

Chapter 7: Territory

Territory is the material basis of a State.

- "Material" means the physical, tangible and spatial element.

Territorial sovereignty; concept

- Acquisition of title over territory involves acquisition of sovereignty over territory.
 - It's essentially **ownership**.
- Territorial sovereignty also includes the capacity to alienate the territory in favor of another State
- Sovereignty need not be exclusive
 - Con-dominium – Two or more States agreeing to exercise sovereignty *jointly* over a certain territory (e.g., New Hebrides Is. [Vanuatu] between the UK and France).
- Territorial sovereignty begins with acquisition of title over territory and ends with its loss.

Territorial relations not conferring or altering sovereignty

- Detachment of territory from one State connotes the *entire disappearance of any political link* and the territorial State loses *all* power to make any disposition with regard to the territory in question
 - This does not happen with territories placed under broad autonomy, or even under international supervision
- **Actual control of territory does not determine what sovereign acts the legal sovereign can undertake for that territory**
- Territory is not necessarily alienated, and sovereignty over it is not replaced, in multiple situations which the State is prevented from exercising the functions of a State to the exclusion of any other State in that territory
- Corollarily, States may exercise jurisdiction or control over a particular territory and bear responsibility for their activities in relation to that territory, without having title to or sovereignty over it:
 - A State may, by treaty, be given the right to administer part of the territory of another State
 - Administration of territory may also follow a war and coincide with belligerent occupation, which does not generate any territorial title (e.g., Germany after WWII).
 - A territory could be placed under international administration which does not involve the change of sovereignty over it
 - Occasionally a State leases part of its territory to another State; the State to which the territory is leased can exercise plenary authority within the territory as long as the lease remains in force (e.g., Hong Kong before the Handover)

- Certain patterns of relationship between States that manifest some form of subordination or special relationship do *not* have to involve the transfer or acquisition of territorial title (e.g., protectorates)
- Under current international law, conquest confers no title, and *debellatio*¹ cannot transform belligerent occupation into title
- It is not uncommon that the territorial State may lose factual control over some part of its territory, owing to war, internal armed conflict, or foreign occupation of its territory.

Three categories

1. Territorial sovereignty – State ownership of territory owned without any condition, and includes the entitlement to alienate that territory
2. Territorial supremacy may be exercised over a territory not owned on conditions of sovereignty
 - a. Ultimately, it has to be returned to the territorial sovereign or be made independent
3. A State's mere physical control of territory (e.g., illegal presence) confers *no* territorial rights to that State; instead it entails responsibility both for that presence and acts of administration

Principles regulating the determination of territorial sovereignty

1. Immemorial possession
2. Uti possidetis juris
3. Claims of territorial unity and contiguity

Immemorial possession

- Most States' territories are owned on this basis
- Immemorial possession could dispense with the requirement that a State should have exercised effective authority over the contested territory²

*Uti possidetis juris*³

- Focuses on the continuity of preestablished boundaries, which confers legal right to the relevant territory to entities emerging as a consequence of dissolution of pre-existing States
- It also makes irrelevant the effective possession or occupation of territory
- The preexisting right to a particular territory operates so as to deny the possibility of it being *terra nullius*
- It is found in the preeminence accorded to legal title over effective possession as basis of sovereignty

¹ This meant that after war, the international personality of one of the belligerents is totally destroyed and its territory becomes liable to annexation.

² Time Immemorial — refers to a period of time when as far back as memory can go, certain ICCs/IPs are known to have occupied, possessed in the concept of owner, and utilized a defined territory devolved to them, by operation of customary law or inherited from their ancestors, in accordance with their customs and traditions (§ 3 (p), IPRA).

³ Lit. "as you possess under law."

- Upon the dissolution of an empire or federal State, the boundaries of former provinces or republics, even if merely delimited, become international State boundaries
 - An entity becoming independent thus inherits territorial supremacy and sovereignty in relation to the entire territory thus determined, regardless of factual effectiveness of control or contestation by others
 - This is the spatial measure to which the duty to recognize unlawful territorial acquisitions operates
- The clarity of preindependence constitutional or colonial law of the predecessor State determines where the actual boundaries of new States lie
 - To carry over via *uti possidetis*, a piece of territory has to have been attributed to the relevant colonial or related province under that pre-independence constitutional law
 - If the predecessor's internal law made no/inaccurate determination as to its internal boundaries, those *cannot be said to devolve to new States that have emerged*
 - Boundaries which have remained unsettled since independence, are ones for which the *uti possidetis juris* arguments are themselves the subject of dispute

Claims of territorial unity and contiguity

- A State owns all natural features of territory over which it has title under one of the grounds provided by law
- The claim of territorial contiguity envisages that sovereignty over "a region which constitutes a single organic whole" can be acquired by demonstrating legal title over a part of it
 - This claim purports to do more than just provide mere proof of title
 - Continuity places emphasis on natural and geographical features of territory!
 - Contiguity acts as an antithesis to the effective control of territory
- **But** contiguity does not create a title but operates as a presumption about what spaces fall under the title that otherwise exists
 - Hence, archipelagos are not ordinarily regarded as a natural unity, and demonstration of title may be required in relation to each island
- Contiguity is *not* a rule of positive IL.
 - There's no *a priori* ownership of islands close to coasts outside territorial waters
 - A group of islands may be regarded as one single whole, but this ultimately depends on territorial acquisition requirements of title and effective control
 - A State bears a burden in relation to title to each particular island it alleges belongs to a ground of islands
- The factors of natural appurtenance and natural unity of spaces are also contradictory with the elements of claim, response, control, and agreement on which the concept of title is based
 - This may account for its moderate use limited to *very small natural features* in relation to which the opposite claims are not supportable by evidence
 - It's also a double-edged sword: A question may arise whether the unity with the mainland should be seen to originate from one State's coast or another's

Modes of acquisition of territory

1. Cession and treaty titles
2. Occupation
3. Effective display of State authority (*effectivités*)
4. Prescription
5. Acquiescence, recognition, and estoppel
6. Dereliction and waiver
7. Operations of nature
8. Adjudication
9. Conquest

Concept of a title

- Title signifies legal right over the territory, as opposed to, or even regardless of factual control over it
 - The concept of title may comprehend both any evidence which may establish the existence of a right, and the actual source of that right
- All land territory in the world is either under the title of some State, or is *terra nullius*.
- While a State may claim multiple bases of title, the title itself only needs to be created or passed on once.
- There can be only one title over any relevant territory.
- **Title to territory is acquired at the moment when the conditions of the particular mode of acquisition are met and lasts until displaced by another mode of acquisition!**
- Inchoate vs. full title
 - Discovery means a mere sighting of the territory, and does not even require the actual landing, let alone assumption of any actual or effective control
 - The effect of discovery as inchoate title is time-limited, and requires effective occupation of territory to complete the title over it
 - Thus, claimed through discovery cannot prevail over the title effectively asserted by another State
 - An inchoate title can exist over lands not yet subject to any State's sovereignty.

Cession and treaty titles

- Cession is the transfer of territory, usually by treaty, from one State to another

- The ceding State has to have the antecedent and rightful title to the ceded territory
- Cession takes effect when the territorial State **expresses the will and consent** to cede, not merely by virtue of its territorial control weakening
- A handover of territory may be subjected to a suspensive condition
- The right of a State to transfer its territory to another State, which is the acid test of sovereignty over territory, may be limited by treaty
 - If there were defects in the ceding State's title, the title of the State to which the territory is ceded will be vitiated by the same defects; this is expressed by the Latin maxim, *nemo dat quod non habet*
- Cession requires definitive proof, which cannot be proved by vague or circumstantial factors
- Under modern international law, valid cession has to be **entirely consensual**. It cannot be a follow-up on illegal annexation or conquest.
- Cession could be made dependent on a suspensive condition such as the wishes of the population confirmed by plebiscite
 - However, the generally applicable legal position is that it is the agreement between States, not the will of the population which determines the legality of cession (see Crimea referendum)

Island of Palmas Case (US v. Netherlands) [PCA, 1928]

FACTS: In 1898, Spain ceded the Philippines to the United States in the Treaty of Paris (1898) and Palmas is located within the boundaries of that cession. In 1906, the United States discovered that the Netherlands also claimed sovereignty over the island, and the two parties agreed to submit to binding arbitration by the Permanent Court of Arbitration. On 23 January 1925, the two governments signed an agreement to that effect. US argues it bases its title on discovery and by treaty. The Netherlands argues that it has possessed and exercised rights of sovereignty from 1677.

ISSUE: Does the Island of Palmas belong to the US or Netherlands?

HELD: The Netherlands. Spain could not legally grant what it did not hold (*nemo dat quod non habet*) and the Treaty of Paris could not grant Palmas to the United States if Spain had no actual title to it. Spain held an inchoate title when Spain “discovered” Palmas. However, for a sovereign to maintain its initial title via discovery, the discoverer had to actually exercise authority. Spain did not exercise authority over the island after making an initial claim after discovery.

There was no positive international law for the American view of *terra firma* in which the nearest continent or island of considerable size gives title to the land in dispute. Mere proximity was not an adequate claim to land.

In contrast, the Netherlands showed that the Dutch East India Company had negotiated treaties with the local princes of the island since the 17th century and had exercised sovereignty, including a requirement of Protestantism and the denial of other nationals on the island. If Spain had actually exercised authority, there would have been conflicts between the two countries, but none is provided in the evidence. Thus, a title that is inchoate cannot prevail over a definite title found on the continuous and peaceful display of sovereignty. Peaceful and continuous display of territorial sovereignty is as good as a title. However, discovery alone, without a subsequent act, cannot suffice to prove sovereignty over the island. The territorial sovereignty of the Netherlands was not contested by anyone from 1700 to 1906 so the title of discovery was, at best, an inchoate title and does not prevail over the Netherlands claims of sovereignty.

If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title—cession conquest, occupation, etc.—superior to that which the other State might possibly bring forward against it. However, if the contest is based on the fact that the other Party has actually displayed sovereignty, establishing the title by which territorial sovereignty was validly acquired at a certain moment is not sufficient. It must also be shown that the territorial sovereignty has continued to exist and did exist at the moment—this is shown in the actual display of State activities.

Occupation

- Occupation is the acquisition of *terra nullius*—that is, territory which, immediately before acquisition, belonged to no State
 - Occupation of lands belonging to another State would be unlawful and generates *no title*
- The *doctrine of effective occupation of territory* has been developed to resist territorial claims arising out of symbolic claims and Papal grants
 - Grotius: States must take real possession of the territory they claimed
- Nowadays, there are hardly any parts of the world that could be considered as *terra nullius*, because most of the land areas of the globe are at present placed under the territorial sovereignty of an existing State
- Territory is occupied when it is placed under effective control
 - Occupation is a means to acquire territory of regions which are not in the dominion of any State and has to be concluded through effective, uninterrupted and permanent possession in the name of the State
 - Thus, a simple affirmation of rights of sovereignty or a manifest intention to render the occupation cannot suffice for title by way of occupation
 - But the concept of “effective control” is relative.
- Some contexts may combine elements of occupation and “inchoate title”, that is, an option to

occupy the territory within a reasonable time, such as discovery

- In the 16th century, a mere discovery gave a State an inchoate title, during which time other states were not allowed to occupy the territory
- Nevertheless, symbolic annexation of territory can be treated as producing effects tantamount to the effects of actual occupation (*Clipperton Island Award*)
- If treaty title can offset effective display of State authority, there is no *a priori* reason why symbolic annexation cannot do the same, given that it involves more than discovery and thus operates as a fully fledged way of acquiring title
- Symbolic annexation of a territory not belonging to someone else might, in the absence of contemporaneous challenge by other States, amount to a sufficient display of State authority (see *Eastern Greenland*)
 - But, if the State claiming the title remains inactive, the elements of prescription and *effectivités* might reinforce another State's competing title claim.

Western Sahara Advisory Opinion

[ICJ, 1974]

QUESTION PRESENTED: Was W. Sahara at the time of colonization of Spain a *terra nullius*?

HELD: NO. The State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. The acquisition of sovereignty was not generally considered as effected unilaterally through occupation of *terra nullius* by original title but through agreements concluded with local rulers. Such agreements, whether or not considered as an actual "cession," were regarded as *derivative roots* of title, and not original titles obtained by occupation. W. Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.

Effective display of State authority (*effectivités*)

- A State, to acquire territory by occupation, must not only exercise effective control, but must also have the intention and will to act as sovereign.
 - The acts of private individuals must be shown that they have acted in pursuance of some authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them
- What matters primarily is not how much authority is exercised, but that public authority is genuinely exercised and it is obvious to other States that it is so exercised.

- *Effectivités* is possible whether the area is populated or not; whether another has laid competing claim or not **but always provided that there is no antecedent sovereignty over the territory.**
- There is a potential interplay between sovereignty over territory and the effective display of a State's authority
 - Tribunals, however, have imposed a high burden on States purporting to obtain a new title under the doctrine of *effectivités*⁴
- Acquiescence from all interested States is required
 - **The title thus established thereupon becomes opposable *erga omnes*.**
- The types and context of the relevant activities purported to establish effective display of control are highly material to manifesting the consensual transfer of the title
- The *effectivités* involved in the relevant situation do not have to be intensive or persistent; they can be scarce, provided that they expose the sovereign nature of relevant State activities
- Private persons' activities cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority
- The **duration** of *effectivités* is **not** as such crucial, though it may create a beneficial *presumption*
- In the end, *effectivités* is merely an **overall term** without prejudice to the specific type of State activities required to acquire or complete territorial title
- The merit is whether the State activities manifest that legal sovereignty has been asserted visibly, transparently and in public
 - It's more about the manifestation of a communicative dimension that X has done something that Y knows it itself has *not* done
 - It is the public sovereign quality of the activities that matters in the first place, not their extent or intensity
- Once *effectivités* are invoked to defeat or displace a pre-established title, the claim can only succeed if it demonstrates both sufficiently effective administration, and consent or acquiescence by the title- holding State
- Where there is a conflict between title (especially treaty-based title) and *effectivités*, preference should be given to the holder of the title
 - In particular, claims premised on the effective exercise of State authority (*effectivités*) are subordinate to the title under a treaty or other pre-established title

Status of Eastern Greenland (Denmark v. Norway)

⁴ In order to establish a title by prescription as compared with establishing a title by occupation, the claimant State must show both a stricter proof of possession and a longer period of possession, because the essence of prescription is the acquiescence, express or implied, of the one state in the adverse possession of the other.

[PCIJ, 1933]

ISSUE: Is Norwegian occupation of Eastern Greenland invalid because Denmark has claimed and exercised sovereign rights over Greenland as a whole for a long time and has obtained thereby a valid title to sovereignty?

HELD: NO. A claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist:

1. The intention and will to act as sovereign, and
2. Some actual exercise or display of such authority.

Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.

