# PUBLIC INTERNATIONAL LAW – harrington 2021

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## Definition and Nature of International Law

* Public (b/c states place dominant role) international (law among states) law (entire system) (13)
* International law is the system of principles and rules designed to govern relations between sovereign states, and between states and other actors in the integrational legal system such as international organizations
* Rules can be universal (bind all) general (bind many) or particular (bind select few)
* Made by states, diplomacy and negotiation, limits on enforcement
* Why bind? Generally think practically 🡪 predictability, consent, power to compliers
* Enforced through collective sanctions, peacekeeping, courts, arbitration, diplomacy
* More info in textbook:
  + 1-7 🡪 intro
  + 11-14 🡪 defining international law
  + 43-46 🡪 why international law matters

## The United Nations

* Inter-governmental organization (that’s what we mean by international organization)
  + Founded by 51 countries in 1945, today has 193 States parties to UN Charter
* **UN Charter provides legal framework and basis (see 252 for UN Charter)**
  + **Purposes of UN (Art 1)**
    - Maintain international peace and security
    - Facilitate friendly relations
    - Achieve international cooperation
    - Be a centre for harmonizing the actions of nations
  + **Principles of UN (Art 2)**
    - 1) Sovereign equality of all members
    - 2) Fulfil obligations in good faith
    - 3) Settle disputes peacefully
    - 4) Do not use force or threat of force on integrity of other State
    - 5) Give UN assistance
    - 6) Non-members generally must act in accordance with these principles
    - 7) UN will not interfere in domestic matters
  + **Principle Organs (Art 7)**
    - **General Assembly (Arts 9-22)**
      * Does not make law. Makes resolutions/declarations 🡪 suggestions
      * Binding internally (generally 50+1, some 2/3)
      * Each member state has one vote (Art 18)
    - **Security Council (Arts 23-32 & Ch VI-VII)**
      * 15 members (P5 [France, UK, US, China, Russia] + E10)
      * Can adopt legally binding resolutions
      * Can use “all necessary means” under Ch. VII.
    - **Economic and Social Council**
    - **Trusteeship Council**
    - **International Court of Justice**
    - **Secretariat**

## SOURCES

* The rules have sources. You must provide the source for you rule anytime you cite one.
* **Article 38(1) of *Statute of International Court of Justice* (“*ICJ Statute*”) lists sources (47)**
  + **(a) international conventions (treaties!)**
  + **(b) international custom (customary international law)**
  + **(c) General principles of law (domestic up to international)**
  + **(d) subsidiarily, writing of highly-qualified publicists (including judgments)**
* See also UNSC resolutions (but not UNGA!)

## Customary International Law

* Presumption of universal application 🡪 custom applies to everyone
* **Test for customary international law (116)**
  + **State practice + *opinio juris* = rule of custom**
    - **State practice = uniform, consistent practice among states**
    - ***Opinio juris* = states feel compelled to comply**
  + Can also source rule from *SS Lotus* 🡪 France failed to source CIL rule requiring the French officer to be tried under French law in French court (insufficient state practice and no sense of obligation among states).
* **State Practice**
  + *Fisheries Case* (UK v Norway), ICJ 1951
    - **Silence is acceptance of custom**
    - UK did not object to Norway drawing straight baselines for the last 60 years, can’t object now. There is now sufficient state practice allowing the act. So, drawing such straight baselines is accepted in international law.
    - “**General toleration of States**” over sufficiently long time creates custom (118)
    - “**constant and sufficiently long practice**” (p 119)
  + *North Sea Continental Shelf*
    - Treaty can *crystallize* new practices or old ones, creating CIL rule (120)
    - Practice must be **widespread and representative** (para 73)
      * Must be **extensive and uniform**, but need not be wholly universal
      * Consider especially the practices of **specially effected states** (para 121)
  + *Nicaragua*
    - **General practice plays an “essential role”** (page 123)
    - Breach of a rule doesn’t mean there is no rule
      * If breaching state attempts to justify breach as “morally necessary” etc., they may actually be confirming the existence of a rule.
      * No firm rule on length of practice required to qualify as a CIL (fact dependent)
* ***Opinio Juris* (123 bottom)**
  + *North Sea Continental Shelf*
    - Need acts which “**evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring i**t” (para 77)
    - More than a courtesy, convenience, tradition… must be belief by States that they must comply
  + *Nicaragua*
    - This is the subjective element (para 207 on 126)
    - It addresses conduct inconsistent with the legal principle.
* Practically, that a rule of CIL exists is very hard to show, especially in a domestic court (just look at *Nevsun*!)
  + Piggyback on earlier work!
* Never forget consent: the “free will of States” (*SS Lotus*)
* Never forget: treaty and custom can operate side-by-side (*Nicaragua* para 178)
  + Niether is better than other. Have separate existence.
* **Particular (Regional) Customary International Law**
  + First exception to general CIL! Can have regional customary law
  + CIL that exists for only a small number of States (even just two: *Passage Case*)
  + Silence for PCIL is not acquiescence (as in CIL), but refusal!
    - State arguing that a rule of PCIL exists must show that every state involve has positively engaged.
  + *Colombian-Peruvian Asylum Case*, ICJ 1950
    - **To show a rule of PCIL/RCIL you must show active buy-in from members**
    - To deviate from a general rule of CIL to a regional one, need evidence that local states are on board with deviation
    - Here, Colombia would need to prove Latin States agree there is a right of asylum, not just that they’ve been silent.
  + *Concerning Right of Passage over Indian Territory* (Portugal v India, ICJ 1960
    - **As few as two states can establish a practice sufficient to source a rule of PCIL/RCIL! Must show acceptance, not merely silence.**
    - Portugal succeeded in showing right of passage between enclaves, but not for military/arms etc.
* **Persistent Objectors (137-139)**
  + Second exception to general CIL
  + A state that has “**actively** and **consistently** denied the existence or applicability to it of a rule of CIL **prior to** and **since** crystallization of that rule”
    - Recall: silence is consent to CIL (*Fisheries Case*)
  + Example of territorial sea. UK objected, saying it was 3 miles not 12.
  + Example of Canada with UNDRIP!
* **General Principle of Law as a Source**
  + Old view: “principles rooted in good sense and common practice of civilized nations – a modern law of nature” (Lord Asquith in Abu Dhabi Oil Arbitration, pp 142)
  + Now: principles and rules found in domestic legal systems
    - *International Status of South-West Africa*, ICJ Adv Op 1950
      * Drew on fiduciary duty notion to expand on how parent States must treat trust States
  + Tend to be procedural principles
  + Methodological problems.

