determine existence of any threat to peace, breach of piece, or act of aggression and make recommendations
    - Call upon parties concerned to comply w/ provisional measures
    - Decide what measures short of force are to be employed (i.e. economic sanctions, severance of diplomatic relations)
    - Art 42: Take action by air, sea, or land forces as necessary to maintain or restore int'l peace and security
  - Ch. VI powers (call upon parties to settle disputes or recommend procedures) are recommendatory only and limited to peace/security
    - Arguably authorizes peacekeeping (lies b/n Ch. VI conflict prevention and Ch. VII addressing threats/breaches of peace)
    - “Peace-keeping”: deployment of UN presence in the field with consent of parties concerned, normally involving UN military, police personnel, and often civilians
    - “Peacemaking”: action to bring hostile parties to agreement through peaceful means under Ch. VI of UN Charter
    - Subject of various declarations and resolutions of GA
    - UN established Peacebuilding Commission in 2006
  - Ch. VII enumerates most potent SC powers
    - UNSC resolutions adopted under Ch. VII binds all states
      - Usually reflected expressly: “acting under Ch VII”
      - We ‘require’ states to do x
    - Situations in Art’s 39, 42, 51 are only clear instances in which armed force may lawfully be used b/n states in int'l law
      - UN doesn’t have an army
      - Arrangements with Troop Contributing Nations (TCN’s)
      - Some countries now contribute police, instead of or in addition to troops (Canada contributes both)

- Only the Council can decide something is threat/breach of the peace (i.e. will only be considered int'l act of aggression if none of the P5 vetoes it)
- Scope of power is very wide, including court-creation

### **Prosecutor v Dusko Tadic [1995 ICTY Appeals Chamber]**

- **Ratio:** Security Council's power include authority to create courts as reaction to 'threat to peace'
- **Facts:** Int'l Criminal Tribunal for Former Yugoslavia (ICTY) estab to try war crimes and genocide
  - Defendant Tadic challenged SC's authority under UN Charter to estab this judicial body (argued this power did not flow from Ch. VII)
- **Issue(s):** What is extent of powers of SC under Art 39 and limits, if any?
- **Held:** Establishment of Tribunal falls within powers of SC under Art 41
- **Reasoning:** SC is established by treaty which serves as constitutional framework
  - Neither text nor spirit of UN Charter conceives of SC as unbound by law
  - Art 24: in discharging duties, SC shall act in accordance with purposes/principles of UN
  - SC both makes determination that situation justifying use of 'exceptional powers' exists AND chooses reaction to such situation (wide discretion but not unfettered)
  - Conflict in former Yugoslavia constitutes 'threat to the peace' according to settled practice of SC and common understanding of UN membership
  - SC's broad and exceptional powers are coercive vis-à-vis the culprit state and mandatory vis-à-vis the other member states (must cooperate with SC in implementation)
  - Establishment of Tribunal matches Art 41: 'measures not involving use of force'
    - Measures set out are merely illustrative; negative defn
- **Analysis:** Circumstances constituting "threat to int'l peace and security" have expanded
  - Absence of war does not ensure peace
  - Non-military sources of instability in economic social, humanitarian, ecological fields have become threats to peace and security
    - I.e proliferation of weapons of mass destruction, int'l terrorism, disintegration of states, climate change (SC has discussed, particularly for small island states)
  - Common understanding, manifested by subsequent practice of UN members, may have led to certain situations being included per se in Art 39 ('threat to the peace')
  - Ways of addressing certain threats to peace and security have also shifted
    - SC Resolution 1373 (2001): states shall criminalize terrorist funds
    - SC Resolution 1540 (2004): states shall enforce laws prohibiting non-state actors from acquiring nuclear or biological weapons, particularly for terrorist purposes
    - Resemble legislative enactments requiring action on domestic level
    - Counter-terrorism committee; subsidiary body
      - Created not long after 9/11
      - Started with focus on Al Qaeda, now ISIS
      - Countries must report on financing of groups
- **Supremacy of UN Charter**
  - Art 25: Members of UN agree to accept and carry out SC decisions
  - Art 49: Members shall join in affording mutual assistance in carrying out measures
  - Art 103: In event of conflict b/n obligations under present charter and other int'l agreement, Charter prevails
    - Read together, these provisions make SC the world's most powerful int'l organ
      - Reason SC is careful with words

- Sometimes resolutions urge or encourage
    - When it wants a state to comply, it says 'decides' (clear they are imposing a legal obligation)
  - SC sees even non-UN members as bound by its decisions indirectly
    - E.g. S. Africa's occupation of Namibia: although SC's decision not technically binding on non-member states, bound to give it effect due to indep legal obligation (*erga omnes*)
  - Perhaps only extra-Charter legal constraints on SC's powers are *jus cogens* norms of intl' law (human rights, fundamental freedoms)
  - But enforcement is an issue; ICJ lacks express power of judicial review in relation to SC determinations
- **Secretariat**
- Secretary-General is the CAO or public face of the UN
    - Administrative functions
      - Coordinates Secretariat and other principal organs, calls special GA sessions, oversees budget, etc
      - Also entrusted with civilian oversight in Kosovo, East Timor
    - Political functions
      - Use good offices and mediation functions to resolve disputes, 'norm entrepreneur'
    - Supportive role with measure of independence
  - UN Charter, Ch. XV
    - Art 97: comprises Secretary-General and other staff as required
    - Secretary-General shall be appointed by GA on recommendation of SC
    - Art 98: Must make annual report to GA
    - Art 99: May bring to attention of SC any matter which in his opinion may threaten maintenance of int'l peace and security
    - Art 100: Shall not receive instructions from gov't or other authority
      - UN members must respect exclusively int'l character of responsibilities of Secretary-General and staff
      - UN civil servant comes with obligation of neutrality vis-à-vis home country
  - GA's interpretation of Secretary-General's peace and security powers (1991 Declaration):
    - monitor peace and security regularly; provide early warning of disputes
    - bring relevant info to attention of SC or GA where appropriate
    - make full use of info-gathering capabilities of Secretariat
- **International Court of Justice**
- UN Charter, Ch. XIV
    - Art 92: Principal judicial organ of UN
      - Shall function in accordance with annexed statute based on PCIJ
    - Art 93: all UN members are *ipso facto* parties to Statute of ICJ
      - Non-members can become parties to Statute of ICJ if determined by GA on recommendation by SC
  - Not based in New York like other organs
    - Based in The Hague, Netherlands (sits at Peace Palace)
  - PCIJ was estab by League of Nations for resolution of disputes b/n states
    - ICJ is its successor, estab by UN Charter (must also know Statute of ICJ)

- Began work in 1946; replaced PCIJ which had functioned since 1922
- **Composition** – set out in Statute of the ICJ
  - Art 2: Independent judges elected regardless of nationality
    - High moral character, qualified in respective countries for appointment to highest judicial offices
  - Art 3: 15 members, no two of whom may be nationals of same state
    - Always one member from each of P5 states
  - Art 4: elected by GA and SC from list nominated by national groups in Permanent Court of Arbitration
  - Art 9: composition must reflect main forms of civilization and principal legal systems of the world
  - Art 13: elected for 9 years may be re-elected under certain stipulations
  - Art 31: when Court does not include judge of nationality of state to a case, that state may appoint person to sit as ad hoc judge
- **Function** – set out in Statute of the ICJ
  - Dual functions:
    1. Settle int'l legal disputes submitted to it by states
      - Art 34: Parties **MUST** be states
      - Neither UN nor specialized agencies can be party in contentious ICJ proceedings
    2. Give advisory opinions referred to it by int'l organs and agencies
- **Legal disputes**
  - Art 95: Doesn't prevent parties from solving their differences through other tribunals by agreement
  - Art 93 does *not* mean ICJ has jurisdiction in relation to any dispute b/n UN member states
  - Recommendation by SC not sufficient to confer ICJ jurisdiction independent of wishes of parties
  - Jurisdiction in contentious cases depends on **consent** of parties, manifested in 3 ways (Art 36):
    1. **Special agreements**
      - *Compromis*: parties bilaterally agree to submit existing dispute to ICJ and recognize its jurisdiction
      - *Forum prorogatum*: one state institutes ICJ proceedings recognizing that opposing party has not recognized court's jurisdiction, which it subsequently does (rare)
    2. **Treaties and conventions**
      - Jurisdiction is conferred on court through treaties
      - General int'l practice to include jurisdictional clauses in agreements for pacific settlement of disputes or where clause refers to disputes re interpretation or application
      - Clauses drawn up before creation of UN that conferred jurisdiction on PCIJ now confer it on ICJ
        - *Provided* agreement is still in force and states are parties to Statute of ICJ
    3. **Declarations accepting compulsory jurisdiction of the court**
      - Known as the "optional clause"

- Parties to statute may recognize, ipso facto and without special agreement, jurisdiction of Court in legal disputes re treaty interpretation, question of int'l law, existence of fact, or reparation for breach
- Can be unconditional or on condition of reciprocity, for certain time
- Puts states in same position toward Court as inhabitants of country toward their courts
- Unilateral act by state concerned
- Deposited with UN Secretary-General, usually signed by Foreign Minister of state
- Declarations referring to PCIJ apply to ICJ
- Usually for certain period with provision for tacit renewal, to be terminated by simple notice
- Fewer in number than UN had hoped for
- Most such declarations include reservations
  - I.e. reservations for disputes arising out of hostilities, concerning law of the sea or multilateral treaties
  - Most common:
    - Disputes relating to domestic jurisdiction of state (Art 2(7))
      - Often 'as determined by state concerned'
      - PCIJ: whether certain matter is solely within a state's jurisdiction is relative question depending on development of int'l relations
      - Gov'ts have been called upon to withdraw such reservations; certain states did
    - Where other peaceful means of settlement are available (Art 95)
  - Condition of reciprocity:
    - Expressly or impliedly attaches Court's compulsory jurisdiction to all declarations of acceptance
    - Court's jurisdiction over case is restricted to classes of dispute that have not been excluded by any of them
- Constraints on court's jurisdiction and unwillingness of states to accept compulsory jurisdiction undermine its potential for settling disputes
- Illustrated in dispute b/n Russian and Georgia
  - Convention they were both parties to: 'any dispute *not settled by negotiation* shall be referred by request to ICJ for decision'
  - Court declined jurisdiction; precondition on matter being adjudicated by ICJ (Georgia had not negotiated with Russia)

- Ordinary meaning interpretation
- IF Court has jurisdiction, it must apply sources of int'l law:
  - Treaties, CIL, general principles, and jurisprudence/scholarly writing as subsidiary aid to determining content of IL
- ICJ decisions on contentious cases are binding on state parties
  - Art 94: recourse to SC if party fails to perform obligations
- Advisory opinions
  - UN Charter, Art 96: UNSC, UNGA, and UN specialized agencies may request advisory opinion on *any* legal question
    - Other organs or authorized agencies may request opinion on legal questions arising within scope of their activities
    - Also see Art 65 of ICJ Statute
  - Advisory procedure is available to public int'l organizations
    - Certain organs and agencies; eg. UNESCO, IMO, WHO
    - Precise circumstances are specified in agency's Act/constitution
    - May concern interpretation of these texts or UN Charter, or disagreements b/n agencies or an agency and its members
  - ICJ has delivered fewer opinions than PCIJ
  - Procedure for advisory opinions is based on provisions in Statute relating to contentious proceedings
  - Begins with filing of written request for advisory opinion
    - After discussion, agency embodies question(s) to be submitted
  - Unlike judgments, advisory opinions have no binding effect
    - Except in a few specific cases where it was stipulated beforehand that opinion would have binding force
    - But decision should be seen as sanctioned by int'l law
    - Only 2 advisory opinions since July 2004
- Judicial review?
  - Court's power of judicial review is limited
  - Bound to ensure rule of law within UN system is adhered to, but cannot substitute its discretion for the SC's in determining threat to peace or steps to be taken

**Interpretation and Application of 1971 Montreal Convention from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v UK), Preliminary Objections [1998 ICJ Rep]**

- **Ratio:** ICJ was never meant to be invested with power of judicial review of legality or effects of Security Council decisions (dissent)
- **Facts:** US and UK demanded Libya extradite two Libyan nationals suspected of causing explosion of PanAm flight over Lockerbie, Scotland
  - L said obligation to extradite is governed by Montreal Convention
  - SC Resolution 748 required Libya to comply with extradition requests
- **Issue(s):** Does SC Resolution override Libya's invocation of rights under Montreal Convention?
  - Implicit question: does Court have power to supervene or judicially review SC resolution adopted under CH. VII?
- **Held (majority):** Resolution post-dated when case was brought by Libya, so it could not affect Court's jurisdiction (measured according to date case was brought)

- **Dissent (President Schwebel):** Court is not empowered to exercise judicial review of SC decisions, particularly those made under Art's 39, 41, 42 (threats to peace)
  - UN Charter and Statute of ICJ do not give Court power of judicial review generally or power to supervise SC's decision
  - On contrary, SC has primary responsibility for maintaining int'l peace and security
    - SC is subject to rule of law and principles of UN Charter
    - But may lawfully decide on measures to maintain/restore peace and security
  - Fact that SC must comply with Charter and ICJ is principal judicial organ of UN does NOT mean Court is empowered to ensure Council's decisions accord with Charter
  - Never intended by drafters of UN Charter in San Francisco
  - Charter may be living instrument, but to give Court this power would be great departure
  - Only states can be parties in cases before courts
    - SC cannot be a party, so could not be bound by any such judgment
  - Could prejudice effectiveness of SC's resolutions and subvert Charter's integrity
    - Would create great conflict b/n Court and SC

#### **Ch. 4: State Jurisdiction over Land Territory**

##### **6) Self-Determination**

- Frequently results in acquisition of territory by an entity that achieves statehood only at moment of such acquisition (rather than pre-existing state)
- International legal personality
  - States are subjects of int'l law as of right
    - Indiv's and companies are domestic legal persons, not int'l legal persons
    - States may allow corporation to act on int'l plane; not as of right, but at consent
    - Indiv's as a group or collectivity that qualify as people may have rights under int'l law, notably right of self-determination
  - Suggests peoples have a *degree* of int'l legal personality
    - Not full personalities (not all rights and duties of states)
- *Principle* of self-determination of peoples is found in UN Charter, Arts 1(2) and 55
- *Right* of self-determination is found in many int'l human rights treaties
  - **Int'l Covenant on Civil and Political Rights (ICCPR), Art 1**
    - All peoples have right to freely determine their political status and freely pursue their economic, social, and cultural development
    - All peoples may freely dispose of their wealth and natural resources
    - State parties shall promote and respect right of self-determination
  - **Int'l Covenant on Economic, Social and Cultural Rights (ICESCR), Art 1**
    - Same wording AS ICCPR
    - Shows that self-determination has multiple components: political, human or sociocultural, economic control over resources
  - African Charter of Human and Peoples' Rights, in force 1986
    - Nothing shall justify domination of a people by another
    - Do not equate with automatic right to secede
    - Its exercise can be met within borders of state to protect territorial integrity
    - Internal vs external dimension to self-determination
  - 1993 Vienna Declaration and Programme of Action

- Right of peoples under colonial or foreign occupation to take any legitimate action, in accordance with UN Charter, to realize inalienable right
- Denial of self-determination is violation of human rights
- Represents 20<sup>th</sup> C int'l law reaction to colonization

**Legal Consequences for States of Continued Presence of S. Africa in Namibia notwithstanding Security Council Resolution 276, Advisory Opinion [1971 ICJ Rep]**

- **Ratio:** Preventing a people's exercise of self-determination is against int'l law
- **Facts:** After WWI, S. Africa granted mandate over SW Africa (later Namibia), at time deemed incapable of governing itself; terms specified in Covenant of League of Nations
  - After its demise, S. Africa argued it was free to dispose of SW Africa as it wished
  - Even after argument rejected in advisory opinion, continued to occupy Namibia
  - Security Council adopted Resolution 276, declaring its continued presence illegal
  - Sought Court's opinion on legal consequences of S Africa's refusal to comply
- **Held:** Continued presence of S. Africa in Namibia is illegal
  - Concepts embodied in Covenant and the 'sacred trust' were by definition evolutionary, not static; parties must be deemed to have accepted them as such
  - Ultimate objective was self-determination and independence of peoples concerned
  - S. Africa is under obligation to withdraw immediately; UN members states under obligation to recognize illegality and refrain from any dealings
- **Outcome:** Namibia gained independence from S. Africa in 1990, 25 years after UNGA terminated S. Africa's mandate and 19 years after ICJ confirmed this

**Western Sahara, Advisory Opinion [1975 ICJ Rep]**

- **Ratio:** Essential feature of right of self-determination is free and voluntary choice by the peoples
- **Facts:** As Spain moved to decolonize Western Sahara, both Mauritania and Morocco made claims to the region based on historical and cultural ties; resisted by occupants
  - Added to UN list of places to exercise self-governance (emerge from colonialism)
  - Competing claims – Mauritania, Morocco, liberation movement
- **Issue(s):** What are the legal ties b/n the Western Sahara territory and the Kingdom of Morocco and Mauritanian entity?
- **Held:** No legal ties b/n W Sahara, Mauritania, Morocco of such nature as to affect application of GA Resolution to decolonization of W Sahara
  - Ties did not displace right to exercise self-determination through free expression of will of people of the territory
  - Art 1(2), 55, 56 of UN Charter – right of self-determination
  - GA Resolution 1514; necessity of bringing to speedy end colonialism in all forms
    - Confirms that application of right of self-determination requires free and genuine expression of will of peoples concerned
- **Outcome:** Morocco remains occupying power decades after ICJ decision; planned referendum on W. Sahara future repeatedly postponed
  - Issue: Which peoples get to decide? Many nomadic peoples

**East Timor Case (Portugal v Australia) [1995 ICJ Rep]**

- **Ratio:** Self-determination is one of the essential principles of contemporary int'l law
- **Facts:** Former Portugese colony in South Pacific invaded by Indonesia

- Portugal brought proceedings against Aus, arguing its treaty with Indo creating 'zone of cooperation' failed to recognize Portugal as only legitimate authority in East Timor
- Also infringed rights of East Timorese to self-determination
- **Arguments:** Aus argued court did not have jurisdiction and Indonesia must be a party
- **Held:** Court agreed it did not have jurisdiction, but commented on self-determination
  - One of essential principles of contemporary int'l law
  - But diff b/n *erga omnes* character of a norm and the rule of consent to jurisdiction
  - Court could not rule on lawfulness of a state's conduct when judgment would imply evaluation of another state's conduct which is not party to case
- **Outcome:** East Timor became indep state in 2002, 27 years after Indo invasion and following decades of oppression, resistance, referendum, multinational military invasion, UN admin
  - Very little consideration of the East Timorese people by any of these powers
  - Essential principle of contemporary int'l law = CIL?

### **Legal Consequences of Construction of Wall in Occupied Palestinian Territory (Advisory Opinion) [2004 ICJ Rep]**

- **Ratio:** Right to self-determination has an *erga omnes* character (concern of ALL states)
- **Facts:** UN GA asked Court to assess legal consequences from construction of wall by Israel in occupied Palestinian territory, including East Jerusalem, considering rules of int'l law
- **Issue(s):** Whether Palestinians enjoyed right of self-determination and implications for wall
- **Held:** Israeli settlements in occupied Palestinian territory is breach of int'l law
- **Reasoning:** Two principles of mandates: 1) non-annexation and 2) well-being and development of peoples not yet able to govern themselves forms a 'sacred trust of civilization'
  - Existence of 'Palestinian people' is no longer in issue; recognize by Israel
  - Despite Israel's assurances that wall is temporary and not annexation, could become permanent and tantamount to *de facto* annexation
  - Severely impedes Palestinian's exercise of self-determination; therefore, breach of Israel's obligation to respect that right
  - Violations include certain *erga omnes* (by very nature the "concern of all states")
  - All states under obligation not to recognize, aid or assist construction of wall
- **Analysis:** Issues: What is included in 'self-determination'? Whose constitutes 'peoples' for purpose of enjoying this right?
- **Outcome:** ICJ's opinion rejected by Israel; issue remains unresolved

### **Indigenous Peoples**

- Are minority indigenous peoples entitled to self-determination?
  - **ILO Convention No 169:** recognized rights of ownership and possession over lands traditionally occupied, but no reference to self-determination
    - Canada, Aus are not parties
    - Pressure from indigenous peoples not to ratify (doesn't grant self-determination)
  - **UNDRIP, GA Res 61 (2007), Art 3:** Indigenous peoples have the right to self-determination (freely determine political status and pursue economic, social and cultural development) - this was key for indigenous negotiating this text
    - Right to **autonomy and self-government** in local/internal matters
    - Right to **own, use, develop lands** and resources and have legal recognition
    - No removal from lands without **free, prior and informed consent**

- Reference to int'l law viewed by many states as ensuring right of self-determination would not threaten territorial integrity of states
- Background:
  - Draft text was negotiated for many years (mostly b/n academics and indigenous)
    - Human Rights Council adopted declaration in June 2006
    - Canada and Russia voted against adoption
  - Draft sent to UNGA; further negotiations
  - Final text adopted at end of GA in Sept 2007
    - Can, Aus, NZ, US voted against adoption
    - Later expressed support for principles and aspirations of Declaration (Canada with qualification in 2010; without qualification in 2016)
  - Some limitations by states added in:
    - Preamble: 'in conformity with **rules of int'l law**'
    - Operative paragraph (Art 46): nothing gives any group right to dismember or impair **territorial integrity** of sovereign states
      - Operates as limitation clause, much like s.1 of Canadian Charter
  - No 'signing'; declaratory text adopted by UNGA resolution put to a vote
  - Canada's concerns
    - Free, prior and informed consent rather than consultation
    - Self-govt without recognition of negotiations
    - Concerns with IP, resources, land
  - Successes for indigenous peoples; right to self-determination recognized
  - No defn of a people or indigenous peoples in UNDRIP
    - Modern states usually use self-identification
- Canada supported Declaration as 'aspirational but non-legally binding document that does not reflect CIL nor change Canada's laws'
  - Rights have limits
  - Justice Minister says we can't adopt UNDRIP 'word for word'
- Unclear if Declaration suggests indigenous peoples have right to sovereignty in int'l law or only *within* states (internal self-determination)

### **Reference Re Secession of Quebec [1998 SCC]**

- **Ratio:** Right to external self-determination (i.e. secession) limited to 3 extreme circumstances, to prevent threats to existing states' territorial integrity and stability
- **Facts:** After close defeat of second referendum on Quebec independence in 1995, fed gov't asked SCC for opinion on application of int'l law of self-determination to potential secession of sub-national unit from Canada
- **Issue(s):** Is there a right to self-determination under int'l law that gives Quebec right to secede?
- **Held:** No; agree with *amicus curiae* that right of self-determination is not applicable to circumstances of Quebec within Canadian federation
- **Reasoning:** Int'l law neither recognizes right of unilateral secession nor expressly denies it
  - But denial is implicit in exceptional circumstances required for secession to be permitted under right of self-determination
    - Great importance placed on territorial integrity of states
    - Where unilateral secession would be incompatible with domestic Constitution, as here, leave creation of new state to existing state's domestic law