Prescription

- Prescription presupposes an effective control over territory, and this needs to be accompanied by the intention and will to act as sovereign
- **Prescription is the acquisition of territory which belonged to another State**, whereas occupation is acquisition of *terra nullius*
 - Thus, the effective control necessary to establish title by prescription **must last for a longer period of time** than the effective control which is necessary in cases of occupation; loss of title by the former sovereign is not readily presumed
- Prescription is about consensual conferral of title, not a ramification of the factual effectiveness doctrine that would discretely benefit the usurper
- Effective control by the acquiring State needs to be accompanied by acquiescence on the part of the losing State, and the threshold of evidence required to demonstrate this may be just as high as the threshold required for proving the emergence of a rule of customary international law; protests, or other acts or statements which demonstrate a lack of acquiescence, can prevent acquisition of title by prescription

Acquiescence, recognition and estoppel

- They play important roles in acquisition of territory, although they are not modes of acquisition
- Where each of the rival claimants can show that it has exercised a certain degree of control over the disputed territory, an international tribunal is likely to decide the case in favor of the State which can prove that its title has been recognised by the other claimant or claimants
 - Recognition can be express or inferred from acquiescence (failure to protest against the exercise of control)
 - Failure to protest against a purely verbal assertion of title unsupported by any degree of

control does not constitute acquiescence

- Recognition or acquiescence by one State has little or no effect unless it is accompanied by some measure of control over the territory by the other State
- The existence of a pre-established title displaces the relevance that acquiescence may possess in this area
- Common law estoppel, defined: When one party makes a statement of fact and another party takes some action in reliance on that statement, the courts will not allow the first party to deny the truth of his statement if the party who acted in reliance on the statement would suffer some detriment in the event of the statement being proved to be false
- **IL definition of estoppel:** A State which had recognized another State's title to particular territory would be estopped from denying the other State's title if the other State had taken some action in reliance on the recognition
- Two views:
 - The element of detriment distinguishes estoppel *stricto sensu* from acquiescence; detriment is necessary for estoppel but not for acquiescence
 - Estoppel and acquiescence have the same effect to preclude the subsequent contrary claim, and the ICJ also said that acquiescence and estoppel were "different aspects of one and the same institution", since both concepts follow from the fundamental principles of good faith and equity
- No territorial acquisition resulting from the threat of use of force shall be recognized as legal (Friendly Relations Declaration Res.)

Dereliction and waiver

- Abandonment of territory requires not only failure to exercise authority over the territory, but also an intention to abandon the territory
- A high threshold of proof has to be discharged to evidence abandonment
 - Waiver of territorial rights can be effected more plausibly through a treaty than through practice
- The abandonment is subject to a higher threshold of proof, and would not take place even if the owner of the territory did not give the territory the degree of attention it could give

Polar regions and Antarctica

- Polar lands have been capable of territorial acquisition just like any other territory, subject to them being permanently frozen
- Sometimes, States may agree not to make claims to particular territory, so that the territory remains *terra nullius* (see 1959 Antarctica Treaty)

- Antarctica is now viewed as belonging to the “international commons” governed by the principle of the “common heritage of mankind

Operations of nature

- A State can acquire territory through operations of nature⁵
- Sometimes a provision is made in treaties for cases not initially foreseeable
- Treaties or conventions which define boundaries in watercourses nowadays usually refer to the **thalweg** as the boundary when the watercourse is navigable and to the median line between the two banks when it is not
 - You’re going to draw a line in the median line

Adjudication

- Adjudication is sometimes seen as a mode of acquisition, but its status is *doubtful*
- A tribunal’s task is to declare the rights which the parties already have, not to create new rights; therefore, adjudication does not give a State any territory which it did not already own
- It sometimes happens that States set up a boundary commission to mark out an agreed boundary, but empower it to depart to some extent from the agreed boundary
 - However, this power of the boundary commission is derived from the treaty setting it up
 - A sort of indirect cession

Conquest

- Under *older* IL, conquest alone, without a treaty, could confer title on the victor in the war⁶
- A corresponding assumption was that the acquisition of territory by conquest was not lawful unless the war had come to an end and the defeated State entered into a peace treaty which ceded territory to the victor
- The view that any annexation based upon the **unauthorized use of force** is **illegal** and is not to be recognised seems to find support in developments in connection with the annexation of Kuwait by Iraq
 - Military, or belligerent, occupation is unlawful as far as it results from the use of force in contravention of the Charter; any threat or use of force, whether it is in contravention of the Charter or not, invalidates the acquisition of territory

⁵ For example, accretion. Accretion, in the sense of gradual augmentation of, or addition of substance to, territory already under effective occupation, can result from silting-up or drying of boundary rivers, the emergence of volcanic islands, or the reclamation by a State of the adjoining sea. The gradual nature of accretion is regarded as not requiring any formal act of assertion of title, and as permitting a presumption of occupation by the State concerned and of acquiescence by other States.

⁶ Because at that time, CIL imposed no general prohibition on States going to war.

- The concept of recognition by third States in itself is not a sufficient explanation for the possibility of the acquisition of territory in spite of unlawful forceful annexation
- *Eastern Greenland*; Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State.
 - The principle does **not** apply in a case where a settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population.

Evidence of title to territory (maps)

- There is no authoritative list of evidence admissible in territorial disputes, nor is any kind of evidence *a priori* excludable
- The key for the relevance of any evidence is the precision in relation to the claim presented to a tribunal, to the intention and understanding by a State of its own claim and position as well as of rival claims and those of third States
- Maps are frequently used in international litigation, but they do not constitute title on their own and have more limited relevance
 - Maps before the emergence of the relevant territorial dispute carry greater weight, and so do ones confirming agreement
 - To carry weight in evidencing title, a map has to relate to the subject matter of claims and also be consistent with a party’s assertions in the relevant proceedings (*Eritrea v. Yemen*)
 - When a map is attached to a treaty, a complex treaty interpretation issue may arise, because there is no rule that places a treaty text above the map which is attached to that treaty and to which the treaty text itself refers.
 - The matter may also turn on what is accepted or agreed in practice; or a map might be regarded as “context” in the sense of Article 31, VCLT.

Critical date

- This refers to a date when an international tribunal identifies that the dispute between two States has emerged through some development that has exposed the opposition between the States’ positions, or divergence between their claims, as to the ownership of the relevant territory
 - Important because state claims after the critical date is irrelevant for determining sovereignty
- Jurisprudence has made it clear that acts undertaken after the State has become aware of another State’s claims, in order to buttress its own claims and improve its own position, will be disregarded

Inter-temporal law

- **The generally accepted view is that the validity of an acquisition of territory depends on the law in force at the moment of the alleged acquisition**
 - Because laws should not be applied retroactively
- *Island of Las Palmas*: Having acquired territory in the first place, a State has to do more and more in order to retain its title—it must continue to run all the time in order to stay in the same place
 - But the *problem* with this approach is that the wide terms in which Huber expressed himself seem virtually to deny the effect of the rule that the validity of an acquisition of territory depends on the law in force at the time of the alleged acquisition
- Nowadays, conquest cannot confer title. But before, it did. Thus, it cannot be said that conquest titles are void.

Boundaries

- **Boundary** disputes are about where one State's territory separates from that of another State
 - Cf. **Territorial** disputes are about ownership of territory
- Recognition of a boundary may result in the recognition of territorial sovereignty
- Owing to the generic similarity of these two issues, the basis of determination of boundaries is the same as that for the acquisition of territory in general: claim, response, agreement, and effective possession
- Ordinarily, States prefer to determine borders by mutual agreement
- Two concepts:
 - Delimitation – Consists of defining the boundary
 - Demarcation – Consists of operations marking it out on the ground

Boundary rivers

- Colonial practice was to consider main navigable channels of rivers as boundaries, thus also disposing of islands in the river
 - The median line between the two banks
- With regard to bridges over a river, the solution is to extend vertically the line of boundary on the water course and thus the boundary on the bridges follows the course of the boundary in the river

Servitudes

- States may acquire minor rights over foreign territory, such as a right of way across it
- A servitude arises when territory belonging to one State is, in some particular way, made to serve the interests of a territory belonging to another State
- The State enjoying the benefit of the servitude may be entitled to do something on the territory concerned; alternatively, the State on which the

burden of the servitude is imposed may be under an obligation to abstain from certain action

- The legal basis of servitudes in international law could derive only from the consent and agreement of relevant States
- International servitudes can sometimes exist, not for the benefit of a single State, but for the benefit of many States, or even for the benefit of all the States in the world.
- Servitudes are particularly important in connection with rivers and canals.
 - In the 18th century, States used to exclude foreign ships from using waterways within their territory
 - This caused great hardship, especially to land-locked States upstream
 - Example: The Convention of Constantinople, signed in 1888 by Turkey and nine other States, declared the Suez Canal open to the ships of all nations. The same rule was applied to the Panama Canal.
- Territory subjected to “servitude” remains under the sovereignty of the territorial State
 - Hence the territorial State retains its regulatory power inherent to its territorial sovereignty
 - The extent of that right depends on the nature of arrangements made in particular cases, because a treaty can restrict that right if this follows from the interpretation of its provisions
- A peculiar type of servitude is provided under UNCLOS, with regard to the access of land-locked States to sea
 - States lying between land-locked States and the sea should negotiate agreements with land-locked States in order to give the latter the right to use their ports and rights of transit through their territory, and such negotiations have to be meaningfully conducted

Forms and ways of joint utilization of transboundary watercourses

- Under general international law, the ownership of transboundary watercourses (lakes, rivers) depends on boundaries
 - If a boundary runs on the bank of the river, the State at that side of the river has no right to take water from it
- In practice, States have established multiple treaty-based arrangements on utilisation of transboundary watercourses
- The International Law Association's Helsinki Rules suggest the criteria of “just and equitable share” for utilising water resources
 - This is difficult to determine objectively
 - Instead, any tribunal is more likely to go by evidence of consensual or agreed practice, if such exists

- Stronger emphasis of general international law may be felt only in relation to *unilateral diversion of transboundary rivers*, but in that respect State freedom is limited by the general prohibition not to use State territory in a way that causes harm to another State's territory
- The chief relevance of general international law with regard to transboundary watercourses is to deny and censure unilateralism (see *Gabcikovo/Nagymaros*)

Conclusion

The existence of any territorial title would depend on the following indicative differentials:

- Whether the territory in question was *res nullius* at the outset
- Whether initially there was a title over the territory based on a treaty or one otherwise declared and which was not contested
- What the State has done, or needed to do, to create or maintain the title
- What other States did in response or how far their position was relevant
- Whether the case is to be disposed by a regulatory principle such as *uti possidetis juris*, or by territorial sovereignty established by a treaty

Chapter 9: Air space and outer space

Air space

Two customary rules:

1. Aircraft from one State have a right to fly over the high seas
2. Aircraft from one State do not have a right to fly over the territory of another State⁷

Access to and overflight of national air space

- It is difficult to assume that CIL could have countenanced any general right of overflight or landing for any type of aircraft, given that, whenever necessary, such rights were conventionally stipulated
- The customary rule has been that aircraft from one State have a right to fly over the high seas, but *not* over the territory or territorial sea of another State (art. 1, Chicago Convention).
- It is a serious breach of IL for a State to order its aircraft to violate the air space of another State.
 - Civilian aircraft which enter the air space of another State without that State's consent can be ordered to leave or to land, and the State whose air space has been violated can protest to the State where aircraft are registered if such orders are ignored
- Nevertheless, every State, in the exercise of its sovereignty, is entitled to require the landing at

some designated airport of a civil aircraft flying above its territory without authority

- But: 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 (art. 3*bis*, Chicago Convention)
- This is not intended to affect the rights of States under the UN Charter, presumably referring to the right to self-defense
- What if the civilian aircraft refuses to land?
 - The Chicago Convention is silent. Humanitarian considerations involved in such situations are pressing, and the gravity of the problem is somewhat mitigated by the fact that modern airborne and satellite technologies enable the carrying out of air reconnaissance without intrusion into the territorial space of the State
 - It's doubtful that there's a custom on the prohibition against shooting down an aircraft
- *Open Skies Treaty* (35 signatories) – Each party has the right to conduct observations on the basis of quotas available under the treaty
 - Passive quota – Number of observation flights that each State-party is obliged to accept as an observed party
 - Active quota – Number of observation flights that each State-party has the right to conduct as an observing party

Regulation of flights

- The general legal and institutional framework for international civil aviation is laid in the 1944 Chicago Convention and the rules adopted by the International Civil Aviation Organization (ICAO)
- The attempt since 1944 to establish on a multilateral basis rights of aircraft of contracting States to fly into each other's territories, whether engaged in scheduled air services or in nonschedule flights, has largely failed
- The current system of the exchange of traffic rights is based on a complex web of bilateral treaties, by which one State gives aircraft from another State the right to fly through its air space (usually in return for a similar convention)
 - Air transport disputes between States are frequently decided by arbitration
- Within the ICAO framework:
 - Nonscheduled flights enjoy the right of flight into and transit over the territory of a State party
 - Schedule flights open to use by the general public and operating according to a published time table require permission from the territorial State
 - Each State-party is entitled to prohibit commercial flights by foreign operators

⁷ The rest are treaties (e.g., Chicago Convention and Paris Convention).

- between two or more places within that State-party's territory
- Each State-party has the right to prohibit foreign operated flights over the whole/part of its territory when safety/military necessity so requires, provided that foreign aircraft are not subjected to discriminatory treatment
- For scheduled flights, or designated air carriers, access to national air space is possible through special permission and specific agreements
- The nationality of an aircraft is based on registration, and an aircraft cannot be registered in two or more States at the same time
- The most common offenses committed against civil aviation safety are hijacking, sabotage, and force flights to seek asylum in another State
 - Since the 1960s, international legal instruments have been adopted to deal with unlawful interference with civil aviation, including the 1963 Tokyo Convention, the 1970 Hague Convention, and the 1971 Montreal Convention
 - These have been ratified by a large number of States and require that the parties provide for severe penalties and far-reaching jurisdiction in most cases
- States must disclose information about their activities in outer space (arts. 10–12)
- Activities of non-governmental entities in outer space require governmental authorization, and the State concerned is responsible for all activities which it authorizes (art. 6)
- A State which launches (or procures or provides its territory for the launching of) an object into outer space is liable for any damage caused by that object (art. 7)
- States must assist astronauts in distress; an astronaut from one State who makes a forced landing in another State must be returned to the former State (art. 5)
- Ownership of objects launched into outer space is not altered by their presence in outer space or by their return to Earth; if found, such objects must be returned to the State of origin (art. 8)
- The moon and other celestial bodies "shall be used ... exclusively for peaceful purposes" (art. 4)
 - However, as regards spacecraft orbiting around the Earth, art. 4 merely provides that nuclear weapons and other weapons of mass destruction must not be placed in orbit around the Earth
 - This difference between the rules applicable to spacecraft in Earth orbit and the rules applicable to celestial bodies justifies the *inference* that spacecraft in Earth orbit may be used for military purposes which do not involve nuclear weapons or other weapons of mass destruction; in particular, they may be used for purposes of reconnaissance

Outer space

Basic rules and instruments

- The 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space led to the adoption of *four* major multilateral treaties:
 - 1967 Treaty on Principles Governing the Activities of States, Including the Moon and Other Celestial Bodies (Outer Space Treaty)
 - 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement)
 - 1972 Convention on Liability for Damage Caused by Objects Launched into Outer Space (Liability Convention)
 - 1974 Convention on Registration of Objects Launched into Outer Space (Registration Convention)
- Additionally, in 1979, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty) was adopted