## Treaties

* References if needed
  + 48-49 🡪 concept and definition of treaty
  + 49-53 🡪 legal essence of treaty
  + 54-68 🡪 making of a treaty
* **Definition:** 
  + An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (VCLT art 2(1)(a) (pp49)).
  + States can make oral treaties, so long as they consent (*Legal Status of Eastern Greenland* (Denmark v Norway), PCIJ 1933)
* **Capacity to make treaties** 
  + Every state possesses capacity to make treaties (VCLT Art 6)
  + Non-States cannot make treaties (*Anglo Iranian Oil Case*)
    - Though watch out for intergovernmental entities!
  + Test for if something is a treaty: look to objective intention of parties objective
    - Did the States intend to enter an agreement governed by international law? (*Qatar v Bahrain*, 1994 ICJ pp52)
* **Intertemporal Law**
  + Treaty validity determined in accordance with law applicable at treaty’s conclusion. (*Rights of Passage* (Portugal v India))
    - This is also a rule of international law generally, see ILC 2001 Arts on State Responsibility Art 13.
* **Treaty Making**
  + First, negotiations.
    - Ask: who has power to represent the State?
    - Default: head of State, foreign minister. Can declare others.
  + Domestic constitutional law aspects
    - Federal executive has sole power to enter treaties for Canada
      * Under POGG (old royal prerogative)
    - See *Labour Conventions Case*
  + Negotiations lead to adoptionof text (60)
  + States must then give their consent to be bound: ratify
    - State signals its intent to be bound by the treaty.
  + Signatory 🡪 not yet consented to be bound, signalling likes draft.
  + Party 🡪 consented to be bound, have ratified.
  + Adopted text 🡪 final version
  + Ratification 🡪 process by which a State consents to be bound.
  + If you are not a signatory, but want to become a party 🡪 accede to the treaty.
    - Same essentially as ratification but for non-signatories.
* **Registration and Publication**
  + Every treaty entered by a UN member must be registered and published with UN secretariat (UN Charter Art 102; VCLT Art 80)
* **Entry into Force 🡪 Treaties enter into force when the States parties say it does.**
* **Reservations (pp70)**
  + “**a unilateral statement**, however phrased or named made by a state, **when signing**, ratifying, accepting, approving or acceding to a treaty, whereby it purports to **exclude or to modify** the legal effect of certain provisions of the treaty in their application to that State.” (VCLT art 2(1)(d))
  + Key: if the statement is modifying or excluding legal affect, it’s a reservation
    - Otherwise it may be just an interpretative aid statement
  + Other States Can:
    - Stay silent 🡪 but worry that silence is acquiescence (may form CIL!)
    - Discuss 🡪 diplomatic pressure etc
    - Object formally 🡪 “objections” with treaty depository
      * Helps to halt CIL
  + **Validity of Reservations** 
    - Old view: required unanimous consent of other parties for valid reservation
    - *Reservations to the Convention on Genocide*, Adv Op, ICJ 1951
      * States can make any reservation they want… but it cannot object to the object and purpose of the treaty in question (73)
      * No unanimity requirement though.
    - VCLT codified this in Art 19 (76)
      * You can issue a reservation unless:
        + (a) reservations are prohibited by the treaty
        + (b) only special reservations are allowed, and yours doesn’t fall into that category
        + (c) the reservation is incompatible with the object and purpose of the treaty
  + **Reservations and Human Rights Treaties** 
    - HRC issued general comment in 1994 embracing ICJ’s object and purpose test (pp79)
    - Goes further: claims that the HRC itself determines if a reservation is incompatible with a treaty’s object and purpose (para 18)
    - Goes further still: claims that an unacceptable reservation “will generally be severable” (top of pp80) [quite controversial! Violates consent!]
  + Some treaties do not permit reservations (see e.g. *Rome Statute* Art 120)
* **Treaty Amendment & Modification (83-85)**
  + Amendment
    - By mutual consent of the states parties (VCLT Arts 39, 40)
    - States only bound to amendments if they consent.
    - States must give notice of amendment to other States parties
  + Modification
    - Between only some of the States parties
    - A set of different rules for a small group only.
* **Obligation to Perform** 
  + Must perform treaty obligations in good faith (CIL rule: *pacta sunt servanda* (and VCLT Art 26))
  + Corollary obligation: national law is no excuse for non-performance (*Treatment of Polish Nationals*, PCIJ 1932 (pp85) + VCLT art 27)
    - Difficulty for federal states, sometimes add a “federal clause” 🡪 national government *shall* (must) comply, other domestic entities (provinces!) *may* (can) comply. 🡪 in practice these are difficult to achieve (non-federal states see no reason to introduce them!) (e.g. of American Convention on Human Rights)
* **Scope of Obligations (88)**
  + States can negotiate their own treaty rules (e.g. WTO), else look to VCLT
  + Temporal scope 🡪 treaties are not retrospective unless parties want them to be (VCLT Art 28)
  + Geographic scope 🡪 treaty binds for entire territory unless they negotiate otherwise (VCLT Art 29)
    - Denmark sometimes does this for Greenland.
* **Binding Third Parties** 
  + Generally, no. 🡪 see autonomy and consent (VCLT art 34)
  + But, *Free Zones*
    - Nothing to prevent State from bestowing a benefit on a third party.
  + Benefits can be given to third party, with consent assumed, unless they indicate otherwise (VCLT 36)
  + Burdens cannot be given to a third party, unless that third party accepts (VCLT 35)
* **Treaty Interpretation (91-97)**
  + General rule: text (plain meaning + common sense) + purpose + context
    - A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (VCLT Art 31)
    - Ordinary meaning is key, with context and subsequent practice too!
  + Supplementary work (including *travaux preparataives*) can also inform (VCLT Art 32)
  + Don’t forget intertemporal law (94-97)
    - *France v USA,* ICJ 1952
      * “dispute” in 1836 treaty: civil and crim, or only civil?
      * Court takes strict approach.
    - *Greece v Turkey*, ICJ 1978
      * “territorial” in 1928 treaty extent to continental shelf?
      * Court looks to context and surrounding features
    - *Costa Rica v Nicaragua*, ICJ 2009
      * “commercio” include trade in goods and services, or only goods?
      * Court sets a nice middle ground
      * The general view is that you look to plain meaning first, then add in context, then subsequent practice, then other documents.
* **Invalidity of Treaties (arts 46-53 VCLT, pp97)**
  + States want to make it difficult to invalidate a treaty.
  + *Jus Cogens* exception 🡪 a treaty is void if it conflicts with a peremptory norm of international law (VCLT Art 53)
  + A state may invoke an error in a treaty as invalidating its consent (VCLT Art 48)
    - This has a high threshold, *Temple of Preah Vihear*, ICJ 1962
    - Cannot have contributed to the mistake!
  + Treaty is void if its conclusion was brought about by threat or force (VCLT Art 52)
  + Consent to treaty is of no legal effect if brought about by fraud (49) corruption (50) or coercion (51) (VCLT 49-51)
* **Termination of a Treaty (103)**
  + Generally covered by treaty itself, or by consent of all parties.
  + Must give notice to withdraw from a treaty, 12 months is default (Art 56)

## Other Sources & *Jus Cogens/Erga Omnes* obligations

* **Art 38(1)(d) of *ICJ Statute***
* Judicial Decisions
  + Subsidiary but persuasive
  + Decisions of ICJ not binding except between parties in that case (Art 59 ICJ Statute)
  + Can include domestic judicial decisions
* Writings of Academics
  + Use as supplementary basis… also use ILC like this!
  + Shabtai Rosanne, Hersch Lauterpacht, Gerald Fitzmaurice etc
* International Law Commission
  + 1947 creation
  + Both **codify and develop international law**
* **Sources of binding international obligation besides Art 38(1)**
  + Unilateral declaration (145)
    - State, as sovereign, can bind itself unilaterally!
    - *Nuclear Tests Cases* (Australia v France), ICJ 1974 (145-147)
      * France made public its intention to cease conduct (para 41)
      * States intention is key 🡪 unilateral acts/declarations can create obligation if the host state so intends (para 43)
      * Need to examine the circumstances to ground an obligation
        + Public nature of statement, intention to bind, principle of good faith…
  + Soft Law (151)
    - Not legally binding… but they might one day become such (*lex ferenda*)
  + UNSC Resolutions
    - UN member states agree “to accept and carry out” decisions of UNSC (UN Charter Art 25)
    - Security measures “shall” be taken by members (Art 48)
    - UNSC measures taken under Art 41 re international peace and security bind states.
    - Canada implements this nationally with *United Nations Act*
* ***Jus Cogens* (153)**
  + Special characteristic of certain rules
  + Higher law, no derogation permitted 🡪 no contracting out!
  + ILC: slavery, genocide, racial discrimination and apartheid, torture (154)
* ***Erga Omnes***
  + “beset by even greater uncertainty” (155)
  + Obligation owed to all states
  + “the concern of all states” (*Barcelona Traction*)… all states under obligation not to recognize and not to aid or assist (*The Wall*, para 159 at pp156)