- Right of people to self-determination is considered general principle of int'l law
  - But should be exercised within framework of existing states and consistent with maintaining territorial integrity of those states
- Defining “peoples”
  - Accessing right requires threshold step of characterizing the group as a ‘people’
  - Common language and culture are key determinants
  - Unnecessary to determine if Quebecois are a ‘people’ b/c self-determination cannot ground unilateral secession in present circumstances
- Scope of self-determination
  - Internal: people’s pursuit of econ, pol, social development within existing state
  - External: may take form of assertion of right of unilateral secession
    - Arises only in extreme cases under carefully defined circumstances
- **Right to external self-determination only exists in 3 situations** at best:
  - Former colonies: break away from imperial power
  - Oppressed peoples: domination or exploitation outside colonial context
    - Rooted in Friendly Relations Declaration
  - Definable group blocked from exercising self-determination internally (meaningful access to gov’t); entitled as last resort to exercise by secession
    - *Amicus curiae* argues Quebec not oppressed or denied access to gov’t
- Application: exceptional circumstances are manifestly inapplicable to Quebec
- **Analysis:** Seen as leading int’l case on self-determination
  - SCC’s view of legal right of self-determination seems broadly supported by state practice and *opinio juris*

**According with Int’l Law of Unilateral Declaration of Independence re Kosovo, Advisory Opinion [2010 ICJ Rep]**

- **Ratio:** General int’l law contains no prohibition of declarations of independence
- **Facts:** Kosovo unilaterally declared independence from Serbia
  - Various states recognized it, including Canada
  - Kosovars were being subject to racism and oppression
- **Issue(s):** What is legality of Kosovo’s unilateral declaration of indep from Serbia in 2008?
- **Held:** Adoption of declaration did not violate any applicable rule of int’l law
- **Reasoning:** Fact that parent state opposes declaration of independence does not mean it is contrary to int’l law
  - Where Security council has condemned declarations of indep, it has stemmed not from unilateral character but from unlawful use of force or violation of *jus cogens* norms
  - Divergent views of states on customary status of right to self-determination outside colonial and oppression contexts
  - Not necessary to answer whether right to “remedial secession” exists; outside scope
    - Court bypassed question of whether thwarting right of independence internally gives rise to a right to secede
  - Declaration did not violate general int’l law or Security Council resolution
- **Analysis:** case law focuses on how people are being treated above other factors for secession

**\*MIDTERM EXAM UP TO HERE\***

## PART II: STATE JURISDICTION

- Definitions:
  - **“Sovereignty”**: autonomy from other states in both domestic matters and foreign relations (for territory, it means autonomous control)
  - **“Jurisdiction”**: state’s competence under int’l law to regulate conduct of natural and juridical persons, including activity of all 3 branches of gov’t
    - Aspect of sovereignty
    - But states have constrained their sovereignty through int’l law, so full and exclusive state jurisdiction always falls short of absolute sovereignty
  - **“Territory”**: all spaces that may be occupied, visited, or explored by humankind
    - More than land
- **4 classes of territorial control:**
  - Territory that **corresponds to the physical or geographic state** itself
    - Comprises land, inland waterways, thin band along state’s coasts, airspace
    - Controlled by state to the exclusion of other states
    - I.e. common law countries typically use this
  - **Res nullius territory** (terra nullius)
    - May in principle be legally subjected to state’s exclusive jurisdictional control (sovereignty), but is not currently subject to any such control
    - “Vacant land”; a legal fiction
    - Only vacant/undiscovered patch of land on earth left is Antarctica
  - **Res communis territory**
    - Is not and may not be legally subjected to any state’s exclusive jurisdictional control, but may be used and enjoyed by every state for its own purposes
    - Not like community garden; don’t have to share resources
  - **Common heritage of humankind**
    - Variety of res communis category
    - Can neither be subjected to state’s exclusive jurisdictional control nor exploited unilaterally by any state
    - Resources reserved for benefit of humanity as a whole
    - E.g. outer space, deep sea bed, the moon

### Ch. 4: State Jurisdiction Over Land

#### Intertemporal Law and Sovereign Title to Land

- Essence of territorial sovereignty is notion of ‘title’
  - Comprehends both any evidence which may establish existence of a right and the actual source of that right
- How states acquire sovereignty over land changes with practice and *opinio juris* of states
  - Many past acts of acquisition would be regarded as illegitimate today
- **Doctrine of intertemporal law**: two elements
  - Creation of rights: Acts should be judged in light of law contemporary with their creation
    - Widely accepted
  - Existence of rights: Rights acquired in valid manner according to law contemporaneous with creation *may be lost* if not maintained in accordance with development of int’l law
    - More controversial

## Acquisition Through Political Events

### Doctrine of Discovery

- In Canada, no need to examine in detail b/c SCC has spoken on issue
  - ***Tsilhqot'in Nation v British Columbia***, 2014 SCC 44 at para 69:
    - "... The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763. ..."
  - **Truth and Reconciliation Commission's "Calls to Action"** of 2015
    - Call on the Government of Canada to develop a "Royal Proclamation of Reconciliation" that would "repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*"
  - But remember doctrine of intertemporal law
    - Don't apply today's principles to land acquisition 100 years ago
    - Conquest was valid way of getting territory at that time

### Effective Occupation

- Discovery only relevant where land previously unknown to Europeans came to their attention
  - Along with 'inchoate' nature of sovereign claims, this gave rise to complementary doctrine of 'effective occupation' of land said to be *terra nullius*

### **Island of Palmas Case (Netherlands v US) [1928 RIAA]**

- **Ratio: Discovery** must be followed by acts of effective occupation. An inchoate title based on discovery with no effective occupation cannot prevail over a definite title founded on peaceful and continuous display of state authority (prescription).
- **Facts:** Dispute arose in 1925 b/n US and Netherlands; competing claims of sovereignty to island near Philippines, which US exercised sovereignty over
- **Issue:** Sole duty of arbitrator was to determine whether Island of Palmas in its entirety forms part of territory belonging to US or Netherlands
- **Arguments:**
  - US claims it acquired island by cession: Spain ceded Philippines to US after Spanish-American War in 1898; Palmas was included in cession
    - As successor to rights of Spain, US bases its rights on discovery
    - Also contiguity: they own rest of Philippines and this island is close
  - Netherlands claims Palmas came under Dutch sovereignty from 1677 at latest
    - *Nemo dat*: You can only cede what you have
    - Either Netherlands discovered and effectively occupied Palmas, OR alternatively (can only discover *terra nullius*), through prescription (exercised peaceful and continuous display of state authority = adverse possession)
- **Held:** The Island of Palmas (or Miangas) forms in its entirety part of Netherlands territory
- **Reasoning:** Title based on prescription prevails over discovery without effective occupation
  - Sovereignty = independence (right to exercise functions of a state over portion of territory, to the exclusion of any other state)
  - Customary to examine which state possesses title (cession, conquest, occupation) superior to other state claiming sovereignty

- Must also show territorial sovereignty continued to exist and did exist at critical moment (actual display of state activities)
  - Arbitrator was prepared to accept without deciding that Spain could have established original title to Palmas by discovery
  - Spain did not make landing on island; merely saw the land
  - Occupation, to constitute claim to territorial sovereignty, must be effective
- Discovery alone, without any subsequent act, cannot prove sovereignty
  - Only creates 'inchoate' title which must be completed within reasonable period by effective occupation of region claimed to be discovered
  - This principle must be applied in accordance with doctrine of intertemporal law
  - Therefore Spain did not possess island at beginning of 1648 or in 1714
- Inchoate title cannot prevail over continuous and peaceful display of authority by another state
- No evidence of Spanish activities on Island of Palmas
  - But in exercise of territorial sovereignty there are necessarily gaps in time and space, particularly in remote regions
- Netherland's display of sovereignty for period of 1700-1906 was peaceful (not contested), open and public, and in its own right (not under derived title)
  - US did not prove equivalent or stronger title
- **Analysis:**

### Prescription

- Int'l law recognizes 'prescriptive title', an occupation-based concept
  - Analogous to adverse possession in common law property systems
  - Process of acquiring title to territory by long, continued, uninterrupted possession
  - Policy reason: maintaining world order and stability of territorial titles through time
- Requirements for acquisition by prescription:
  - Possession must be sufficiently: Peaceful, Continuous, Public, Lengthy

### **Kasikili/Sedudu Island (Botswana v Namibia) [1999 ICJ Rep]**

- **Ratio:** Acquisition by prescription requires peaceful, continuous/enduring, uninterrupted, public display of state authority. Simple occupation by individual actors (or indigenous peoples) is irrelevant unless they are authorized as agents of the state.
- **Facts:** Competing claims to island near Namibia
  - Germany and Great Britain entered into 1890 treaty re influence in SW Africa
  - States experienced various changes in status over next century
  - In late 20<sup>th</sup> C, former British republic, Botswana, and former German territory, Namibia, became independent
  - Differences arose concerning boundary around Kasikili island
- **Issue(s):** Whether conditions to acquire title by prescription have been met in this case
- **Arguments:** Namibia claims title on basis of 1890 treaty and, alternatively, prescription (continuous and exclusive occupation with acquiescence of governing authorities)
- **Held:** Island belongs to Botswana
- **Reasoning:** Prescription is method of territorial acquisition which can ground title
  - Both parties agreed on test for prescription which ICJ adopted
    - 4 conditions enable possession to mature into prescriptive title:
      - Exercised *a titre du souverain*

- Peaceful and uninterrupted
  - Public
  - Endure for certain length of time
- Namibia claims Germany's peaceful, public possession continued w/out interruption ('indirect rule' by Masubia peoples), until accession of territory to independence
  - Argued Botswana continued to remain silent for almost 2 more decades
- Botswana argues no credible evidence that Namibia exercised state authority; acts of private persons cannot generate title unless subsequently ratified by state
- Not established that members of tribe were exercising functions of state authority
  - Acts of Masubia on the island were independent from title to island
- Therefore, Namibia has not established acts of state authority capable of providing alternative justification for prescriptive title
- **Analysis:** How did Botswana prove their title to the island (just by Namibia's failure to)?

**Land and Maritime Boundary b/n Cameroon and Nigeria (Equatorial Guinea Intervening)**  
**[2002 ICJ Rep]**

- **Ratio:** Where effectivites adduced by a state do not correspond to the law, preference is given to holder of the title (other state must show they acquiesced to acquisition by prescription).
- **Facts:** Dispute b/n C and N over sovereign title to lands and villages near northern border
  - Boundary previously established by int'l agreement b/n predecessor colonial powers
  - That agreed delimitation gave title to Cameroon
- **Arguments:** N bases claim on: long occupation constituting historical consolidation of title; effective administration by N acting as sovereign and absence of protest; and manifestations of sovereignty by N with acquiescence by C (the people say they 'feel' Nigerian)
  - C claims its valid conventional title prevails over any *effectivites* to the contrary (need not demonstrate effective exercise of sovereignty); never acquiesced
- **Held:** Rejected Nigeria's argument; sovereignty continues to lie with Cameroon
- **Reasoning:** Land occupation cannot prevail over established treaty title
  - Furthermore, Nigeria's claim was for period of 20 years (too short)
  - Test is different where there is pre-existing treaty title
    - Must show Cameroon acquiesced in passing of title from itself to Nigeria
    - Preference given to holder of the title
  - Finding: there was no acquiescence by Cameroon in abandonment of title to Nigeria
- **Analysis:** Note: This is the area plagued by Boko Haram today

**Law in Context: Polar Regions**

- 2 diff polar regions in the world
  - **Antarctica:** last area yet to be incorporated into sovereign territory of a state
    - Competing claims by different states on basis of discovery + effective occupation are suspended by treaty regime
      - E.g. Aus, UK/Chile/Argentina (competing claims)
        - US declined to make claims but refused to recognize others
      - Antarctica Treaty of 1959
        - All claimant states and over 30 others became parties
        - Froze territorial claims and preserved Antarctica as demilitarized zone dedicated to scientific research
    - Note: key differences from Arctic

- Frozen land; very different than Arctic which is mostly sea
  - Arctic has Indigenous peoples; Antarctic doesn't
- **Arctic:** law of sea applies (do not apply law of the land)
  - No treaty regime like Antarctica
  - But states like Canada say Convention on the Law of the Sea governs
    - When media talks about 'use it or lose it', that's an effective occupation test and doesn't apply to sea (wrong law)
  - Canada's *land* claims in the Arctic are generally not contested
    - Whether or not the islands are inhabited
      - No state after WWII has contested Canada's Arctic land sovereignty (with one exception)
      - Hans Island: Canada's Minister of Defence visited to show occupation; left a flag and bottle of Canadian whisky; then Danes took our flag off and left bottle of Schnapps
  - Canada's contested claims and disputes in Arctic are sea routes and passageways, what's under the water (oil and gas), etc
    - Some Canada/US vs Russia disputes with respect to underneath Arctic Ocean; where is line drawn in continental shelf

#### **Subjugation: Conquest and Annexation**

- Historically a key way of obtaining title
- Conquest is permanent absorption of all or part of defeated enemy's territory
- Must satisfy two requirements:
  - **Material strength** to make conquest good
  - **Intention of appropriation**
- Conquest must be followed by formal annexation of territory to acquire title
- Requires conquering people to be considered a 'state'

#### **Legal Status of Eastern Greenland (Denmark v Norway) [1933 PCIJ]**

- **Ratio:** Conquest requires a war b/n two states where sovereignty over territory passes
- **Arguments:** Norway argues after disappearance of Nordic settlements, sovereignty was lost and Greenland became *terra nullius* (grounded on basis of conquest and abandonment)
- **Reasoning:** Conquest only operates when there is a war b/n two states and sovereignty over territory passes to victorious state
  - Does not apply where settlement is established in distant country and inhabitants are massacred by the aboriginal population
- **Analysis:** Acquisition of territory by conquest and annexation is no longer permissible
  - See UN Charter, Art 2(3)-(4) prohibition on use of force, UNSC resolutions 242 in 1967 and 662 in 1990, UNGA Friendly Relations Declaration, ICJ in The Wall
  - But historically valid (doctrine of intertemporal law)
    - Professor Jennings: unless rule of intertemporal law is completely rejected, old titles by conquest must remain valid
  - Like discovery, two-part process; conquest had to be followed up by annexation

#### **Acquisition or Loss of Territory by Geomorphology**

- New territory is added, usually through natural causes
  - No formal act or assertion of title is necessary

- **Accretion, avulsion and erosion**
  - Accretion is gradual increase
  - Avulsion is dramatic increase in territory (e.g. volcano)
  - Erosion is gradual decrease
  - E.g. *Chamizal Arbitration (USA v Mexico)*: part of river produced by gradual process belonged to US and portion created by sudden flood belonged to Mexico
- **Principle of contiguity**
  - Geographical relationship may exist b/n claimed piece of land and one over which sovereignty is established by another base of title
  - Assertion of sovereignty may be made on basis of proximity to existing territory
    - But do not overstate significance of contiguity
      - *Island of Palmas case*: “title of contiguity, as basis of territorial sovereignty, has no foundation in int’l law”
    - **Limited role** in determining sovereignty over islands off a state’s coasts
      - Strong presumption that islands within twelve-mile coastal belt will belong to coastal state, unless fully-established case to the contrary
    - Outside of this rebuttable presumption, merely one factor of many to assess extent of state’s claim on one of other established bases of title

#### **Effect of Recognition, Acquiescence, and Estoppel**

- **Recognition:**
  - Positive act; one state accepts claim of another state
  - May be implied from all relevant circumstances
- **Acquiescence:**
  - Circumstances where a protest is called for and does not happen
  - Tacit recognition through silence and subsequent activities
  - May be impt consideration in claim grounded in prescription
    - Depends on facts of specific case
    - E.g. *Pedra Branca/Pulau Batu Puteh*: Singapore’s actions *a titre du souverain*, and Malaysia’s failure to respond to conduct of Singapore and its predecessors, resulted in passing of sovereignty
- **Estoppel:**
  - Detrimental reliance on other state’s seeming recognition of its territory (Temple case)
  - State which made or consented to particular statement, upon which other party relied in subsequent activity to its detriment, cannot change its position later

#### **Temple of Preah Vihear (Cambodia v Thailand) [1923 ICJ Rep]**

- **Ratio:** silence/failure to react may amount to tacit recognition (acquiescence); that state may be estopped from asserting a contrary claim
- **Facts:** Dispute over sovereignty of Temple on T-C border, established by treaty in 1904
  - Boundary was to follow watershed b/n two countries
  - Maps did not truly follow watershed; if so, would have placed temple in Thai territory
- **Held:** Sovereignty belongs to Cambodia on various grounds
- **Reasoning:** Official visit of Prince at Preah Vihear called for a reaction; Thailand did nothing
  - Amounted to tacit recognition of Cambodia’s sovereignty through failure to react to affirm or preserve title in fact of obvious rival claim
  - T now precluded by conduct from asserting she did not accept Cambodia’s claim

- Immaterial whether Cambodia's reliance was based on belief that map was correct
- T cannot deny she was ever a consenting party to the settlement while continuing to claim and enjoy benefits of it
- **Analysis:** Cambodia forced to return for 'interpretation' of 1962 judgment in 2011
  - Court found Cambodia had sovereignty over entire disputed territory
  - Thailand required to withdraw its personnel from region

### **Summary: Modes of Territorial Acquisition**

1. Discovery (inchoate) + Effective occupation
  - For discovery to be valid it must be terra nullius, and followed by effective occupation
2. Prescription (must meet test)
3. Cession (but nemo dat)
4. Conquest + Annexation
  - Illegal today; but remember doctrine of intertemporal law
5. Geological realities: accretion, avulsion, erosion
  - E.g. states on the River Delta will grow or shrink
  - Land reclamation projects (China, Dubai)
    - Int'l law usually pragmatic, sees this as geological realities
6. Geographic unity: principle of contiguity
  - Presumption for islands within 'territorial sea'
  - Otherwise just a factor to consider
7. Recognition, acquiescence, estoppel
  - One state expressly recognizes claim of another state
  - Tacit recognition through silence and subsequent activities
  - Estoppel: detrimental reliance on other state's seeming recognition of its territory (Temple case)

## **Ch. 5: State Jurisdiction Over Water**

### **Oceans**

- Except thin margin along a state's coast, most marine spaces were traditionally considered the 'high seas'; *res communis* domain over which no state could assert sovereignty
- **Ocean Zones** under UN Convention on the Law of the Sea (UNCLOS) – pg 393
  - Territorial Sea – 12 NM (sovereignty, subject to innocent passage)
  - Contiguous Zone – 24 NM (coastal state policing powers, art 33)
  - Exclusive Economic Zone (sovereign rights for exploring and exploiting, conserving and managing natural resources of water, seabed, subsoil)
  - High Seas (freedom of fishing, scientific research, etc)

### **Baselines, Internal Waters and Territorial Seas**

- Breadth of each zone typically defined by start and end point
  - Starting point for most zones is state's coast – acts as baseline
  - Issues: how to define state's coast; can we depart from following physical line?
  - State's physical coastline when tide is out usually acts as baseline from which to measure
  - But for deeply indented coastlines, states decide to draw straight baselines – See Fisheries

- Why do baselines matter?
  - all waters on landward side of a baseline are internal waters – UNCLOS, art 8
  - measuring 'out' 12 nautical miles = territorial sea (aka Maritime belt, coastal waters)

### **Fisheries Case (UK v Norway [1951 ICJ Rep])**

- **Ratio:** Straight baselines is CIL based on state practice (later codified in UNCLOS, Art 7)
- **Facts:** N contended it was entitled to use straight baselines as starting point to measure territorial sea and coastal fisheries zone; UK objected to practice beginning in 1933
- **Arguments:** UK argued that CIL obliged N to follow low-water mark; even if straight baselines were permissible, max of 10 NM
- **Held:** N has not violated int'l law in fixing baselines for delimitation of fisheries zone
- **Reasoning:**
  - Possible methods to effect application of the 'low-water mark' rule:
    - Trace parellele: follow coast
    - Straight baselines: depart from physical line of coast
  - Straight baselines has been used not only in cases of well-defined bays but also minor curvatures of coast; no valid reason to confine to bays
  - But practice of states does not justify formulation of any general rule of law for the length of these baselines
- **Analysis:** At time of this judgment, no multilateral treaty governed concept of baselines

### **UNCLOS:**

- **History:** Third UNCLOS conference; negotiations lasted for 9 years!
  - Major issues: oil spills, medical wastes washing onto beaches, environmental law, deep sea bed mining
  - States decided to adopt one comprehensive treaty – “Constitution for the Oceans”
    - adopted in 1982; in force 1994
    - NO reservations allowed; package deal
    - Side agreement on implementation 1995
  - Ratification: widely ratified; 168 state parties
    - Canada ratified UNCLOS in 2003 (delay b/c we had concerns about conservation of fisheries); Denmark in 2004
    - Art 311(1): UNCLOS provisions prevail over 1958 conventions for parties
      - US in NOT a party to UNCLOS
        - Most American corporations are in favour of it, but requires 2/3 consent of Senate and still would be blocked
        - Why? Int'l seabed authority, *res communis* (taxing and tariffs shared among all countries); socialist element
        - US still follows most rules of UNCLOS; self-interest
        - US ratified the four 1958 Conventions in 1961
        - Canada must know 1958 conventions and other customary rules; our leading ally is working off different agreements
  - **Implications:** trade and economic realities; goods are transported by sea
    - Law of the sea impt for shipping, maritime, public law, national defence, global affairs, environmental, off-shore resources, oil and gas, fishing
- **Different methods for:** normal baselines (Art 5), reefs (Art 6), straight baselines (Art 7), mouths of rivers (Art 9), bays (Art 10), low-tide elevations (Art 13)

- ports/permanent harbours are part of coast (Art 11)
- roadsteads are included in territorial sea (Art 12)
- **'Historic bays'** greatly exceed size of standard bay, but b/c of historic relationship with state, subject to full sovereignty and closed off with straight baseline (e.g. Hudson's Bay)
- **Marine waters:** waters lying on landward side of any straight baseline, incl historic bay (Art 8)
- **Territorial sea:** waters lying on seaward side of baseline, up to max distance of 12 NM (Art 3)
  - approx 1.8km per NM; authorizes coast guard/ navy doing fish patrols
  - subject to imp't limitation: cannot hinder right of innocent passage of foreign-registered ships (Practical reason: safety for ships)
  - Must meet definitions of 'passage' (Art 18) and 'innocent' (Art 19) in UNCLOS
- Where states have competing claims to territorial sea, neither can extend beyond median line except by reason of historic title, special circumstances or contrary agreement (Art 15)