Outer Space Treaty of 1967

- Outer space is free for exploration and use by all States in accordance with IL (art. 1) and cannot be appropriated by any State (art. 2)
- Activities in outer space must not contaminate the environment of the Earth or of celestial bodies, and must not interfere with the activities of other States in outer space (art. 9)

Assertion and development of State rights

- In terms of the lawmaking process, since 1958, in practice this has primarily relied upon the work of a special international body, the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS)
 - The important issue of the military use of outer space is considered by the major space powers to be outside the mandate of UNCOPUOS and to properly belong to the fora dealing with disarmament and arms control issues
- Customary law: (1) Freedom of exploration and use of outer space by *all* States, and (2) the prohibition of national appropriation of outer space
- All the major treaty instruments were prepared on the basis of the consensus method (instead of majority decision-making) to ensure the participation of the space powers
- Since Sputnik 1, artificial satellites have passed over the territory of other States on innumerable occasions; for many years no State has ever protested that this constituted a violation of its air space
- Customary law: (?) States are entitled to put satellites in orbit over the territory of other States, but not

necessarily to pass through their air space to get into orbit in outer space

- Meaning of air space: Space where air can be found
 - The precise location of the point where air space ends and outer space begins is, however, uncertain but not crucially important, because the minimum height at which satellites can remain in orbit is at least 2x at which aircraft can fly (?)
- Owing to various ways in which States determine their air space frontiers, “one may reasonably conclude that the vertical limit of State sovereignty, wherever it has been established at the national level, tends towards local and national interests and often varies in nature and scope”
 - Unilateralism is *not* completely ruled out

Treaty mechanisms of space cooperation

- While general international law does not hold States responsible for the activities of private individuals, in space law, art. 4 of the Outer Space Treaty establishes the rule that States-parties bear international responsibility for national activities in outer space, including activities carried out by non-governmental (*i.e.*, commercial) entities
- The technical necessities of jointly using resources, as well as the immense financial and technological requirements of conducting activities in outer space, necessitate international cooperation
 - Regulatory needs became most obvious in the fields of satellite communications and remote sensing
- The development of the substantive and procedural aspects of space law was accompanied by innovations in international organisation concerned with the exploration and use of outer space, especially with regard to satellite communications systems providing global and regional networks
- Furthermore, albeit controversial at the beginning, the competence to deal with the regulation of the use of radio frequencies and satellite positions in geostationary orbit for space communications rests with the International Telecommunication Union (ITU) and its global membership

Liability Convention

- Art. 2 provides for “absolute” liability of **States** for damage caused by a space object on the surface of the Earth or to aircraft in flight
- According to art. 22, an inter-governmental organisation active in space is liable as a State, if a corresponding declaration is made and the majority of member States are parties both to the Liability Convention and the Outer Space Treaty
- The Convention provides for the establishment of a Claims Commission at the request of either party, if diplomatic negotiations fail
 - Although the details laid down in the Convention for the Claims Commission resemble international arbitration, the

decision of the Commission is final and binding only if the parties have so agreed

- The settlement procedures of the Convention have not yet been used

The common heritage of mankind principle

- The term has emerged in connection with the progressive development of international law and has found reflection in the reform of the law of the sea, in space law, and in the legal framework for Antarctica
- In space law, the principle was incorporated in art. 1 of the OST: the exploration and use of outer space shall be the “common province” of all mankind
- Common heritage of mankind could, in this area, be seen either a discrete principle or as a rationalization of a number of rules and obligations applicable to specific kinds of activities of States
 - Legal consequences flowing from this principle are, arguably, not very specific, and at times the customary law status of this principle is also doubted
 - It may also be suggested that the *res communis* status of outer space already achieves the aims sought to be achieved by the “common heritage” doctrine
 - It seems that the discrete relevance of the latter doctrine is increased when the possible exploitation of space resources is at stake

Chapter 9: Law of the Sea

Development of the law of the sea

- Driven by ever-persisting competition and contestation between States in relation to maritime areas
- The law of sea was codified by the first UN Conference on the Law of the Sea (UNCLOS I) in Geneva in 1958 which drew up 4 conventions:
 - Convention on Territorial Sea and the Contiguous Zone
 - Convention on the High Seas
 - Convention on Fishing and Conservation of the Living Resources of the High Seas
 - Convention on the Continental Shelf
- UNCLOS III, 1973: **UN Convention on the Law of the Sea (UNCLOS)** in 1982
 - Entry into force: Nov. 16, 1994
- Customary law status may accrue to individual provisions of UNCLOS if the required evidence confirms that, *even if not to UNCLOS in totality*.

Nature of rules and regimes under UNCLOS

Bilateralism and derogations from the multilateral regime

- UNCLOS is the “constitution of oceans,” thus, any possible maritime claim, in relation to UNCLOS States-parties at least should be assessed by reference to UNCLOS

- The rights of any State in any maritime space are individual to each State; any such right could be conceded, enjoyed, or carried out by any State independently of the extent of any other State's rights in the same maritime area
- In short: The general law of the sea under UNCLOS can be derogated from by bilateral agreements, embodying *lex specialis*
- ICJ general position: Historic rights must enjoy respect and be preserved as they have always been by long usage
 - Implication: historic rights and historic titles could consolidate in a manner similar to the title over land territory
 - It is through prescription, and through prescription alone, that a State may acquire rights with regard to the actual waters of the high seas in excess of those rights already conferred on it by conventional or customary international law
 - This applies to historic bays too

Preferential and historic rights

- The concepts of fishery zones and preferential fishing rights are *potentially* customary law notions not reflected in UNCLOS
- The rights to resources which are at variance with the UNCLOS and established *anterior (after)* to its entry into force *could survive post-UNCLOS* but only if they could be validly created since UNCLOS entered into force
 - Akehurst: Historic rights can arise and subsist even if UNCLOS does not indicate that it allows for them
 - UNCLOS is but a bundle of reciprocal treaty obligations and thus it allows for historic rights to materialize through a reciprocal consensual process
- Historic rights operate in a way amounting to a reservation to the rules set forth in the relevant treaty
 - Thus, historic rights could enable taking ownership of maritime areas further than allowed for by UNCLOS, to that extent interfering with the freedom of the seas
- Under UNCLOS, historical rights claims are at least at variance with the UNCLOS, but not a violation of UNCLOS—it merely derogates from UNCLOS
 - Thus, there is no single regime of historic rights
- **Historic waters** – Waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title
 - UNCLOS to a degree acknowledges that historic rights may exist, but does not define or affirmatively regulate them
 - Historic titles are but one manifestation of the manner in which historic rights – exceptional in relation to the general legal position – are created, maintained, or altered
- Historic rights could not be justified or created through the mere practice of a State that asserts them
 - Thus, fishing practices carried out de facto do not influence determination of maritime boundaries de jure
- Historic rights as *erga omnes*? No.
 - That is merely an outcome obtained by the acquiescence of States affected by particular historic rights claims, not a ready-made consequence of historic rights claims

Land factors and sea factors

Status of a coastal stage

- Rights to maritime spaces are generically determined by the law of the sea (UNCLOS), which bestows those rights to all States-parties that have territorial title to land whose coast generates the relevant maritime claim
- The law of the sea does not determine who the coastal State is, and any dispute regarding that issue would be a dispute regarding territorial sovereignty
- A valid title to land territory leads to the status of coastal State
- The relevance of land territory is expressed by the principle “land dominates the sea”
 - It informs the principles to be used in achieving those outcomes, such as geographical or geological natural prolongation of the coast, distance from or proximity to the coast, or correspondence of maritime areas to the coastal configuration

Islands, rocks, and low-tide elevations

- Land territory that *can generate entitlement to maritime areas (terra firma)* consists of:
 - Mainland
 - Islands
 - Low-tide elevations
 - Rocks
- The status of features depends solely on legal requirements, not on natural characteristics (to hell with geology!)
 - The legal regime of islands set out in art. 121, UNCLOS is an *indivisible regime*—all of which has the status of customary international law
 - Natural/geological diversity notwithstanding, a feature is either:

- **Island** – Entitled to *all maritime spaces* the mainland coast would be entitled to; or
- **Rock** – Which cannot sustain human habitation or economic life of its own, and is thus only entitled to territorial sea
- **Low-tide elevations** are *not territory in the same sense as islands*
 - They are features of submerged landmass and cannot be appropriated as territory, but a coastal State has sovereignty over low-tide elevations situated within its territorial sea
 - The position of low-tide elevations depends on whether they are located within or beyond the territorial sea.
 - Low-tide elevations are entitled to territorial sea up to 12 miles
 - When contributing to measuring territorial sea, a low-tide elevation gives effect to the mainland coast's territorial sea entitlement
- Test of being a rock: Cannot sustain human habitation *or* economic life of their own (art. 121(3), UNCLOS)
 - To qualify as an **island**, a feature must meet either a human habitation or economic life test; these requirements need not be cumulatively satisfied
 - But see South China Sea Arbitration: The mere presence of a small number of persons on a feature does not constitute permanent or habitual residence there and does not equate to habitation
 - Key factor was the subsistence and survival of a number of people for an indefinite time *and* a feature must be capable of maintaining both human habitation and economic life
 - Akehurst: The Tribunal was mistaken on this point
 - An island that is able to sustain *either* human habitation *or* an economic life of its own is entitled to *both* an EEZ *and* a continental shelf
- In other words: The land dominates the sea through the projection of the coasts or the coastal fronts
 - This may be *mainland or island coast*
- The basic idea is to identify the area in which coasts of different States are most obviously opposite or adjacent to each other and which therefore generate the most obviously contested maritime area
 - Spatial confrontation of land coasts generates the maritime areas relevant for delimitation, subject to *not* encroaching on the rights of third States
- When more than one coast projects into the same maritime area, the claim of the coastal State is strengthened, *though not extended*
 - There's no legal distinction between opposite and adjacent coasts
- "Fixed permanent identifiable points on the land" (see art. 6(3), 1958 Continental Shelf Convention) – Starting points for determination of maritime areas
- All coastlines are subject to the same legal regime
 - There's no distinction between primary and secondary coasts
- Boundary lines should be derived from two basepoints of which one is in the unchallenged possession of one State and the other of another State
- What matters for delimitation is the State of the coastline at the time of litigation; the future possible impact of global warming is irrelevant
 - Also, as an unstable coast may be regressing or progressing, art. 7 of UNCLOS states that baselines from which territorial sea is measured survive, even if land points they are drawn from subsequently end up under water

Archipelagos

- UNCLOS specified that an archipelago forms "an intrinsic geographical, economic and political entity, or which historically have been regarded as such"
- There are *no* archipelagos under arts. 46–47, UNCLOS *apart from archipelagic States*, and that mainland States are not included in and do not benefit from this concept
- The archipelagic State thus identified is regarded as a unity
 - It may draw **straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago**
 - The method of straight baselines is applicable only if the State has declared itself to be an archipelagic State
- Provided that the ratio of the area of the water to the area of the land is not higher than 9:1 and the longest baseline is not longer than 125 NM

Coasts

- The rights which a State may claim to have over the sea are not related to the extent of the territory behind its coasts, but to the coasts themselves and to the manner in which they border this territory

Internal waters

- The sovereignty of coastal States extends to internal waters which consist of:
 - Ports
 - Harbors
 - Rivers
 - Lakes
 - Canals
- Definition: Waters on the landward side of the baseline from which the width of the territorial sea is measured
- A coastal State is entitled to prohibit entry into its ports by foreign ships, except for ships in distress (ships seeking refuge from a storm, or ships which are severely damaged) and in certain cases in which previously a right of innocent passage had existed
- The coastal State cannot profit from ships in distress by imposing harbour duties and similar taxes which exceed the cost of services rendered
- **General rule:** The coastal State may apply and enforce its laws in full against foreign merchant ships in its internal waters
- **Exceptions:**
 - The jurisdiction of the coastal State's courts is not exclusive. *The courts of the flag State may also try people for crimes committed on board the ship.*
 - The coastal State will not interfere with the exercise of disciplinary powers by the captain over his crew
 - *If a crime committed by a member of the crew does not affect the good order of the coastal State or any of its inhabitants, the coastal State will usually allow the matter to be dealt with by the authorities of the flag State, instead of trying the criminal in its own courts.*
 - This abstention from exercising jurisdiction is a matter of grace and convenience, rather than obligation
- Warships are immune from enforcement, but they can be required by the coastal State to leave its internal waters immediately
- A foreign warship is expected to observe the coastal State's laws on navigation and health regulations, but the authorities of the coastal State cannot set foot on the ship, or carry out any act on board, without the permission of the captain or of some other authority of the flag State

Territorial sea

Rights of the coastal State

- The coastal State exercises sovereignty over its territorial sea
- The following generate a territorial sea:
 - Mainland
 - Island
 - Low-tide elevations (provided that those are *not* situated beyond the breadth of the

territorial sea of the State measured from its mainland/island)

Rights of a coastal State over its territorial sea

1. An exclusive right to fish, and to exploit the resources of the seabed and subsoil of the territorial sea
2. Exclusive enjoyment of the air space above the territorial sea; unlike ships, foreign aircraft have no right of innocent passage
3. The coastal State's ships have the exclusive right to transport goods and passengers from one part of the coastal State to another (cabotage)
4. The coastal State may enact regulations concerning navigation, health, customs duties, and immigration, which foreign ships must obey
5. The coastal State has certain powers of arrest over merchant ships exercising a right of innocent passage, and over persons on board such ships

Right of innocent passage

- Foreign ships have a right of innocent passage through the territorial sea
 - "Foreign ships" include warships
- Passage is innocent so long as it is not prejudicial to the *peace, good order, or security* of the coastal State; fishing vessels must comply with laws enacted by the coastal State to prevent them from fishing, and submarines must navigate on the surface and show their flag
- The coastal State must not hamper innocent passage, and must give warning of known dangers to navigation in the territorial sea
- States may, however, *prevent non-innocent passage and, for security reasons, temporarily suspend innocent passage in specified areas of its territorial sea*
 - Provided that the areas do not constitute "straits which are used for international navigation between part of the high seas and another part of the high seas or the territorial sea of a foreign State"
 - Straits link 2 parts of high seas
 - Nevertheless, coastal States enjoy the same rights over waters forming international straits as in the territorial sea (save for the limitation above)
- An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea

Width of the territorial sea

- Poor states favored an extended territorial sea to exclude foreign fishing vessels, and there was a danger of over-exploitation by foreign fishing vessels causing exhaustion of local fishing stocks
- Rich states favored a narrow territorial sea; the losses which they suffered by allowing other States to fish near their coasts were outweighed by the

gains which they made by fishing off the coasts of other States⁸

- Art. 3, UNCLOS: Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles

The line from which the territorial sea is measured

- The measuring of the territorial sea can rest on the concept of “baselines”
- The normal baseline from which the width of the territorial sea is measured is the low-water line
 - Low-water line: Line on the shore reached by the sea at low tide
- In certain geographical circumstances, “where the coastline is deeply indented or cut into” (art. 7, UNCLOS) it is permissible to draw straight lines across the sea, from headland to headland, or from island to island, and to measure the territorial sea from those straight lines (straight baselines method)
- Bays are regulated by art. 10, UNCLOS
 - It had been customary to draw straight baselines across the mouth of a bay and to measure the width of the territorial sea from such lines (maximum length: 24 miles)
- Art. 10 is inapplicable to historic bays
 - Historic bays – Are bays which the coastal State claims to be entitled to treat as internal waters, not by virtue of the general law, but by virtue of a special historic right
 - **Under customary international law a State may validly claim title to a bay on historic grounds** if it can show that:
 - it has “for a considerable period of time” claimed the bay as internal waters and effectively exercised its authority therein, and
 - that during this time the claim has received the acquiescence of other States

The contiguous zone

- Article 33(2), UNCLOS: The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured

Exclusive fishery zones and exclusive economic zones

- A rule of customary law had developed since 1960 which permitted States to claim exclusive fishery zones of twelve miles (*Fisheries Jurisdiction*)
 - Likewise, a coastal State had a preferential right over fish in adjacent areas of sea *beyond* the 12-mile limit, at least if the coastal State was (like Iceland) economically dependent on local fisheries, but that the coastal State could not wholly exclude other States from fishing in such

areas, especially if they had traditionally fished there and if part of their population was economically dependent on fishing there

- Art. 56 (1) (a), UNCLOS gives the coastal State *sovereign rights over all economic resources* of the sea, seabed, and subsoil in its EEZ; this includes not only fish but also minerals beneath the seabed
 - EEZ is 200 NM!
- Article 56 UNCLOS allocates to the coastal State sovereign rights in relation to resources living or non-living, whether in water, on the seabed, or in the subsoil.
 - These sovereign rights cover bunkering of foreign fishing vessels
- The EEZ has to be claimed!
- Articles 62 and 69–71, UNCLOS provide that a coastal State which cannot exploit the fish or other living resources of its own EEZ to the full must make arrangements to share the surplus with other States; *however, it can require payment* for allowing foreign vessels to fish in its EEZ
- The coastal State also has limited powers to prevent pollution and to control scientific research in its exclusive economic zone
- But foreign States enjoy freedom of navigation and overflight, and the right to lay submarine cables and pipelines in the coastal State’s EEZ
- Foreign ships which violate the rights of a coastal State in its exclusive fishery zone or exclusive economic zone may be arrested by the coastal State!