## domestic Element of international law

**National Application of International Law**

* The rules for reception of international law domestically is a matter to be reserved in each state
  + Monism (adoptionist) 🡪 generally civil law
    - There’s one body of law, international and domestic law form a single body
  + Dualism (transformationalist) 🡪 generally common law
    - Separate bodies of law, domestic system must “transform” international rule into a domestic rule (UK use “incorporate”)
  + Canada: dualism for treaties but monism for custom
* **Canada**
  + *Capital Cities* 1978 SCC
    - Lawyers for US TV rely on 1937 treaty to challenge CRTC decision
    - Laskin: treaties not self-implementing! Requires national implementation
      * Typically that comes through an Act of parliament
      * Here, no implementation, so the treaty need not modify our domestic law.
    - Pigeon J in dissent 🡪 but note that we assume that Canada intends to comply with our international obligations
      * So if a domestic statute is ambiguous, interpret it so that it complies with Canada’s international obligations
      * Only a presumption, and only for ambiguity!
  + *Francis v The Queen* 1956 SCC
    - Treaty rule must be transformed through domestic law to have domestic legal effect.
    - Kerwin CJ \*exception\*
      * Some treaties don’t need implementation legislation by their nature 🡪 see peace treaties (interstate, don’t need domestic legal effect)
    - Jay treaty
* **Treaty Transformation** 
  + *Labour Conventions Case*
    - Canada ratified conventions about labour, provinces made because impacts their jurisdiction.
    - Lord Atkin:
      * **Power to make =/= power to implement**
      * **Treaty implementation must respect the division of powers. Federal executive can make treaties, but implementing must be done by correct level of government under s91/92.**
    - “Well established rule that making of treaty is an executive act, while the performance of its obligations, *if* they entail alteration of the existence domestic law, *requires legislative action*”
  + Aussies, btw, are total opposite: *Tazmanian Dam Case*
    - If executive can make, executive can implement.
* **Direct Significance of Treaties** 
  + IF implemented treaty
    - *National Corn Growers* 1990 SCC (4-3)
      * GATT implemented through SIMA
      * Look to treaty to resolve any “latent” ambiguity in domestic legislation
      * Wilson in dissent: don’t go beyond statute!
    - *Pushpanathan* 1998 SCC
      * On Refugee convention and Immigration Act
      * Free to look to treaty to inform the meaning of the treaty… they even mention VCLT rules on interpretation
  + IF unimplemented treaty
    - *Baker v Canada* 1999 SCC
      * Convention on the rights of the child.
      * Dube uses the values of the international agreement to interpret the domestic law.
      * Values of unimplemented treaties provide context for domestic interpretation of domestic statute.
      * Harrington Crit: what’s the difference?
        + Also, surely art 3 is a rule of CIL too!
* **Domestic Effect of Custom** 
  + *Trendex Trading* UK 1977
    - Doctrine of adoption: rules of CIL are automatically adopted into UK law.
  + *R v Hape* 2007 SCC
    - “absent an express derogation, courts *may* look to prohibited rules of CIL to aid in the interpretation of Canadian law and the development of the common law”
  + *Nevsun Resources* 2020 SCC
    - Canada follows automatic incorporation of CIL to domestic law, absent conflicting legislation
* **International Law as Interpretive Aid**
  + *Slaight Commerce* (175) 🡪 content of Canada’s international human rights obligations is indicia of whole benefit of Charter’s protection (p175)
  + SCC has affirmed that Charter presumed to provided at least as great protection as is found in international human rights treaties.
    - *Health Services and Support* 2007 SCC 27 at paras 69-70
    - *Divito v Canada*, 2013 SCC 47 at paras 22-23
    - *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 64-65
    - *India v Badesha*, 2017 SCC 44 at para 38
    - *Ktunaxa Nation v British Columbia*, 2017 SCC 54 at para 65.
  + *Suresh v Canada* 2002 SCC (176-178)
    - International law places total prohibition on State sending individual to another State when risking real risk of torture.
    - Para 75: international law rejects deportation to torture…
    - Para 78: we do not exclude that doing so may be justified!
    - When push comes to shove, we value domestic law over international law.

## INTERNATIONAL DISPUTE SETTLEMENT

**The ICJ**

* Principal judicial organ of UN (UN Charter art 92)
  + All member states are ipso facto parties to ICJ Statute, all UN states can access the court (UN Charter Art 93, pp289)
* **Composition**
  + 15 judges. Must reflect “many forms of civilization and legal systems of world” (art 9 of ICJ Statute, pp291)
  + President casts an additional vote if a tie (since judges often recuse, and parties before a court may appoint a judge of their own nationality) (*Legality of the Threat or Use of Nuclear Weapons*, adv op 1996)
* **Functions**
  + Hears contentious cases (contentious jurisdiction) and advistory jurisdiction (asked by any UN organ – States cannot ask)
  + Can be interveners, but only other States!
* **Jurisdiction** 
  + Need a basis of state consent in order to appear before the ICJ (cannot compel)
  + 1) Special Agreement/Consent *ad hoc* (293)
    - *Compromis* – agreement to appear before the court.
  + 2) Treaties that contain compromissory clause (293-294)
    - Often done in the 60s… fairly common method to get to court.
    - Though today more treaties include arbitration options instead
  + 3) Optional Declaration under ICJ Statute Art 36(2) (294-295)
    - ~75 states have done this.
    - Almost all have some reservations
    - Canada: reserves commonwealth disputes and fishing and domestic jurisdiction
      * *Spain v Canada*
        + Canadian coast guard cut fishing nets on boundary, Spain tried to take us to ICJ, we amended our declaration removing jurisdiction over fishing disputes!
        + “Turbot war”
* **Absent Defenders** 
  + *Nuclear Tests Case*
    - France, after losing the jurisdiction aspect of case, refused to participate
* **Effect of ICJ Judgment**
  + Binding on parties to case in that dispute (UN Charter Art 94, 298)
  + Only persuasive to everyone else.
  + No appeal
  + Recourse to UNSC if States do not comply (no help with P5 obvs!)
* **Adv Ops**
  + UNSC, UNGA, Un agencies can ask for advice on any legal Q (UN Charter art 96)
  + UNSC uses for weaker states (since only need 50+1)
    - *The Wall, Kosovo Independence, Chagos Archipelago*
* **Judicial Review Power?** 
  + UN Charter is silent on this. (301-305)
  + Justice Schwebel (US Judge) 🡪 can’t imply review power in
    - We can’t assume ICJ gets it by default since many systems do not give judges that power
    - Lockerbie case: jurisdiction and power of review
      * Around 303 🡪 only operates on powers given by states, and states didn’t clearly give it this power.

## **STATEHOOD**

**States and their Recognition**

* Criteria for Statehood (181)
  + - Source: 1993 *Montevideo Convention on Rights and Duties of States*, art 1 (embodying a rule of CIL)
  + Permanent population
  + Defined territory
  + Government (effective!)
  + Capacity to conduct international relations (link to recognition)
* Burdens on Statehood
  + Illegality of creation (Rhodesia as “illegal racist minority regime” UNSC)
  + Violation of principle of self-determination
  + Creation through unlawful use of force
* Recognition
  + No legal duty to recognize (200)
    - **Declaratory position (dominant) 🡪 statehood does not depend on recognition; it follows!**
    - Constitutive approach 🡪 not a state unless generally (not universally) recognized (minority view)
  + Non-recognition can be evidence that an entity has not attained Statehood (Arbitrator Taft in *Tinoco Arbitration*)
* Recognition of a government (not a state!)
  + **Estrada Doctrine (208-209)**
    - Recognition of a government should be based on de facto existence, not legitimacy (recognize states, not governments!)
      * Based on non-intervention and national sovereignty
      * US, UK, others adopt this approach
  + **Tobar Doctrine (209)**
    - Ecuadorian view 🡪 non-recognition for illegal changes in government (e.g. if coup takes over illegally under own constitution)

**Key Corollaries of Statehood**

* Rights
  + Sovereignty (237-238)
    - Right to independence (1949 ILC Draft Decl, art 1)
    - Right to choose form of government (1949 ILC Draft Decl, art 1)
    - Right to exercise jurisdiction over its territory (1949 ILC Draft Decl, art 2)
  + Sovereign Equality (238-240)
    - Equality in law to every other State
    - Various elements: 1970 Friendly Relations Declaration
* Duties
  + Do not intervene in another State’s affairs
    - Non-use of force
    - Non-aggression
  + Duty to respect international law, perform obligations in good faith
  + Duty to respect human rights without distinction

**States and Change**

* **State Succession** 
  + Replacement of one State by another
  + A change in sovereignty over territory, not just in government.
  + Types of successions (*Vienna Convention on Succession of States in Respect of Treaties* – VCSSRT)
    - Dissolution
    - Unificiation or merger
    - Incorporation of one into another
    - Secession of one part of a state
    - Cessation and handover of one part to another State
  + Easy answer is agreement.
  + If not, rely on CIL and VCSSRT
    - Low ratification 🡪 art 16: newly independent state benefits from “clean slate” approach to treaty obligations (non-automatic transmission of treaty obligations)
  + Clean slate vs continuity
    - Clean slate view supported by colonization period, earlier practice supports continuity.
      * Low ratification suggests states do not buy that different rules apply to different scenarios 🡪 violates equality of states!
    - In practice, more complex. Even if general rule of non-automatic transmission of treaty obligations, some exceptions
      * E.g. localized treaties! (215) these bind the new state
      * Most generally accept a clean slate view
    - Exception for territorial regimes
      * Art 11 🡪 succession does not affect a boundary established by treaty
      * Art 12 🡪 extends to other territorial regimes
      * Supported in *Danube Dam Case* by ICJ
        + Also applies to treaties concerning water rights or navigation on rivers.
  + Uti Possidetis (Libya/Chad)
    - “once agreed, the boundary stands” (217) 🡪 decolonization context originally… but extended now 🡪 idea that leaving borders stable avoids bloodshed, increases stability.
    - Embraced by ICJ in *Burkina Faso v Mali* 🡪 resonates in former Yugoslavia
  + Human rights do not pass automatically 🡪 we need consent!
  + *Vienna Convention on State Succession in Respect of State Property, Archives, and Debts* (VCSSRSPAD)
    - Only 7 signatories.
    - Basically just a matter of negotiations.
    - Colonial states generally do not pass on debts.
* **State Continuity**
  + States persist even when governments change (225)
  + *Tinoco Arbitration*
    - Illegal internal changes in government do not modify external State obligations (there, the context of loans!)
  + *Velasquez Rodriguez* human rights case 🡪 we hold the state responsible!