### **State Jurisdiction over Internal Waters and Territorial Sea**

- Internal waters typically subject to full sovereign control of coastal state, like land
  - Except when new straight baseline encloses new internal waters, other states' ships enjoys 'right to innocent passage'
- **Canadian Dept of Foreign Affairs and Int'l Trade, legal memo (2000):**
  - Ports are part of internal waters; does coastal state have right to exclude vessels?
  - Two schools of thought:
    - Presumption that ports are open to int'l merchant traffic, subject to restrictions
    - In times of peace, commercial ports must be left open to int'l traffic
  - Conclusions:
    - Subject to treaty obligations and entry in cases of distress, a coastal state may close its ports to all int'l commercial traffic
    - A state may exclude classes of vessels on non-discriminatory basis
    - States may have even more extensive right to exclude vessels from its ports
- **"Right of innocent passage"** means any ship of any state may pass through territorial sea, as long as not prejudicial to peace, good order, or security of coastal state (Art's 17-19)
  - Does not include fishing, research, spying, etc
  - Submarines must navigate on surface and show flag in territorial sea (Art 20)
  - Coastal state shall not hamper innocent passage (Art 24), but may take necessary steps to prevent passage which is not innocent (Art 25)
- **Warships:** entitled to innocent passage but additional rules
  - May be required to leave for non-compliance (Art 30)
  - Flag state bears int'l responsibility for any damage resulting f/ non-compliance (Art 31)
  - Does not affect absolute immunity of warships and non-gov't state vessels from coastal state enforcement jurisdiction
- **Criminal jurisdiction:** coastal state's jurisdiction should not be exercised on foreign ship except in certain cases (Art 27)
  - Jurisdiction generally is exercised over ships by their 'flag state'

### **International Straits**

- Special regime for narrow ocean passages used for shipping and int'l transit
- Various chokepoints in the world require special legal regime (rights of innocent passage will not be sufficient; sea-highways)
  - Any passage point less than 24 NM may involve overlapping claims

- With the breadth of the territorial sea extending from 3 NM to 12 NM, concerns are raised for navigational access to and from various key areas of the world:
  - Strait of Gibraltar - 8 miles wide - only access to the Mediterranean
  - Strait of Malacca - 20 miles wide – main sea route between the Pacific and Indian Ocean
  - Strait of Hormuz - 21 miles wide – only sea passage to oil-producing areas of the Gulf
  - Bab el Mandeb - 14 miles wide – connects Indian Ocean with Red Sea
- Realities of geography demonstrate a need for a special legal regime for navigational straits
  - P.409: right of 'transit' passage (diff than 'innocent' passage)

### **Corfu Channel Case (UK v Albania) [1949 ICJ Rep]**

- **Ratio:** a foreign ship, even warship, has a right of passage through a strait connecting two parts of the high seas ('sea highways')
- **Facts:** Channel b/n Albania and Greek island of Corfu passes through Albanian territorial sea
  - Used historically by UK and other states to pass
  - During war with Greece, Albania warned UK it would no longer allow transit through
  - UK continued to and struck minefield; took action against Albania in ICJ for damages as result of incident to men and ships
  - A counterclaimed for violations of sovereignty
- **Arguments:** A denies the Channel belongs to class of int'l highways on which right of passage exists; secondary importance, not necessary route, mostly local traffic
- **Held:** Channel belongs to class of int'l highways through which passage cannot be prohibited by coastal state in time of peace
- **Reasoning:** Generally recognized int'l custom that states, in time of peace, have right to send warships through straits used for int'l navigation b/n high seas without prior authorization of coastal state, provided passage is innocent
  - Decisive criterion is geographical situation (connects two parts of high seas and used for int'l navigation)
- **Analysis:** Preserved and enhanced in UNCLOS
  - Note: war was over but mines were left there; still 'time of peace'

### **UNCLOS Part III: Straits Used for Int'l Navigation**

- Art 36: doesn't apply to strait if there is route through high seas or an EEZ
- Art 37: applies to int'l navigation straits b/n one part of high seas/EEZ and another
- Art 38: all ships and aircraft enjoy right of transit passage which shall not be impeded
- Art 39: Duties of ships/aircraft (must proceed without delay, refrain from threat/use of force)
- Art 40: ships may not carry out research/survey activities without prior authorization
- Art 41: Bordering states may designate sea lanes or traffic separation schemes for safety
- Art 42: Bordering states may regulate traffic, pollution, fishing, loading/unloading
- Art 44: states shall not hamper/suspend transit passage
- Art 45: innocent passage applies to int'l straits where transit passage doesn't

### **What is difference b/n innocent and transit passage?**

- Transit applies to ALL ships AND aircraft (Art 38 ensures freedom of navigation and over flight)
- Right cannot be suspended as innocent passage can
- But must be continuous passage 'through or over strait without delay' (art 39)
- Where does it apply? UNCLOS doesn't define a strait
  - through practice and agreement over time, bodies are defined as these sea highways

- Some countries have bilateral treaties (e.g. UK/France; Dover Strait)
- Canada doesn't call it the Northwest Passage (implies transit rights), but consider it to be Canada's internal waters - US argues NW Passage is comprised of int'l straits
  - But no history of ships passing through like Corfu Channel

**Donald M McRae, "Arctic Sovereignty: What is at Stake?" (Canadian Institute for Int'l Affairs)**

- **NOTE: Canada has straight baseline claim for the Arctic**
- "Sector claim" initially made by Senator Poirier in 1907 - DISCREDITED
  - Seen as claim to sovereignty over land/waters from mainland of Canada to North Pole
  - Any disputes over islands north of Canadian mainland have abated (except Hans Island)
  - But issue of sovereignty over water more complicated
- Historic title claim: waters b/n islands are internal waters of Canada based on historic, effective occupation and control (i.e. practice of Inuit)
  - Result: waters of Northwest Passage would be subject to Cdn jurisdiction and control (ships could only navigate through if permitted by Cdn law)
    - Believed unlikely that surface passage through would ever be a reality
  - But then SS Manhattan reawakened interest in debate over sovereignty of Arctic waters
    - 1969; US wanted to run huge ship through 'strait' to show they have right of transit passage (symbolic)
    - Oil tanker got stuck; Canadians helped
    - US didn't concede it's a strait, we didn't concede it's internal waters
    - Russia's northern sea route: Potential of another route through north with climate change, rather than going through Panama Canal
  - Concern: sea route through NW Passage could be regarded as int'l strait subject to right of transit passage, not just innocent passage
  - Trudeau gov't enacted *Arctic Waters Pollution Prevention Act* 1970, claiming authority to control shipping in NW Passage, including prohibitions if necessary
  - Campaign by Canada to gain int'l acceptance of this right
  - Led to 'arctic exception' in UNCLOS 1982 (Art 243)- permits states to regulate to prevent/control marine pollution in ice-covered areas within EEZ (200 NM from coast)
    - Limitation: does not apply to warships or other gov't ships
  - In 1985, US *Polar Sea* voyaged into NW Passage without Canada's prior consent
  - Canada responded by adopting drawing of straight baselines to confirm sovereignty
    - 1988 Arctic Cooperation Agreement b/n Canada and US
    - Agreed to disagree on claim to waters, but any navigation through those waters by US had to be consented to by Canada
    - A state could bring a case in ICJ to challenge Canada's position on NW Passage; except US b/c it no longer accepts Court's compulsory jurisdiction
      - Possible challenges:
        - 1) Canada's claim that waters of Arctic archipelago are internal waters;
        - 2) NW Passage has status of int'l strait; right for int'l shipping to pass
          - 1) Canada has strong legal argument to support this claim:
            - Fact that area is larger than other areas where straight baselines are drawn is balanced by uniqueness of the area (sea/land/ice) and usage by indigenous peoples
            - Canada was not party to 1983 UNCLOS when it drew straight baselines, so not affected by Art's 8 and 35
              - not binding as CIL

- 2) Canada also has legally sound arguments on second claim
  - NW Passage meets geographic test for int'l strait (connects two oceans), but not functional test from *Corfu Channel* ('used for int'l navigation')
  - Int'l navigation has been extremely limited
  - But while surface transits are known, little is known about submarine transits
  - US argument that it means 'capable of being used for int'l navigation' not support by *Corfu* or UNCLOS
  - If shipping were to increase in NW passage without attempt by Canada to regulate, could become int'l strait
- Continued applicability of Art 234 ('ice-covered areas') if ice recedes?
  - Indicates precariousness of relying only on Art 234 for Cdn authority to regulate shipping in Arctic
- Conclusion: narrower in scope; NOT a sovereignty threat to land, Canada's rights over waters of Arctic archipelago generally, or rights to marine/mineral resources

#### **Alan H Kessel, "Canadian Practice in Int'l Law at Dept of For Aff and Int'l Trade"**

- No one disputes the waterways in NW Passage are Canadian
  - Issue is control over foreign navigation
  - Arctic Cooperation Agreement: US asks for permission and Canada grants it
- Right to exercise strict pollution prevention measures in ice-covered waters to max 200 NM codified in UNCLOS
- Canada in process of developing mandatory ship-reporting requirements (NORDREG)
  - US and other states argued Canada has no authority to impose mandatory measures without approval of Int'l Maritime Org (IMO) – UN specialized agency
  - Response: Art 234 permits states to enact regulations without prior IMO approval
    - Uniqueness of 234 overrides Art 211 which requires states to conform to generally accepted int'l rules and standards
    - NORDREG is justified by Art 234 and consistent with SOLAS, principal convention administered by IMO

#### **The Contiguous Zone**

- UNCLOS Art 33: states may prevent and punish infringement of customs, fiscal, immigration, or sanitary laws within contiguous zone (up to 24 NM from baselines)
  - additional 12 NM past territorial sea – "buffer zone"
  - Cf CIL which gave states no jurisdictional rights over oceans beyond territorial sea
- **Difference b/n territorial sea and other zones:**
  - Territorial sea: presumptive starting point is coastal state sovereignty, subject only to limitations imposed by int'l law
  - Other zones: presumptive starting point is absence of special coastal state jurisdiction, other than as specifically granted by int'l law
- NOT an extension of coastal state's full sovereignty (can't pass whatever law it wants)
  - Limited purposes; can stop people smugglers, leaking hazardous waste, invasion of customs tariffs
  - KEY: don't overestimate rights given to coastal state

- Canada's domestic *Oceans Act*: federal customs, fiscal, immigration, or sanitary laws can be enforced in contiguous zone, but power of arrest cannot be exercised in contiguous zone on any ship registered outside Canada without AG's consent

### **Fisheries Zones & Exclusive Economic Zones**

- Contiguous zone does not provide basis for resource exploitation beyond territorial sea
- CIL developed concept of 'fisheries zone': coastal state has preferential jurisdiction over harvesting of living marine resources
- Traditionally, anything beyond the territorial sea was open to all states (the high seas)
- ICJ case at same time as UNCLOS negotiations going on
  - States were very concerned about depletion of fish stocks and wealthy countries with huge fishing fleets taking over; developing countries trying to protect their fishing

### **Fisheries Jurisdiction Case (UK & N. Ireland v Iceland) [1974 ICJ Rep]**

- **Ratio:** Preferential fisheries zone has gained widespread acceptance (right of first refusal)
- **Facts:** I purported to establish exclusive fisheries zone 50 NM in breadth
  - UK objected on basis that CIL didn't permit such declaration and 1961 exchange
  - Pre-UNCLOS; breadth of territorial sea was uncertain at CIL at the time
- **Reasoning:** general acceptance of extension of fishery zone, where coastal state may claim exclusive fishery jurisdiction independently of territorial sea, up to 12NM from baselines
  - State practice reveals widespread acceptance of preferential rights of fishing in adjacent waters in favour of coastal state in situation of special dependence on coastal fisheries
    - Engages where imperative to limit fishing but fishing is fundamentally important to economic development of one state; applies in present case
    - Implies priority but doesn't extinguish concurrent rights of other states
    - Both parties under duty to have due regard to conservation for benefit of all
- **Analysis:** As Court foreshadowed, preferential fisheries zone later replaced by EEZ in UNCLOS
  - UNCLOS gives exclusive right to resources (more than right of first refusal)
    - Huge impact: 38M miles of ocean that now goes to coastal states
      - US has largest EEZ; all its coast plus Guam, Puerto Rico
      - Not Canada b/c straight baselines means Arctic is included in our internal waters – gives us even more rights over those waters
      - Second highest is France, Aus, then Russia
    - But NOT full jurisdiction to regulate what's happening in these waters

### **UNCLOS: Exclusive Economic Zone**

- Art 55: area adjacent to territorial sea has special legal regime
- Art 56: In the EEZ, coastal state has sovereign rights of exploration and exploitation, conservation and management of natural resources, and jurisdiction over other rights
- Art 57: EEZ can extend up to 200NM from baselines
- Art 58: other states enjoy freedom of navigation and overflight and laying of submarine cables and pipelines in another state's EEZ; must have due regard for coastal state's rights
- Art 60: coastal state has exclusive right to construct and regulate artificial islands, installations
- Art 61: coastal state shall determine allowable catch and prevent over-exploitation
- Art 62: should promote objective of optimum utilization of living resources in EEZ
  - If no capacity, should arrange for other states to access surplus

- Art 65: Nothing restricts right of coastal state or IO to prohibit or regulate exploitation of marine mammals more strictly
- Art 69: land-locked states have right to participate on equitable basis in exploitation of appropriate part of surplus of living resources (bilateral or regional agreements)
- Art 70: geographically disadvantage states have same right (dependent on living resources of other state's EEZ or cannot claim EEZ's of their own)
- Art 73: coastal state may enforce laws and regulations to exploit/manage living resources
- Art 121: territorial sea, contiguous zone and EEZ of island are determined same as land, except rocks which cannot sustain human habitation or economic life of their own
  - **Islands have EEZ's; rocks do not**
- Art 74: where EEZ's overlap, delimitation shall be effected by agreement to achieve 'equitable solution'; states should attempt to enter into provisional arrangements
  - ICJ: no normative principle of int'l law mandates specific location of any maritime boundary line (state practice varies substantially)

### **The Continental Shelf**

- EEZ includes subsoil, seabed, and living resources in column of water above it
- More detailed regime governs seabed and subsoil of continental shelf
  - Extension of land under water is valuable; where oil and gas, hydrocarbons are found
- Canada working with US to map continental shelf in Arctic
  - entire division at Foreign Affairs for extended cont shelf issues
    - Raises question of drilling in the Arctic
  - Dispute body created under UNCLOS to deal with claims

### **UNCLOS: Continental Shelf**

- Art 76: continental shelf comprises sea bed and subsoil of submarine areas, extending beyond territorial sea to natural prolongation of land territory, or at least 200 NM from baselines
  - Outer limit shall not exceed 350 NM
  - continental shelf beyond 200 NM must be vetted by Commission
- Art 77: Coastal state exercises sovereign rights for purpose of exploring and exploiting natural resources; no one else may undertake these activities without express consent
  - Rights do not depend on occupation, effective or notional, or any express proclamation
  - Natural resources include mineral/non-living resources and living organisms
- Art 78: rights do not affect legal status of superadjacent waters or air space
- Art 79: Subject to right to take reasonable measures for exploration, exploitation, and control of pollution, coastal state may not impede laying or maintenance of cables and pipelines
- Art 81: exclusive right to authorize and regulate drilling
- Art 82: Must pay for exploitation of natural resources of continental shelf beyond 200 NM
- Art 83: equitable dispute settlement standard for overlapping claims

### **Truman Presidential Proclamation on Continental Shelf, No 2667 (1945)**

- Truman proclaimed the continental shelf belonged to US in 1945
  - Exclusive right to exploit the seabed and subsoil of its continental shelf
  - Huge royalty raiser for central treasury; pay US for mining, oiling, drilling there
- Continental shelf may be regarded as extension of state's land territory
  - Need not be 'claimed' by coastal state like EEZ
- US proclaims that natural resources of subsoil and sea bed contiguous to coasts are subject to US jurisdiction and control

- Other states copied; codified in UNCLOS

### The High Seas

- States enjoy:
  - Full sovereignty over internal waters
  - Sovereignty subject to jurisdictional limits in 12NM territorial sea
  - Limited law enforcement jurisdiction over contiguous zone up to 24NM
  - Jurisdictional control over resources up to 200NM
  - Exclusive rights to resources of subsoil and seabed of continental shelf
- But what is legal regime for the high seas?
  - No state can assert sovereignty over the high seas; jurisdiction is on the ship
  - *Res communis* territory
  - freedom of overflight, laying cables and pipelines, fishing

### **UNCLOS Part VII: High Seas**

- Art 86: all parts of sea not included in EE, territorial sea, internal waters, or archipelagic waters
- Art 87: The high seas are open to all states, landlocked or coastal
  - Freedom comprises navigation, overflight, lay cables/pipelines, construct artificial islands, fishing and scientific research
  - Exercised by states with due regard for interests of other states
- Art 88: reserved for peaceful purposes
- Art 89: No state may validly subject any part of high seas to its sovereignty
- Art's 90-92: states have right to sail ships flying its flag; must be genuine link b/n state and ship
  - Ships generally subject to exclusive jurisdiction of flag state; only allowed one flag
- Art 94: flag state can effectively exercise jurisdiction under its internal law, must maintain register of ships and take safety measures
- Art 95: warships on high seas have complete immunity from other state's jurisdiction
- Art 96: non-commercial gov't service ships have complete immunity
- Art 97: penal jurisdiction only by flag state or state of which person is a national
- Art 100: all states shall cooperate to fullest extent in repression of piracy on high seas
- Art 101: piracy consists of illegal acts of violence or detention for private means on high seas or outside a state's jurisdiction
  - Pirates = original 'enemies of mankind' (*hostis humani generis*)
  - Any state on high seas can capture, arrest, and try a pirate (they don't have to)
  - But must meet legal definition: mutiny on a ship is not a pirate in int'l law (might be in domestic law); need two vessels, one ship attacking another
- Art 105: any state may seize pirate ship and arrest persons (only warships or gov't service)
- Art 110: not justified in boarding unless it suspects piracy, slave trade, unauthorized broadcast, without nationality or same nationality as that ship
  - 'Right to visit'; must verify ship's right to fly flag first
  - Do not overread 110; must have reasonable grounds to suspect
- Art 111: hot pursuit may be undertaken when good reason to believe ship violated laws
  - Must *commence* in internal waters, territorial sea or contiguous zone of pursuing state and *cease* when ship pursued enters other territorial sea
  - *I'm Alone* case (1933); Canadians running rum during Prohibition
    - If foreign registered vessel illegally fishes in your EEZ, state actor (coast guard or Navy) can engage in hot pursuit of that vessel into the high seas
    - Must be 'hot'; right when it happens, not days/weeks later

- If they go into territory of another state, must back off (not your jurisdiction)
- US had to pay Canada because they intentionally sunk the ship

### Flags of Convenience & The “Lawless” Seas

- Jurisdiction follows the flag
  - Difference b/n nationality of ship owner and nationality of the vessel on the high seas
  - Flag state laws on tax, employment, safety govern what happens on ship
- ‘Flag-of-convenience’ states extend nationality to virtually all ships
  - Notoriously ineffectual in performing duties of flag states (regulating ships)
  - E.g Panama, Liberia offer lax regulation or cheap registration for shipping
  - UN Convention on Registration of Ships proposed measures to strengthen ‘genuine link’ b/n state and ship flying its flag, but not in force

### Terrorism and the High Seas

- Responses to increasing threat of WMD’s:
  - Proliferation Security Initiative (PSI); doesn’t change int’l law
    - Reciprocal, bilateral ship boarding agreements b/n US and ship registry nations
    - e.g. Panama gives consent to US Navy to board ships
  - North American Aerospace Defense Command (NORAD) Agreement: Canada and US
    - Adds maritime surveillance mission; identify potential threats to NA security

### The Deep Seabed

- Seabed and subsoil of ocean floor beyond limits of national jurisdiction/continental shelf
  - Traditionally part of *res communis* regime of high seas
  - Attempt to establish special legal regime was controversial
- **UNCLOS Part XI, The Area**
  - Art 136: “The Area and its resources are the common heritage of mankind”
  - Art 137: No claim or exercise of sovereignty over any part of the Area will be recognized
    - All rights in resources are vested in mankind as a whole
  - Art 139: responsibility to ensure activities carried out in conformity with this Part
  - Art 140: equitable sharing of financial and other benefits derived from activities
  - Art 141: open to use exclusively for peaceful purposes by all states, coastal/landlocked
  - Art 144: acquire and transfer technology and scientific knowledge to developing states
  - Art 148: effective participation of developing states shall be promoted with regard to their special interests and needs including remoteness and difficulty of access
- Note: This regime prevented many from ratifying UNCLOS, including US
- **Implementation Agreement (1996)** modified ‘common heritage of mankind’ regime
  - Incorporated market-oriented approaches
  - S.2: deep seabed mining through joint ventures
  - S.5: developing states shall seek to obtain technology on fair and reasonable commercial terms
  - S.6: development of resources in accordance with sound commercial principles
    - No subsidization of activities; no discrimination b/n minerals derived from Area and other sources
  - S.7: economic assistance fund for developing countries suffering adverse effects
- Could argue legal regime for deep seabed has become CIL (binding on all states)
  - But some states such as US have persistently objected to resources regime

## Ch. 6: State Jurisdiction Over Air and Space

### Airspace

- Not inhabited in any permanent way; until recently, human beings not active in these domains
- Traditional approach: extension of state sovereignty upwards into space
  - Airspace over oceans, beyond states' territorial seas, is governed by high seas rules
  - UNCLOS: freedom of overflight over high seas, transit passage rights through int'l straits
- *Nicaragua* (1986 ICJ): respect for territorial integrity is directly infringed by *unauthorized overflight of a state's territory* by aircraft under control of another state
- Air law's beginnings
  - WWI period: conference on air law in Paris 1910
    - Interrupted by WWI (1914-18)
    - First crossing of Atlantic by air in 1919
  - After WWI, aviation was subject of discussion
    - Int'l Air Convention 1919: signed by 26 of 32 Applied powers, but low ratification
    - CIL recognized: Every state has complete and exclusive sovereignty over airspace above its territory (incl territorial sea); can regulate, tax, prohibit entry
    - Some discussion of passage rights for private aircraft
    - Foresaw need for int'l body to monitor/regulate air law
  - US wanted to regulate air travel
    - Huge conference in Chicago 1944