The continental shelf: development of the basic concept

- The history of the continental shelf in the years after 1945 is a classic example of the formation of a new rule of customary law
- The action of US created a precedent which other States followed—and in some cases tried to extend
 - In 1945, US President Truman issued a proclamation that the US had the exclusive right to exploit the seabed and subsoil of the continental shelf off its own coasts. For the purposes of Truman’s proclamation, the continental shelf was defined as being those offshore areas of the seabed which were not more than 100 fathoms deep.
- Art. 76(1), UNCLOS: The continental shelf of a coastal State comprises the *sea-bed* and *subsoil* of the submarine areas that extend beyond its territorial sea *throughout the natural prolongation of its land territory* to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance
- The continental margin consists not only of the continental shelf, but also of:
 - The continental slope (a steeply sloping area beyond the continental shelf), and

⁸ In addition, since aircraft have no right of innocent passage through the air space above the territorial sea, an extension of the territorial sea, particularly for straits, was opposed by some States on the grounds that it would force aircraft to make expensive detours.

- The continental rise (a gently sloping area between the continental shelf and the deep seabed)
- The coastal State exercises over the continental shelf exclusive sovereign rights for the purpose of exploring and exploiting its natural resources
- The coastal State may construct installations for the purpose of exploiting the natural resources of the continental shelf. The installations may protrude above the surface of the sea, but they do not have the legal status of islands (and have no territorial sea)
 - But the coastal State may establish safety zones with a radius of 500 metres around each installation
- The legal basis of entitlement to that which is being delimited is pertinent to that delimitation
- The continental shelf contested by States is *a priori* two separate areas appertaining to the litigating States
- Land dominates the sea. Thus, for any delimitation to be made on an objective and equitable basis, it is necessary to ensure that each State controls the maritime territories opposite its coasts and in their vicinity
- Delimitation methods cannot change the inherent nature of a continental shelf
 - Only methods reflective of that inherent nature should be employed
 - Rationale: Principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other;⁹ the principle of that although all States are equal before the law, equity does not necessarily imply equality nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice

Maritime boundaries

Normative framework

- **Territorial sea:** Where the coasts of two States are opposite or adjacent to each other, neither is entitled to extend its territorial sea *beyond the median line*
 - Exceptions:
 - Treaty/agreement
 - By reason of historic title or other special circumstances (art. 15, UNCLOS)
- **Contiguous zone:** Where the coasts of two States are opposite or adjacent to each other, neither is entitled to extend its contiguous zone *beyond the median line*
 - Exception: Treaty/agreement (art. 24, Convention on Territorial Sea)
- **Continental shelf:** Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf shall be determined *by agreement between them*
 - If there's no agreement and unless another boundary line is justified by "special circumstances," the boundary is the median line
 - The same rule applies where the same continental shelf is adjacent to the territories of two adjacent States
- **EEZ:** The delimitation of the EEZ between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in art. 38 of the Statute of the ICJ, in order to achieve an equitable solution (art. 74 (1), UNCLOS)
- Meanwhile, factors of appurtenance, adjacency and natural prolongation are likely to inform most claims advanced and are thus considerations antecedent to delimitation
 - Those factors provide some initial criteria to judge the legitimacy of State claims
 - For the *fundamental concept of continental shelf not to be distorted*, in the bulk of cases, those factors are responsible for the choice of median line as the provisional line of demarcation
- The criterion of natural prolongation helps in identifying a true natural submarine frontier
 - If the land dominates the sea, then the State owns as far as the natural features of its coast extend seawards
 - Natural prolongation is a factor of greater importance than proximity
- However, the rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves and not when the continental shelf formed by the prolongation of their respective coasts is one and the same
- Only a structural discontinuity disrupting the unity of the shelf would alter this position
 - What is required is a *marked disruption or discontinuance* of the seabed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongation

Basis for, and nature of, the entitlement to a maritime space

- Problem: Delimitation presupposes an area of overlapping entitlements. Therefore, the first step in any delimitation is to determine whether there are entitlements and whether they overlap.
 - The entitlement to a continental shelf and delimitation of a continental shelf are *separate yet very highly interrelated issues*

⁹ This is just the positive rule that coastal States enjoy sovereign rights over the continental shelf off its coasts.

- The length of the continental shelf should be the outer edge of the continental margin, or 200 NM, *whichever is less* (art. 76, UNCLOS)
 - *Within 200 NM from coastline* – Distance confers entitlement to the shelf
 - *Beyond 200 NM* – Natural prolongation acquires increasing significance and discretely account for the State's entitlement to a continental shelf
- In other words, States are entitled to claim anything within 200 NM even if it is not a natural prolongation
- In the overlapping areas of natural prolongation, the claims of opposite/adjacent States cancel each other out, and this paves the way for the greater prominence of the distance factor (in its turn enhancing the relevance of the delimitation through the equidistant/median lines)
- Beyond 200NM from the coast, only third States' navigation and fishing rights in the high seas and the international seabed regime are at stake
- The concepts of natural prolongation and distance are not opposed but complementary
- In any case, the territorial sea entitlement within 12 NM from the coast takes priority over coastal State and EEZ entitlements other States may have, and is *not subject to an equitable solution*
- In any case, evidence of a tacit legal agreement must be compelling
- A *de facto* line in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource, *but it is to be distinguished from an international boundary*

Single delimitation of the continental shelf and the EEZ

- The emergence of the institution of the EEZ—after the continental shelf—has corroborated this relativity of delimitation factors.
- The factors of delimitation of them are *prima facie* different, as one requires taking into account geological factors and the other does not.
 - But: The rights which the EEZ entails over the seabed of the zone are defined by reference to the régime laid down for continental shelf.
 - Although there can be a continental shelf where there is no EEZ, there cannot be an EEZ without a corresponding continental shelf.
- Delimitation methods could vary depending on delimitation of exactly what area is requested
- *Guinea/Guinea-Bissau*: A single line of demarcation was claimed to be applicable to the territorial sea, EEZ and continental shelf alike.
- *Ghana v. Cote d'Ivoire*: A single boundary with regard to the continental shelf, EEZ and territorial sea, though the latter area is one out of sovereignty, because the parties did not press the sovereignty issue
- Under general customary law, every State is entitled to an equitable result in relation to every particular area and can prevent the use of a single line by withholding consent
- In particular, facts referred to must evidence that the agreement as to the boundary contended to exist has indeed been reached between the relevant States
- Overall, delimitation carried out through the agreement between States *needs to consider and respect third State rights*
- It is only when the relevant case is not covered by any treaty or tacit agreement between the relevant states that arts. 76 and 83, UNCLOS require courts and tribunals to apply the equitable considerations on their own merit and thus delimit the contested areas
- The relevance of *equity* derives from the *fundamental rule* in *North Sea* or the UNCLOS counterparts in arts. 76 and 83.
- On a general plane, the equitable task of the Court is more limited than what States can achieve through mutually agreed delimitation
 - Thus, courts can do no less to shape or modify States' rights than States themselves can do through their mutual agreement
- Courts and tribunals generally place emphasis on equitable and objective principles to effect delimitation on an equitable and objective basis
- Nevertheless, arts. 76 and 83 do not specify what the particular elements of equity are, and courts will be inclined *not* to divorce equitable considerations from the State's initial entitlement to the relevant area
- If courts and tribunals accorded the definitive relevance to one or another particular heading of equity, such as natural prolongation, coastal length, configuration of the coast, or proportionality, among others, based on the size of the coast, they would essentially be treating the relevant heading of equity as though States had agreed to endow it with the force of generally applicable law
 - States have not done that
 - Equidistance is *not* a binding delimitation method for the simple reason that no method is.
 - None of the "relevant circumstances" bind the courts as positive law
- Still, subjectivity had to be avoided; equidistance entailed certainty and needed less justification than any other method
 - Thus, despite not being prescribed by positive law as a governing determinate

Content and elements of equitable delimitation

- Many cases of delimitation will be covered by specific boundary or delimitation agreements

requirement, the equidistance factor is *not* something that can be easily evaded

- There may be cases where a provisional use of equidistance is *not appropriate*
 - For instance where base points on coasts are *inherently unstable*
 - In such cases, the use of the line formed by bisecting the angle created by the linear approximation of coastlines has commended itself as appropriate
 - Bisector is a geometrical approach and an “approximation of the equidistance method” owing to peculiar geographical circumstances
- Buder art. 6 of the Continental Shelf Convention, equidistance is residual and can be overtaken by special circumstances
 - The merit of “special circumstances” cannot be visualised unless they are first compared with the median line
 - However, the equidistant line cannot be validated unless special circumstances claimed are gone into and dismissed
- There are very few grounds on which the provisionally determined equidistance line will be modified
 - The relevance of *sea resources* cannot be ruled out, but is *not* a relevant factor in most cases
- Finally, the *proportionality requirement* enters the scene as an *equalizing factor*
 - This is not an independent equitable delimitation factor but a way of testing the equitableness of delimitation arrived at by other means
 - To illustrate, the use of the equidistance or a median line may need to be modified if its mechanical application will lead to inequitable results, as the slightest irregularity in a coastline is automatically magnified by the equidistance line
 - Most importantly, the relevance of proportionality does not turn exclusively on a direct and mathematical application of the relationship between the lengths of coastal fronts

Land territory in contested maritime areas

- Maritime boundaries based on the equidistance principle are often distorted by the presence of islands or by curvatures off the coast, and the effect of such distortions increases as one moves further out to the sea
 - Separate issue: Presence of natural land features in the disputed waters but visibly far away from the coast
- Starting point: There’s a difference between the overall legal status of a natural feature and how it influences the delimitation outcome
- Minor features, such as islets and rocks, have no inherent relevance in equitable delimitation,

especially when a single line is being drawn with regard to seabed and superjacent waters

- The status of a land feature may be disputed and it may not generate maritime claims if those potential claims are absorbed by those more straightforwardly attaching to other land features

Continental shelf beyond 200 NM

- A claim of a continental shelf beyond 200 nautical miles is contingent on having a continental margin that extends that far
- Art. 76 adopts a geological and geomorphological approach, focusing on “natural prolongation” in enabling coastal States to extend their jurisdiction beyond 200 NM
- In some cases there is no need to distinguish between coastal projections within and beyond 200 nautical miles, because the shelf area is single and faces the high seas
- Only coastal States can establish the outer limits of their continental shelves, but if this is not done in accordance with international law this cannot be relied upon against other States

The high seas

The calculus of the rights of States

- The term “high seas” refers to *all the parts of the sea that are not included in the EEZ, territorial sea, archipelagic waters, or in the internal waters of a State* (art. 87, UNCLOS)
- It is open to all states for the purposes of navigation, fishing, overflight, or submarine activities
 - Freedom of navigation includes bunkering activities (supply of fuel to ships on the high seas)
 - It also includes protest at sea
 - Freedom of navigation includes anything and everything that does not interfere with other States’ similar freedom or their other maritime rights under treaty or customary rules
- General rule: A ship on the high seas is subject only to IL and the laws of the flag State¹⁰
- Flags of convenience countries – Countries that are prepared to register virtually any ship in return for the payment of a fee
 - Mainly used as a means of avoiding payment of taxes and statutory wage rates
 - It is dangerously easy for shipowners to avoid compliance with such treaties by registering their ships in States which are not parties to them¹¹

¹⁰ Flag state means the State whose nationality the ship possesses. Ordinarily, the nationality of merchant ships is determined in virtually all countries by registration.

¹¹ But they can also be used for more sinister purposes. A vast amount of the law of the sea is contained in treaties – dealing with such matters as ships’ lights, safety regulations, the slave trade, compulsory insurance, “pirate” radio stations, pollution, and the conservation of fisheries – which, of course, are binding only on States-parties to them.