## **Intergovernmental Organizations as International Subjects**

* IGOs 🡪 organizations of states!
* ***Reparations*, Adv Op 1949 ICJ**
  + UN sought reparations for assassination of Bernadotte in Israel.
  + ICJ: UN has international legal personality sufficient to bring claim
    - Founded by States!
    - Test
      * 1) IO must be permanent associations of States, engaged with organs
      * 2) There must be a distinction between the organization and its members
      * 3) Organization must have legal powers exercisable on the international plane
* **UNGA 🡪 aims for universal membership**
  + Criteria for membership (UN Charter Art 4, 254-255) applied liberally
  + Consists of all UN member states (Art 9)
  + Each member has 1 vote (Art 18)
  + Can discuss any matter relating to anything under Charter (Art 10, 262)
    - Exception is when UNSC is seized of a matter (art 12)
  + ***The Wall*, Adv Op ICJ 2004**
    - Art 24 gives UNSC *primary* obligation to control peace and security… but that “primary” still leaves some room for UNGA (when UNSC isn’t ‘seized’ of the matter).
* **UNSC 🡪 coercive authority!**
  + Art 24 🡪 peace and security is its breadbasket, can compel action.
  + Veto Power
    - Votes require affirming vote of 9, including all permanent (veto power!) (Art 27(3))
    - US is #1 and it isn’t really close.
  + **Ch VI 🡪 peaceful means to resolve disagreements (273)**
    - Art 33 🡪 can investigate and recommend peaceful settlement
    - Art 34 🡪 investigate any dispute likely to endanger the maintenance of international peace and security
    - Art 35 🡪 States may also bring dispute to UNSC
  + **Ch VII 🡪 use of force** 
    - Art 39 🡪 determines existence of threat to peace
    - Art 41 🡪 determination of invoked response not using force
    - Art 42 🡪 use of force
    - Can also create courts! (ICTY, ICTR)
* **ICTY** 
  + Dusko Tadic 🡪 UNSC made court and appeal tribunal.
* **Supremacy of the UN Charter (280-281)**
  + Obligations of UN Charter prevail over other international agreement (Art 103)
  + Accept and carry out decisions of UNSC in line with Charter (Art 25)
  + All members or some must carry out UNSC actions, can also be with international agencies (Art 48)
* **Secretariat** 
  + International civil service for UN
  + Can bring matters of concern to UNSC through UNS-G (art 99)
  + Shall not seek or receive instructions from any government (art 100)
* **Who are not subjects?** 
  + Individuals are not subject to international law as of right. Need state consent to bring claims (investor, human right, etc)
  + Corporations are generally not subjects
    - But see *Nevsun*: corps are bound to rules of CIL!

## JURISDICTION

**State Jurisdiction over Land**

* **Categories of Territory (308)**
  + Sovereign = territory of the State
  + Res Nullius/Terra Nullius 🡪 can be acquired, not currently subject ot any state’s control
  + Res Communis 🡪 is not and cannot be subjected to a State’s exclusive control (e.g. sharing of sea) – no profit sharing from plunder required
  + Common Heritage of Mankind 🡪 no control, no profit of state (must be shared for benefit of all) – e.g. moon, deep sea bed.
* **Intertemporal law applies as well to acquisition of territory! (309-310)**
  + *Island of Palmas* (310) 🡪 difference between creation of rights and existence
    - Some means of holding today may be so offensive as to bar continuation
* **Discovery 🡪 the best known means for Euros to acquire (312)**
  + *Tsilhqoit’in Nation v BC* (2014 SCC 44) para 69: *terra nullius* never applied in Canada
  + *TRC* Call to action: repudiate Terra Nullius and Doctrine of Discovery
* **Methods of Acquisition** 
  + Conquest 🡪 no longer legal (b/c of practice and *opinio juris*)
  + *Island of Palmas* (314) outlines several:
    - Dominant method is effective occupation
* ***Island of Palmas Arbitration*, 1928** 
  + Netherlands: we got it by discovery + effective occupation OR prescription
  + US: no, we got it by cessation from cession from Spain
  + *Nemo dat quot non habet* 🡪 cannot cede what you do not have!
  + Discovery alone does not give title
    - Only grants inchoate title, must be perfected by effective occupation
    - Discovery alone cannot best continuing and peaceful occupation by another State
  + **Terra Nullius + Discovery + Effective Occupation** = sovereignty
  + Prescription is good too (long, continued, uninterrupted, continuous and peaceful display of state authority) (331)
  + Contiguous principle is a moderately helpful guesstimate
* **Effective Occupation** 
  + Strongest basis (322)
  + Continuous display of state control, accompanied by establishment of permanent exclusive control
    - Pragmatic: relaxed for remote areas (*Eastern Greenland*, 325-327)
  + Western Sahara 🡪 TN is a term of art, not of fact!
  + *Kasikili/Sedudu Island*, ICJ 1999 (333)
    - Land can be acquired by prescription
    - Test
      * 1) Possession exercised by the sovereign [key in this case]
      * 2) Possession is peaceful and uninterrupted
      * 3) Possession is public
      * 4) Possession must endure for a certain length of time
* **International law is also practical: geomorphological realities can inform policy**

## Peoples and Self-determination

* **Individuals are not traditional subjects of international law… but collectives, peoples, are.**
  + They have a *degree* of international legal personality.
  + The right of self-determination.
* **Principle/Right of Self-determination (345-348)**
  + UN Charter Art 1(2), *Namibia Case*, Woodrow Wilson speeches
  + Also in ICCPR and ICESCR Art 1
  + Right of SD also finds source in regional international human rights agreements
  + UNGA declarations too 🡪 especially in colonial contexts
  + External SD 🡪 secession
    - Generally not allowed, seen in post-colonial context though
* **ICJ Guidance (348-356)**
  + *South West Africa* Adv Op, 1971
    - Mandate territory emerging from colonialism 🡪 “sacred trust;” illegal to acquire land against a mandate
  + *Western Sahara* Adv Op, 1975
    - Decolonialization, es**sential feature of self-determination is the free and voluntary choice by peoples of the territory**
  + *East Timor Case* (Portugal v Australia), 1995
    - **Self determination is “one of the essential principles of contemporary international law”**
    - **SD has an *erga omnes* character**
  + *Legal Consequences of the Wall* Adv Op 2004
    - Confirms *erga omnes* character of SD
    - Para 118: right of self-determination
    - Para 122: wall would impede Palestinian SD 🡪 acquisition by annexation!
* Does the right extended to colonial peoples to self-determination also apply to Indigenous Peoples?
* **ILO Convention 169 🡪 legally binding treaty (1989)**
  + Does not mention indigenous self-determination … also only 23 ratifications
* **UNGA UNDRIP 2007 🡪 not law! Not a treaty!**
  + Final text adopted by vote in Sept 2007 (Can, USA, NZ, Aus against)
  + Canada finally accepted without qualification in 2016.
  + Canada was concerned with
    - Art 26: right to lands, resources, traditionally owned or occupied
    - Art 46: a limit provision
      * No impairing country unity/territorial integrity of States
      * Only for recognition and respect
    - Art 3 (not an issue): Indigenous Peoples have a right to self-determination
* ***Quebec Secession Reference*, 1998 SCC** 
  + **Right of self-determination *may* give right to right of secession… but the right to secede is not an automatic consequence of having the right of self-determination**
  + SD is a right held by people, not individuals
  + Right has operation within a framework of respect for the territorial integrity of existing states (para 127 on pp 363)
  + The right has internal and external character
  + KEY (para 139 on 366)
    - **Right to secession only arises in 2 contexts:**
      * **Colonization context OR oppression context**
      * [ICJ chose not to develop this beyond this point in *Kosovo Adv Op*]
* ***Chagos Island* Adv Op, ICJ 2019**
  + Decolonialization context, says UK has obligation to bring to an end its control of Chagois island and complete decolonization.
  + UK is not really…. Since US military base there!
  + Also, this is an adv op, not technically binding on UK.