### **Chicago Convention on Int'l Civil Aviation (April 1947; pre-dates the UN)**

- Near-universally ratified; 191 state parties
- Art 1: every state has complete and exclusive sovereignty over airspace above its territory
  - Incl territorial sea (but note what is not mentioned; EEZ, high seas)
- Art 3: Convention **applies only to civil aircraft**, not state/military/police aircraft
  - 3(c): No state aircraft shall fly over territory of another state without authorization
- Art 3bis: Refrain from **use of weapons** against *civil* aircraft in flight and, in case of interception, lives of persons on board and safety of aircraft must not be endangered
  - Civil aircraft violating this Convention may be ordered to land
  - Civil aircraft must comply with order; violation punishable by severe penalties
- Art 5: right of non-scheduled flight to make transit or stops without prior permission
  - limited passage right, subject to state requiring them to land (fly over or stop for fuel without prior permission)
- Art 6: no scheduled int'l air service may be operated without authorization of state
- Art 9: may restrict or prohibit aircraft of other states from flying over certain areas
  - In emergencies, may temporarily restrict flying over whole or any part of territory
- Art 44: Int'l Civil Aviation Organization (ICAO); specialized UN agency based in Montreal
  - Encourage development of airports, prevent economic waste, promote safety of flight
  - promotes best practices/'soft law'; e.g. after 9/11, cockpits should lock their doors

### **Other Aspects of Air Law**

- All aircraft are registered with nationality of state of registration
- State aircraft clearly have nationality of their state - Military, police, govt aircraft

- Immune from interference by another state
- Large network of bilateral agreements
- Private law issues – liability, compensation for lost luggage
- Int'l criminal law conventions dealing with hijacking, bombing
- Sexual harassment of and by airline staff
- Relief operations

### Use of Force Against Civilian Airliners

- Several instances since WWII when military jets have downed civilian airliners
  - E.g. Soviet Union shot down Korean aircraft in 1983, killing all 269 persons on board
    - Prompted provision barring use of weapons against civilian aircraft (*3bis*)
    - Reflects basic principles of humanity (incompatible to use weapons against civil aviation - some say already under CIL)
      - US is not a party to this amendment

### Outer Space

- Exact height where sovereign airspace ends and outer space begins remains uncertain
  - Some argue where aircraft can no longer fly; others where lowest satellite can orbit
- Int'l law has imposed **res communis regime** on outer space: no portion of outer space, including celestial bodies, may be appropriated by any state as part of sovereign territory
- Background: once Russians launched Sputnik in 1957, int'l community saw need for agreed legal regime for outer space
  - Faced with potential of a space race, states agreed space was *res communis regime*
    - Note: diff than common heritage of mankind which is more controversial
  - Easier to start with agreement on principles before drafting treaties
  - UNGA adopted declaratory statements of principles all states agreed to, then adopted treaties
- 5 multilateral treaties addressing issues of space law
  - **Outer Space Treaty** is most imp; ratified by 101 states incl. major space-faring
    - No national appropriation
    - Nuclear-weapons free zone
    - Ownership of objects launched into space remains with owner on earth (and liability); imp for telecommunications companies
  - Moon Treaty ratified by only 15 states, none of which has space program

### 'Outer Space Treaty' (Governing Activities of States in Exploration and Use of Outer Space) - 1967

- Art 1: exploration/use of outer space shall be carried on for benefit and interests of all countries, irrespective of economic/scientific development, and shall be province of all mankind
  - Freedom of use without discrimination and scientific investigation
- Art II: outer space not subject to national appropriation by claim of sovereignty
- Art III: activities carried on in interests of int'l peace and security and cooperation
- Art IV: undertake not to orbit objects containing nuclear weapons/WMD's around earth

### 'Moon Treaty' (Agreement Governing Activities of States on Moon and Other Celestial Bodies) - 1984

- Similar provisions to Outer Space Treaty, but very low record of ratifications
- Art 11: moon and natural resources are common heritage of mankind
  - Not subject to national appropriation

- Neither surface nor subsurface shall become property of any state
- Right to exploration and use of moon
- Undertake to establish int'l regime to govern exploitation of natural resources
  - Including equitable sharing by all state parties of benefits
- Note: economically viable exploitation of resources of moon and other celestial bodies still remains hypothetically possible
  - Common heritage of mankind for the moon is likely **NOT a customary rule**; no country with a space program agrees with this principle

### **The Space Millennium: Vienna Declaration on Space and human Development (UN Doc 1999)**

- Huge variety of issues being pursued by states:
  - Protecting Earth's environment and managing resources
    - Remote sensing data, environmental monitoring
  - Using space applications for human security, development and welfare
    - Controlling infectious diseases, natural disaster mitigation, transport
  - Advancing scientific knowledge of space and protecting space environment
    - Near-Earth objects, space debris, nuclear power sources, unwanted emissions
  - Enhancing education and ensuring public awareness of space activities
  - Strengthening/repositioning space activities in UN system
    - Committee on Peaceful Uses of Outer Space
  - Promoting int'l cooperation; follow up decision in UNISPACE III
    - Voluntary UN fund and innovative sources of int'l financing

### **Space Debris Mitigation Guidelines, UN GAOR (2007)**

- Ever-increasing accumulation of space debris orbiting Earth is issue of concern
- Guidelines: limit debris released during normal operations; minimize potential for break-ups; limit probability of accidental collision in orbit; limit long-term presence of spacecraft in low-Earth orbit after mission; limit long-term interference of spacecraft with Earth orbit
- Note: guidelines are voluntary
  - States active in space (China, Japan, Russia, US, EU) have developed domestic debris mitigation standards
  - Canadarm is our famous contribution

### **Other Space Treaties**

- Agreement on rescue and return of astronauts (seen as Earth's ambassadors), and return of objects launched into outer space (1968)
  - Obligation on all states to rescue any astronaut
  - Damage caused by satellite/space object is on state that shot it up into space
  - Convention on registration of objects launched into outer space, 1974
- Space law and Canada
  - In 1978, nuclear-powered Russian satellite disintegrated over Canada crashing over NWT; Russian liability established (\$3M in 1981)
  - Brief bilateral treaty settling this matter
- Negotiation is first protocol where one state breaches an obligation to another

## Ch. 7: State Jurisdiction Over Persons, Conduct, and Events

### Introduction

- State's power to regulate or control persons, conduct, events or subject
  - Usually within state's sovereign territory (domestic law), but state can also impose liability or control over persons or dealings abroad
  - Human persons and legal persons (e.g. companies operating abroad)
- **Enforcement vs prescriptive jurisdiction**
  - Enforcement = Capacity to *enforce* rules or take coercive action (limited)
    - General prohibition subject to exceptions
  - Prescriptive = Capacity to *make* rules regulating persons or conduct (substantial)
    - No general prohibition but certain limits imposed by int'l law
    - Classic e.g. UK Parliament can enact laws saying no smoking on streets of Paris - no int'l law barring this but may not want to for diplomatic reasons
    - A state MAY enact laws about extraterritorial activities
  - Adjudicative/judicial jurisdiction considered third category by some authorities

### Enforcement Jurisdiction

#### The Case of SS "Lotus" (France v Turkey) [1927 PCIJ]

- **Ratio:** Failing existence of permissive rule to contrary, one state may not *exercise* power in any form in territory of another state (enforcement jurisdiction) – **principle of non-interference**
  - However, int'l law does not prohibit states from exercising jurisdiction in their own territory for acts taking place abroad (prescriptive)
- **Facts:** France sued Turkey over high seas collision between two ships
  - French officer was arrested, charged, tried and convicted in Turkish court
  - France claimed Turkey had exceeded its jurisdiction; breached rule of CIL
- **Held:** By instituting proceedings against French officer, Turkey has not violated int'l law
  - Rejected F's argument that T must cite rule of int'l law authorizing jurisdiction over event taking place *outside* territory (where defendant is now *within* territory)
- **Reasoning:** Prescriptive vs enforcement jurisdiction (making laws vs enforcing laws)
  - A state's enforcement jurisdiction is strictly territorial
  - But doesn't mean state is barred from exercising jurisdiction in its territory over acts that took place outside its territory (e.g. State A enacts laws regulating conduct in State B)
  - Wide measure of discretion limited only by prohibitive rules in certain cases
  - Within these limits, title to exercise jurisdiction rests in state sovereignty
  - Territoriality of criminal law is not absolute principle of int'l law and does not coincide with territorial sovereignty
- **Analysis:** Public policy reason for Canada to govern extraterritorial conduct?
  - Child sexual abuse in other countries (e.g. Cambodia, Thailand), raising an army, counterfeiting domestic currency
  - Canadians who do such things will be prosecuted here when they come back, or request for citizen to be sent back
    - Can also be civil matters

- States can choose to exercise prescriptive jurisdiction but can only enforce laws within their territory (criminal law is generally territorial)

### **Gaining Enforcement Jurisdiction**

- Person must be in your jurisdiction; e.g. state must have custody
- What about individuals who have fled the country?
  - Classic methods: extradition, deportation, and abduction
    - Abduction, or state kidnapping; i.e. drive person over border and push them over
    - Raises legal question as to whether a court can rule on legality of how individual came before the court - 3 famous cases illustrate this

### **AG Israel v Eichmann [1961 Dist Ct Jerusalem]**

- **Ratio:** Violations of int'l law by one state against another state do not bar a domestic court from assuming enforcement jurisdiction over human person once before the court
- **Facts:** One of major architects of Holocaust found working at Mercedes Benz factory in Argentina; agents of Israel kidnapped, drugged, flew him to face domestic trial in Israel
  - Eichmann trial had survivors testifying and it was filmed
- **Arguments:** Defence counsel challenged jurisdiction of District Court of Jerusalem (a trial following kidnapping is in conflict with int'l law); unsuccessful
- **Held:** No violation of int'l law; Eichmann convicted (judgment upheld on appeal)
- **Reasoning:** established rule of law that person tried for offence may not oppose trial by reason of illegality of his arrest or means whereby he was brought within state's jurisdiction
  - Right to plead violation of sovereignty is the exclusive right of that state, to plea or waive; AC has no right to base himself on infringed sovereignty of state
    - Principle of non-interference is an *inter*-state obligation, not *intra*-state
- **Analysis:** 'Ends justify the means' reasoning b/c Eichmann committed most egregious crimes
  - Whose rule was breached? Argentina's sovereignty and they chose not to press the issue (went to Security Council then decided it doesn't look good)
  - What if Argentina hadn't withdrawn its complaint from Security Council?

### **US v Alvarez-Machain [1992 US Sup Ct]**

- **Ratio:** Rule of *male captus, bene detentus* (wrongly captured, properly detained); state kidnapping does not bar individual's trial in domestic court for violations of US criminal law
- **Facts:** Believed to be doctor who kept alive DEA agent Kiki Camarena (who was fighting cartels) alive long enough to be tortured by narcs
  - Agents of US forcibly abducted Alvarez-Machain from Mexico; tried in US
  - Canada and Mexico both intervened in case; legal implications of ruling
  - Mexico protested to violation of its territorial sovereignty; US should have used existing bilateral extradition treaty
- **Issue(s):** does a criminal abducted to US acquire a defense to that state's jurisdiction? (No)
- **Arguments:** Respondent argues int'l abductions are clearly prohibited in CIL, so no reason to include clause in Treaty
- **Majority:** Alvarez-Machain may be tried in federal district court for violations of US law
  - State kidnapping does not bar individual's trial in domestic court for violations of US criminal law

- Mexico can protest the US having breached its sovereignty, but doesn't stop case respecting the individual
    - Alvarez-Machain could bring tort action for abduction/battery but that doesn't stop criminal action
  - US-Mexico Extradition Treaty does not address obligation to refrain from forcible abductions; therefore, common law precedent applies
    - Counter-argument: treaty didn't expressly prohibit kidnapping but whole purpose of entering into extradition treaty is to prevent this
  - Rejected respondent's argument; no term prohibiting abductions should be implied
- **Dissent:** monstrous decision; agents deliberately kidnapped and drugged him over border to get into US jurisdiction
  - Majority fails to differentiate b/n conduct of private citizens (no violation) and conduct expressly authorized by gov't (violates int'l law and treaty obligations)
- **Analysis:** Majority ruling has attracted much criticism; giving domestic permission for extraterritorial extension of US police powers
  - Compare with "abuse of process" approach in law of UK which relied on dissent
  - Other options? Extradition bilateral treaty with Mexico (they had negotiated this scenario in advance; should US want to request fugitive in Mexico, here are our terms)

### **R v Horseferry Road Magistrates' Court, ex parte Bennett [1994 HL]**

- **Ratio:** Domestic court must inquire into circumstances by which person was brought within jurisdiction; if in disregard of extradition procedures, may stay prosecution and order release
- **Facts:** English police colluded with S. Africa to force B's return to England under pretext of deportation to NZ, via England (B was wanted for criminal prosecution in the UK)
  - B later contested jurisdiction of British courts for perpetuating abuse of process
- **Held:** Appeal allowed
- **Reasoning:** Judiciary must accept responsibility for maintenance of rule of law and refuse to countenance behaviour threatening basic human rights
  - Ignoring extradition procedures deprives AC of safeguards benefiting him
  - Courts can refuse to allow police to take advantage of abuse of process by preventing a prosecution
  - "Cannot turn a blind eye to executive lawlessness"
    - extension of abuse of process doctrine
- **Analysis:** Fully aware that US Supreme Court majority held to the contrary

### **Extradition**

- Means by which a state gains custody over a person; process of request and surrender
  - ONLY for individuals wanted for criminal trial or who has escaped prison
    - Applies only to **serious criminal offence**
      - requires double criminality - would be a crime in both jurisdictions – and sentence of certain length
      - E.g. offense for women to drive in Saudi Arabia is not extraditable
    - Seriousness is determined by punishment, not how offense is codified
    - NEVER applies to non-criminal/civil law matters
  - Treaty usually provides agreement in advance
  - Domestically, extradition governed by statute (Canada's *Extradition Act*)
    - Reason we don't change our treaty often (would have to amend legislation too)

- UN has recognized that most states use template
- **Model Treaty on Extradition, GA Res 1997** (\*NOT a treaty but a template/suggestion)
  - Art 1: each party agrees to extradite upon request any person wanted in requesting state, subject to provisions of Treaty
  - Art 2: Extraditable offences are serious criminal offences (sentence of certain length) that would be a crime in both jurisdictions (double criminality)
  - Art 3: **mandatory grounds for refusal** (offense of political nature, military offence, immunity, discriminatory, subject to torture)
  - Art 4: **optional grounds for refusal** (individual is a national, death penalty exception)
- Other alternative: deportation
  - Can't deport a national (right to remain or leave); but can deport a non-national
  - Canada has infamously done this; *Judge v Canada*
    - Instead of going through extradition treaty process which has safeguards, disguised extradition by deporting person into another state's jurisdiction
    - UN HRC found Canada in violation of int'l human rights obligations for deporting rather than extraditing American fugitive

## Prescriptive Jurisdiction

### General

- States exercise such jurisdiction in five broad categories:
  1. **Territorial:** Matters connected to state territory
  2. **Active personality:** Where perpetrator is national of state (generally recognized)
  3. **Passive personality:** Where victim is national of state (more controversial)
  4. **Protective personality:** Where essential interests of state are engaged (e.g. threat to security; effects doctrine)
  5. **Universal jurisdiction:** Where act itself gives rise to UJ (e.g. piracy, slavery, war crimes, genocide, crimes against humanity)
- States can also by **consent** allow another state to exercise jurisdiction in its territory
  - Not additional bases for jurisdiction, just practical reality of int'l law
  - Done by agreement (SOFA's)
- **Canadian Practice in Int'l Law at Department of Foreign Affairs (2002)**
  - Starting point: prescriptive jurisdiction is territorial
  - But states may exercise extraterritorial prescriptive jurisdiction under certain circumstances; should be 'real and substantial link' b/n subject matter of jurisdiction and territorial base
  - Canada opposes extraterritorial measures that undermine laws or clear policies of another state exercising concurrent jurisdiction on territorial basis over same conduct

### Territorial Principle

- States may have prescriptive jurisdiction where event is only partially connected to territory
- Issue: A shoots B across border – where did the murder occur?
  - Traditional common law approach: completion of transaction (where's the body?)
    - But what if key elements of offense occurred on other side of border?
  - Criminal law has traditionally been viewed as territorial
    - **CCC 6(2):** subject to this Act or other Act of Parliament, no person shall be convicted in Canada of offence committed outside of Canada

- evidence and witnesses are here; no subpoena powers outside the state
- Subject to some exceptions, but **presumption** is 6(2)

### Libman v the Queen [1985 SCC]

- **Ratio:** To be subject to jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must have taken place in Canada ('real and substantial link' test)
  - Canada can take jurisdiction if some key element occurred here (planning, conspiracy)
- **Facts:** Canadians fraudulently solicited investments by Americans in supposed gold mining operations in Costa Rica (variety of cross-border transactions)
- **Issue(s):** Could AC be prosecuted in Canada for offence 'completed' outside the country? (Yes)
  - Where is crime committed? Where fraud originated or terminated?
- **Arguments:** AC argued Criminal Code did not apply to alleged crime because investors were deprived of funds (essential element) in either US, Costa Rica, or Panama, but not Canada
- **Held (La Forest J):** AC may be prosecuted in Canada for fraud charges; no issue of int'l comity
- **Reasoning:** Presumption against application of laws beyond territory codified in now s.6(2) of CCC ("no person shall be convicted in Canada for offence committed outside of Canada")
  - But requires flexible application; otherwise crimes occurring in several countries would escape punishment
  - Historically, Canadian courts have taken jurisdiction where country had 'legitimate interest' or victim/impact was abroad
  - Other tests: offence is where gist or gravamen occurs, or where offence is completed
  - Must consider all relevant facts taking place in Canada that may give state an interest in prosecuting offence; does anything in those facts offend int'l comity?
  - Suggests outer limits of prescriptive jurisdiction may be int'l comity
- **Analysis:** Compare to controversial "effects doctrine" adopted by US courts
  - I.e. we have jurisdiction if something outside our territory has *effects* on our territory
    - gave 'territory' a broad definition
  - In *US v Aluminum Company of America*, Judge Learned Hand applied US antitrust laws to extraterritorial commercial events; modern judicial endorsement
  - Canada and other trading partners have criticized US assertions of prescriptive jurisdiction over transactions outside US with no links other than 'effects' on US interests or foreign policy (e.g. trading of Cuba)
  - Parliament enacted *Foreign Extraterritorial Measures Act* in 1984 to counter US
    - AG may: prohibit or restrict production of records or doing any act, giving of info by any person in foreign tribunal, may require any person in Canada to give notice of measures and prohibit compliance with such measures
    - Makes it an offense to contravene these orders

### **Nationality Principle of Jurisdiction**

- Link of nationality b/n regulating state and regulated person/object
- int'l law permits (but does not require) states to exercise jurisdiction over its nationals
  - civil or criminal - applies to human and legal persons
  - Non-nationals often referred to as 'aliens'
  - NOT a matter governed by int'l law
- **Nationality of individuals:**
  - Nationality falls within domain of legal competence reserved to state's **domestic** laws

- Shall be recognized by other states as long as consistent with int'l conventions, custom and general principles of law
    - ICJ Adv Op (1923); **Hague Convention** - "It is for each state to determine under its own law who are its nationals"
  - In practice, states tend to base on birth in territory of state (*jus soli*), descent from state nationals (*jus sanguinis*), or both
    - Can also be acquired after birth through 'naturalization'
    - *Citizenship Act* in Canada provides for each of these means
  - But state's approach to nationality may be challenged where insufficient connection b/n state of nationality and individual, or where nationality improperly conferred
- Int'l law has no relevance in determining nationality, but imp't in cases of **multiple nationalities**
  - Must resolve claims b/n states (can have dual, even triple nationality)
  - Australia prevents indiv's from having two nationalities
  - Other countries don't allow you to renounce citizenship
  - Nationality has both obligations and benefits; can claim protection of state, but may have duties of taxation, military service

### **Nottebohm Case (Liechtenstein v Guatemala) [1955 ICJ Rep]**

- **Ratio:** There must be **effective or "genuine link"** b/n individual and state of nationality before nationality may be relied upon against another state
- **Facts:** N, German national by birth, moved to Guatemala for 34 years; travelled to Liechtenstein (L) and granted nationality by naturalization
  - On return to Guatemala, detained, deported and property seized
  - Guatemala (G) was in state of belligerency with Germany
  - Liech espoused N's claim for compensation against Guat
- **Issue(s):** What is the extent of a state's discretion, under int'l law, to award nationality?
- **Arguments:** Guat did not recognize N's Liechtenstein nationality; objected to standing
- **Held:** Claim inadmissible; Guat not required to recognize nationality and Liech not entitled to extend its protection to N vis-à-vis Guat
- **Reasoning:** Nationality is within state's domestic jurisdiction; Liechtenstein can decide who to confer nationality on
  - But is Guatemala obligated to recognize effect that nationality under int'l law?
  - Nationality only entitles that state to exercise protection vis-à-vis another state IF it translates that indiv's connection with the state into juridical terms
    - no need to resort to 'effective links' test if there is only one nationality
  - Naturalization has a serious character and repercussions
  - N's connections with L were extremely tenuous (transient); only intended to gain L's protection, not become attached to its traditions, way of life, or obligations
    - Simply trying to dodge German obligations
  - In contrast, longstanding connection b/n N and Guatemala
- **Analysis:** Potential concern: living abroad from one's state of nationality (i.e. expats) could result in effective 'statelessness'
  - Generally recognized human right to acquire a nationality
  - Two multilateral treaties limiting statelessness (but low number of ratifications)
  - *Flegenheimer Case*

- **Nationality of Corporations:**
  - State and treaty practice on nationality of corporations varies
  - But public int'l law has long accepted that corporation's nationality may be based simply on state of incorporation and/or state of head office (usually must be same nation)

### **Barcelona Traction, Light and Power Company (Belgium v Spain) [1970 ICJ Rep]**

- **Ratio:** Where unlawful act is committed against company representing foreign capital, general rule of int'l law authorizes national state of company alone to make a claim
- **Facts:** Holding company incorporated and head office in Canada; some subsidiary companies subject to Canadian law, some Spanish; operated in Spain; most shares owned by Belgians
  - Declared bankrupt by Spanish court
  - B espoused claim of nationals who invested in company which ended up worth nothing
  - B brought claim against S alleging S caused bankruptcy and loss to shareholders
- **Issue(s):** What is nationality of the company?
- **Arguments:** S argued any injury was to the company (Canadian national); B had no standing
- **Held:** Claim rejected; *jus standi* is not conferred on Belgian gov't in these circumstances
  - injury was sustained by Canadian national (the corporation) so claim must be espoused by Canada, not Belgium
- **Reasoning:** Traditional rule: corporate entity has right of diplomatic protection under laws of which it was incorporated and in whose territory it has registered office
  - Both criteria confirmed by long practice and int'l instruments
  - Close, permanent connection with Canada; received recognition
  - Canadian gov't retained capacity to exercise diplomatic protection
- **Analysis:** Does case imply additional requirement of genuine/effective links b/n corporation and state of nationality?