- This leads to the issue of a *genuine link* between the ship and the State of its nationality, which is a requirement for the State's effective exercise of jurisdiction and control over the ship which has its nationality
 - See arts. 91 & 94, UNCLOS
 - The fact that a ship is owned by foreigners does not necessarily prevent a flag State from exercising control in administrative, technical, and social matters over the ship
- The ship is a unit, and the flag State has legal standing with regard to all things and persons located within the ship
- The State can exercise diplomatic protection over the ship without having done its part to ensure that the ship conducts itself compatibly with UNCLOS and other relevant treaties.
- If there is no genuine link between the ship and the State, and the State does not effectively control the ship, then the State lets the ship fly its flag in violation of the Convention, *yet remains able to exercise protection on behalf of it before international tribunals*

Interference with ships on the high seas

- As a general rule, no one but the flag State may exercise jurisdiction (e.g., powers of arrest or acts of physical interference) over a ship on the high seas

Number of cases where a warship of one State may interfere with a merchant ship of another State:

1. Stateless ships – It's lawful to seize a stateless ship on the high seas
2. Hot pursuit – The right of hot pursuit is designed to prevent the ship avoiding arrest by escaping to the high seas
3. The rights of approaching and boarding – If a warship encounters a merchant ship on the high seas and has reasonable grounds for suspecting that the merchant ship is of the same nationality as the warship, it may carry out investigations on board the merchant ship in order to ascertain its nationality
4. Arrest – Treaties often give the contracting parties a reciprocal power of arrest over one another's merchant ships
5. Piracy – Pirates are treated as enemies of mankind (*hostis humani generis*). If a warship has reasonable grounds for suspecting that a merchant ship is engaged in piracy, it may board it on the high seas for purposes of investigation, regardless of the merchant ship's nationality
6. Belligerent rights – A warship belonging to a belligerent State may seize enemy merchant ships
7. Self-defense and other defenses
8. Action authorized by the United Nations

Enclosed or semi-enclosed seas

- These mean a gulf, basin or sea surrounded by 2 or more States and connected to another sea/ocean by a narrow outlet

- It could also mean consisting entirely or primarily of the territorial seas and EEZs of 2 or more coastal states
- The agreement between coastal States is crucial for any rights of navigation and resource development to arise, whether on the basis of condominium or of equitable or consensual delimitation

The deep seabed

- The deep seabed was the common heritage of mankind and laid down various principles to govern the future exploitation of its resources

Chapter 10: State jurisdiction

Concept of jurisdiction

- Domestic jurisdiction – The area preserved for a State's sovereign freedom on matters not covered by that State's international legal obligation (art. 2 (7), UN Charter)
- Jurisdiction, under *international human rights treaties*, determines the scope to which these treaties apply to acts and conduct of States-parties
- **Mainstream meaning of jurisdiction** – The entitlement of a State to exercise State authority over persons and things
 - Jurisdiction may be exercised in compliance with or in contradiction to IL
- **State jurisdiction** includes:
 - The power to legislate in respect of persons, property or events (legislative or prescriptive jurisdiction)
 - The powers of a State's courts to hear cases concerning persons, property or events (judicial or adjudicative jurisdiction)
 - The powers of physical interference exercised by the executive, such as the arrest of persons, or seizures of property (enforcement jurisdiction)
- Principle of territorial sovereignty – A State may not perform any governmental act in the territory of another State *without the latter's consent*
- Territoriality is *more prominent* in enforcement jurisdiction.
 - No State has the authority to infringe the territorial integrity of another State in order to apprehend an alleged criminal, even if the suspect is charged with a serious crime, such as drug trafficking
 - (However, municipal law does not always follow IL)
- The State-sponsored abduction of individuals violates two sets of international norms:
 - International law of sovereignty
 - This is redressable usually by the return of the person kidnapped
 - International human rights
- State committing official abduction is responsible for this wrongful act and is under a formal duty to return the person

- Doctrine of *male captus male detentus* (wrongly captured, wrongly detained)
- But compare this with cases involving perpetrators of *core international crimes*
 - The abducting State is *not* obliged to refrain from exercising its jurisdiction over such persons merely because they have been brought before national courts in breach of international law
 - Reason: Core international crimes are outlawed under *jus cogens* and States are under an international obligation to prosecute perpetrators, as opposed to merely being entitled to do so
 - However, the *abduction still remains an international wrong*, and the abduction State continues owing reparation to the State in whose territory abduction was performed

The essence of jurisdiction of national courts

General characteristics

- The jurisdiction of municipal courts is asserted through municipal law
- IL determines the ultimate legality, and permissible scope, of the assertion of State jurisdiction
- Under national law, there could be a direct statutory conferral of jurisdiction to courts or administration
- Each mode of national assertion of jurisdiction may follow a *treaty provision*
 - Alternatively, jurisdiction may be exercisable as a matter of domestic law but not in fact exercised (*i.e.*, prosecutorial discretion)
- In any case, there is no feasible difference in terms of PIL between civil and criminal jurisdiction—where a State has criminal jurisdiction, it has civil jurisdiction over it as well
 - Civil jurisdiction is governed by private international law/conflicts of law
- It is comparatively rare for IL to require a domestic court to hear a case or prohibit it from doing so
 - A case of mandatory jurisdiction arises out of treaty provisions to exercise jurisdiction, typically in conventions relating to terrorism and core international crimes
 - A typical case of prohibiting one State to exercise jurisdiction over a particular matter would arise under a treaty that confers on that very same matter *exclusive jurisdiction to another State*
- The ordinary rules of IL concerning criminal jurisdiction apply to crimes committed on the high seas
 - For this purpose, a ship is treated as if it were the territory of the flag State
 - For instance, if a British citizen on a French ship fires a fatal shot at someone on a German ship, he can be tried in the UK (nationality principle), France (subjective

territorial principle), and Germany (objective territorial principle).

The Case of S.S. “Lotus” (France v. Turkey) [PCIJ, 1927]

HELD:

- The Lotus decision, based on the *objective territorial principle*, caused some concern, and a long campaign against the rule in this case culminated in art. 11 (1) of the 1958 Convention on the High Seas and repeated in art. 97 (1) UNCLOS

Art. 97

Penal jurisdiction in matters of collision or any other incident of navigation

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. [xxx]

- Thus, for cases of ships colliding at the sea or incident of navigation, the following have *criminal jurisdiction*:
 1. Flag state (subjective territory principle)
 2. Nation of the perpetrator (nationality principle)
- This provision reverses the effect of the Lotus decision only in so far as that decision dealt with collisions and other “incidents of navigation”, specifically on the high seas (and obviously merely as between States-parties to UNCLOS)
- But the wider principles laid down in the *Lotus* case, concerning the objective territorial principle, or presumptions governing jurisdiction in general, remain valid, on land as on all maritime areas not included in the high seas
- Over matters *other than collision*, UNCLOS does not propose any derogation from the ordinary pattern of concurrence of jurisdiction as between the flag State and other States; nor does it contradict *Lotus*
- The rationale underlying *Lotus* and the existence of different grounds of jurisdiction invocable by national courts mean that several states may have **concurrent jurisdiction**
 - A safeguard against this is a human rights principle—*ne bis in idem* (not twice for the same, a.k.a. double jeopardy)

Territorial principle and extraterritoriality

- Every State claims jurisdiction over crimes committed in its own territory, even by foreigners

- Sometimes, a criminal act may begin in one State and be completed in another: a man may shoot across a border and kill someone on the other side
 - In this case, both States have jurisdiction:
 - The State where the act commenced has jurisdiction under the **subjective territorial principle**
 - The State where the act is completed has jurisdiction over the **objective territorial principle** (a.k.a. the **effects doctrine**, based on the fact that the injurious effect, although not the act or omission itself, occurred on the territory of the State)
- When States assert jurisdiction, its *domestic law* is *not* inconclusive on the legality of the exercise of national jurisdiction—IL ultimately governs the issue
- In the same manner, the limits that States self-impose under their nation law are *not conclusive* as to the external limits of their jurisdiction under IL either

The nationality principle (active and passive)

- A State may prosecute its nationals for crimes committed anywhere in the world (**active nationality principle**)
 - Some countries claim jurisdiction on the basis of some personal link other than nationality (for example, long residence by the accused)
- A State could also claim criminal jurisdiction on the basis of the **passive nationality principle**, by trying an alien for crimes committed abroad against one of their nationals
 - Argument against: The mere fact that the national of a State has been the victim of a crime does not necessarily concern the general interests of the home State¹²
 - The US has come to accept the passive nationality principle with regard to terrorist activities and similar serious crimes

The protective principle

- The **protective principle** allows a State to punish acts prejudicial to its security, even when they are committed by foreigners abroad
 - Example: Plots to overthrow its government, espionage, forging its currency
- There is a danger that some States might try to interpret their “security” too broadly¹³

Effects jurisdiction

¹² On the other hand, if the State where the crime has occurred is unwilling or unable to prosecute the offender, one could also argue that the home State is entitled to protect its own citizens once the foreign suspect comes under its control.

¹³ For instance, if a newspaper published in State A criticises State B, it would be unreasonable to suggest that State B has jurisdiction to try the editor for sedition solely on the basis of the protective principle.

The universality principle

- The concept of **universal jurisdiction** relates to the power of a State to punish certain crimes, wherever and whomsoever they have been committed, without any connection to territory, nationality or any other special State interest being required
- IL allows States to exercise universal jurisdiction over certain acts which are criminal in relation to **all countries**, such as:
 - War crimes
 - Piracy
 - Genocide
 - Torture
 - Crimes against humanity
- Offenses may be subject to universal jurisdiction on the basis of international agreements
- Such conventions create an obligation to prosecute or extradite the accused (*aut dedere aut judicare*) and thereby confer jurisdiction under the provisions of the relevant treaty
- Generally, **the guide to identify whether a treaty requires the exercise of universal jurisdiction** is to see whether it stipulates a link between the State-party and the offence as a **precondition** for the exercise of jurisdiction
- Customary IL has also come to accept these offenses as subject to universal jurisdiction
 - Such crimes are violation of IL, directly punishable under IL itself, and they may be dealt with by national courts or international tribunals without demonstrating any link between the forum (State) and the crime
- Under IL, universal jurisdiction is available over breaches of *jus cogens*
- Universal jurisdiction is based on the notion that certain acts are so universally condemned that, regardless of the situs of the offence and the nationality of the offender or the victim, each state has jurisdiction to deal with perpetrators of those acts
- Customary *jus cogens* crime of genocide empowers all States to exercise jurisdiction over it
- The crime of genocide which has acquired the status of *jus cogens* or peremptory norm has been established and consequently States may exercise universal jurisdiction over such a crime
- Perpetrators of torture can be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime
 - One of the consequences of the *jus cogens* character bestowed by the international

community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture

- The inherently universal character of the crime based on its peremptory status gives all States universal jurisdiction
- The inconclusiveness of State practice is not an indication of the lack of a jurisdictional entitlement of the State
 - Consequently, universal jurisdiction over serious international crimes can flow from grounds other than its recognition in individual situations in practice

The universal civil jurisdiction of national courts over human rights violations

- States can provide other remedies for victims of crimes against universally accepted interests, through civil proceedings for compensation for damages
- Example: US Alien Tort Statutes
 - This grants federal district courts jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States
 - There's a presumption against extraterritoriality in the ATS
- Likewise, in the Convention Against Torture, each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation
 - Redress should be made available to any victim of torture, regardless of the locus of the act

Extradition

- A State is entitled to exercise jurisdiction over a particular individual may not always have custody over them
- To overcome this problem, cooperation exists between different countries in civil, criminal and administrative matters, based upon multilateral and bilateral treaties
- Individuals may be extradited (that is, handed over) by one State to another State, in order that they may be tried in the latter State for offences against its laws
- **There is no duty to extradite any person in the absence of a treaty obligation to that effect**
 - The state has a right to grant asylum, even though an individual has no right to receive it
- **There is no rule of IL which prevents States from extraditing persons in the absence of a treaty**
- Extradition of a person may be prevented by conflicting treaty obligations to which the custodial State is subjected

- This is owed mainly to the absolute nature of certain human rights obligations, such as prohibition of torture

Some requisites/requirements for extradition:

1. Double criminality
2. Principle of speciality
3. Non-extradition for "political offenses"

Double criminality

- An offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States

Principle of speciality

- The person should be tried only for the crime that the person was extradited for

Non-extradition for political offenses

- Practically, the way of dealing with this issue is to stipulate that certain listed acts *do not* constitute political offenses

Chapter 15: Protected persons and entities: nationality and individual rights¹⁴

The essence of individual rights

- Individual rights – The range of substantive standards of protection applicable under *customary international law or under treaties* which accord non-State entities against a host State
 - Compare with: Rights enjoyed by non-State entities regardless of their nationality (such as human rights)
- Individual rights operate to the benefit of individuals
- Their violation causes **no** direct damage to the State
- Still, individual rights are legally owned by States of the individuals' nationality
 - If such a state chooses not to raise the matter, the state violating those rights cannot be held responsible
 - The injured right is the right of an individual, but in some of them, the national State may claim a "general interest" separate from, and supplementary to that of the private individual
- There could be cases where the State of the nationality can be considered to be injured directly (*i.e.*, the individual rights are violated in a broader context involving prejudice against a particular State's nationals)
- **Alien's rights:** The citizen of a nation may enjoy many rights which are withheld from aliens, and *aliens may enjoy rights and remedies which the nation does not accord its own citizens*
- Treaty obligations may require a State to accord aliens the same rights

¹⁴ This chapter focuses on *standards protecting non-State entities as nationals of a particular State or as aliens in a foreign States (i.e., foreign nationals or stateless individuals).*

- Individual and human rights may overlap in content, such as in the provision of **consular assistance**
 - This individual right must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial
 - Nevertheless, an individual's right to consular assistance and a State's right to provide it to their nationals operate independently of each other

Nationality

Concept

- Nationality is a legal notion which must be based on a State law to exist and be productive of effects in IL
- Nationality – The legal bond between a person and a State (European Convention on Nationality)
 - No precise definition of “legal bond”
- Being a state's national is not only the individual's right to benefit from a particular nationality, but also at times to suffer detriment
- The relevance of nationality under general international law focuses, therefore, on the criteria under international law to evaluate decisions of the grant and deprivation of nationality by a State
 - General II does *not* endorse an individual's wholesale right to have/choose a particular State's nationality, or even to give up a particular State's nationality

Initial State prerogative and its limits

- The State itself determines who its nationals are
 - Including the grant, denial or deprivation of nationality
 - In the absence of treaty obligations, the State's respect for an individual's entitlement to nationality is a matter for that State's domestic law and jurisdiction
- IL is irrelevant with the legality of State decisions to grant nationality.
- IL only becomes concerned when it comes up in relations between States who assert/contest the person's status as the relevant State's national
- The problem comes where the domestic laws of a State deny their nationals a right to acquire another State's nationality
- Therefore, grants and determinations of nationality by a State under their own law *are not conclusive and international courts/tribunals dealing with this issue have to consider whether those grants and determinations are effective under IL!*
 - Nationality should not be conferred through means incompatible with IL
- A treaty may oblige the state to extend its nationality to certain persons (e.g., 1918 Bucharest Peace Treaty)
 - 1961 Convention relating to the Status of Stateless Persons: A contracting state shall

grant its nationality to a person born in its territory who would otherwise be stateless

- However, there is no authoritative definition of the “right to nationality,”¹⁵ including:
 - Whether it prefers the nationality of the State of a person's *habitual and effective residence*
 - Whether it allows multiple nationalities of the same person's choice

Methods of acquisition and conferral of nationality

1. By birth
 - a. Jus soli – Nationality is conferred on children born on the State's territory
 - b. Jus sanguinis – Nationality is conferred on children born of parents who are nationals
2. By marriage
3. By adoption or legitimation
4. By naturalization
5. As a result of the transfer of territory from one State to another,¹⁶ or through the creation of a State

Loss of nationality

1. A person becomes a dual national at birth, as a result of the cumulative applications of the *jus soli* and *jus sanguinis* principles by different States
 - a. He is sometimes allowed to renounce one of the nationalities upon attaining his majority
2. Acquisition of a new nationality was often treated by the State of the old nationality as automatically entailing loss of the old nationality
3. By deprivation
4. As a result of the transfer of territory from one State to another, by way of option¹⁷
 - a. Ordinarily, territorial changes do not entail changes of nationality of the affected population as a general/blanket outcome. These persons do not thereby lose their original nationality, nor automatically acquire the new territorial sovereign's nationality. They would be treated as aliens
5. Renunciation by an individual

Dual or multiple nationality

- General international law does not contain a rule endorsing or prohibiting dual or multiple nationality as such
 - However, “within a third State, a person having more than one nationality shall be treated as if he had only one” (art. 4, 1930 Hague Convention)

¹⁵ Right to nationality is defined by the ILC's draft articles on State succession as a right to nationality of either the predecessor or successor State, thus effectively equalling that right to the requirement to avoid statelessness.