## **State Jurisdiction over Persons, Conduct, Events**

* ***SS Lotus*, 1927 PCIJ 🡪 the common starting point** 
  + 1) failing the existence of a permissive rule to the contrary, one state may not exercise its power in any form in the territory of another state (476)
    - Enforcement jurisdiction is limited to your own territory
    - Territorial integrity, non-interference
  + 2) This does not mean that a State is barred from exercising jurisdiction in its own jurisdiction in respect of acts which took place outside of its territory (488)
    - Prescriptive jurisdiction has no such limit
    - Though, for reasons of comity, most States do not.
  + A state may enact laws about the extraterritorial conduct of persons… but can only enforce within its own territory
  + 3) Fundamental rule that State has power over all persons, property, and events within its territory.
* **Enforcement Jurisdiction** 
  + Territorial! So, you have to get a person into your state to enforce laws against them.
  + ***AG Eichmann*, Dist Ct 1961**
    - Was his forced presence is Israel problematic? Oust domestic court jurisdiction?
    - No!
    - This was a breach of international law: Israel breached Argentina’s laws.
    - Violations of international law by one state against another does not bar that court from assuming enforcement jurisdiction against a human person in a domestic court case against that domestic person.
  + ***United States v Alvarex-Machain*, US SC 1992**
    - Maj: state kidnapping does not bar an individual’s trial in domestic court for violations of domestic law.
    - Dissent: “this is a monstrous decision”
    - Canada and Mexico intervened: mad that extradition processes weren’t used.
  + ***Ex Parte Bennett*, UK HL 1994**
    - When a process of law is available to retain an individual through extradition, the courts in the UK will refuse to try that person forcibly brought within their jurisdiction in disregard of those principles
      * Must not “turn a blind eye to executive lawlessness”
  + **Extradition 🡪 legal means to gain custody over a person** 
    - Only available for criminal matters. Usually bilateral treaty (but need not be)
    - Governed by statute (extradition act)
    - UN Model Treaty on Extradition
      * Sets out timelines on conditions and terms
      * Mandatory (art 3) and optional (art 4) exceptions are common
        + Death penalty (Canada has this, for s7), civil law countries often refuse to extradite their own nationals.
  + **Deportation 🡪 a state can depart a non-national back to their home country (and advice as such! Getting around extradition worries)**
* **Prescriptive Jurisdiction (488)**
  + Many grounds, some more controversial than others.
  + **Territory** (491-499)
    - Make/enact laws concerning acts on their territory
    - Criminal Code s6(2) 🡪 not conviction for offence outside Canada (subject to exceptions – e.g. sex tourism!)
    - Objective territoriality 🡪 offences completed in territory
    - Subjective territoriality 🡪 broader, permitted… but CL often uses obj
    - *R v Libman*, 1985 SCC
      * Not just objective, but “real and substantial connection”
      * If the acts had a “real and substantial connection” to the conducting of the rest of the offence, we can have jurisdiction.
    - US “effects doctrine” 🡪 it goes too far (496-499)
      * Anything which has an effect on US gives them jurisdiction
      * Can be “blocked” with e.g. FEMA (497)
        + Prohibits compliance with an order if Minister demands
  + **Nationality (active personality) (499-508)**
    - States can make/enact laws concerning the nationality of the perpetrator
    - Permits but does not require States to exercise jurisdiction extra-territorially on nationals (common in civil law, no extradition!)
    - **Acquisition of Nationality**
      * It is for each state to determine its own citizens (499 – 1930 *Hague Convention* Art 1)
        + Jus Soli (territory of birth) or jus sanguinis (national birth) or something else even.
      * ***Nottebohm* (Liechtenstein v Guatemala) (500-503)**
        + When someone has competing citizenships, need a genuine link (502)
        + That link, though, can just be the formal citizenship itself.
        + ICJ finds that Nottebohm’s connection with Liechenstein were “extremely tenuous”… G under not obligation to recognize nationality granted in circumstances suggesting no bond of attachment… no genuine link!
        + Modern twist: 2020 EU seems intent on using the “genuine link” test!
      * ***Barcelona Traction* ICJ 1970 (505)**
        + Belgium sues Spain over loss to Belgian nationals for Canadian company carrying on business in Spain bankrupted by Spanish government.
        + ICJ: the injury was sustained by a Canadian national (Barcelona Traction headquartered in Canada!), so it’s Canada that needs to bring this action, not Belgium!
  + **Passive Personality** (508)
    - Concerning the victim’s nationality
    - Some do this, technically permitted? But some also object.
    - Canada eg. *Crimes Against Humanity and War Crimes Act* s8(a)(iii)
    - More and more common for e.g. victims of terrorism
  + **Protective Principle** (509)
    - Concerning essential interests of the State
    - E.g., threatening the political or military security of the State; counterfeiting abroad.
    - *Joyce v DPP*, 1946 AC 347
      * Captured and tried in England after the war on basis that he undermined the British war effort.
  + **Universal Jurisdiction** (510-521)
    - Some crimes are of such a nature that all States have jurisdiction
    - Applies to offences of an international character and of serious enough concern to the international community as a whole that it is accepted by States that these offences may be punished by whichever State has custody of the offender.
    - Nature of the offence guides the jurisdictional base!
      * Piracy is the oldest and clearest example.
      * Any state could choose to punish the *hostis humani generis* – enemy of mankind.
    - ***AG Eichmann* 1961**
      * There is universal jurisdiction for crimes that strike “at the whole of mankind” – “grave offences against the law of nations itself”
      * UJ thus includes: genocide, crimes against humanity, and serious violations of laws and customs of war.
      * CAH definition: heinous acts, such as murder, extermination and enslavement, committed as part of a widespread or systematic attack directed against any civilian population (Rome Statute, art 7) (932-938)
    - **Dual motivation: nature of the offence and beyond any one state’s jurisdiction/lack of international court. (*Eichmann* para 12, 510)**
    - **Canada: *CAHWRA* s8 🡪 we require a “presence connection” … we are not a pure universal jurisdiction country (unlike Belgium!)**
    - *Arrest Warrant Case*, ICJ 2002
      * Court was split on UJ…
      * French judge: you can’t have that
      * US/UK/Dutch: just because they haven’t yet, doesn’t mean you can’t.
  + Plus, as always, **consent**!