### **Passive Personality Principle of Jurisdiction**

- State asserts prescriptive jurisdiction because of nationality of the victim of activity
  - I.e. person suffering, rather than perpetrating, the injury or civil damage is a national
  - Must occur abroad, otherwise state would have territorial jurisdiction
- Not embraced by common law countries; more accepted by civil law jurisdictions
  - **Some states object to this approach**, or see no need for it; what gap is being filled?
  - Policy rationale; exercised when Americans are killed by terrorists in foreign countries
  - Some countries don't want to be worldwide policemen; interference
    - countries like Canada limit to serious offences like terrorism, war crimes
- Canada's *Crimes Against Humanity and War Crimes Act* includes passive personality basis for jurisdiction for crimes of genocide, etc
  - If Canadian dies at hands of Rwandan in genocide, this legislation allows for prosecution
  - War crimes = genocide, crimes against humanity, serious breach of custom
- Also some CCC provisions extend criminal jurisdiction to extraterritorial acts where victim is Canadian (e.g. hostage-taking, terrorism, torture, offences on space stations)

### **Protective Principle of Jurisdiction**

- Each state may exercise jurisdiction over crimes against its security and integrity or vital economic interests (consequences of utmost concern to that state and offences may escape punishment if such jurisdiction is not exercised)
  - Where crimes on foreign land have deleterious effects on national security

- This is not interfering in domestic jurisdiction of another state
- Avoid interference in enforcement; must have perpetrator in your territory
- **Nearly all states assume this jurisdiction**
  - E.g. Lord Haw-Haw (William Joyce) was a Nazi broadcaster
  - Prosecuted for treason by UK after war
  - not perpetrator, victim or British national, but they claimed protective principal
- CCC S.7 extends criminal law jurisdiction over hostage taking, offences against UN personnel, terrorism, etc without requiring nationality link

### Universal Principle of Jurisdiction

- Some acts are of such concern to int'l law that they are lawfully subject to prescriptive jurisdiction of ANY state, irrespective of where they are committed
  - Perhaps **most contentious basis** for jurisdiction
  - Defined by character of crime concerned rather than nexus to prescribing state
  - E.g. piracy, slavery, genocide, crimes against humanity, possibly torture
  - Oldest e.g. any state can arrest and prosecute a **pirate** on the high seas; beyond protection of any state; UJ crime because they are 'enemies of all' (*hostis humani generis*)
  - ONLY relates to criminal law; still have to enact law domestically
- Different than duty to extradite or prosecute which is restricted to parties to such treaties
- Note: For crime against humanity if victim was a national, could invoke passive, protective, both or, more likely, universal jurisdiction

### Israel (AG) v Eichmann [1961 Dist Ct Jerusalem]

- **Ratio:** Universal jurisdiction includes genocides, crimes against humanity, and war crimes
- **Facts:** architect of Final Solution kidnapped in Argentina and put on trial in Israel
- **Held:** Eichmann's abhorrent crimes are not crimes under Israel law alone, but grave offences against the law of nations itself
- **Reasoning:** Genocide has been recognized as crime under int'l law, so jurisdiction to try such crimes is universal
  - *Lotus*: principle of territoriality does not limit power of state to try crimes; any argument against this must point to specific rule in int'l law negating that power
- **Analysis:** Difficult to claim other grounds of jurisdiction (nationality, territoriality) because Israel didn't exist at time of crimes, and crime took place outside Israel
  - Rome Statute of ICC: crimes against humanity = heinous acts, such as series of murders, extermination and enslavement, committed as part of widespread or systematic attack developed against any civilian population
  - Rationale for universal jurisdiction: absence of int'l court
    - Who else would prosecute? E.g. no int'l court on high seas to prosecute piracy
    - Traditionally indiv was not subject of int'l law
      - neither rights nor duties under int'l law
    - Changes with Nuremburg and Tokyo ad hoc tribunals after WWII
      - indiv's may not be actors under int'l law, but duties/obligations under int'l law ('Thou shalt not commit genocide' is int'l obligation on indiv)
    - Now permanent ICC (but many states not parties to treaty establishing the court)
      - US, Russia, China – not parties (UK and France are)

- This means universal jurisdiction still has some relevance
- Like *jus cogens*, some debate about which crimes fit under UJ
  - Piracy, crimes against humanity, genocide are widely accepted
  - But what about single act of torture (not as part of widespread crime against humanity?) Terrorism is another area for debate

#### Presence Connection

- Once agreed that particular crime is subject to universal jurisdiction, sole connection required b/n state and alleged perpetrator is presence in territory of state at time of prosecution
  - I.e. only state with territorial jurisdiction to secure **custody** of suspect is in position to execute any judgment from exercise of such jurisdiction
  - Canadian approach: Most states don't take a 'pure' UJ approach
    - Worried about broader implications in relations with other states
    - Canada, like many states, requires a presence connection
    - *Crimes Against Humanity and War Crimes Act s.8* – person may be prosecuted if after offence was committed, the person is present in Canada
- Whether this is also required for exercise of prescriptive jurisdiction per se remains unclear
- **Human Rights Watch, “Belgium: Universal Jurisdiction Law Repealed” (2003):**
  - Famous ‘white knight’ law introduced by Belgium in 1993 allowing prosecution of genocide and war crimes regardless of place of commission, perpetrator on Belgian territory, nationality of perpetrator or victim, or date of crime
    - Belgian got series of requests to prosecute – e.g. put Sharon, Israeli general, on trial for crimes occurring in refugee camp outside Belgium
    - But issue with NATO headquarters also based in Belgium; military leaders coming in for meetings, worried about being arrested
  - Later strengthened, then repealed in 1999 due to US pressure
    - Now AC or victim must be Belgian, like other EU nations

#### Arrest Warrant of 11 April 2000 (DRC v Belgium) [2002 ICJ Rep]

- **Facts:** Belgian magistrate issued int'l arrest warrant against foreign affairs minister of DRC, alleging grave breaches of int'l humanitarian law and crimes against humanity
  - Belgium did not claim any connection to crimes other than willingness to prosecute pursuant to principle of universal jurisdiction
  - DRC focused on argument that Belgium's actions violated sovereign immunity, but several judges appended separate opinions to clarify prescriptive jurisdiction issue
- **Issue(s):** Did Belgian judge have jurisdiction to issue int'l arrest warrant where persons had no connection with state and accused was not present in state's territory?
- **Arguments:** B argues under s.7 of its 1993 law, perpetrators of such offences fall under Belgian courts' jurisdiction, regardless of perpetrator or victim's nationality
  - DRC made two arguments: 1) permitted scope of jurisdiction (why can Belgium interfere in our country?); 2) immunity issue (minister represents the state)
- **Opinion of President Guillaume:** territorial character of criminal law is fundamental
  - Classic int'l law does not exclude state's power to exercise *judicial* jurisdiction over offences committed abroad in *limited* cases
  - CIL recognized only one case of universal jurisdiction = piracy

- Hague Convention for Suppression of Unlawful Seizure of Aircraft and other treaties set up system where state is under obligation to arrest, extradite and prosecute, but must first confer jurisdiction on its courts
  - None established jurisdiction where perpetrator not in territory of that state
- Belgium relies on this argument on basis of CIL, citing state practice and opinio juris
  - But it has not been shown there is state practice or general consensus that all int'l crimes have universal jurisdiction
  - Belgium argued *Lotus*; absence of prohibitive rule meant they're entitled
  - But exclusively territorial character of criminal law prevents this
- States normally have jurisdiction in offence committed abroad *only* if offender or victim is national, crime threatens internal/external security, cases of piracy, or subsidiary universal jurisdiction if offender is present on territory
  - Apart from these cases, int'l law does NOT accept universal jurisdiction
- **Opinion of Judges Higgins, Kooijmans, Buergenthal:** int'l law is permissive (unless something says the contrary, states can do what they want)
  - National legislation of states other than Belgium does not suggest universal jurisdiction over these offences, and case law has been cautious in relying on UJ
  - Treaty-based obligatory territorial jurisdiction over persons in relation to acts committed elsewhere; called 'universal jurisdiction' but not true
  - No established practice in which states exercise universal jurisdiction
    - Links of some sort to state are required in national legislation and case law
  - But doesn't indicate such exercise would be unlawful; state practice is neutral
    - Int'l trend is toward bases of jurisdiction other than territoriality
    - E.g. "effects doctrine", passive personality
  - Only prohibitive rule is that criminal jurisdiction should not be exercised *without permission* in territory of another state (*Lotus*)
    - But Belgium would only arrest at discretion of states concerned
  - State may choose to exercise universal criminal jurisdiction *in absentia* with safeguards:
    - Must respect immunities of person concerned
    - Must first offer national state opportunity to act on charges
    - Charges may only be laid by independent prosecutor
    - Must be special circumstances requiring exercise of int'l criminal jurisdiction
    - May only be exercised over most heinous int'l crimes (here, this is met)
- **Analysis:** Divided court; which judgment is more convincing?

### PART III: Constraints on State Jurisdiction

- While *Lotus* principle still applies, in modern int'l law limitations on state jurisdiction have become the rule whereas freedom of states has become the exception
- Rules limiting state jurisdiction: some are logical necessities (e.g. immunities), but others are voluntary assumption of substantive limits on state sovereignty

### Ch. 8: Jurisdictional Immunities

- Diplomatic and state immunities significantly curtail extent to which prescriptive or enforcement jurisdiction can be exercised by a state

## Diplomatic Immunities

- State's ability to exercise jurisdiction over foreign diplomats in its territory is limited
- Justifications (US Sup Ct):
  - Necessity: diplomatic personnel are essential to int'l affairs of country
    - Int'l relations can't function without envoys
  - Self-interest (reciprocity in treatment)
    - Protecting foreign diplomats ensures similar protections will be accorded to ours, thus serving national interest in protecting our own citizens
  - Balancing of policy considerations
- Practically, foreign diplomat is immune from application of receiving state's laws, incl most taxes
  - Broad immunities; extends to diplomat's correspondence, children, premises
    - Also applies to UN officials
- While diplomatic premises are protected from host state jurisdiction by immunities, they nevertheless remain subject to receiving state's sovereignty
- Sources: derived from long-established practice b/n states (rules of CIL)
  - Courtesy of granting immunity led to obligation
  - After WWII, codified into a treaty
  - **VCDR** is very widely ratified; 191 state parties
    - Canada has signed, ratified and transformed this into domestic law
    - *Foreign Missions and Int'l Organization Act* –both int'l and Canadian law
- Immunity can be abused
  - Famous e.g. After Russian diplomat committed manslaughter (drunk driving) in Ottawa and Russia refused to waive immunity, Canada adopted 'zero tolerance' policy – loss of driving privileges followed by recall/expulsion of diplomat
  - Foreign diplomats not paying congestion charges in London; not ignorant of the law but know it can't be enforced against them
- Obligations (general):
  - **Host/receiving state**
    - Facilitate establishment of diplomatic presence
    - Maintain security sufficient to protect mission, personnel
    - Respect immunities of mission, personnel, communications
  - **Sending state**
    - Use mission only for agreed purposes (e.g. not for spying)
    - Ensure respect for local law (e.g. pay for parking, don't drive drunk)
    - Do not interfere in local affairs (e.g. don't contribute to local mayor's campaign)

## **Vienna Convention on Diplomatic Relations (1964)**

- Purpose: not benefit indiv's but ensure efficient performance of functions of diplomatic missions
- Art 2: establishment of diplomatic relations/permanent missions takes place by mutual consent
- Art 3: functions of diplomatic mission (represent, protect interests of state, negotiate, ascertain conditions/developments, promote friendly relations)
- Art 9: receiving state may notify sending state that mission is *persona non grata*
  - 9(2): If sending state refuses within 'reasonable period' to recall or terminate, receiving state may refuse to recognize person as member of mission
  - can't enforce laws, arrest or sue diplomat, or enter their premises, but can withdraw your consent (diplomatic relations are estab by mutual consent)
    - tell them to leave; declare a diplomat *persona non grata*

- E.g. In 2012, Canada closed embassy in Iran and expelled Iranian diplomats
  - Canadian diplomats were expelled from Sudan for ‘meddling’ (bringing up HR abuses – *persona non grata* can be worn as a badge domestically)
- Art 22: premises of mission shall be **inviolable**; receiving state under special duty
  - Immune from search, requisition, attachment, or execution
  - Art 30: Also applies to private residence of agent
  - Diplomatic agent is immune and inviolable
  - can’t go through their papers/correspondence, search their residence or cars
- Art 23: exempt from national, regional, municipal dues or taxes for premises of mission
- Art 26: ensure freedom of movement and travel in territory for members of mission
- Art 27: free communication for all official purposes (wireless transmitter by state consent)
  - Official correspondence inviolable; diplomatic bag not to be opened or detained
- Art 29: person of diplomatic agent inviolable; not liable to any form of arrest or detention
- Art 31: diplomatic agent enjoys immunity from criminal jurisdiction of receiving state, and from civil/admin jurisdiction except: real action; private succession action; professional/commercial activity outside official functions
- Art 32: **immunity may be waived** by sending state; must be express
- Art 34: diplomatic agent exempt from dues/taxes except goods/services, property, etc
- Art 35: diplomatic agent exempt from personal/public service, military obligations
- Art 37: agent’s household enjoys privileges and immunities in Art 29-36
- Art 39: privileges begin when agent enters territory; when his functions have ended, privileges cease when agent leaves country or after reasonable period
- Art 41: persons enjoying immunity have duty to respect laws of receiving state and not interfere in internal affairs of that state
- Art 43: function of diplomatic agent ends on notification by receiving state (refusal to recognize)
- Art 45: obligation to respect premises, property, archives of missions even when diplomatic relations broken off or mission recalled (even in times of armed conflict)

#### ***Foreign Missions and Int’l Organization Act (1991)***

- Incorporates many provisions of Vienna Convention into Canadian law
- ‘Reasonable period’ in 9(2) of Convention means period not exceeding ten days from notice

#### ***Tehran Hostages Case - Diplomatic and Consular Staff in Tehran (USA v Iran) [1980 ICJ Rep]***

- **Ratio**: Principle of inviolability of persons and premises of diplomatic agents is foundation of diplomatic law regime (customary); total inaction of host state can also be a breach
- **Facts**: in 1979, Iranian revolutionaries occupied US Embassy in Tehran and American consulates, detaining about 50 American diplomats as hostages
  - US brought matter before ICJ
- **Held**: Iran must make reparation for injury caused to US for committing successive and continuing breaches of obligations under Vienna Convention and rules of general int’l law
- **Reasoning**: 2 phases of US claim:
  - Armed attack on Embassy and occupation of consulates
    - No Iranian military or police intervened to impede operation
    - Conduct of militants not imputable to Iranian state (not acting on its behalf)
    - But Iran under obligations to ensure protection of diplomatic mission and attack on person (Art’s 22, 29 Vienna Convention)

- Iranian gov't failed to take any 'appropriate steps' to protect premises, staff, archives or prevent attack or protect US Consulates
- Unlike on previous occasions, gov't took no steps to prevent militants from invading or compelling them to withdraw, despite repeated calls for help
- Iran was fully aware of urgent need for action, had means to perform their obligations, but completely failed to comply with obligations
- This inaction constitutes serious violations of Iran's obligations to the US
- Series of facts after completing of seizure of consulates
  - Duty to take every appropriate step to bring infringements to speedy end, re-establish status quo and offer reparation for damage
  - Instead, Iranian gov't endorsed the takeover with approval (Embassy hatching plots against our Islamic movement does not enjoy int'l diplomatic respect)
  - Legal effect = transformed continuing occupation of Embassy and detention of hostages into acts of Iranian state
  - Repeated breaches of obligations to US under Vienna Conventions, even more serious than those arising from failure to prevent attacks

- **Analysis:**

### Other Key Points on Immunity

- Immunity belongs to the state, not individual
  - Protocol allowing a state to request that other state waive immunity
    - Must be express, clear, specific
    - Can waive for one purpose but not another
- Inviolability of correspondence:
  - Immunity extends to diplomatic 'bag/pouch' – can't be opened, restrained, searched at border crossing or airports
    - No rules about size – e.g. Russia wrote 'diplomatic bag' on an entire truck
    - Another e.g. when the diplomatic bag moaned, we opened it (clear breach on their part) and saved the person who had been drugged and smuggled

### Other Internationally Protected Persons

- Other classes include:
  - Consular officials (more limited immunities than diplomats - tied to functions)
  - Members of special missions (Canada not party to Convention on Special Missions)
  - Officials of int'l organizations ('such privileges as are necessary for exercise of functions')
    - UN personnel including Secretary-General – UN Charter, Convention on Immunities and Privileges
    - You cannot sue UN itself or its officials in a domestic court
    - World Bank is also immune (recent SCC decision World Bank v Wallace)
  - Judges of ICJ (when engaged in court business)
  - Judges of ICC
  - Visiting militaries

## State Immunities

### Nature of Immunities

- Immunities enjoyed by states themselves, or sometimes representatives/agents, from proceedings in courts of other states (historically 'sovereign immunity')
- Traditional approach (absolute): You cannot sue a foreign state
- But law has evolved; certain exceptions on civil side, and changes on criminal side
- Classic rationale: national courts are not applicable to int'l proceedings
  - Sovereign equality: one state cannot be subject to another's domestic authorities
  - Also necessary for peaceful relations (diplomacy, comity)
  - Some would argue implied condition of entry into relations with another state
- **Sources:** developed through cases in national courts and legislatures (state practice)
  - General CIL rule; cannot sue a foreign state
  - case-by-case approach led to areas of uncertainty (what is scope?)
  - States recognized it would benefit from codification; attempted in European Convention on State Immunity - 1972 (low ratification record)
  - ILC studied and made recommendations
  - 2004 UN Convention on Jurisdictional Immunities – NOT IN FORCE
    - Useful as existing summary of where we think rules are
    - Canada is not a party, so we focus on national legislation (SIA)
    - We have used our statute to codify CIL rule on state immunity (unusual)
  - Remember there is a presumption of compliance with int'l law, but that can be rebutted by domestic statute

### The Schooner Exchange v M'Faddon [1812 US]

- **Ratio:** sovereign person is exempt from arrest or detention in foreign territory
- **Facts:** US-owned ship forcibly seized by Napoleon; used as French warship (decreed as public/state vessel); sailed into American port
  - Owners filed action in US courts to reclaim it (US had permitted ship to enter)
- **Issue(s):** Could US courts exercise jurisdiction over the ship?
- **Held:** No; ship enjoyed sovereign immunity
- **Reasoning:** Jurisdiction of a nation within its own territory is exclusive and absolute
  - All exceptions must be traced to consent of the nation itself
  - Consent may in some instances be tested by common usage
  - Some cases where sovereign waives exercise of its exclusive territorial jurisdiction
    - Exemption of sovereign person from arrest or detention within foreign territory
    - Imparts full security to person who obtains it; implied from circumstances
- **Analysis:** Modern context – 3 functions of state immunity:
  1. Ensures 'stand-off' b/n states where private parties seek assistance of courts of one state to make claim against another state
  2. Distinguishes b/n matters related to public admin of state and private law claims
  3. Allocates jurisdiction b/n states relating to prosecution and settlement of private claims re state activities, in absence of int'l agreement to resolve conflicting claims

### **"Restrictive" Doctrine of State Immunities**

- Traditionally, absent their consent, states enjoyed absolute immunity from all phases of court proceedings in other states

- Some countries still have absolute approach (e.g. China)
- But over time, seen as leading to unfairness as states engage in contracts and commercial acts; *Tate Letter* [US 1952], *Trendex Trading* [UK 1977] (Lord Denning)
  - Adoption of restrictive approach
  - Exceptions for state engaged in commercial activities
- Recognition that states are now engaged in both public and private acts
- Int'l began to distinguish b/n:
  - Acts of sovereignty or public authority (*acta jure imperii*) – immunity
  - Private acts (*acta jure gestionis*) – no immunity
- Canada's **State Immunity Act** reflects restrictive approach:
  - S.2: 'Commercial activity' means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character
    - Circular definition; need case law to interpret
  - S.3: Except as limited by Act, foreign state is immune from jurisdiction of any Canadian court – court shall give effect to immunity notwithstanding that state failed to take any steps in the proceedings
  - S.4: foreign state may waive immunity or submit to jurisdiction
  - S.5-6: foreign state is not immune in any proceedings relating to its commercial activity, or death/bodily injury or damage/loss of property (tort) occurring in Canada
  - S.18: Act does not apply to criminal proceedings

### **Re Canada Labour Code [1992 SCC]**

- **Ratio:** test for 'commercial activity': look at nature, purpose, and context - sovereign aspects?
- **Facts:** employee group working on US base wanted to form union
  - Public Service Alliance of Canada (PSAC) sought certification as bargaining agent for civilian trades people working on U.S. naval base in Argentia, Newfoundland
  - Employee contracts falls under commercial activity exception
  - But US argued military base is sovereign activity; this changes employer relationship
  - U.S. appealed case to SCC and won
- **Held:** immunity applied
- **Reasoning:** Employment at a military base is a multifaceted relationship; more than a mere contract; has sovereign aspects
  - Must look at its nature (a contract), purpose, and context (principles from constitutional interpretation) - it's about running a sovereign military base

### **Bouzari v Iran [2004 ONCA]**

- **Ratio:** Test for commercial exception: 1) do acts constitute commercial activity? and 2) do proceedings relate to that activity?
- **Facts:** Bouzari was abducted, imprisoned and tortured by agents of Islamic Republic of Iran
  - After release, came to Canada as landed immigrant
  - Sought to sue Iran for punitive damages (tort)
- **Lower courts:** Trial judge found action barred by *State Immunity Act* and dismissed action
- **Issue(s):** What is the extent of the exceptions to state immunity in the *State Immunity Act*?
- **Held:** Appeal dismissed
- **Reasoning:** Where action is brought against foreign state, state immunity necessarily engaged
  - Rooted in CIL; founded on sovereign equality of states and non-interference principle