¹⁶ The PRC believes that Hong Kong's population became, upon handover, Chinese citizens.

¹⁷ The 1867 Alaska Cession Treaty provided that the inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, could return to Russia within three years, or remain in the United States.

- Third States are free to determine the priority between two nationalities by relying on the person's habitual residence, intensity of connection with the relevant State, or the **effectiveness of the relevant nationality**

International law limitations on the deprivation of nationality

- State discretion is greater with grant of nationality than with its deprivation
 - UDHR: No one shall be arbitrarily deprived of nationality
- In assessing whether deprivation is arbitrary, it depends on whether it has basis in law, or produces statelessness
 - It must be backed with evidence
- CEDAW: Marriage to an alien shall not automatically render her stateless

Contestation of nationality decisions in relations between States

- There is no general or customary law as to specific aspects of the legality of the conferral, deprivation of nationality, and the recognition thereof by third States
- State retains their freedom to determine these matters according to their national law
- But third States may be entitled, or even obliged, not to recognise the outcomes warranted by the first State's national legal system
- This can happen:
 - Owing to the lack of effective connection between the State and the individual
 - By virtue of the third State's own national law
 - On account of a duty not to recognise such decisions as may arise by virtue of some fundamental illegality attending the conferral or deprivation of nationality¹⁸
- Contestation of nationality can be based on a claim:
 - That a State's national law requirements as to the grant of nationality were not observed
 - That those requirements were observed but under IL, the State granting nationality was not entitled to grant nationality
 - That a State may not have been so prohibited from granting nationality but its decision to do so cannot be relied upon against other States
- There is no general rule under international law that the acquisition of one State's nationality leads to the loss of another nationality
 - All will depend on what the relevant State wants to recognise, acquiesce to, or challenge in the relevant grant
 - It has never been considered as contrary to IL that a State grants rights to the nationals

of a third country without asking for the consent of that State

- In any case, a State is *not prevented* from extending its nationality to foreign citizens
- It seems that unless such decisions of the State engage some clear-cut prohibition under international law or are connected to some situation that international law treats as illegal, no legal objection could be raised
 - Example of objectionable grant: Conferral of nationality to inhabitants of an annexed or occupied territory
 - This is covered by the doctrine of non-recognition
- Considerations as to whether a person would be recognized as a particular State's national:
 - Whether they have actual or inchoate nationality
 - Inchoate means nationality available in the relevant State's law, but not actually acquired
 - What amount of discretion the State of nationality has with regard to granting or refusing citizenship to a person
 - What conditions it imposes on applicants
- In some cases, international law may well determine whether the nationality laws of one State could be relied on against another State

Statelessness

- As aliens wherever they go, stateless persons have no right of entry, no voting rights, are frequently excluded from many types of work and are often liable to deportation.
- States have entered into treaties to reduce the hardship of statelessness, or eliminate it altogether by altering their nationality laws
- Overall, the 1954 Convention relating to the Status of Stateless Persons purports to improve the position of stateless persons by stipulating a number of rights in their favour, either in terms of national treatment or non-discrimination
- Gulapa: Based on state practice, it has crystallized into CIL: **That they should be treated in the same accord as aliens**

Rights of aliens regarding entry to, remaining in, and expulsion from a State

- A person that does not have a particular State's nationality is an alien when present in that State's territory
- The right to control the movement of aliens through national borders is an **attribute of State sovereignty**, but with limitations under IL
- With regard to the admission of aliens, discrimination on nationality grounds is not as such unlawful.
 - However, under the guise of nationality States can engage in de facto racial discrimination, which is clearly unlawful

¹⁸ Such as the connection to aggressive war, discrimination or other violations of human rights, or the breach of the principle of self-determination.

- Refugee law is a specialized area dealing with the admission and treatment of a particular category of aliens
- Most States have claimed wide powers of deportation
- The treaty obligations that a State has assumed under international law can restrict the scope of that State's prerogative to control entry to, and movement through, its territory by foreign citizens
- ILC: Expulsion of aliens should be carried out in a way that is compatible with human rights requirements
- Expulsion is a generic term that encompasses any form of nonadmission, return or exclusion of an alien, including return (*refoulement*) used specifically in the context of refugee law; and whether or not an individual is lawfully present on a State's territory
- There are also other ways in which the maladministration of justice in civil or criminal proceedings can engage a State's responsibility
 - Examples: If the courts are biased or guilty of excessive delay
- The minimum standard also concerns the manner of diligence in which the State should safeguard aliens' rights
- The discrete scope of this standard thus focuses on grave infringements on the human person and denial of justice before courts of the host State
- A more **modern trend** has been to connect the minimum standard to the concept of **arbitrariness**, which the ICJ defined as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" (*ELSI*)

Treatment of foreign investment

Admission of foreign investments

- Investment law enshrined in bilateral investment treaties (BITs) is meant to protect aliens who invest in foreign States ("host States")
- Requirements for an investment:
 - A contribution of money or assets
 - A certain duration over which the investment project was to be implemented
 - An element of risk
 - A contribution to the host State's economy
- Under general IL, a **state has an unlimited discretion as to allowing investors entry into its own territory**

The doctrine of "acquired rights"

- Acquired or vested rights concern:
 - Whether the same State under whose law the relevant private law has been acquired must respect the existence and exercise of that right
 - Whether a State should respect rights acquired under another State's legal system
- The doctrine has been invoked in an improvident way in the past as a rather vague doctrinal obstacle to any act affecting the interests of aliens

International minimum standard

- A national treatment standard is difficult to formulate and apply as a matter of general international law, because national legal systems and standards diverge from State to State
- An international minimum standard at least aspires to formulate a uniformly applicable international standard
- A State's international responsibility will be engaged if an alien is unlawfully killed, imprisoned, or physically ill-treated, or if his property is looted/damaged
- Excessive severity in maintaining law and order will also fall below the minimum international standard

Most-favored-nation (MFN) clauses and national treatment

- MFN clauses included in a treaty ordinarily require that one party grants to the nationals of another party *any privilege/favor it grants to nationals of any other State under another treaty*
- MFN obligations are essentially **referential** as they invariably refer to obligations assumed under a different treaty, its content depending on the interpretation of treaties involved in the relevant context
- For a MFN clause to take effect, obligations contained in the basic treaty containing the MFN clause and in the treaty to which the MFN clause refers should cover the **same subject matter**

The concept of expropriation

- Expropriation is a sovereign right of every State and is thus not inherently illegal under international law
- Expropriation is commonly understood to refer to unilateral interference by the State with the property or comparable rights of an owner in general terms
- Customary law limits:
 - Expropriation must be for a public purpose
 - Expropriation must be accompanied by payment of compensation for the full value of the property ("prompt, adequate and effective compensation")
- UNGA Res. 1803 (XVII): Expropriation shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures.
- Overall, the *Hull* formula has been embodied in multiple BITs, but has not become customary law, whereas Resolution 1803 carries more weight

Disguised expropriation

- Any act which deprives a foreigner indefinitely of all benefit from his property is regarded by international law as an expropriation, even though a formal change of ownership may not have occurred.

- Indirect expropriation can be defined as treatment rendering property rights useless even if not actually involving expropriation of the property
- Furthermore, indirect expropriation claims at times refer to governmental measures not directed against the particular investor, such as generally applicable legislative or other regulatory measures
- The position is less certain as regards acts which diminish the value of property but which do not deprive the owner of its use
 - Such acts are permitted by international law, provided that they are not done for an improper motive
 - The easiest way of proving improper motives is to show that the acts in question *discriminate particularly against foreigners*, or against a specific group of foreigners
- Overall, a governmental measure targeting particular investors and affecting control of the investment can genuinely be “tantamount” to expropriation and can conceal the intent of evading the direct expropriation prohibition by achieving the same objective through different means
 - However, general regulatory measures are more difficult, and less appropriate, to subsume within this concept
- Under BITs, contractual rights fall within the concept of expropriation where “investment” can be defined to include contractual rights, and the host State acts in a way that goes beyond an ordinary breach of contract and engages in the unlawful or arbitrary use of State authority

Fair and equitable treatment (FET)

- It is part of the international minimum standard under general international law, focusing on a breach of judicial propriety, arbitrariness, and non-discrimination
- Stability of the legal framework and legal certainty can be part of the FET standard, but that does not negate the right of the State to regulate foreign investments
- Three IL doctrines:
 - Detrimental reliance
 - Denial of justice
 - Abuse of rights
 - To inform the content of FET
- Another area the FET standard has focused upon is denial of justice and discrimination
- FET can also include the national treatment standard that requires treating foreign investors on terms equal to host States’ nationals
- It is important to understand that the minimum standard could at most require only legal certainty as to investors’ rights and obligations, which does not encompass the overall economic climate and advantages the investor may have or may be expecting to obtain, including in terms of economic incentives, income, profits, competitiveness or expansion
 - Hence, the impact on the legal authority of management and disposal of investments should be included; altering the general investment climate by taxation, the lawful imposition of fines or some administrative inconvenience not interfering with the legal management of investments should be excluded

Calculation of compensation for expropriation

- The price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat
- If the expropriation act was illegal under international law, there is a tendency also to grant compensation for lost profits
- Another option is the so-called discounted cash flow method, an accounting method calculating future profits and discounting certain amounts for costs and commercial risks

Expropriation of contractual rights

- Rights created by contracts between an alien and the defendant State are not as such within the province of IL
 - They are usually subject to the law of the defendant State
 - The alien, by entering into a contract governed by the law of the defendant State, must take the risk of amendments to that law, whether favorable/unfavorable
- Opposite argument: When an alien buys property in the defendant State, his title to the property is governed by the law of the defendant State, but few people would accept that the defendant State has an unlimited power to take away property rights; why, then, should it have an unlimited power to take away contractual rights? (analogy)
- Breach of contract by a State does not engage the State’s international responsibility unless it constitutes an abuse of governmental power

“Full protection and security”

- Full protection and security is another substantive standard of protection featured in multiple investment agreements
 - It requires that the investor has to be protected, regardless of the level of protection generally available to similar entities under the State’s domestic legal system
- But full security and protection clauses subsume only those risks which are attributable to the host government owing either to its action or its breach of due diligence obligations
 - The most prominent aspect is physical and operational security

[ICJ, 1989]

FACTS: ELSI was a corporation in Italy, fully owned by Raytheon. In the late 60s, the corporation seriously planned to close and liquidate ELSI to minimize Raytheon's losses. At the same time, meetings were conducted with Italian officials and companies to save the corporation. However, Raytheon pursued the corporation's closure. The workers were dismissed, as a consequence thereof. However, on Apr. 1, 1968, the mayor of Palermo issued an order requisitioning ELSI's plant and related assets for six months. The plant was also occupied by ELSI's workers during the requisition. Thus, ELSI appealed the requisition to the prefect of Palermo. A bankruptcy petition was also filed, referring to the requisition as the reason why the company had lost control of the plant. A decree of bankruptcy was issued, and the prefect annulled the requisition order. The following year, the trustee in bankruptcy sued the minister of interior and the mayor for damages. The Court of Appeal of Palermo awarded damages for loss and use of the plant. The US alleged that Italy's actions breached its obligations under the Friendship, Commerce and Navigation (FCN) Treaty.

ISSUE: Did Italy breach the FCN Treaty?

HELD: NO.

As to art. III (right to control and manage corporations)

NO. The management of ELSI had no practical possibility of successfully carrying out a scheme of orderly liquidation under its own management, it cannot be said that it was the requisition that deprived it of this faculty of control and management.

As to art. V (protection and security of nationals and their property)

NO. Art. V cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. In any event, considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production, the protection provided by the authorities could not be regarded as falling below the full protection and security required by international law; or indeed as less than the national or third-State standards. The mere fact that the occupation was referred to by the Court of Appeal of Palermo as unlawful does not, in the Chamber's view, necessarily mean that the protection afforded fell short of the national standard to which the FCN Treaty refers. The essential question is whether the local law, either in its terms or its application, has treated United States nationals less well than Italian nationals. This has not been shown.

As to art. V, ¶ 2 (expropriation)

Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then, if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation. Furthermore this requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period, and liable to be overturned by administrative appeal, could not, in the Chamber's view, amount to a "taking" contrary to Article V unless it constituted a significant deprivation of Raytheon and Machlett's interest

in ELSI's plant. The requisition could therefore only be regarded as significant for this purpose if it caused or triggered the bankruptcy.

As to art. I of the supplemental agreement (MFN standards)

Though examining the decisions of the Prefect of Palermo and the Court of Appeal of Palermo, the Chamber observes that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law. Arbitrariness is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.

Chapter 11: Immunity from jurisdiction

Basic concept

- In cases where national courts have jurisdiction over a particular matter, certain defendants can still be exempted from that jurisdiction if they are granted immunity, either on the basis of:
 - International law
 - Comity
 - Self-imposed limitation by the forum state on its own jurisdiction (e.g., national legislation)
- Entities granted immunity encompass:
 - Foreign states and their officials (sovereign immunity)
 - Diplomatic and consular agents of foreign states (diplomatic and consular immunity)
 - International organizations and their officials
- It is only where a State has jurisdiction under IL in relation to a particular matter that there can be any question of immunities regarding the exercise of that jurisdiction
 - Jurisdiction does *not* imply absence of immunity, while the absence of immunity does *not* imply jurisdiction
 - Immunity is available where it is demonstrated that a rule of positive IL requires the exemption of a particular class of defendants from jurisdiction of the forum State

Sovereign (or State) immunity: scope and sources of law

- State immunity deals with the conditions under which a foreign State may claim exemption from jurisdiction of the forum State
- No State may exercise jurisdiction over another State without its consent (*par in parem non habet imperium*)
 - This arises from the doctrine that States are independent and legally equal
- Two levels:
 - The immunity of a foreign State from the jurisdiction of municipal courts of another State to *adjudicate a claim against it* (e.g., tort or contract)