## Law of the sea/ state jurisdiction over water

* Canada has brought nearly all of these rules into the domestic sphere with the *Oceans Act* (1996)
  + Canada-US border waters issues handled by 1909 Boundary Waters Treaty
* Desire for clarity left to Geneva Convention in 1958: 5 treaties
  + Some codification… but low ratification.
* UNCLOS III conference, led to adoption of *UN Convention on the Law of the Sea UNCLOS* in 1973 (US call it LOST) – adopted in 1982, force in 1994
  + Prevails over earlier treaties for parties (art 311(1))
  + But because US not a party, awareness required for when UNCLOS now reflects custom, and when need to go to old treaties.
* **Baselines (394)**
  + Physical coastline when tide out is usual starting point (UNCLOS art 5)
  + For deeply indented coastlines, see *Fisheries Case* and Art 7 for drawing of straight-baselines
    - Canada does this in the arctic, EU opposes this
  + Waterway on landward side of baseline are internal waters (Art 8, 399)
  + 12 nautical miles out are territorial waters/sea/maritime belt
* **Bays**
  + Baseline follows indents of coastline, unless mouth of bay is 24NM or less (art 10(4))
  + If bay mouth >24NM, and bay has “major historical connection” can still draw baseline across (art 10(6)).
    - Matters for Canada b/c of Hudson’s bay
* **Territorial Waters**
  + Cannon shot rule 🡪 3NM 🡪 art 3 adopts 12NM (399)
  + This is now CIL
  + Coastal State has sovereign jurisdiction over its territorial sea (Art 2(1))
  + Not absolute sovereignty
    - Must allow right of innocent passage (art 17, 402)
    - Definition of innocent passage (art 19)
      * No fishing, spying, polluting, etc.
    - Right can be regulated, but not denied by coastal state (art 21)
    - Passage must be continuous and expeditious (art 18(2))
    - Coastal state can enact laws for safety of navigation (art 21)
    - Coastal state can designate sea lanes (art 22)
* **Ports and Ships**
  + Ports are often internal waters, so other ships there on consent.
  + Ships have nationality 🡪 registration 🡪 flag state jurisdiction applies on ship
  + Warships immune from foreign state enforcement (art 29)
  + State immunity for state ships!
* **Contiguous Zone (423-424)**
  + State can claim an addition 12NM from the territorial sea for certain matters (art 33)
  + Permitted uses (art 33(1))
    - Buffer zone (French), public infringement of customs fiscal immigration sanitary laws, stopping the smuggler early
  + Canada has claimed its contiguous zone for enforcement (*Oceans Act* s10 (424))
* **International Straits** 
  + Many would’ve been closed off on move to 12NM territorial sea
  + *Corfu Channel Case* (UK v Albania), ICJ 1949
    - Strait = connecting one high seas area to another
    - Foreign ships, including warships, have right of passage through straights without prior consent of coastal state
    - Coastal state cannot hamper right of passage, cannot prohibit
    - Doesn’t matter if alternative route
    - But must be for passage… not minesweeping!
  + *Corfu* was further codified in UNCLOS (409-411)
    - International straights 🡪 transit passage rights
    - Territorial sea 🡪 right of innocent passage
      * States cannot temporarily suspend transit passage rights (unlike innocent passage art 25(3))
    - Includes war ships and aircraft, no impeding (art 38)
    - Used for continuous and expeditious transit (art 39(1)(a))
  + Big connection to arctic, with some claiming it’s a bunch of straights connected!
* **Arctic Waters**
  + Art 234 applies to ice-covered areas
    - Permits additional pollution prevention authority
    - But has interpretive challenges (“for most of the year” and “exceptional hazards”)
* **Exclusive Economic Zones**
  + An area of exclusive rights for coastal state (not preferential ala *Fisheries Case*)
  + There is an EEZ (art 55)
  + Sovereign rights to resources and limited jurisdiction (art 56)
  + Further 188NM from territorial sea, for total of 200NM (art 57 – also now CIL, ICJ confirms this in 1982 and 1985)
  + Coastal state has right to explore, exploit, conserve, and manage living and non-living resources in the EEZ
  + Coastal State has jurisdiction RE artificial islands, installations, structures, and jurisdiction for marine environmental protection
  + Other States have rights too in EEZ (art 58)
    - Freedom of navigation
    - Right of overflight
    - Right to lay cables
  + **Key: Coastal state retains its right to the resources**
* **Rocks and Islands**
  + Islands have their own EEZ, rocks do not
  + Test: can the mass sustain human habitation? (Art 121(3), 433)
* **Continental Shelf**
  + Truman proclamation 1945 🡪 we own resources in continental shelf (442)
  + Codified in 1958 treaties and UNCLOS (art 81)
  + All states, though, can lay cables in EEZ and on shelf (art 79)
  + Continental shelf beyond 200NM, some earnings must go to international community (art 82)
* **High Seas**
  + Right to lay cables (Art 87(1)(c) + 112)
  + High seas open to all states (art 87, 445)
  + No state can assert sovereignty over high seas (art 89)
  + State not obligated to share benefit from high seas (res communis – 308)
  + Freedoms: navigation, overflight, laying cables, constructing islands, fishing, research…)
* **Jurisdiction on High Seas**
  + Incident on high sea? 🡪 follow the flag.
    - State of registration reigns (art 94)
  + Merchant ship subject to exclusive jurisdiction of flag state unless treaty
  + State ships are subject only to flag state (arts 95, 96)
  + Must be a “genuine link” between ship and registration state (art 91)
    - But this is literally just the registration – *MV Saiga Case ITLOS*
  + **Exceptions to Flag State Jurisdiction** 
    - Stateless ships (dual-registry makes you stateless)
    - Warship from one sate can approach foreign and exercise “right to visit” (art 110), if suspected piracy, slave trading, unauthorized broadcasting.
      * Not a general right to board! Must link to these circumstances
      * Still, can be changed by treaty (oft is!)
    - *Supertanker SS Torrey Canyon* 1967
      * UK blew up, claimed self-defence, Liberia didn’t protest.
* **Piracy on the High Sea**
  + Oldest international law crime
  + Any state can capture, arrest, try a pirate
  + Def of pirate: need two ships and an attack for private gain (art 101, 447)
* **Right of Hot Pursuit**
  + Coastal state has the right to arrest a foreign vessel found acting illegality in its waters
  + Can purse into high seas if they run. Pursuit must be hot, cease when in territorial waters of another state, and (per *I’m Alone*, 451) no sinking!
* **The Deep Seabed (“The Area”)**
  + Common heritage of mankind (art 136, 455)
  + No state shall claim or exercise sovereignty over the deep seabed or its resources (137)
  + Activities in the Area shall be for benefit of humankind (art 140, 456)
    - Revenue sharing with ISA for all, some modification by implementation agreement

## State Jurisdiction in Airspace and Outer space

* **Recall that overflight rights and transit rights exist under UNCLOS!**
* **Key: *Convention on International Civil Aviation*, 1944 (462-464)**
  + Does not apply to military aircraft (art 3)
  + Every state has complete and exclusive sovereignty over airspace above its territory (art 1)
  + This includes territorial sea (art 2)
  + High seas = freedom of overflight
  + State aircraft cannot fly over the territory of another state without consent (art 3(c))
  + Private aircraft engaged in international air service need permission (art 6)
  + Private non-commercial aircraft can fly over or stop for fuel without permission (art 5) – limited right of passage, requires landing on request
  + **Article 3*bis***
    - **Every state must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.**
* **All aircraft registered and have nationality of registration** 
  + Plethora of bi- and multi-lateral treaties for air routes, taxation etc
  + Obligation to reduce navigation between contracting states (art 22)
* **Outer Space**
  + Imposed a res communis regime (with some debating that its partially common heritage of humankind)
  + 1963 UNGA declaration… and later four more led to 5 key treaties (2 in text)
  + *Outer Space Treaty* 1967
    - Art 1 🡪 principle of freedom of exploration in space
    - Art 2 🡪 no national appropriation of space or sovereignty of states
    - Art 3 🡪 due regard must be paid to international law (expanding its scope!)
    - Art 4 🡪 principle of peaceful purposes
  + *Moon Agreement* 1979 🡪 low ratification!
    - Prevents military use of moon
    - Establish juridical regime for exploration and exploitation of moon’s resources
    - Moon and natural resources on moon are common heritage of humankind (subject to profit sharing like deep seabed) (art 11) – not law too few ratifications

## JURISDICTIONAL IMMUNITIES

**Diplomatic Immunity**

* **Basic rule: foreign embassy and its diplomat is inviolable** 
  + *Vienna Convention on Diplomatic Relations* art 22 + *Tehran Hostages* (even in war, consulate etc. is inviolable!)
  + Domestically, *Foreign Missions and International Organizations Act*
  + **Obligations on host state** 
    - Facilitate establishment of diplomatic presence
    - Maintain security sufficient to protect the mission and its personnel
    - Respect the immunities of the mission, personnel, and communications
  + **Obligations on sending state**
    - Use mission only for agreed purposes (no spying!)
    - Ensure respect for local law
    - Do not interfere in local affairs
* **If there is abuse, a state can withdraw its consent (that’s how relations began anyway!)**
  + Host state can declare a diplomat *persona non grata* (VCDR art 9)
* **Diplomatic Immunities** 
  + Diplomat is immune from legal duties and law, inviolable from interference (VCDR art 29)
  + Diplomatic premises are inviolable (VCDR art 22)
  + Diplomat’s private residence, papers (diplomatic bag/pouch!) and correspondence are inviolable (VCDR art 30)
  + ***Tehran Hostages* - *United States Diplomatic and Consular Staff in Tehran*, ICJ 1980**
    - Diplomatic inviolability is a key principle of international law
    - 1) Iran needed to better protect the premises
    - 2) The acts gained an “official” status once they endorsed
  + **ONLY DIPLOMATS HAVE DIPLOMATIC IMMUNITY** 
    - Will have official document indicating as such
* **Other immunities** 
  + Consular officials, more limited (*Vienna Convention on Consular Relations*)
  + UN Personnel (*UN Charter* & *Convention on Immunities and Privileges*) (538)
  + Judges of the ICJ
  + Judges of ICC
  + Visiting Militaries