- General trend toward restrictive doctrine of immunity reflected in SIA, which makes states immune from civil suits in Canada unless an exception applies
- Appellant relied on 3 exceptions:
  - S.18: Criminal proceedings - punitive damages have nature of a fine
    - Rejected by court; deterrence purpose but remains a civil remedy
  - S.6: Suffering continues here, constituting personal injury in Canada
    - Rejected by court; injuries were inflicted in Iran (to meet exception, physical breach of personal integrity must take place in Canada)
  - S.5: torture related to Iran's commercial activity (oil and gas)
    - Rejected by court; not enough for proceedings to relate to acts which in turn relate to foreign state's commercial activities
      - 2 basic questions: 1) do acts constitute commercial activity? and 2) do proceedings relate to that activity?
      - case is about torture, not truly related to commercial activity
      - Only link b/n torture and commercial activity is alleged purpose
- **Analysis:** Note limited weight given by CA to Iran's purpose when determining commercial activity; SCC has since affirmed that act must be considered in full context including purpose

### **Kuwait Airways Corp v Iraq [2010 SCC 40]**

- **Ratio:** Canadian test for commercial activity exception (S.5 SIA): look at nature and purpose of act, in its full context
- **Facts:** Kuwait Airways Corporation (KAC) sued in several jurisdictions for return of planes or damages from Iraq's illegal occupation of Kuwait (appropriation of its property)
  - Got judgement in UK; applied for recognition of judgment in Quebec
  - Iraq claimed impugned acts were sovereign and entitled to state immunity
- **Issue(s):** Does commercial activity exception (S.5 SIA) apply?
- **Lower courts:** QBCA rejected commercial exception; found that state immunity applied
- **Held:** Iraq cannot rely on state immunity; use of planes was commercial activity
- **Reasoning:** US and English law: state engages in commercial activity where it exercises *only* those powers that can also be exercised by private citizens (focus on nature)
  - Not sufficient to ask if act was result of state decision or to protect state interest
  - Lamer J in *Re Canada Labour Code*: Contextual approach to SIA interpretation
    - Neither nature nor purpose should dominate
  - Original appropriation of aircraft was sovereign act, but retention and use (focus of litigation) were commercial acts
- **Analysis:** Is the focus on purpose consistent with ONCA holding in *Bouzari*?
  - Note: absolute immunity applies with respect to actually executing a judgment (immunity from injunction, specific performance, restitution orders)
  - States are cautious with respect to this more coercive involvement

### **UN Convention on Jurisdictional Immunities of States and Property (not yet in force)**

- Note: early in signature and ratification process, but provisions arguably conform to existing or emerging rules of CIL

### **State Immunity and Visiting Forces Act**

- Governs immunity of visiting foreign military forces in Canada

- Canadian criminal courts have full jurisdiction for offences committed in Canada by US forces, except acts committed within lines or on warships
- NATO SOFA - 3 categories of offences to which sovereign immunity attaches to either sending or receiving state:
  1. Sending state has right to jurisdiction over persons subject to military law when: a) security offence or b) not punishable in receiving state
  2. Receiving state has right to jurisdiction when offence is not punishable by sending state
  3. Concurrent jurisdiction: sending state has primary jurisdiction if offence committed against their own members or in course of official duties; otherwise receiving state has primary jurisdiction
- Canada's *Visiting Forces Act* implements NATO SOFA
  - Prevailing interpretation of CIL: members of foreign warships on board are shielded, even where Canada has primary jurisdiction over matter under VFA
  - Reciprocal understanding for our warships

### Serious Int'l Crimes/Gross Violations of Human Rights

- Modern int'l law has focused on whether states should enjoy immunities for serious int'l crimes or gross violations of human rights committed by them or on their behalf
- Two types of state immunity:
  - ***Ratione materiae* immunity:** attaches to acts, transactions, or *conduct* of state itself
    - Including organs, gov't officials, agents, rep's acting in official capacity
  - ***Ratione personae* immunity:** attaches to *person* of certain senior state officials as long as they occupy official position (whether or not conduct was "official")

### Immunities from Criminal Jurisdiction

#### ***R v Bow Street Metropolitan ex parte Pinochet Ugarte [No 3] (1999 HL)***

- **Ratio:** another state can prosecute a former head of state for widely recognized, prohibited criminal acts (high point of universal jurisdiction)
- **Facts:** General Pinochet was head of state in Chile from 1973-1990
  - Spanish judge authorized his prosecution for ordering acts of torture on mass scale in Chile (exercising universal jurisdiction)
  - Acts of barbarism not committed by Pinochet himself but at his instigation
  - P decided to come to UK for medical treatment in 1998
  - Spain made extradition request for Pinochet's surrender
- **Issue(s):** Can immunity be refused to a head of state for certain int'l (jus cogens) crimes?
  - Does a head of state have immunity after being removed from office, or does immunity attach to those state actions?
- **Arguments:** P is 'senator for life' so immunity attaches to his person (HL rejected)
- **Majority held:** Pinochet not entitled to immunity; could be extradited to Spain
- **Lord Browne-Wilkinson:** Head of state is entitled to same immunity as state, from all actions or prosecutions whether related to matters done for benefit of state (*ratione personae*)
  - Former head of state enjoys similar immunity as former ambassador (*ratione materiae*)
  - Continued immunity for ex-heads of state is inconsistent with provisions of Torture Convention; Pinochet was not acting in capacity giving rise to immunity when he authorized torture b/c such actions were contrary to int'l law and Chile had outlawed it
- **Lord Goff of Chieveley:** waiver of immunity must be express; not done by Torture Convention

- Pinochet entitled to benefit of state immunity *ratione materiae* as former head of state
- **Lord Hope of Craighead:** not a case of waiver and not an implied term of Torture Convention
  - But obligations recognised by CIL in Torture Convention for serious int'l crimes override any object on ground of immunity *ratione materiae*
  - Pinochet's immunity was lost when Chile ratified Torture Convention
- **Lord Hutton:** Pinochet not entitled to claim *ratione materiae* immunity
  - Torture Convention: no state can tolerate torture by public officials/official capacity
  - Acts of torture cannot be regarded as functions of head of state when int'l law expressly prohibits torture in any circumstances
- **Lord Saville of Newdigate:** State parties are in agreement that immunity *ratione materiae* of former heads of states cannot be claimed in cases of alleged official torture (exception)
  - Express and unequivocal terms of Torture Convention is enough to waive immunity
- **Lord Phillips of Worth Matravers:** Convention is incompatible with immunity *ratione materiae*
  - 2 explanations for immunity *ratione materiae*:
    - To sue individual for state's business is to indirectly sue the state
    - Contrary to int'l law for one state to adjudicate on internal affairs of another
  - Extra-territorial jurisdiction overrides non-intervention principle
- **Lord Millett:** there was no immunity to be waived; *ratione materiae* could not be available
  - Official nature of act, which forms basis of immunity, is essential ingredient of offence
  - Int'l law would not establish crime with *jus cogens* character while providing immunity
- **Analysis:** Unclear whether the Torture Convention waives immunity; judges hesitant to 'read in' a provision when it's not there expressly
  - extradition is decision made by executive of a state, and Home Security declined to extradite Pinochet on health reasons – no conviction

### **Arrest Warrant of 11 April 2000 (DRC v Belgium) [2002 ICJ Rep]**

- **Ratio:** *Ratione personae* immunity persists for certain senior state officials in office even where alleged conduct amounts to serious int'l crimes (no exception recognized in CIL).
- **Facts:** DRC sued Belgium for issuing int'l arrest warrant against sitting Minister for Foreign Affairs at the time, Yverdi Ndombasi, for war crimes and crimes against humanity
- **Issue(s):** Is there an exception to *ratione personae* immunity for crimes against humanity? (No)
- **Arguments:** Belgium invoked their interpretation of *Pinochet* (no immunity for crimes against humanity); also immunity only attaches to official functions, not private acts
  - Congo argued Minister is entitled to absolute immunity from criminal process while in office; covers all acts, not just 'official acts' – no exception recognized
- **Held:** Belgium violated obligation toward Congo in failing to respect immunity
- **Reasoning:** Court rejected Belgium's argument; cannot find widespread established practice showing this exception in CIL to immunity for Ministers of Foreign Affairs
  - Rules governing jurisdiction and immunity must be distinguished
    - Immunity is procedural, not substantive
    - Indiv criminal responsibility (substantive law) is a separate concept
  - Head of State, Head of Gov't, and Minister for Foreign Affairs enjoy full immunity as their person while in office, from both civil and criminal jurisdiction
  - 4 ways Minister may be prosecuted:
    - prosecute him in DRC (not immune from criminal jurisdiction in his own state)
    - Waiver of immunity by the DRC
    - Wait for him to no longer hold Foreign Minister office

- Then no longer holds 'all' immunities, but what about acts themselves?
  - Immunity not relevant to int'l criminal court proceedings

### **Prosecutor v Taylor, Decision on Immunity from Jurisdiction [2004 SCSL]**

- **Ratio:** The sovereign equality of states does not prevent a Head of State from being prosecuted in int'l criminal tribunal or court
- **Facts:** President of Liberia at time; arrested for crimes against humanity and grave breaches of Geneva Conventions; goes on trial in Special Court for Sierra Leone (SCSL)
- **Issue(s):** Was it lawful for SCSL to issue arrest warrant for serving Head of State?
- **Arguments:** T argued immunity from exercise of jurisdiction of this court
- **Held:** no immunity from jurisdiction of an int'l court; T is subject to proceedings in SCSL
- **Reasoning:** Special Court for Sierra Leone (SCSL) is NOT a national court
  - Estab by treaty; has characteristics of int'l court
    - Hybrid court – mixes int'l and national elements and judges
    - Competence and jurisdiction similar to ICTY, ICTR, ICC
  - Rationale for state immunity = sovereign equality (one state not making another subordinate); no relevance in int'l criminal tribunal
  - Official position as Head of State is not bar to prosecutions by this court
- **Result:** trial proceeded in special courtroom in Netherlands for safety, then UK housed him for prison (had to pass an Act of Parliament to approve this)

### **Immunities from Civil Jurisdiction**

#### **Bouzari v Iran [2004 ONCA]**

- **Ratio:** no recognized exception for torture occurring outside of Canada in SIA; state practice does not establish this exception and statute can overrule custom
- **Facts:** Bouzari was abducted, imprisoned and tortured by agents of Islamic Republic of Iran
  - After release, came to Canada as landed immigrant; sued Iran for punitive damages
- **Issue(s):**
- **Arguments:** B argued int'l law gave him right to civil redress for torture that overrode any state immunities enjoyed by Iran or its agents
  - SIA must be read in conformity with Canada's int'l obligations (treaty and CIL)
  - Essentially arguing developing customary practice should oust SIA to allow civil cause of action in a third state where it didn't occur
- **Held:** Civil action dismissed; no claim can be brought in Canada for torture suffered in Iran
- **Reasoning:** no exception for torture in SIA and no state practice evidencing this exception
  - Even if you could prove CIL rule, statute can overrule custom
  - Interpreted Art 14 of Convention Against Torture to mean when act occurs in Canada
    - doesn't mean all state parties must open up national courts to civil causes of action for torture even when committed outside its jurisdiction
  - Pinochet reflected distinction b/n criminal sanction and civil remedy for torture
  - Prohibition of torture is jus cogens norm, but state practice shows state immunity applies to acts of torture committed outside that state (CIL principle)
- **Analysis:** How to reconcile Pinochet and Bouzari? Is exercise of criminal jurisdiction less damaging to sovereign equality than civil jurisdiction?
  - UN Committee Against Torture 2005 expressed concern that Canada is not permitting civil actions for torture under Art 14 – should amend to 'wherever torture occurs'

- But in *Jones v Saudi Arabia* 2006 UKHL found no exception for torture

### Jurisdictional Immunities of the State (2012 ICJ)

- **Ratio:** A state is not deprived of immunity for reason only that it was accused of serious violations of int'l law
- **Facts:** Italy and Greece allowed actions against Germany for WWII in their national courts
  - Germany sued Italy for failing to respect its jurisdictional immunity – and won
- **Issue(s):** in proceedings regarding claims for compensation arising out of clearly illegal acts, were Italian courts obliged to accord Germany immunity?
- **Arguments:** I argued G is not entitled to immunity b/c acts were death/personal injury (torts exception) and serious violation of int'l law (jus cogens exception)
- **Held:** Italy's denial of Germany's immunity was breach of CIL obligations
- **Reasoning:** ICJ rejected jus cogens exception argument – cited Bouzari and cases from other states showing there is no established practice
  - Both parties agree states are generally entitled to immunity for *acta jure imperii* (exercise of sovereign power)
  - ICJ found state immunity applies for proceedings for torts committed by one state's armed forces on territory of another in armed conflict
  - Rules of state immunity are procedural in nature; only determining whether courts of one state may exercise jurisdiction over another state, not whether conduct was lawful
- **Analysis:** It helped that there was an alternative; Germany had set up reparations fund

### Kazemi Estate v Iran (SCC 2014)

- **Facts:** Iranian-Canadian tortured and killed in Iran
  - Son tried to sue Iran
- **Argument:** there must be exception to state immunity for acts of torture
- **Held:** Lost in SCC: except as provided in Act, cannot sue a foreign state
  - Immunity is a procedural bar

### **Amendments to SIA**

- Exceptions to immunity expanded to include terrorism (still not torture)
  - Now: Commerce, torts in Canada, and state-sponsored terrorism
- Now litigator in Canada can bring claim for terrorism against state listed by Cabinet as a state-sponsor of terrorism (Iran and Syria)
  - Removes immunity for actions AND assets (no immunity over execution)
  - Upheld in *Tracy v Iran* 2017 ONCA

## Ch. 14: The Use of Force

### Introduction

- Extent to which int'l law permits states to use military force against other states (and recently, against non-state armed groups like ISIS) is controversial
  - divided views between powerful states and less powerful
- "Laws of war"
  - **Jus ad bellum:** law on going to war (relevant to this course)
  - **Jus in bello:** law on the conduct of war (not relevant to this course)
    - Relates to int'l humanitarian/criminal law (breaches)

- LOAC = laws of armed conflict
  - IHL = int'l humanitarian law (during times of conflict; not same as int'l human rights law which applies during peacetime)
- Declarations of war
  - Substance over form; formal declaration not required
  - But no agreed defn of '**armed conflict**'
    - **Tadic** (ICTY Appeals): an armed conflict exists where there is:
      - i. resort to armed force b/n states (IAC = int'l armed conflict) OR
      - ii. protracted armed violence b/n gov't authorities and organized groups or b/n such groups within a state (NIAC = non-int'l armed conflict)
    - Situations may evolve from one type to another
- Historical context
  - 19<sup>th</sup> C: no legal limits on states; extra-legal rules (alliances, balance of power) were means relied upon to keep the peace – war was part of foreign policy
  - 1914-1918: WWI unprecedented suffering
  - 1919 Covenant of League of Nations did not prohibit war, but tried to impose cooling off period (3 months before resorting to force)
  - 1928 Kellogg-Briand Pact condemned recourse to war
    - many states agreed, but it was unsuccessful
  - 1939-1945: second global war

### General Prohibition of Threat or Use of Force

- Use of force is a matter of int'l law enforcement
- Modern int'l law as general rule outlaws resort to force by states against other states, subject only to narrowly defined exceptions
- **Art 2(4) UN Charter:** starting point – general prohibition on threat or use of force
  - *All members shall refrain in their int'l relations (not domestic) from threat or use of force (not confined to 'war') against the territorial integrity or political independence of any state, OR in any other manner inconsistent with purposes of the UN*
  - Art 2(3) UN Charter: corollary obligation to settle int'l disputes by peaceful means
- **Friendly Relations Declaration:**
  - accepted as expression of CIL (adopted by consensus), but NOT formal int'l law
    - ICJ in **Nicaragua** uses Declaration as evidence of opinio juris
  - Expands on prohibition – what activities would breach Art 2(4)?
    - Force includes war of aggression, forcible deprivation of self-determination, encouraging armed bands, instigating terrorism, etc
    - Nothing in the declaration should be construed as affecting provisions of Charter or other int'l agreement, or powers of UNSC

### Military and Paramilitary Activities (Nicaragua v USA) [1986 ICJ Rep]

- **Ratio:** Principle of non-use of force is principle of CIL with character of jus cogens, but mere supply of funds for armed group does not in itself amount to use of force (although it is an interference in internal affairs of that state)
- **Facts:** N claimed US used force unlawfully against it contrary to Art 2(4) of UN Charter
  - Americans laid mines and supported group called 'contras'
- **Arguments:** N brought 2 complaints: US used actual military force (laid mines) and established/financed armed counter-revolutionary group

- **Held:** US breached prohibition on use of force with military activities but not supply of funds
- **Reasoning:** Principle of non-use of force may be regarded as principle of CIL and jus cogens (Friendly Relations Declaration, ILC)
  - US laid mines and attacked N's ports/naval base = breach of 2(4)
    - This constitutes infringements of prohibition on use of force, unless justified by circumstances
  - Mere supply of funds to the *contras* is prima facie violation of Friendly Relations Declaration and intervention in N's internal affairs = NOT a breach of 2(4)
    - Support for armed group does not in itself amount to use of force
- **Analysis:** Controversial ruling by ICJ; still debated today
  - Many developing states criticize powerful states for using money to control them

### **Legality of Threat or Use of Nuclear Weapons, Adv Op [1996 ICJ Rep]**

- **Ratio:** Court suggests that mere possession of nuclear weapons is not in itself an unlawful threat to use force
- **Issue(s):** Is the threat or use of nuclear weapons permitted in any circumstances under int'l law?
- **Reasoning:** Prohibitions in 2(4) do not refer to specific weapons
  - If use of force itself is illegal, the threat to use such force is also illegal
  - Whether it is a 'threat' contrary to 2(4) depends on whether particular use of force would be directed against territorial integrity of state or against purposes of UN
  - If used for self-defense, does it violate principles of necessity and proportionality?
- **Analysis:** Seems circular; difficult to evaluate legality of threat of force based on legality of future, hypothetical use of force
  - How could use of a nuclear weapon NOT be against purposes of UN?
  - E.g. Trump's statement "Rocket Man is on a suicide mission for himself and for his regime (North Korea)...US is ready, willing and able but hopefully it won't be necessary"
    - Is this a threat of force?

### **Guyana v Suriname, Award of Arbitral Tribunal [2008 ILM]**

- **Ratio:** Force can be used in law enforcement activities IF such force is unavoidable, reasonable and necessary
- **Facts:** G and S, former colonies of UK and Netherlands, are two adjacent states in South America
  - Boundary dispute matters for oil and gas
  - Arbitral award concerning disputed location of maritime boundary dividing their territorial seas, EEZ's and continental shelves
- **Issue(s):**
- **Arguments:** G claims S' actions represented breach of Art 2(3) and 2(4); S claims exercise of coastal jurisdiction (policing) does not amount to armed force
- **Held:** S' actions constituted threat of use of force in contravention of int'l law
- **Reasoning:** Officers from G said they were told to leave Surinamese waters or 'face consequences'; officers from S said they had never been authorized to use force
  - the order constituted an explicit threat that force might be used if not complied with
  - Force may be used in law enforcement provided it is unavoidable, reasonable and necessary – but this was more akin to threat of military action
- **Analysis:** Note difference b/n rules in peacetime (which this technically was, although disputed area) and armed conflict
  - Although S warned G, didn't jump straight to force, it should be a VERY last resort

## **Definition of Aggression, UNGA Res 3314 (1974)**

- Art 1: Use of armed force by state against sovereignty, territorial integrity, or political independence of another state or in any manner inconsistent with Charter of UN
  - Note: amendment to Rome Statute of ICC extending court's jurisdiction to "crimes of aggression" relied on this defn (only five states have ratified)
  - *act of aggression* is public int'l law; *crime of aggression* is indiv criminal responsibility
- Art 2: first use of armed forces is *prima facie* evidence of act of aggression
  - Need for sufficient gravity
- Art 3: the following e.g.'s qualify as act of aggression
- Art 4: non-exhaustive list; UNSC may determine other acts are aggression
  - Does not include cyber-attacks but not precluded; circles back to UNSC
- Art 5: no political, economic consideration may serve as justification
  - War of aggression is int'l crime and no territorial acquisition will be recognized as lawful
- Art 6: does not enlarge or diminish scope of UN Charter
- Art 7: does not prejudice right to self-determination, freedom and indep of peoples
- Art 8: each provision to be construed in context of other provisions

## **Exceptions to Prohibition of Force**

### **Overview**

- Resort to force is, in certain exceptional circumstances, necessary feature of int'l legal system
- Two recognized exceptions in UN Charter:
  - 1. Collective military action authorized by UNSC (Ch. VII)**
  - 2. Self-defence (Art 51)**
- not mutually exclusive; US argues their force against ISIS is both self-defence and authorized
  - Also third scenario; when states consent to use of force
- **A More Secure World: Shared Responsibility (Report of SG's high-level panel on threats)**
  - Use of military force causes most difficulty of all contemporary policy issues
  - Maintenance of world peace and security depends on common understanding of when application of force is legal and legitimate
  - 3 difficult situations:
    - State claims right to strike in self-defence in response to **non-imminent** threat
    - State appears to pose external threat but **disagreement in UNSC** on response
    - Threat is primarily **internal**, to a state's own people

### **Collective Action Authorized by UNSC**

- Art 42 UN Charter authorizes UNSC to "take such action by air, sea, or land forces as may be necessary to maintain or restore int'l peace and security"
  - SC will authorize that member states to 'use all necessary means' to repel attack
  - Some states have used strained interpretations of SC resolutions to cover their use of force in certain circumstances
    - E.g. US and UK launched invasion of Iraq in 2003 - 'coalition of the willing'
    - No SC authorization; France and Russia vetoed
  - **AG's Advice on Legality of Iraq War to PM Tony Blair (March 2003):**
    - SC authorized use of force against Iraq in 1990; UK claims that violation of Iraq's obligations under this resolution revives the authorization to use force

- **Revival argument is strongest**
  - But it is for Council to decide if breach of obligations has occurred
- Although revival argument is controversial, disagrees that nothing less than explicit authorization by UNSC resolution to use force is sufficient
- Safest course: secure adoption of further resolution to authorize use of force
  - Need not be explicit but should establish that Iraq has failed to take final opportunity to comply with disarmament obligations
- Revival argument only strong if hard evidence of non-compliance/cooperation
- How matter might be brought before a court:
  - GA could request adv op from ICJ on legality of military action
  - Another state which has accepted Court's jurisdiction might bring case against UK but less likely
  - ICC could examine whether military campaign was conducted in accordance with int'l humanitarian law
    - but no jurisdiction over crimes of aggression
- Lawfulness of any military action depends on legal basis and proportionality
  - Any force must have objective of enforcement of the terms of the cease-fire (not regime change), be limited to what is necessary to achieve object, and be proportionate response to objective
- Note: UK and US invaded Iraq without securing SC resolution clearly endorsing it
  - UK opted for narrow textual reading, but many said int'l law trend is to read prohibition on use of force broadly
  - Chilcot report showed UK gov't showed little appetite to ensure Iraq war was legal; given legal advice but chose to ignore
- Other argument: need to protect the Kurds (but why did they wait so long?)
  - Is there a right of humanitarian intervention? Responsibility to use force?