- The exemption of a foreign State from enforcement measures against its State property, especially to execute a municipal court decision, for example, by attaching the bank account of the embassy of that State
- Old rule: Doctrine of absolute State immunity
 - This covers all areas of State activity, including commercial and private acts
- **Prevailing norm: Doctrine of qualified immunity**
 - Immunity is granted to foreign States *only* in respect of their governmental acts (acts *jure imperii*), not in respect of non-sovereign acts (acts *jure gestionis*)
 - Here, you look at the nature of activities complained of before a national court—not the mere identity of the defendant
- Akehurst:
 - States are obliged to grant immunity from jurisdiction *if the claim is based on its conduct de jure imperii*, and immunity from execution if it is sought against property of the foreign State which serves public purposes
 - With regard to property *de jure gestionis* of a foreign States, this view implies that States may grant immunity¹⁹
- It remains unclear if IL has positively endorsed a newer and different standard of qualified, or restrictive, immunity as a standard of customary IL
- The significant divergence in details of applying the restrictive theory has *not* been overcome in the practice of States
 - Nor is there any evidence that any particular version of a restrictive theory of immunity has become a custom
- Rules on State immunity are codified in international treaties (e.g., 1972 European Convention on State Immunity, or the 2004 UN Convention on Jurisdictional Immunity)
 - However, such treaties enjoy rather low ratification status, or are not in force at all, and thus cannot be seen as evidence of general international law on this matter
 - On the whole, these instruments start from the principle of absolute immunity of the State, qualified by listed exceptions
- On the *national* level, a number of common-law States have enacted State immunity legislation
 - A common feature is that they do not provide immunity for foreign States in respect of their commercial transactions and other matters listed in statutory texts as exceptions
 - If the matter concerns the exercise of “classical” State functions, such as the use of the army in an armed conflict, the matter is rather simple.
- In *Argentine Republic v. Amerada Hess Shipping Corp.*, SCOTUS found no difficulty in granting immunity to Argentina against a claim filed by the owner of a tanker which had been attacked and damaged on the high seas by the Argentinian air force in the Falklands war
- The restrictive doctrine is *not* about general rules on immunity and exceptions from them.
 - Instead, you assess the nature of every single State act on its own merit, to determine if it’s a sovereign act (act *jure imperii*)
- The distinction between sovereign and non-sovereign activities is *prima facie* based on the conduct of a State and that State’s sovereign authority
 - Acts which, by their nature, **can only be performed by States** are unsuitable for adjudication by municipal courts
 - Acts which **can be performed equally well by States/private individuals** are suitable for adjudication by municipal courts
 - The State has sovereign authority; individuals and companies do not
 - The State can act the same way as individuals and companies, while the reverse isn’t true
- There are cases in which foreign States have selected *forms of private commercial activities to pursue public purposes*
 - Objective test – Look at the “nature” of the acts
 - Subjective test – Look at the “purpose” of the act
 - The starting point is the objective test, because most state acts would be classed as dual-nature acts if the subjective test is used
 - The law recognizes no such dual-nature acts
- The distinction between acts *jure imperii* and acts *jure gestionis* is not about the distinction between sovereign and commercial activities
 - The restrictive doctrine is not about any general immunity rule and exceptions from it
 - It simply requires assessing the substantive nature of each and every act complained of before a national court to identify whether the State acted in the exercise of its sovereign authority when performing that particular act
- These distinctions have been overlooked in some cases dealing with State involvement with violations of human rights and laws of war
 - Mere State involvement in and perpetration of the relevant wrong was seen as tantamount to the sovereign activity of the State

¹⁹ However, the validity of such a presumption turns on whether the sources of the law endorse it.

- Violations of human rights and humanitarian law remain outside the scope of acts *jure imperii*

State immunity and the hierarchy of norms

- Owing to the doctrine of normative hierarchy, when State immunity is claimed for violation of a rule of *jus cogens*, it should yield to the latter rule and be denied to the entity that claims it
- But in *Germany v. Italy*, the ICJ refused to accept the primacy of *jus cogens* over immunities
 - The rules of *jus cogens* are substantive rules of State conduct, while immunity rules are procedural rules—and so there is no conflict
 - Nevertheless, the requirement not to commit war crimes still stands, but remedies cannot be claimed when a State perpetrates them

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)
[ICJ, 2012]

FACTS: Germany filed an application instituting proceedings against Italy in respect of a dispute originating in violations of obligations under international law allegedly committed by Italy through its judicial practice, in that it has failed to respect the jurisdictional immunity which Germany enjoys under international law. Italy allegedly did this by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by Nazi Germany during WWII; that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts.

ISSUE: Were Italian courts obliged to accord Germany immunity?

HOLDING: YES

As to the territorial tort principle

There is no state immunity if the injury or damage occurred in the forum state and if the author of the injury was present in that territory at the time when those facts occurred (art. 11, European Convention). However, art. 31 of the European Convention excludes from the scope *all proceedings* relating to acts of armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict. The commentary on the text of art. 12, UN Convention states that it does not apply to situations involving armed conflict—no State questioned this interpretation. Moreover, State practice (judgments of national courts) supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. Accordingly, the decision of the Italian courts

to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

As to the subject-matter and circumstances of the claims in the Italian courts

First strand: Gravity of violations

After examining State and international practice, the Court concludes that, under customary international law as it presently stands, a State is *not* deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court emphasizes that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

Second strand: Contravention of *jus cogens*

Jus cogens and state immunity are different matters and there can be no conflict. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility. The Court observes that, in the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. The Court adds that the argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts.

Third strand: "Last resort" argument

The Court considers that it cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. It can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.

Akehurst's criticism of Germany v. Italy

- Akehurst: Such a distinction is **false** (!)
- Immunity is a rule that is invoked during some kind of procedure, but it is not, under IL at least, a procedural rule
 - In fact, the ICJ has treated it as a substantive rule when it accepted its alleged violation as a cause of action put forward by Germany
- There is also the argument that the *jus cogens* nature of a particular norm does not by itself generate a second, consequential norm stipulating the mandatory duty of States to provide remedy and

reparation for the victims of the original violation of the first rule

- It makes little sense to expect any particular *jus cogens* norm to stipulate that, if it is violated, there is a mandatory duty to provide remedies for that violation
- Instead, under the law of State responsibility, there is a **general duty to provide remedy and reparation for every single internationally wrongful act**
- In relation to breaches of *jus cogens*, this general consequential duty itself operates as peremptory
- Otherwise, it would effectively approve a breach of *jus cogens* as well as denying the relevance of the relevant peremptory norm and would also breach the duty of non-recognition of breaches of *jus cogens*
- The argument as to the requirement of a discrete and additional mandatory rule requiring remedies to be granted for breaches of *jus cogens*, as a precondition of the primacy of *jus cogens* over immunities, is consequently flawed
 - The aim of derogation from *jus cogens* is to provide comfort to derogating States by rendering the *jus cogens* framework irrelevant in relation to a particular case and/or in mutual relations of those States
- *Germany v. Italy* can be further exposed to have admitted and accepted derogation from *jus cogens* as it attempted to trim down the effect of art. 41, ARSIWA
 - In this case, the impunity created through the grant of immunity, the lack of any other remedy for victims, and the consequent practical denial of the capacity of the relevant rules of *jus cogens* to operate with regard to the case, **clearly amount to the situation produced and persisting after the initial violation.**
- A fully fledged derogation from *jus cogens* is clearly involved through the grant of immunity to a foreign State
 - The issue here relates to derogation from *jus cogens*, which is not about the abolition of the relevant rule, but about preventing the relevant peremptory norm operating in relation to underlying facts

Entities and persons entitled to immunity

The State and its subdivisions

- The question arises as to what constitutes a "State" for the purposes of immunity
- Under the *restrictive doctrine*, the matter turns on whether the activities in question are sovereign activities, not whether they are perpetrated by central or local organs of the State

Property interest and indirect impleading

- Immunity may also be claimed in proceedings involving property in which the foreign State has an interest, even though the foreign State may not necessarily be a party to the proceedings²⁰
- This rule applies if the foreign State claims to own the property, or if it claims some right less than ownership (e.g., possession)
- Clearly, a court cannot allow a foreign State to halt proceedings between two private individuals by simply asserting an interest in property, unsupported by evidence

*State officials: immunity ratione materiae*²¹

- All servants or agents (or former) of a foreign State are immune from legal proceedings in respect of acts done by them in exercise of sovereign authority of a State, and the position under IL is the same in both criminal and civil cases, because the scope of sovereign authority is identical throughout
- However, the immunity of officials cannot be pleaded as a defense to charges of war crimes, crimes against peace, or crimes against humanity
 - He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action *moves outside its competence under IL*
 - Officials are immune only to the extent to which States themselves would be immune
- Immunities focus on the nature of particular acts and transactions, not on whatever "capacity" has been used to perpetrate them
 - Again, you don't look at the identity—but on the subject matter
- The restrictive doctrine of immunity requires focusing on the nature of the specific act of torture, which can be perpetrated by anyone, whether or not acting in an official capacity
 - The nature of such crimes and the circumstances under which they are committed, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him immunity from criminal processes
 - Serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone can perform

*State officials: immunity ratione personae*²²

- A few high-ranking State officials enjoy more comprehensive immunity for the duration of their terms of office
 - These are:
 - Heads of State

²⁰ For instance, if A sues B, disputing B's title to property which a foreign State has leased from B, the foreign State may intervene to have the proceedings stopped, because judgment in A's favor would deprive the foreign State of its interest in the property.

²¹ Lit. "by reason of the subject matter."

²² Lit. "by reason of the person."

- Heads of government
- Foreign ministers
- Immunity *ratione personae* is temporary and lasts for the duration of office only
 - Thus, immunity is less likely to lead to impunity

Immunity from execution and attachment of State property

- With immunity from jurisdiction, a foreign State could merely be condemned before the forum State's court
- However, *without immunity from execution*, State property can be targeted, despite this property no having anything to do with the State's actions towards the victim
- There is no general prohibition under international law against the execution and attachment of State property of any kind held abroad in satisfaction of a judgment entered against that State in a foreign country.
 - But national regulations of this issue tend to diverge
- *Germany v. Italy*: The rules of immunity from enforcement and jurisdiction are distinct, and must be applied separately
 - But the ICJ provided hardly any evidence as to how those rules of customary law have been established and from where they derive
- If the logic of the restrictive doctrine is extended to the execution issue, then property held for sovereign purposes, should be exempt from enforcement, while property deployed for private and business activities should *not* be exempt

Diplomatic relations, diplomatic immunity and consular relations

Conduct of diplomatic relations

- Diplomatic immunity is governed by the 1961 Vienna Convention on Diplomatic Relations (VCDR)
 - Accession is almost universal and most of the provisions can be used as evidence of customary law, even against non-State parties
- The presence of diplomatic agents relies on the host's consent and they enjoy immunity only in the receiving State
- Diplomatic relations are established by mutual consent between the two States concerned
 - However, they may be broken off unilaterally
 - When State A breaks off diplomatic relations with State B, it not only withdraws its own diplomatic mission from State B, but also requires State B to withdraw its mission from State A.
- The receiving State's consent is necessary for the head of mission (*i.e.*, the ambassador), but not for lower officers

- Military and naval attaches require host State approval, and so do members of the mission if they have the State's nationality
- The host State may request that the size of the mission is kept reasonable and normal
- The receiving State may at any time declare a diplomat *persona non grata*, which forces the sending State to withdraw him or her
- Any interference in the internal affairs of the receiving State by diplomatic staff is forbidden

Art. 3

The functions of a diplomatic mission consist *inter alia* in:

- representing the sending State in the receiving State;
- protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- negotiating with the Government of the receiving State;
- ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Diplomatic immunity from the jurisdiction of courts

Art. 31

- A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
 - an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
 - an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

- The same immunity is enjoyed by a diplomat's family if they are not nationals of the receiving State
- Diplomatic immunity under art. 31 is *wider* than State immunity available to all State officials, because it does *not* focus on the nature of acts in relation to which immunities may be claimed
- The VCDR does not grant full immunity to *all* the staff of a diplomatic mission:
 - Administrative and technical staff, and service staff only have criminal immunity

- Their civil/administrative immunity is limited to official acts

search, requisition, attachment, or execution.

Immunity of other staff

Art. 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

- When an individual ceases to be a member of the staff of the diplomatic mission, his immunity continues for a *reasonable time* thereafter, in order to give him time to leave the country
- After that, he may be sued for private acts done during his period of office, but not for official acts (art. 39 (2), VCDR)
- The mainstream immunity of diplomatic agents under art. 31 is *wider* than art. 39 and covers acts both within and outside the agent's official functions
 - In that sense, again, diplomatic agents have immunities wider than ordinary State officials

Other diplomatic privileges and immunities

- Diplomats possess other privileges
 - Privileges refer to *special positions* enjoyed under the receiving State's domestic law (e.g., tax exemption) while immunities refer to exemption from judicial processes while preserving the substantive duties under domestic law intact

Art. 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from

- The sending State cannot unilaterally designate a building as its diplomatic premise, because this would force the host State to accord protection to premises against its will, even after diplomatic relations are possibly broken off.
- However, the host State's objection to designation should not be arbitrary and discriminatory and the host State remains under a duty to facilitate the acquisition of premises by the foreign mission
- Archives, documents, and other property belonging to a diplomatic mission or diplomat are inviolable
- The mission must have unimpeded communication with the sending State by all appropriate means, including diplomatic couriers and messages in code or cipher
 - But it may *not* use a radio transmitter without the host State's consent
- The mission's official correspondence is inviolable, and the **diplomatic bag** must not be opened or detained
 - But what if the diplomatic bag is abused?
- Bugging of diplomatic premises, which is not discretely mentioned in the VCDR, is contrary to the spirit of it, *but is not expressly outlawed*
 - But if the bugging amounts to intrusion, art. 22 (2) may apply
- The premises of the mission are exempt from *all taxes*, except those which represent payment for specific services rendered
 - Diplomats are also exempt from all taxes, with certain exceptions²³
- The receiving State must allow the importation, free of customs duties, of articles for the official use of the mission and of articles for the personal use of a diplomat or his family
- Diplomats shall not be liable to any form of arrest or detention, and that appropriate steps must be taken to protect them from attack
 - The obligation to respect the rules of diplomatic immunity is an absolute obligation which must be obeyed in all circumstances

Consular relations and consular immunity

- Consuls, like diplomats, represent their State in another State, but, unlike diplomats, they are not

²³ A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except: (a) indirect taxes of a kind which are normally incorporated in the price of goods or services; (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39; (d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State. (e) charges levied for specific services rendered; (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23 (art. 34, VCDR).

ordinarily concerned with political relations between the two States.

- They perform a wide **variety of non-political functions**: issuing passports and visas, looking after the shipping and commercial interests of their States, and so on
- Consulates are often based in provincial towns as well as in capital cities
- Persons who act simultaneously as diplomats and as consuls have diplomatic immunity
 - Consuls who do not act as diplomats have many of the same privileges and immunities as diplomats, but they are immune from the civil or criminal jurisdiction of the receiving State's courts *only in respect of official acts*
 - Consuls may import articles for their personal use, free of duty
- Consuls have a right to communicate with nationals of the sending State in the territory of the host State, *especially when those nationals are in prison before trial or after conviction*
- There's an inherent connection between the obligation of the receiving State to inform a detained person of his rights under art. 36 and his ability to request that the consular post of the sending State be informed of his detention
 - Unless the receiving State has fulfilled that obligation, the individual may not be aware of his rights and consequently may not be in a position to make a request that the competent authorities of the receiving State inform the sending State's consular post of his arrest (*Jadhaw case*)

Immunities of international organizations

- International organisations enjoy no immunities under customary law
 - **Treaties** govern the area
- The purpose of immunity in the case of international organisations is at times seen as a purely functional one
- The UN has complete immunity from *all* legal processes
 - Its premises, assets, archives, and documents are inviolable
 - It is exempt from direct taxes and customs duties
 - Its staff are exempt from income tax on their salaries
 - The secretary-general and assistant secretaries-general have diplomatic immunity
 - The secretary-general must waive a staff member's immunity if in his opinion immunity would impede the course of justice and can be waived without prejudice to the interests of the UN
 - The UN must "make provisions for appropriate modes of settlement of" claims

against it (e.g., insurance contracts and arbitration agreements)

- Representatives of member States attending UN meetings are granted almost the same privileges and immunities as diplomats, except that their immunity from legal process applies only to their official acts, and they are immune from customs duties only in respect of their personal baggage
- UN officials have immunity from domestic jurisdiction when performing their official duties (*Cumaraswamy advisory opinion*)
- **Doctrine of equivalent protection** – Organizations can enjoy immunity from national jurisdiction when the organization in question provides alternative remedies to affected individuals

Waiver of immunity

- Both sovereign and diplomatic immunity can be waived
 - The immunity is conferred in the interests of the State, and can be waived only by the State
 - A State may waive the immunity of one of its diplomats against the diplomat's wishes
 - But waiver by a diplomat is ineffective unless authorized by his superiors
- Waiver can take two forms:
 - Express
 - Implied
 - But under art. 32 (2), VCDR, waiver must always be express, but this only applies to diplomatic immunities and cannot be applied by analogy to State immunity
- State immunity can be waived either:
 - 'In the face of the court' (after proceedings have commenced)
 - By an agreement made before proceedings are commenced
- If States/diplomats appear as plaintiffs, they are deemed to waive their immunity in respect of counterclaims
- Waiver of immunity in a court of first instance also covers appeals from the judgment of that court
 - So if the State wins in trial, it cannot revive its immunity to prevent the other party from appealing
- A waiver of immunity from jurisdiction *does not entail* waiver of immunity from enforcement of judgments
 - A separate act of waiver of immunity from enforcement is necessary before execution can be levied against the property of a foreign State/diplomat to satisfy an unpaid judgment debt

Chapter 14: State succession

State succession is about whether and how rights, duties, and liabilities can pass from one State to another. This area

of law is codified in multilateral treaties, and there has been vast practice of States and international courts in this area.