## **State Immunity**

* Diplomats are state officials, but not all state officials are diplomats!
* *State Immunity Act* is key
* **Foreign States have immunity from most domestic civil suits (exceptions!) and movement for criminal suits…**
  + This only applies to national suits
  + Immunity can always be waived!
* **Sovereign equality of states underlies much…**
* ***Schooner Exchange v M’Faddon* (1812) US CJ**
  + Immunity because of sovereign equality and reciprocity
* **Codification attempts in *European Convention on State Immunity* (1972) (low ratification)**
* **ILC work lead to *UN Convention on Jurisdictional Immunities* 2004 (548-552)**
  + Not yet in force.
* **Scope of Immunity**
  + Used to be absolute absent consent (541)
  + Move to restrictive approach, with some kind of public/private distinction
    - US: *Tate Letter* 1952; FSIA 1976
    - UK: Lord Denning in *Trendex Trading* 1977
    - Canada: *State Immunity Act* 1982
  + Could define based on *nature* or *purpose*
    - UN *Convention on Jurisdictional Immunities*, art 2(2) tries to do both
    - Canada: we look at purpose, nature, and whole context
* ***State Immunity Act***
  + Foreign States immune from jurisdiction of court except for as this act permits, s 3(1) 🡪 need to show this applies!
  + Not immune if foreign state waives immunity (s 5)
  + Not immune if proceedings relate to any commercial activity (s5)
    - Commercial activity = “one of commercial character” (s2)
  + Not immune for torts committed in Canada (s6)
  + Act is not about criminal proceedings (s18)
* **On commercial activity …**
  + ***Re Canada Labour Code*, 1992 SCC**
    - Immunity applies to workers on US military base.
    - Employment there is multi-faceted relationship
    - View it in its context!
    - Don’t just look to the nature of the transaction, but take account of context!
  + ***Kuwait Airways Corp v Iraq*, 2010 SCC**
    - This is a commercial transaction!
    - Commercial transaction identified using nature, purpose, and context (para 33)
    - Note s11-12 of SIA 🡪 performance remains near absolute immunity
  + ***Bouzari v Iran*, 2004 ONCA**
    - Continuing tort? No.
    - Commercial activity? No.
    - Court: there is no exception for torture. SIA applies.
* **Some Terms**
  + *Acta jure imperii* – acts of public authority (541)
  + *Acta jure gestionis* – private acts (541)
  + *Ratione materiae* immunity – attaching to acts, transactions, conduct (554)
  + *Ratione personae* immunity – attaching to the person (554)
* **State immunity can and does also attach to individuals**
* **Immunities from CRIMINAL jurisdiction**
  + *Pinochet No 3*, 1999 HL
    - Does former dictator, and current senator for life, Pinochet have immunity?
    - No personal immunity because not current head of state (ratione personae attaches to current heads of state)
    - Maj
      * No immunity for former heads of state unless the act attaches to an official act of state during tenure
      * Difficulty here is that Torture Convention defines torture (art 1) as requiring it to be committed by a public official or at their acquiescence, which would make it seem as though its an official act!
      * But some of the justices applied an implied exception to the convention or that the act was actually private, thus immunity does not apply.
  + ***Arrest Warrant Case*, 2002 ICJ**
    - ICJ limits *Pinochet* to former heads of state 🡪 closes door to sitting officials
    - Certain high-officer holders (head of state, head of government, foreign minister) are immune (para 51 on 565) have ratione personae
      * They represent the state // no distinction between their official and private acts (55 on 566)
    - No special exception for CAH or *jus cogens*… instead (61on 568)
      * Wait until out of office
      * Charge in their own state
      * Get state to waive immunity
      * International criminal proceedings!
  + ***Prosecutor v Taylor* (2004 SCSL)**
    - Internationalized court, has characteristics of international court
    - Rules of state immunity derive from equality of sovereign states
    - State immunity thus has no application to international criminal tribunals (51 on 572)
* **Immunities from CIVIL jurisdiction** 
  + ***Bouzari v Iran*, 2004 ONCA (572-576)**
    - No obligation on Canada to provide access to Canadian courts for civil causes of action that took place elsewhere with no Canadian involvement under *Convention Against Torture*
    - UN Committee Against Torture criticized Canada for this… said art 14 (576) required it had made access for civil remedy (see 576-577)
    - But see Lord Hoffman in *Jones v Saudi Arabia* (2006 UKHL) (577): why’d they call out Canada for this? No exception to State Immunity for civil cases of torture.
* ***Jurisdictional Immunities of the State* (2012 ICJ)**
  + ICJ: no. Jus cogens rules do not form an exception to international law obligation to ensure immunity for foreign states from domestic courts.
* ***Kazemi Estate v Iran* (2014 SCC)**
  + No civil suits against foreign state… except in accordance with *SIA*
  + Immunity is a procedural bar (34)
  + Art 14 does not require Canada to implement universal civil jurisdiction for torture
  + SIA is a complete codification of Canadian law here (54) 🡪 go to parliament!
* **Parliament did amend… for “state sponsors of terrorism” (s6.1 on 584) Iran&Syria**

## USE OF FORCE

* Starting on 843
  + *Jus ad bellum* 🡪 rules about going to war
  + *Jus in bello* 🡪 rules of conduct in war
* **An armed conflict does not require a declaration of war (*Geneva Convention I*, art 2)**
  + Its about the facts on the ground: if there is a resort to armed force between States or between a State and armed groups, or between armed groups, it’s an armed conflict (ICTY in *Tadic*)
* **UN Charter art 2(4) 🡪 the starting point**
  + “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” (843)
  + Duties to refrain from using forceful things! Friendly Relations Declaration of 1970 (UNGA) (843-844)
  + Friendly Relations Declaration
    - ICJ in *Nicaragua* lends support to this view (para 188 on 845)
* ***Nicaragua v USA*, ICJ 1986 (844-846)**
  + Principle of non-use of force may be regarded as a principle of CIL (188 on 845)
  + ILC of the view that it is *jus cogens* character (190 on 845)
  + Military maneuvers at the border are not threats (846)
  + A “mere supply of funds” to the contras is not a use of force (228 on 846)
    - Still violation non-interference in domestic affairs
* ***Nuclear Weapons* Adv Op, ICJ 1996**
  + UN Charter prohibition on use and threat of use of force applies regardless of weapon used (39 on 847)
    - However, States can signal they have a weapon as a deterrent
  + Whether it is a threat is variable…
  + If a use of force threatened would be illegal, then the threat is illegal (47)
* ***Guyana v Suriname Arbitration* 2007**
  + Leave or “the consequences would be theirs” (438 on 849)
  + This is a threat of the use of force (439 on 850)
  + **Force can be used in law enforcement, but its got to be unavoidable, reasonable, and necessary… not the case here (445)**
* **UNGA Definition of Aggression 1974 (851)**
  + Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State (art 1)
  + Need for “sufficient gravity” (art 2)
  + Examples in Art 3 (851)
  + UNSC may provide other situations as aggression (non-exhaustive) (art 4)
  + Likely this is now CIL
  + Also, through amendments to the Rome Statute, now a international crime!
* **Exceptions!**
  + Prohibition on use or threat of use of force has two exceptions
    - Collective military action authorised by the Security Council (Ch VII – “all necessary means” // art 42)
      * UNSC Res 678 (1990) 🡪 Iraq refuses to comply revitalization argument? (855)
    - Use of force in self-defence
    - And consent I suppose (Iraq re ISIS)
* **Humanitarian Exception to Use of Force**
  + NATO bombing of FRY 1999
    - Not authorised by UNSC, certainly illegal.
    - Perhaps moral, since collective and for humanitarian purposes.
    - Need for regional arrangements (with UNSC approval!) (art 53 UN Charter)
  + **Responsibility to Protect** 
    - International Commission on Intervention and State sovereignty 🡪 High-level Panel 🡪 UN SG Kofi Annan’s endorsement 🡪 UN World Summit 2005 (871-877)
    - Three pillar approach to collective action against genocide, war crimes, ethnic cleansing and crimes against humanity
      * 1) each state has the primary responsibility to prevent these acts in its territory (triggered on genocide, war crimes, etc., generally decently supported)
      * 2) International community should appropriate, encourage, and help states exercise this responsibility and establish an early warning system (okay…)
      * 3) International community has responsibility to take action through UNSC if peaceful means fail (very little support)
      * See 878-879 for Libya
    - **UK Claims (defending its actions in Libya in 2018) it can act to alleviate extreme humanitarian suffering, if:** 
      * 1) extreme humanitarian distress
      * 2) no preventable alternative
      * 3) necessary and proportionate force to the relief
* **Self-Defence (880)**
  + **Art 51 UN Charter**
    - Individual or collective
    - Inherent right (CIL and UN Charter)
    - If an armed attack occurs, to repel…
    - Until UNSC steps in
    - Notify UNSC
  + **The *Caroline Incident* 1837 (881)**
    - US Secretary of State Daniel Webster IDs two conditions for self-defence
      * Necessity / no moment for deliberation
      * Nothing unreasonable or excessive 🡪 proportional!
  + ***Nuclear Weapons* Adv Op ICJ 1996**
    - Submission of the exercise of the right of self-defence to the conditions of **necessity** and **proportionality** is a rule of CIL (41 on 881)
    - Also, see requirement to notify UNSC (44 on 882)
  + ***Nicaragua v USA*, ICJ 1986**
    - For collective self-defence, victim State must request help from you, they also must declare they were actually a victim
    - Supply arms to El Salvador is not an armed attack (230)… if no victim of armed attack, then no right for third State to use force in self-defence of that State!
  + ***Oil Platforms* (Iran v USA) ICJ 2003**
    - US didn’t show that it was the victim of an Iranian armed attack (51 on 888)
    - Armed attack is an essential pre-condition
      * Must show necessity and proportionality of actions
      * Must show target was legitimate military target
* **Self-Defence Against Non-State Actors**
  + ICJ says Art 51 inapplicable to self-defence against non-state actors (*The Wall* 139 on 899)
  + Even when attacks come from within another State, need to link to State (*Armed Activities* DRC v Uganda 897-899)
  + 9/11 was lawful because of link!
  + BUT, the inherent right may be more permissible.
* **Anticipatory Self-Defence** 
  + British did this in *Caroline*
  + CIL accepts that threatened State can use force when attack is imminent (903-905)
  + US takes wider, pre-emptive view (902)
  + UK takes a similar approach in Reyaad Khan missile strike (s/2015/688 letter to UNSC)
  + *Israeli Osiark Reactor*
    - UNSC 2280th Meeting 🡪 dismantled before it could be used against us
  + Bush Doctrine vs. Biden/Obama actions

## STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS

* **A secondary (supportive) set of rules for state responsibility in breach of primary rules**
* **No treaty… but dominant guidance from ILC 2001 SR Articles** 
  + Highly respected by States and Courts for last 20 years.
  + Every internationally wrongful act of a State entails the international responsibility of that State (Art 1) (765)
    - PCIJ in *Cherzow Factory* (764)
  + **Internationally wrongful acts are conduct constituting acts or omissions… (art 2)**
    - (a) **attributable** to the state under international law; and
    - (b) constitutes a **breach** of an international obligation of the state
  + **Attribution** – (part 1 ch 2)
    - **Attribution to State Actor**
      * Actions of State agents are actions of the State (art 4)
        + See also *Genocide Case* (385 at 269 🡪 CIL!)
        + This includes legislative, executive, and judicial organs
      * Non-state actor exercising governmental authority is state action (Art 5)
      * Can still be attribution when State actor acts without instruction but in official capacity (Art 7)
        + See also ICJ in *Honduras Disappearances Case* (771-772)
    - **Attribution to non-state actor**
      * If person acting on instruction, director, or control of state, then conduct is State conduct (Art 8 – *Nicaragua*!)
        + High threshold… ICTY challenged in *Tadic*, brought back up in *Genocide Case*
      * State can adopt acts of others as own (Art 11 – *Tehran hostages*!)
    - ***Nicaragua v USA***
      * US military (art 4), CIA (art 4), UCLAs (art 8) all attributable
      * But the contras are not. Not explicit “direct or control”… just fund!
    - **Can also find attribution of conduct when non-state actor puts themselves in the position of state actors to carry out governmental functions when state actor is absent (art 9)**
    - **When insurrectional movement becomes effect government, attribution to State (art 10)**
  + **Lex specialis 🡪 the ILC SRA apply unless a treaty etc. is negotiated (art 55)**
  + **No amending obligations under the UN Charter (art 59) or international criminal law (art 58)**
  + **Effective Control** 
    - The test for attributing non-state actions to state (*Nicaragua*)
    - Confirmed in *Genocide Case* (399)
    - ICJ explicitly rejects lower bar (“overall control”) from ICTY in *Tadic*
  + **Breach (part I ch 3)**
    - Conduct (act or omission) must be not in conformity with requirements of an international obligation (art 12)
    - National law is no excuse, this is about international law (art 3)
    - Rule must be in force at time of alleged breach (art 13)
    - Continuing character can extend time of breach (art 14)
    - Question of Fault
      * **Majority opinion: obligations are of strict liability (788-789)**
      * ***Estate of Jean-Baptiste Caire* 1929**
        + Arbitration holds no need to prove fault, causal link suffices
* **Defences – Circumstances Precluding Wrongfulness (ILC SRA Part I, Ch V)**
  + Only 6 ILC recognized defences 🡪 clear want to limit flaunts of international law
  + **Consent (790)**
    - Art 20 + CIL (SOFAs, boarding agreements, air flight, Iraq re ISIS)
  + **Self-Defence (790)**
    - Art 21 and UN Charter Art 51 (+ inherent right!)
    - Wrongfulness precluded if act taken in accordance with proper exercise of self-defence
  + **Countermeasures (790)**
    - Art 22 🡪 normally unlawful act made lawful because its in response to another State’s breach – pushing other State back into compliance
  + **Force Majeure (790)**
    - Art 23 🡪 occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to preform the obligation
      * Involuntary (no choice but to breach) + impossible to perform (not just onerous or burdensome)
    - Not applicable if state caused the force!
    - Requires 5 elements
      * 1) Unforeseen event or irresistible force
      * 2) The event of force must be beyond control of the State
      * 3) The event must make it materially impossible to preform an obligation
      * 4) The State must not have contributed to the force
      * 5) The state must not have assumed the risk of the situation occurring
    - *Rainbow Warmer* Case 🡪 absolute and material impossibility
  + **Distress (791)**
    - Art 24 🡪 In a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.
    - 5 elements:
      * 1) Threat to life
      * 2) Entrusted to the author’s care – special relation between author and potential victim
      * 3) No other reasonable way to deal with the threat
      * 4) State did not contribute to the situation
      * 5) Measures were proportionate
  + **Necessity (791)**
    - Art 25 🡪 the act was the only way to safeguard an essential interest against a grave and imminent peril; and the act does not seriously impair an essential interest of the State/States toward which the obligation is owed
    - *Danube Dam* builds on this: 4 requirements and 2 defeaters
      * 1) There must be grave and imminent peril
      * 2) This peril must threaten an essential interest of the State/international community as a whole
      * 3) State’s act must not seriously impair another essential interest
      * 4) Must be “only way” to safeguard the interest from that peril
      * 5\*) the obligation in question must not exclude reliance on necessity
      * 6\*) the State must not contribute to the situation of necessity
* **Remedies (ILC SRA Part II CH 1)**
  + **Remedies available for a proven instance of an internationally wrongful act are found in Part Two (art 28)**
  + **Cessation and non-repetition (art 30)**
  + **Injured state is entitled to claim reparations (art 31)**
  + **This reparation can take a number of forms… (art 34)**
    - **Restitution (art 35)**
      * Establish back to situation before wrong committed
      * Subject to limits (*Pulp Mills* 805-807) 🡪 can’t undo environmental damages
    - **Compensation (art 36)**
      * Payment for damage 🡪 *I’m Alone* arbitral award
    - **Satisfaction (art 37) (804)**
      * Court’s finding of wrongdoing could be award enough (e.g. in *Arrest Warrant Case*)
* **Countermeasures (807 – see above as well)**
  + Can be both remedy and circumstance precluding wrongfulness
  + Limit use to inducing other State to comply (art 49)
  + **Restraints on use (art 50). Countermeasures shall not effect:**
    - Threat or use of force
    - Fundamental human rights
    - Humanitarian obligations
    - Peremptory norms
  + **Limits** 
    - No use of force (recall 1970 Definition of Aggression adopted by UNGA) (851)
  + **A countermeasure must be proportionate (art 51, 809)**
  + Should be dependent on previous attempted use of peaceful means of dispute settlement (art 52)
    - This is likely not reflective of CIL… but an ILC attempt to push law
  + Countermeasure must stop when other state brings itself into compliance (art 53)
  + See also *Danube Dam* at paras 83-85)
    - Proportionate, must call for them to stop…
* **Obligations owed to all?**
  + States can bring *erga omnes* claim (art 48, 812)
  + Granting this in *Questions Relating to Obligation to Prosecute or Extradite* (Belgium v Senegal) (814-816)
    - All States parties to Torture Convention have interest in preventing torture
* **Espousal**
  + An injury to a human or legal person is an indirect injury to that person’s State of nationality
  + That State is entitled, and may choose to assert, right to protect national (816) 🡪 right of diplomatic protection
    - The Mavrommatis fiction (*Mavrommatis*, PCIJ 1924)
* **Other procedural matters** 
  + Required to exhaust all available local remedies before pursuing an international claim (822-824)
    - Used to be strict (*Ambatielos*)
    - And burden on State to show a local remedy did in fact exist (*ELSI*) (824-826)
  + If a State waives its claim, it cannot change its mind
  + A claim will fail if unreasonable delay or improper behaviour by claimant
  + The two michaels!