### **Legality of Use of Force (Yugoslavia v Belgium), Oral Argument of Belgium [1999 ICJ Rep]**

- **Ratio:** Preponderance of int'l legal opinion is against right of unilateral humanitarian intervention, but question left open
- **Facts:** 1999 NATO bombing campaign against Yugoslavia provoked by mass atrocities in Kosovo
  - Not clearly sanctioned by UNSC (Russia threatened to veto any proposed resolution)
  - Former Republic for Yugoslavia (FRY) instituted proceedings against ten member states in ICJ, claiming violation of prohibition on the use of force
- **Issue:** Is there a 'right to humanitarian intervention' where UNSC fails to authorize force?
- **Arguments:** Belgium claimed it acted on basis of humanitarian considerations
  - NATO intervened to protect fundamental *jus cogens* values and prevent catastrophe recognized by UNSC; NOT against territorial integrity or political indep
    - Using force in accordance with purposes of UN
    - Argued torture and right to life are *jus cogens* obligations
    - Armed humanitarian intervention is compatible with Art 2(4) UN Charter
  - Previous similar interventions have not been expressly condemned by UN bodies
  - Trend toward greater protection of minorities
  - In alternative, there was a state of necessity:
    - Impending peril: humanitarian catastrophe
    - Higher values: *jus cogens*/collective security of entire region
    - Proportional to threat: intervention was limited to war machine

- **Analysis:** Court declined request for provisional measures; did not decide case on its merits
  - Ultimately cases against all NATO members were dismissed on jurisdictional grounds
  - Preponderance of int'l legal opinion is against right of unilateral humanitarian intervention; e.g. ICJ in *Nicaragua* case said use of force was not appropriate method to monitor US' claimed concern for human rights
    - clear distrust among many states of any such right – only for the powerful
    - desire for “coalitions of the willing” instead of unilateral action
  - General conclusion: most agree NATO intervention was perhaps **illegal but 'legitimate'**

#### **Kosovo, Select Committee on Foreign Affairs, UK House of Commons (2000)**

- NATO intervention was not for self-defence and did not secure SC authorization for operation
  - But many actions at UN could be interpreted as supportive of NATO position
- Therefore, contrary to specific int'l 'law' but could have used United for Peace procedures
- Doctrine of humanitarian intervention has tenuous basis in current CIL (state practice not sufficient), rendering NATO action legally questionable
  - But justified on moral grounds
- Ideally, states should agree to treaty setting out conditions where humanitarian intervention is permissible – criteria not so flexible as to legitimize state's intervention in another's internal affairs claiming humanitarian grounds
  - Supports FCO in establishing new UN principles governing human.interv.

#### **The Responsibility to Protect: Report of Int'l Commission on Intervention and State Sovereignty**

(ICISS, Ottawa, 2001)

- Where population is suffering serious harm and state is unwilling or unable to protect citizens, principle of non-intervention yields to int'l responsibility to protect
- Founded in concept of state sovereignty, responsibility of SC, human rights obligations, and developing practice of states
- 3 responsibilities: responsibility to prevent, react, and rebuild
  - Prevention and less coercive methods must be considered first
- **Just cause threshold**: to justify extraordinary measure of military intervention, there must be serious and irreparable harm occurring to humans or imminently likely to occur, of either:
  - Large scale loss of life, or
  - Large scale 'ethnic cleansing'
- Precautionary principles:
  - Right intention – to halt or avert human suffering
  - Last resort – every non-military option has been explored
  - Proportional means – minimum intervention necessary
  - Reasonable prospects – chance of success
- Right authority: UNSC authorization should be sought first
  - P5 members should agree not to cast veto where there is otherwise majority support
    - note SC has not adopted these constraints
  - Alternative options: United for Peace, regional organizations
  - If SC fails to act, concerned states may not rule out other means
- Operational principles:
  - Clear objectives
  - Common military approach
  - Acceptance of limitations – objective is protection of population only
  - Rules of engagement that fit operational concept

- Acceptance that force protection cannot become principal objective
- Maximum possible coordination with humanitarian organizations

\*Note: ICISS report had profound impact on UN reform, but **NOT int'l law**

\*Embraced in *A More Secure World: Our Shared Responsibility*, Report of the SG's High-level Panel on Threats, Challenges and Change (UN Doc 2004)

\*Concept received endorsement of Secretary-General in 2005

### ***In Larger Freedom: Towards Development, Security and Human Rights for All: Report of SG (UN 2005)***

- States should embrace 'responsibility to protect' as basis for collective action against genocide, ethnic cleansing, or crimes against humanity
- Responsibility lies first with each indiv state to protect its population
- If national authorities unable or unwilling, int'l community has responsibility to use diplomatic and humanitarian methods to protect human rights
  - If insufficient, SC may out of necessity take action under UN Charter

\*After period of intense negotiations, concept was included in GA resolution

### **World Summit Outcome Document, GA Res (2005)**

- Each individual state has responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity (4 triggers)
- Int'l community through UN also has responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance with Ch. VI and VIII UN Charter
  - Prepared to take collective action *through UNSC* on case-by-case basis, should peaceful means be inadequate and state manifestly fails to protect population
  - force is a *last resort*
- Commit ourselves to helping states build capacity to prevent populations from genocide
  - Read R2P both narrowly and widely; triggers are specific but it's not just about use of force, also about state responsibility and prevention/assistance

\* This is what states have agreed to – all other policy documents are just ideas

\*Subsequently reaffirmed by SC in 2006 resolution on protection of civilians in armed conflict

\*Q: does this allow states to use force against one another without SC authorization in extreme crises?

### **UNSC Resolution 1973 (2011), UN Doc**

\*Response to humanitarian crisis during Libya's civil war in 2011 - High point of R2P in action

- Condemning gross and systematic violation of human rights
- Determining situation in Libya constitutes threat to int'l peace and security
- Acting under Ch.VII of UN Charter:
  - Demands immediate cease-fire and end to violence, attacks against, abuses of civilians
  - Authorizes member states to take all necessary measures to protect civilians
  - Decides to establish ban on all flights except for humanitarian purposes

\*Note: still concern that this provides UN mandate for regime change; further discussion needed

- If SC authorizes force to protect civilians, strong states may see it as authorization for much broader intervention, e.g. regime change (but counter-argument: if leader is committing crimes against humanity, removing him is part of R2P)

\*SG proposed three-pillar structure for implementation of concept:

- Primary responsibility for protecting population rests with state itself
- Int'l community will assume supportive role (assistance, capacity building)
- As last resort, use of collective action to protect populations at risk according to UN Charter

## Self-Defence

- Right of states to use force in self-defence without prior SC authorization is controversial
- Starting point: **UN Charter, Art 51:**  
*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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.***
  - Right is only available 'if' armed attack occurs; suggests it is reactive
    - What about anticipatory self-defence (using force before you're attacked?)
  - 'Inherent' right generally taken to mean full scope of right of states to self-defence is **defined in CIL** - suggests it pre-existed Art 51 of UN Charter
    - Can also source the right by custom which evolves over time
    - This is where scope for arguing anticipatory self-defence arises
    - At some point anticipatory turns into doctrine of pre-emption (controversial)
  - 'Until' suggests a duration to the right; temporary nature
  - Notification requirement; as state, must tell UNSC you're using force under Art 51
    - Must be deliberate, not inadvertent use of force
  - ICJ case law upholds individual or collective right to self-defence
  - **Multiple sources** for this right: UN Charter, CIL, ICJ
- Canadian connection: 1837 rebellion (Caroline incident involving ship)
  - Preparations for subversive action against UK from US (militia)
  - US unable or unwilling to stop, so British force from Canada crossed into US, seized the SS Caroline, set her on fire, and cast the vessel adrift over Niagara Falls
    - destroyed ship, killing two Americans
  - US responded by arresting British captain
  - Famous statement of law from Secretary of State, Daniel Webster
    - Expressed two conditions under which self-defence may be invoked to invade foreign territory: Must be necessary and proportionate
      - Necessity: situation must be overwhelming; no choice
      - Proportionality: means used must be reasonable, not excessive

## **Legality of Threat or Use of Nuclear Weapons, Adv Op [1996 ICJ Rep]**

- **Ratio:** Requirements of necessity and proportionality for use of force in self-defence apply in CIL and under Art 51, no matter the measure of force used
- **Issue(s):** GA requested advisory opinion on question of whether threat or use of nuclear weapons was permitted in int'l law under any circumstances
- **Reasoning:** Submission of exercise of right of self-defence to conditions of necessity and proportionality is a rule of CIL
  - Proportionality may not in itself exclude use of nuclear weapons in self-defence in all circumstances
  - Nature and risks assoc with nuclear weapons are further considerations
  - Requirements of Art 51 apply whatever the means of force used

### **Military and Paramilitary Activities (Nicaragua v USA) [1986 ICJ Rep]**

- **Ratio:** Whether response to armed attack is lawful depends on criteria of **necessity** and **proportionality**. Exercise of collective self-defence is not permitted in absence of **request by state** which has declared itself victim of armed attack (i.e. until attacked, no justification for using force in self-defence).
- **Arguments:** US claimed it was acting in 'collective self-defence' of N's neighbouring states El Salvador, Honduras, and Costa Rica (subject to prior unlawful uses of force by N)
- **Held:** Rejected collective self-defence argument; US violated principle prohibiting use of force
- **Reasoning:** Exercise of indiv self-defence is subject to state concerned having been victim of armed attack (can include armed bands/mercenaries more than 'frontier incident')
  - State in whose benefit right is invoked must declare itself to be victim of armed attack
    - El Salvador declared itself to be victim and asked for help *after* US used force
  - Absence of immediate report to SC under Art 51 is factor in determining whether state was convinced it was acting in self-defence
    - US has still not made report to SC
  - Provision of arms to opposition in another state does not constitute armed attack on that state in CIL (N's assistance to opposition in El Salvador does not justify use of force)
  - US actions did not correspond to necessity or proportionality requirements
  - Confirmation that self-defence exists under treaty and CIL
    - Also draws on Friendly Relations Declaration and Definition of Aggression
- **Analysis:** Problem was timing; US could maybe have justified if they waited
  - Frontier incident as opposed to attack invoking self-defence (matter of interpretation)
  - What recourse is available to a state subject to low-level 'frontier incidents'?
  - What is the legal relevance of motivations of state?

### **Oil Platforms (Iran v USA) [2003 ICJ Rep]**

- **Ratio:** Armed attack is essential pre-condition to use of force in self-defence. Must meet requirements of necessity and proportionality, AND show target was legitimate military target.
- **Facts:** during Iran-Iraq war of 1980-88, two incidents causing loss to US-flagged vessels (one commercial, one naval) in Persian Gulf
  - US-registered vessel, Sea Isle City, hit by a missile in 1987 that US suspected came from Iran; US responded by attacking Iranian oil platforms
  - Iran brought claim against US under 1955 Treaty of Amity (gave consent to ICJ)
- **Arguments:** US claimed it acted in self-defence in both instances based on series of unlawful armed attacks by Iranian forces against US, including missile attack on *Sea Isle City*
  - Iran denied responsibility for attacks and claimed oil platforms were civilian-use only, not engaged in military activity
- **Held:** US actions constituted use of force and breach of int'l law
  - Cannot be justified as self-defence to protect essential security interests
- **Reasoning:** Party to treaty may be justified in taking certain measures which it considers 'necessary' for protection of essential security interests
  - Necessity not purely subjective question; to be assessed by Court
  - US must show Iran was responsible for attacks which were of a nature to qualify as 'armed attacks' within meaning in Art 52 and CIL
  - US must also show its actions were necessary and proportional, and platforms were a legitimate military target open to attack in exercise of self-defence
    - US has not proven Iranian responsibility for attack on *Sea Isle City*

- Cannot find evidence of specific intent by Iran to direct attacks against US
- Even assuming responsibility, incidents taken cumulatively do not constitute armed attack on US of kind in *Nicaragua* ('most grave' form of use of force)
- Evidence not sufficient to prove US claim of military activity on platforms
- Even so, attacks made on platforms cannot be justified as self-defence
  - Not necessary: 'target of opportunity'
  - Not proportional: part of larger 'Operation Praying Mantis'

### **Self-Defence Against Non-State Actors**

- Does right to use force in self-defence extend to responding to armed attacks by non-state actors? (e.g. 9/11 attacks by al-Qaida)
- Reasonably clear after 2001 that a state can use force against non-state actors
  - Can use force against state which is sponsor of non-state actors
  - Must establish a link/nexus to the state

### **The Wall, Adv Op [2004 ICJ Rep]**

- **Ratio:** To constitute self-defence, attacks must be imputable to a foreign state
- **Facts:**
- **Issue(s):** Could construction of wall be justified as measure in self-defence?
- **Held:** construction of wall and associated regime are contrary to int'l law
- **Reasoning:** Art 51 recognizes existence of inherent right of self-defence in case of armed attacks BY one state AGAINST another state
  - Israel does not claim attacks against it are imputable to a foreign state
    - Threats to Israel came from within territory it exercised control in
  - Therefore, Art 51 has no relevance

### **Armed Activities on Territory of Congo (DRC v Uganda) [2005 ICJ Rep]**

- **Ratio:** to justify self-defence, armed attacks must come from foreign state or have sufficiently close nexus to a foreign state
- **Facts:** Violent situation in Great Lakes region of Africa
  - In 1997, President Kabila came to power in DRC and invited Uganda and Rwanda to provide military assistance in suppressing insurgent groups
  - In 1998, DRC reversed this policy and terminated consent
  - Rather than leaving DRC territory, U increased military activities as part of 'Operation Safe Haven'; DRC claimed this amounted to unlawful use of force contrary to Art 2(4)
- **Arguments:** U argued it was acting in self-defence
- **Held:** Objectives of 'Operation Safe Haven' not consistent with self-defence in int'l law
- **Reasoning:** Legal and factual circumstances for exercise of self-defence against DRC not present
  - Attacks came from ADF (anti-Ugandan rebel group), not from DRC
  - Uganda did not report to SC the events that required it to act in self-defence
  - No proof of involvement in these attacks, direct or indirect, by gov't of DRC
  - Cannot conclude DRC was acquiescing in organized rebel activities on its land
- **Analysis:** Generally agreed that act of terrorism could give rise to Art 52 right of self-defence if nexus b/n terrorist act and another state was sufficiently close
  - E.g. US air strikes in Libya following bombing of Berlin discotheque – condemned because not enough evidence tying bombing and other terrorist activities to Libya

- But widespread reaction to **9/11 attacks** was that al-Qaida terrorist acts constituted “armed attack”; UNSC invoked right of self-defence, collective response from NATO
  - Still, US relied on Taliban (then-gov’t of Afghanistan) supporting al-Qaida
  - Common (but not unanimous) view is that ensuing armed response against al-Qaida was compliant with int’l law
- Issues arise where state is unable or unwilling to stop attacks/deal with terrorist groups
  - E.g. Iraq and ISIL operations; US will argue both self-defence (expanding into Syria) and consent from Iraq to UNSC (help us)

### “Anticipatory” and “Pre-Emptive” Self-Defence

- Hotly debated issue whether right of self-defence may also be invoked where attack has not happened yet, but is anticipated
  - Should states have to wait for an armed attack, or can they use force in anticipation?
- CIL accepts threatened state can use force when attack is imminent
  - Key is test for ‘imminent’
  - **Caroline incident:** US and UK agreed only warranted where ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation’ - no authoritative rulings by int’l tribunals on the matter
    - UK stated legal position is ability to use force against *imminent* attack
- Even more contentious: whether int’l law recognizes right of ‘pre-emptive’ self-defence responding not to imminent but rather potential threats (“Bush doctrine”)
  - **Doctrine of pre-emption** (‘shoot first; ask questions later’)
  - Powerful state pushing rule much further - any state practice supporting this?
- **National Security Strategy of USA, 17 Sept 2002**
  - For centuries, int’l law has recognized nations need not suffer attack before they can lawfully take action to defend themselves against imminent danger
  - Concept of imminent threat must adapt to today’s adversaries
  - US has long maintained option of preemptive actions to counter sufficient threat to national security – US will, if necessary, act preemptively to prevent hostile acts
    - *Note:* Failure of US to find WMD’s after invading Iraq in 2003 brought dangers of doctrine of pre-emption into sharp focus
- **Israeli attack on Iraqi nuclear reactor**
  - Israel argued it was in final stages of construction and once finished, could make atomic bombs that could be thrown onto Israel; no attack yet
  - Ambassador speaking at UNSC: “Elementary act of self-preservation, both morally and legally, exercising our inherent right of self-defence” (invoking CIL)
    - “Tried to have threat halted by diplomatic means...we were left with no choice” (suggests necessity)
    - “We did it cleanly and effectively” (suggests proportionality)
  - UNSC condemned Israel including US, UK, etc
  - Shows all other states did NOT support Israel’s anticipatory use of force; left uncertain
    - E.g. US missile strike on Syria to ‘deter regime’ from use of chemical weapons
    - Essential that US give legal justification for strikes announced by President; law is in flux, and need to get support of allies
    - Some states say imminence is still the key; can attack first if threat is imminent

- **A More Secure World: Our Shared Responsibility (Report of SG, 2004)**
  - Issue in circumstances where threat is not imminent but still claimed to be real (i.e. nation with hostile intent acquiring nuclear weapons-making capability)
  - Can a state, without going to UNSC, claim right to act in anticipatory self-defence against non-imminent threat? NO; should go to UNSC first to authorize action
  - Risk to global order is too great to allow unilateral preventive action
  - We do not favour the rewriting or reinterpretation of Art 51

## Ch. 12: State Responsibility

### Nature of State Responsibility

- State responsibility is general set of rules governing int'l legal consequences of violations, by states, of their int'l legal obligations
  - Whereby injured state becomes entitled to redress for damage suffered
  - What are the consequences of a breach of int'l law?
  - Set of supportive (secondary) set of rules
- No multilateral treaty, but "**ILC Articles on State Responsibility**" have been accepted as CIL
- Developed from practice of states, documented in arbitral tribunal awards typically involving injuries to foreign nationals (often in Mexico)
  - Not always consistent; gaps in the law
  - ILC recognized this topic was worthy of study (took almost 50 years)
- ILC's study of the law of state responsibility began in the 1950s – adopted draft articles in 1996 but division of opinion between experts and States
  - ILC adopted final version of Articles on State Responsibility in 2001
    - recommends these to GA
  - Up to States to decide next steps – no treaty as of yet; and there may never be a treaty
  - ILC Articles of 2001 are NOT a treaty, but highly respected
    - States and courts are using them – many reflect existing rules of custom
- If a state breaches a rule of int'l law = "a wrong" or an "**internationally wrongful act**"
  - Law of state responsibility provides that for every wrongful act, there is an obligation of reparation

### General Principles of State Responsibility

- Due to lack of enforcement and adjudicative mechanisms in int'l law, principle was not clearly established in state practice and *opinio juris* until 20<sup>th</sup> C
- Every state is responsible for an internationally wrongful act and has an obligation to make reparations - sourced in PCIJ in Chorzow Factory, ILC Articles, art 1
  - Applies to all forms of international obligation
  - Unless treaty specifies what happens in the event of a breach (i.e. a specific rule modifies a general rule)
    - WTO agreement has timelines and specific directions in event of a breach
    - But Vienna Convention on Diplomatic Relations does not set out rules
    - ILC Articles on State Resp., art 55 (page 765)
  - Note the tortious nature – not criminal in nature
  - Focus here is on STATE not individual responsibility
- Must prove both elements of int'l wrongful act – prove it's attributable/imputable to the state and prove it's a breach

### Case Concerning Factory at Chorzow (Claim for Indemnity) (Germany v Poland) [1928 PCIJ]

- **Ratio:** General principle of int'l law that any breach of an engagement involves an obligation to make reparation, whether treaty expressly provides for system of remedies
- **Facts:** After WWI, Upper Silesia transformed from Germany to Poland
  - G sought reparations for losses caused by P's takeover of factory which had been established by German company under contract to G gov't
- **Reasoning:** 3 questions: 1) existence of obligation to make reparation, 2) existence of damage, and 3) extent of damage
  - No necessity for reparation to be stated in convention itself
- **Analysis:** ILC articles are founded on general principle: secondary rules of responsibility and reparation are triggered whenever primary int'l legal obligation is breached, whether primary obligation expressly provides for system of remedies

### **ILC Articles on State Responsibility for Internationally Wrongful Acts 2001**

- Art 1: every internationally wrongful act of a state entails int'l responsibility
- Art 2: elements of internationally wrongful act of a state:
  1. attributable to the state and
  2. constitute breach of int'l obligation of the state
- Art 55: *lex specialis* (these articles operate in residual way, in absence of special law)

### **Analysis: State Responsibility**

- i. Identify and apply relevant primary rules of int'l law
- ii. For state responsibility (secondary rules), ask -
  - a. Is there an **internationally wrongful act**?
    - i. Can I attribute act/omission to a state? Non-state entity or state entity?
      1. Art's 4-11 (Ch. 2) are about attribution of conduct to state actors
    - ii. Has there been a breach (was act or omission wrongful)?
  - b. Is there an excuse or defence – known as a '**circumstance precluding wrongfulness**' for state committing the act? (e.g. self-defence)
  - c. If no excuse/defence, has there been **loss or damage** resulting from this act/omission?
    - i. E.g. remedies/reparations

### Attribution of Conduct to the State

#### **State Organs and Entities Empowered to Exercise Gov't Authority**

- Rules defining range of actors for whose conduct state may be considered responsible
- Starting point: state's formally defined organs, indiv's and entities, acting as 'agents of state'
- **ILC Articles on State Responsibility for Internationally Wrongful Acts 2001**
  - Art 4: conduct of any **state organ** shall be considered act of state, incl person or entity (CIL; Genocide Case 2007) - includes legislature, head of state, domestic courts
  - Art 5: conduct of entity which is *not* organ but empowered by law of state to exercise gov't authority shall be considered act of state if acting in that capacity (**de facto**)
  - Art 7: even if it exceeds its authority or contravenes instructions (incl unlawful acts disowned by the state, as long as acting with apparent authority at the time)
    - even if acting without instruction but in official capacity

- comes from bilateral arbitration decisions; Honduras Disappearances Case

### **Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007 ICJ Rep]**

- **Ratio:** De facto state organs must be completely dependent on the state
- **Facts:** B sought declaration that S or its predecessor, FRY, was responsible for genocide in connection with massacre of thousands of Bosnia Muslim men in 1995
  - ICJ found massacres amounted to genocide, but could genocide be attributed to FRY?
- **Issue(s):** Can conduct of persons not having legal status of state organs, but who in fact act under strict control by state, be attributed to state?
- **Held:** S not internationally responsible for acts; genocide cannot be attributed to it
- **Reasoning:** *Nicaragua*: persons or entities may, for purposes of int'l responsibility, be equated with state organs provided in fact they act in 'complete dependence' on the state (merely an agent) – this is exceptional
  - Persons who committed acts of genocide did NOT have such ties with FRY (not completely dependent on it)

### **Velasquez Rodriguez Case [1988 Inter-American Ct on HR]**

- **Ratio:** Under int'l law, a state is responsible for acts and omissions of agents undertaken in official capacity EVEN when they act outside sphere of authority or violate domestic law
- **Facts:** petitioners made claims against Honduran gov't after students were 'disappeared'
- **Issue:** whether armed men were state agents for whose conduct state was responsible
- **Reasoning:** Court considered implications of Art 1(1) of American Convention on HR
  - Whenever state organ or official violates one of rights in Convention, this is illegal
    - constitutes failure of duty to respect rights and freedoms
  - Any violation of rights recognized by Convention carried out by act of public authority or persons using position of authority is imputable to the state, even if outside instruction

### **Conduct of Other Entities**

- A private person can, in some circumstances, engage responsibility of the state
- **ILC Articles on State Responsibility for Internationally Wrongful Acts 2001**
  - Art 8: conduct of persons/group shall be considered act of state if person is in fact acting on instructions of, or under control of, that state in carrying out the conduct

### **Nicaragua v USA [1986 ICJ Rep]**

- **Ratio:** "Effective control" test is a high standard; non-state entity must be completely dependent on state
- **Issue(s):** Whether US was responsible in int'l law for attacks on port and oil facilities, and acts of the *contras*
- **Arguments:** N claims US personnel directed operations and gave close intelligence and practical support, indirectly responsible although they did not themselves enter N's territory
- **Held:** US is responsible for conduct of 'UCLAs' acting under its instructions and its acts in supporting the *contras* that violated int'l law, but NOT wrongs committed by *contras* themselves
- **Reasoning:** *contras* were not so completely dependent on US that they should be equated with US forces ('organ' of the US)
  - US participation insufficient to attribute acts committed by *contras* to US

- Couldn't prove US had effective control of operations of alleged violations
  - would have to show US ordered contras to lay mine, not just funded
- Contras remain responsible for their own acts
- US is responsible for its own conduct only, including that of 1) US military personnel; 2) CIA; 3) UCLAs (Unilaterally Controlled Latino Assets)
- **Analysis:** Many states find this unconvincing; i.e. US can give them a map, guns, and money but not responsible for what they ultimately do
  - High threshold challenged in Tadic case

### **Prosecutor v Dusko Tadic [1995 ICTY]**

- **Ratio:** Extent of requisite state control for int'l state responsibility should vary with type of entity ('overall control' test for organized military groups) – REJECTED IN NEXT CASE
- **Facts:** Tadic, member of Bosnian Serb militia, charged with 12 counts of grave breaches of 1949 Geneva Convention (applied only to int'l armed conflict)
- **Issue(s):** Was there sufficient link b/n FRY and Bosnian Serb militia to render conflict int'l?
  - What is degree of authority that must be wielded by a state over armed force before they can be considered to be fighting on its behalf?
- **Held:** Acts can give rise to int'l responsibility of FRY on basis of overall control, without proving each operation was carried out under FRY's 'effective control'
- **Reasoning:** *Nicaragua* test is unconvincing based on logic of int'l state responsibility
  - States cannot act de facto through indiv's and then disassociate themselves from such conduct when those indiv's breach int'l law
  - *Nicaragua* test is at odds with int'l judicial and state practice, where lower degree of control has been upheld
  - Diff standard applied to unorganized groups of individuals acting on behalf of states vs organized, hierarchical military or paramilitary groups
  - Organized military groups:
    - Not sufficient for group to be financially or even militarily assisted by a state
    - Must be proved that state wields overall control over group by *coordinating or helping* in general planning of military activity
    - Does not require issuing of specific orders or direction of indiv operation
  - Unorganized groups of individuals:
    - Overall level of control not sufficient; requires specific instructions aimed at commission of certain acts or public approval of acts following commission

### **Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007 ICJ Rep]**

- **Ratio:** Confirmed *Nicaragua* precedent ('effective control' test; must involve instructions, directions, control)
- **Facts:** B sought declaration that S or its predecessor, FRY, was responsible for genocide in connection with massacre of thousands of Bosnia Muslim men in 1995
  - ICJ found massacres amounted to genocide, but could genocide be attributed to FRY?
- **Issue(s):** were massacres committed by persons who, though not organs of S, acted on its instructions or were under its direction or control?
- **Held:** S not internationally responsible for acts; genocide cannot be attributed to it
- **Reasoning:** Art 8 in ILC Articles must be interpreted in light of *Nicaragua* "effective control" test

- Need not show persons who performed acts were in relationship of 'complete dependence' on state, just that they acted under instructions or 'effective control'
- No need to depart from Nicaragua criterion because of characteristics of genocide
- Rules of int'l state responsibility do not vary with nature of wrongful act, in absence of clearly expressed *lex specialis*
- Rejected *Tadic*: ICTY was not called upon to rule on questions of state responsibility; its jurisdiction is criminal and extends over persons only
  - 'Overall control' test is unpersuasive in context of state responsibility for acts committed by paramilitary units
  - Broadens scope of state responsibility far beyond a state being responsible only for its own conduct (i.e. conduct of persons acting on its behalf)
- Not established that massacres were committed on instructions or under direction of organs of the state, or that state exercised effective control over operations

### **State Adoption of Non-State Conduct**

- State may unilaterally adopt conduct of persons or entities with which it has no prior legal or factual connection whatsoever
- **ILC Articles on State Responsibility for Internationally Wrongful Acts 2001**
  - Art 11: conduct not attributable to state under preceding article will be considered act of state if acknowledged and adopted as its own

### **Tehran Hostages Case (USA v Iran) [1980 ICJ Rep]**

- **Ratio:** Breach of int'l law must be attributed to a state; even if act is not committed by state, it may be adopted
- **Issue(s):** how far, legally, can the acts of seizing, occupying and detaining US diplomats as hostages be regarded as imputable to Iranian state?
- **Held:** Iran has incurred responsibility toward US; must make reparation for injury
- **Reasoning:** Evidence does not establish existence of link b/n militants and competent organ of the Iranian state
  - Seal of official gov't approval was set out in decree by Ayatollah Khomeini
  - This policy fundamentally transformed legal nature of continuing occupation and detention of hostages into acts of the state
  - Militants became agents of state for whose acts Iran was internationally responsible

### **Absence or Displacement of Gov't Authority**

- Special treatment given to conduct of non-state actors where:
  - They 'step in' for gov't authorities that are absent or fail to act
    - ILC Art 9: If non-state actors put themselves in position of state actors to carry out gov't functions, they carry state responsibility
    - E.g. long-running revolution which essentially becomes the gov't
  - They forcibly displace existing gov't authorities
    - ILC Art 10: If insurrectional movement does in fact become the gov't

### **Establishing Breach of Int'l Obligation**

- **ILC Articles on State Responsibility for Internationally Wrongful Acts 2001**
  - Art 2: breach requires 2 elements - attribution of conduct to state + conduct = breach

- Art 12: act or omission must be inconsistent (not in conformity) with int'l legal obligation - secondary rules follow primary rules
  - If treaty is not in force for that state, no inconsistency with rule = no state responsibility (no such thing as a breach in the abstract)
- Art 3: Determining breach is matter of int'l law- national law is no excuse
  - *Suresh* case: In *obiter*, suggestion that Canada could in extraordinary circumstance extradite to face torture (despite absolute prohibition in int'l law)
  - Fact that SCC left this question open is not excuse for state responsibility
- Art 13: obligation must bind state at time of act or omission (temporal requirement)
  - In keeping with guarantee against retrospective application of int'l law
- Articles are silent as to general requirement for fault; contending theories
  - Q: should there be some level of fault? Degrees of negligence? Objective/subjective?
  - Majority opinion = strict liability
- ***Estate of Jean-Baptiste Caire 1929***: France v Mexico arbitration
  - C, French national, killed by officers and soldiers of Mexico – state agents
  - Issue: Could M be held responsible for unauthorized and illegal acts of its armed personnel?
  - Ratio: int'l responsibility of a state is purely objective resting on notion of indemnity; subjective notion of fault plays no role
    - no need to prove fault (i.e. that Mexico intended or was negligent resulting in death of French national); a simple causal link suffices
  - Reference to famous Italian jurist who broke ground on no-fault state responsibility
  - This can cover negligence, due diligence, acts AND omissions

### Defences/Circumstance Precluding Wrongfulness

- Some such breaches are not considered wrongful, in CIL, in certain specific circumstances
  - Justification or excuse
- Six ILC-recognized defences (ILC Articles, Ch V):
  - **Consent (Art 20)**; valid consent by state to commission of an act precludes wrongfulness
    - Can interfere in territorial jurisdiction of another state if that state allows it
    - SOFA's
    - Agreements allowing US officials to board foreign vessels
    - Air services (scheduled flights over a state are done at that state's consent)
  - **Self-defence (Art 21)**; must be in conformity with UN Charter, Art 51)
    - 'inherent' – CIL
  - **Counter-measures (Art 22)**
    - If state A breaches obligation owed to state B, state B may respond by breaching obligation owed to state A
    - State B's actions are not wrongful
    - Both a defence and a remedy
      - Self-help/reciprocity is one of ways int'l obligations are enforced
    - Counter-measures can justify an otherwise wrongful act, but still a prohibition on use of force
    - No requirement of exact symmetry, but must be some proportionality, and some limits – can't use force or breach fundamental rights (i.e. torture)
    - Should stop once other state is in compliance
  - **Force majeure (Art 23)**

- Long-standing defence
- Domestic law concept; seems logical it would be available in int'l law
- VERY high threshold to invoke successfully
- State must be facing an irresistible force or an unforeseen event so beyond the control of the State, that it is materially impossible to perform the obligation
  - Involuntary aspect – no free choice but to breach
  - Impossible – not just onerous, or burdensome
- **Distress (Art 24)**
  - Key diff's from force majeure: wrongfulness of act precluded if actor had no other reasonable way, in situation of distress, to save lives of persons in peril
    - Person is not acting involuntarily like in force majeure
    - E.g. State B's aircraft enter sovereign aircraft of State A without permission during hurricane to save lives of people on board
- **Necessity (Art 25)**
  - Recognized as reflecting rule of CIL - *Danube Dam* (state succession case)
  - Very high threshold to invoke; only available in exceptional cases
    - Subject to strict limitations to safeguard against potential abuse
    - Need a grave danger to the essential interests of the State or of the international community as a whole (inherently subjective)
    - Act taken by the State in necessity must be one such that it is the only way for the State to safeguard an essential interest against a grave and imminent peril
  - In *Danube Dam* (1997 ICJ Rep), Hungary relied on state of 'ecological necessity'
    - Issue: was there state of necessity which permitted H to abandon works it was committed to perform, without incurring int'l responsibility?
    - ICJ held peril lacked necessary immediacy
      - Necessity is exceptional measure; requirements reflect CIL
      - Safeguarding ecological balance is an 'essential interest'
      - But mere apprehension of a possible 'peril' does not suffice
        - 'grave peril' had not risen to level of imminence
      - H had other means of responding to perceived perils
        - states seemed to be in negotiation about changing terms of treaty (colours their actions– was it necessary, or were you just not pleased with negotiations?)
      - ICJ also found Israel would not meet the test in *The Wall*

## Remedies

### **Cessation, Non-Repetition, and Reparation**

- Every breach deserves reparations – consequences of internationally wrongful act for which there are NO circumstances precluding wrongfulness
- Art 30: First legal consequence = state is obliged to cease the illegal act and offer assurances and guarantees of non-repetition
  - Cessation is similar to restitution but not subject to limitations re proportionality
  - Guarantees similar to satisfaction but better treated as aspect of repairing relationship
- Art 31: obligation to make full reparation – moral or material
  - No general requirement of material harm/damage for state to be entitled to reparation

- Art 34: various forms of reparations
  - Restitution, compensation, or satisfaction
- Art 35: restitution – re-establish situation which existed before wrongful act was committed
  - not proper remedy if impossible to restore to original position
  - Compensation may be most commonly sought; restitution frequently unavailable
  - *Pulp Mills* case: ‘finding of wrongful conduct by Uruguay in respect of procedural obligations per se constitutes a measure of satisfaction for Argentina’
    - You may not get all three (usually you get one remedy)
    - Q: which is the best remedy that fits this particular breach?
- Art 36: compensation for damage caused by the wrong, insofar as not made good by restitution
  - Covers any financially assessable damage
  - *I’m Alone* arbitral award: Can’t restore boat or human lives lost, so provide payment to estate of indiv’s lost at sea
- Art 37: ‘just’ satisfaction of claim insofar as it cannot be made good by restitution/compensation
  - Exceptional remedy
  - E.g. acknowledgement of breach (court’s finding of a wrong), expression of regret, formal apology
  - Must be proportional in character and not humiliating to responsible state
  - *Arrest Warrant* case
  - Common in human right cases, similar to declaration in domestic constitutional cases
  - This is in compliance with principle that every breach deserves a reparation
- Art 40: serious breach of peremptory norm
  - Gross or systematic failure by responsible state to fulfil obligation
- Art 41: particular consequences of serious breach of peremptory norm
  - Without prejudice to other consequences, states shall cooperate to bring to end through lawful means and shall not recognize situation as lawful (duty of abstention)
  - E.g. Iraqi invasion of Kuwait in 1990

### ***I’m Alone v US (1933)***

- **Facts:** Canadian-registered vessel sunk on high seas by American Coast Guard after hot pursuit
- **Arbitral Commission:** no compensation ought to be paid for loss of ship or cargo
  - US ought to formally acknowledge its illegality and apologize to Canadian gov’t
  - Compensation paid for benefit of captain and members of crew, none of whom was party to illegal conspiracy to smuggle liquor into the US

### ***Arrest Warrant Case (DRC v Belgium) [2002 ICJ Rep]***

- **Facts:** In issuing arrest warrant against then foreign affairs minister of DRC, Belgium had violated int’l obligations (failed to respect immunity and inviolability)
- **Issue(s):** What is proper remedy for such violation?
- **Held:** Belgium must, by means of its own choosing, cancel warrant and inform authorities
  - Situation cannot be re-established merely by a finding that arrest warrant was unlawful

### ***Pulp Mills Case (Argentina v Uruguay) [2010 ICJ Rep]***

- **Ratio:** restitution is not appropriate remedy for procedural breach; assurances/guarantees of non-repetition are exceptional remedy

- **Facts:** ICJ found that Uruguay breached various procedural obligations under 1975 Statute with Argentina governing permissible uses of river (i.e. duty to negotiate prior to allowing construction of mill), but did not breach any substantive obligations
- **Issue(s):** What are appropriate remedies for Uruguay's procedural breaches?
- **Arguments:** A argues restitution (dismantling of mill) is primary form of reparation
- **Held:** Finding of wrongful conduct by U in respect of procedural obligations per se constitutes measure of satisfaction for A
  - Breaches have come to an end, so no cause to order cessation
  - U has not breached any substantive obligations, so dismantling of mill would not constitute appropriate remedy
  - Compensation for alleged 'economic' injuries cannot be ordered
  - No special circumstances requiring court to order U to provide guarantees
    - Good faith of state must be presumed

### Countermeasures

- What are counter-measures?
  - Acts of retaliation / permitted acts of self-help ("reprisals")
  - Normally illegal, but now made legal by the other state's internationally wrongful act
- A counter-measure serves in essence is both a remedy and a circumstance precluding wrongfulness
- ILC Articles, Art 49: A counter-measure is an act aimed at getting the other state to comply with its obligations
- Art 50: Limits on counter-measures
  - Human rights
  - Use of force
  - Peremptory norms
    - State A breaches bilateral treaty obligation owed to State B – State B cannot blockade A's ports (use of force & 1974 UNGA Definition of Aggression)
    - Nor can State B now torture citizens of State A
- Art 51: Counter-measure must be proportionate
- Art 52: ILC also recommended that the use of counter-measures should be dependent on prior use of peaceful settlement (this is likely not reflective of CIL)
  - Hard to find examples of states doing this
  - Art 52(3): comes up in investment law, e.g. World Bank
  - Art 52(4): Does not apply if dispute settlement not being used in good faith
- Art 53: Counter-measures must stop once other state now in compliance

### Invoking State Responsibility

#### Standing

- Who has standing to bring claims/invoke responsibility of states?
  - One of key attributes of being 'int'l legal person' is capacity to make claims
  - *Reparations Case* and assassination of UN mediator Count Bernadotte – UN has been conferred sufficient int'l legal responsibility by Charter to assert int'l claims
  - foreign state is immune from domestic courts (with exceptions), but not from international proceedings
  - companies have a nationality (*Barcelona Traction*)

- Just as there is state responsibility for injury to foreign human nationals, there can be state responsibility for injury to foreign legal persons
  - Remember *Eichmann* case
  - Ability to bring a claim on behalf of national – allows state to claim breach as its own
  - Seen as indirect injury to the state
  - But no right on part of national to have a claim brought
- **What about obligations owed to all?** Do all states have standing to bring a claim when the alleged breach is of an erga omnes obligation?
- ILC Articles, Art 42: injured state is entitled to invoke responsibility of another state if the obligation breached is owed to:
  - a) That state individually, or
  - b) Group of states incl that state or int'l community as a whole, and the breach
    - specially affects that state, or
    - the character radically changes position of all other states to which obligation is owed with respect to performance of obligation
- Art 48: any state other than injured state is entitled to invoke responsibility of another state if:
  - a) Obligation is owed to group of states incl that state established for protection of collective interest, or
    - E.g. environment, protection of human rights, or security of a region
  - b) Obligation is owed to int'l community as a whole
- First case in which ICJ granted state standing to pursue claim on basis of erga omnes obligations

### **Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) [2012 ICJ]**

- **Facts:** Former dictator of Chad, alleged to have ordered the commission of widespread acts of torture, leaves Chad for Senegal
  - Senegal declined Belgium's request for extradition and failed to prosecute
- **Arguments:** Belgium argued Senegal should prosecute or extradite him to Belgium where he would stand trial for acts of torture
  - All states parties have an interest in the prevention of torture
  - Lack of compliance by Senegal of an obligation owed to all
  - Invoking custom and Convention Against Torture
- **Issue(s):** Does Belgium have standing to bring this claim?
- **Held:** Belgium has standing to invoke responsibility of Senegal for breaches
- **Reasoning:** State parties to Convention have common interest in ensuring acts of torture are prevented, which implies obligations are owed by any state party to all others
  - So you can have standing to invoke a breach that doesn't directly or indirectly affect that state but is erga omnes partes
    - Qualified: an obligation owed to all who are parties to the treaty
    - But other states rely on this as saying you have standing to uphold an obligation owed to all
- **Analysis:** He was later convicted for crimes against humanity in a Senegal court

### **Espousal of Claims**

- Used to be that state had to take your claim up for you to have standing
  - but now HR treaties allow indiv's to bring claims
  - investment treaties like NAFTA give indiv's rights to directly bring int'l claims in special arbitral proceedings without state's permission

- An injury to a human or legal person is an indirect injury to the state of nationality
  - That state is entitled to assert a right to protect its national in a foreign state
    - known as exercising the right of diplomatic protection
  - **Diplomatic protection** is a doctrine of CIL that permits, but does not require, states to extend 'protection' to their nationals when they have suffered injuries as result of wrongful acts of other states
    - Does NOT mean they're making that indiv a diplomat
    - Long-established that a national's claim can be espoused as the state's claim: ***Mavrommatis Palestine Concessions (Greece v UK)***, PCIJ 1924
    - "the Mavrommatis fiction": the injury to M was an injury to Greece, his country of nationality
    - But only if the state desires – the "right" is at the discretion of the state, rather than a right that the person can insist upon (as seen in Barcelona Traction)
      - Case law does not support an obligation to espouse a claim
      - *Khadr v Canada*; does Canadian gov't have obligation to espouse his claim? SCC did not agree this obligation existed in int'l law
  - injured person must be a national at the time of the injury for the state to espouse
    - Comes up often with Canadian immigration
    - E.g. immigrants from Zimbabwe whose farms were expropriated without compensation now want Canada to espouse claims but can't
    - Could try to use good offices, dispute resolution, negotiation
  - **Dual nationality**
    - One country cannot espouse claim against other country of nationality – Art 4 of Hague Convention on Conflict of Nationality Laws (reflects CIL)
    - Nazanin Zaghari-Ratcliffe was dual national, similar to Kazemi (Canadian-Iranian)
      - Dominant nationality principle
    - Companies can also be dual nationals but usually country of head office
  - **ILC Draft Articles on Diplomatic Protection**
    - Trying to codify the rules and additional developments like stateless persons
    - Some procedural aspects could result in denial of ability to bring a claim
      - E.g. Nationality at the time
    - Required to **exhaust local remedies** before pursuing international claim
      - Rule once applied strictly (*Ambatielos*)
      - Now required to exhaust all available local remedies
        - E.g. if your final case was at CA and leave to SCC was denied, you exhausted all *available* local remedies
      - Burden on defending state to show that a local remedy did in fact exist (ELSI) (pp 824-826)
      - If a state waives its claim, cannot change its mind
      - Claim will fail if there has been unreasonable delay or improper behaviour on the part of claimant state

### **The Ambatielos Claim (Greece v UK) [1956 RIAA]**

- **Facts:** A entered into contracts with UK for supply of ships
  - When his action for breach of contract failed in English courts, Greece espoused his claim and dispute submitted to arbitrator
- **Arguments:** UK argued A did not exhaust English legal remedies; A argued they were ineffective

- **Held:** A failed to exhaust local remedies by not calling key witnesses or appealing negative result obtained in English trial
- **Reasoning:** defendant state must prove existence, in its internal law, of remedies which have not been used
  - non-use of certain procedures constitutes a gap in exhaustion of local remedies ONLY if use was essential to establish claimant's case before domestic courts

**Elektronika Sicula SpA (ELSI) (USA v Italy) [1989 ICJ Rep]**

- **Facts:** ELSI was Italian corporation whose shares were owned by 2 American corporations
  - Italian gov't expropriated ELSI before it could be liquidated
  - US claimed compensation on behalf of shareholders
- **Arguments:** Italy contended US espousal on basis that they failed to exhaust local remedies
- **Held:** US has standing to espouse claim
- **Reasoning:** It was for Italy to show, as matter of fact, existence of remedy open to US stockholders which they failed to employ
  - Italy has not discharged that burden