Attempts of codification on State succession

- **State succession** – This refers to the transmission of the rights and obligations of the predecessor State to the successor State, when the latter replaces the former's sovereignty over a particular territory, including cases where a State that is being succeeded continues to exist
- Two Conventions:
 - 1978 Vienna Convention on State Succession in Respect of Treaties (VCSS)
 - 1978 Vienna Convention on State Succession in Respect of State Property, Archives and Debts
- These are undersubscribed, and the number of ratifications required for their entry into force is too small (15 States), which diminishes the potential of these instruments to serve as evidence of customary law

Automatic succession or a clean slate?

- Succession of States is defined as the **replacement** of one State by another in the responsibility for the international relations of territory, *not* as a wholesale replacement of sovereignty over a territory
 - Rationale for ILC: Need to integrate the position of “newly independent States” as colonial powers' territory did not legally encompass that of their colonies
- “Automatic succession” refers to succession effective merely by virtue of the State's emergence and regardless of any further consensual or procedural steps
 - The succession occurs *ipso jure* and therefore ensures the continuity of rights and obligations as if no change had occurred
 - It operates as of the date of succession in fact
 - Even the lack of succeeding States' consent is not crucial nor is any right to opt out foreseen, nor would those States be able to enter reservations to, (re)negotiate, or have the opportunity to terminate the treaty to which succession relates
- “Modernized” or “clean slate” approach places emphasis on the new State's entitlement to *choose* to become a successor
 - There is no such thing as succession by law, but merely one by consent
 - Consent of the “successor” State is privileged, for it has a choice whether to ratify, accede to anew, or succeed to a treaty and admit the continuity of obligations arising under that treaty

Differential shaping/affecting State succession

Identity and continuity of States

- Mere territorial changes, whether by increase or by diminution, do not, so long as the identity of the state is preserved, affect the continuity of its existence or the obligations of its treaties
 - Cf. Liability for debts is affected only if the predecessor State loses its identity and the “continuity of the life of the State” is broken
- The way in which the identity and continuity factor operates varies with each type of succession, whether arising upon secession, separation, dissolution, or unification
- Voluntary unification – The State that has voluntarily assumed the debt or obligation and owes it at the point of succession, gives up independence voluntarily and the new State takes it over on that basis
 - Such considerations would **not** be present in cases of involuntary dissolution, or voluntary secession and cession, if the newly emerging State or other “successor” States were presented with claims as to instruments and debts they *never had a chance to consent to*.
- Continuity may refer to State continuity as a unit or legal continuity
 - Legal continuity operates without an emphasis of unit continuity of a State and makes various agreed solutions possible in the interest of legal security or convenience
 - However, when there's no such agreed solution, the unity continuity issue may come to the forefront, *i.e.*, the identity issue becomes prominent again.
- Legal continuity (or continuity of obligations) does not have to derive from continuing identity, but it can be agreed as between successors or with third States
 - The source and basis of such continuity is the agreement between the States involved
- Political and administrative convenience may lead a State to adopt various decisions, but it does not substitute the criteria as to the identity and continuity of States (*e.g.*, Vietnam's decision to absorb South Vietnam's debt)

Legality of territorial change

- State succession is conditional upon the legality and validity of territorial change
 - The continuing identity option is more suitable if a territory has been made part of another State via illegal annexation

The effect of notification and date of succession

- The issues of the notification and the date of succession matter only on the premise that State succession is not automatic
 - “Notification of succession” – The successor State giving its consent to become a party to the relevant treaty

- Succession by a successor State's choice operates as of the point in time when such choice is declared or from the date of entry into force of the treaty, whichever is later
- "Date of succession" relates to the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates
- As there is no customary law definition of these two notions, a precise point of time at which treaty succession occurs may be difficult to identify, and would be contingent on whether the relevant case is handled as one of consensual succession or automatic succession
- If a new country inherits an old country's treaties starting from the original date they were signed, it becomes responsible for the old country's past actions.
 - This means the new country can be held legally accountable for violations—like human rights abuses or broken investment deals—that happened before it even became independent.
- There is no customary law rule as to the date at which succession to treaties has to take effect

Succession vs. voluntary transmission of international obligations

- In some cases where a putative general rule on succession would purport to determine the outcome, the relevant State may object to succession
 - In some cases, the State may be estopped, by virtue of its own position stated earlier to that effect, from contesting the succession
- Overall, the acceptance of treaties by successor States concluded by their predecessors may be frequent; however, it is not dictated by new States' sense of obligation to do so.

Succession to treaties

Principle of "moving treaty boundaries"

- When a State loses territory by transferring sovereignty over a part of its territory to another State, it loses its rights and obligations under treaties, insofar as those treaties used to apply to the lost territory (art. 15, VCSS)
- When a State acquires territory, it does not succeed to the predecessor State's treaties, but its own treaties become applicable to that territory

Dissolution and unification of States

- Art. 16, VCSS enables the newly independent State which has come into being *through decolonization* to start its life on the "clean slate" premise in relation to bilateral treaties
- A new State succeeds to a bilateral treaty, which the predecessor State made with another State, only if

that other State and the new State both agree (Art. 24, VCS)

- Agreement can be inferred from conduct
- Under Articles 17 and 24 VCSS a new State is under no obligation to succeed to a treaty if it does not want to do so; it can start life with a "clean slate"
- The clean slate doctrine was well established in customary IL before 1945
- Though post-1945 some countries seemed to accept that they succeeded automatically to treaties made by their predecessor. This practice was insufficient to destroy the clean slate doctrine:
 - Only some of the States which became independent after 1945 followed this practice
 - Some of the States which followed the practice of automatic succession applied it to only some of the treaties made by their predecessors, and not to others
 - The States which followed the practice of automatic succession appear to have done so because they found it convenient (*not opinio juris*)

Automatic succession: human rights treaties

- An argument in favour of automatic succession of human rights treaties could be that the object and purpose of the treaty requires continuing protection of those objectively operating rights that should not be disturbed through territorial change
 - UNHRC: The rights enshrined in the ICCPR belong to the people living in the territory of the State party. Once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.

Membership in international organizations

- UN practice: encountered both the acceptance of State continuity, and differentiation between various "successor" States
- The constituent instruments of international organisations ordinarily regulate the matters of membership and accession—they do not directly draw on succession issues

International claims and State responsibility

- Thesis: To transfer the authorship of wrongful acts committed in the past, and by a previous and extinguished entity, to the one whose successor status is subsequently claimed
 - Continuing application of a treaty and responsibility for previous violations of that treaty *are two different things*

- If succession happens in relation to the latter, the successor State may be held responsible for what it has not done
- International claims for compensation for illegal acts are regarded as being intensely “personal”
 - So long as the State responsible remains in existence as a legal person, it can and should be responsible for its own deeds
 - The claims and responsibility of a State are unaffected by its expansion or contraction
- However, new States ought to commence with a “clean slate” and extinction of either the claimant State or the defendant State might be seen as resulting in the extinction of the claim
 - Their conduct and attitude cannot lead to intentional and blanket nullification of third States’ and their nationals’ rights or claims.
 - Therefore, responsibility must be assumed by the State that continues after or emerges upon merger.
 - With new States emerging through separation or dissolution, this principle is not as pressing.
- Public property encompasses property, rights and interest which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State
- ICL: Upon succession, most of the public property situated in territory retained by the predecessor State, or in third States, continues to belong to the predecessor State, while most of the public property situated in the transferred territory passes to the successor State
- When a State acquires all the territory of another State, it succeeds to *all* the public property of that State, wherever that property may be situated

Contractual rights

- Some authorities doubted whether a successor State succeeded to the contractual obligations of the predecessor State.
- Akehurst: A successor State must pay compensation if it revokes a concession granted by the predecessor State.
 - But this view cannot be endorsed if the State that has **initially endorsed the concession was a colonial or occupying power**.

Debts

- If State A annexes the whole of State B’s territory, it succeeds to the obligations which State B owed to foreign creditors in respect of State B’s national debt
- If State B loses only part of its territory, an “equitable” outcome would be that the successor State or States should take over part of State B’s debt, otherwise State B, with reduced territory and economic resources, might be unable to meet its debts
- The difficulty in such cases is deciding what proportion of the debt should be borne by each of the States concerned; in practice this problem can only be settled by treaty

Boundaries and other rights over territory

- A boundary determined by a treaty achieves permanence independently of the legal status and force of the treaty establishing it, and has “legal life of its own”
- It is generally accepted that the newly independent States inherited boundaries drawn by the former colonial powers; this consequence was accepted by almost all newly independent States, who had no wish to see their boundaries called into question
 - This reflects the *uti possidetis* principle (customary international law)
- There is no doubt that the obligation to respect preexisting international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula of *uti possidetis*
- Thus, the rule of the automatic succession to boundary treaties is not a discrete rule of succession, but is part of a wider principle that

Nationality

- A change of sovereignty over territory does not inevitably mean that the subjects of the predecessor State, who inhabit the territory, automatically lose their old nationality and acquire the nationality of the successor State
 - Much depends on the position relevant States take in, or arrangements made with regard to, particular situations and whether they permit option

The treatment of property and contractual rights on succession

“Acquired rights” and private property

- The “acquired rights” thesis is premised on the claim of automatic succession in relation to those rights
 - It presupposes that private property rights do not lapse automatically when territory is transferred from one State to another
 - PCIJ: Private rights acquired under existing law do not cease on a change of sovereignty²⁴
- The notion of vested rights stands in conflict with the autonomous identity of the new State, which, owing to its sovereignty and especially permanent sovereignty over natural resources, becomes entitled to use resources situated in its territory in its own public interest; renegotiation or end of investment or concession is compatible with international law.

Public property

²⁴ There is little evidence that the blanket approach taken by the PCIJ forms part of general international law.

boundaries are independent of treaties specifying them, as confirmed, among others in the law of treaties

- Therefore, a State acquiring territory automatically succeeds to the boundaries of that territory, whether the boundaries are fixed by a treaty or whether they are fixed by the application of rules of customary law concerning title to territory and acquisition of territory
- Moreover, the *uti possidetis juris* rule proper applies to territorial changes as a discrete rule, even in the absence of a treaty, and on the basis of pre-existing intra-State boundaries, as opposed to a boundary being succeeded to owing to an agreement by treaty
 - Boundaries established or modified through illegal territorial change are as null and void as that territorial change itself

Chapter 20: Use of Force

Jus ad bellum vs. jus ad bello

1. Use of force – jus ad bellum
2. Rules governing the conduct of armed conflict – jus in bello

Prohibition of the use of force in the UN Charter

UN Charter

Art. 2 ★

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles:

[xxx]

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. 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.

[xxx]

Art. 24

1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the

discharge of these duties are laid down in Chapters VI, VII, VIII, and XIII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Art. 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

- Art. 2 (4) is of **universal validity** because it is also a rule of customary IL, and has become recognized as a rule of *jus cogens*
- A **threat** of the use of force is **illegal** in every situation where the actual use of the same force would be illegal
 - Mere threat is illegal!
- “Territorial integrity” means territorial supremacy as a legal prerogative of the State to exclude foreign State activities from their territories
- “Political independence” refers to State autonomy on identical terms
- The broad normative scope of the prohibition of armed force in international relations is confirmed in the Friendly Relations Declaration, adopted by consensus
 - No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State
- Thus, art. 2 (4) should be interpreted as **totally prohibiting the threat or use of force, regardless of the aims or motives driving it.**
- This is further reinforced by the **Definition of Aggression Resolution**

Definition of Aggression Resolution

Art. 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

[xxx]

Art. 3

Any of the following acts, regardless of a declaration of war, shall be subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- a. The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b. Bombardment by the armed forces of a State

against the territory of another State or the use of any weapons by a State against the territory of another State;

- c. The blockade of the ports or coasts of a State by the armed forces of another State;
- d. An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e. The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g. The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.²⁵

Territorial claims and disputes

- Every State has the duty to refrain from the threat or use of force as a means of solving international disputes, *including territorial dispute*
- However, an invaded State remains entitled to self-defense as it is not dependent on duration or context
- A State whose territory has been taken through another State's armed attack remains under armed attack and a victim of aggression until it recovers that territory

Armed protection of nationals abroad

- Attacks on a State's nationals resident abroad do not constitute attacks on a State and thus they do not entitle the State to use force in order to defend its nationals without the consent of the foreign government
- Such operations ("rescue operations") without the consent of the territorial State breach art. 2(4) and, as an invasion, constitute an act of aggression pursuant to art. 3(a) of the Definition of Aggression Resolution

Armed reprisals

- Self-defense does **not** include a right of armed reprisal
 - If terrorists enter State A from State B, State A may use force only to arrest or expel the

terrorist, but is not entitled to retaliate by attacking State B

- UNGA: States have a duty to refrain from acts of reprisal involving the use of force

Self-defence

Art. 51 ★

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

- "Armed attack" – use of armed force
- "If an armed attack occurs" implies that the armed attack must have already occurred before force can be used in self-defense. **There is no right of anticipatory or preventive self-defense!**
- The occurrence of an armed attack is a question of fact which is capable of objective verification, while the assessment of the likelihood of an attack that is being anticipated ultimately turns on the subjective appreciation of the State that proposes to take the relevant military action

Preventive self-defense

- Refers to threats that are likely to occur in the near or remote future
- **Caroline doctrine:** There must be a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation and the action taken must not be unreasonable or excessive, and it must be limited by that necessity and kept clearly within it

Self-defense against attacks on ships and aircraft

- An attack which gives rise to the right of self-defense need not necessarily be directed against a State's territory—it can also be attack by the armed forces of a State on the armed forces/fleets of another State

Attacks carried out by non-State actors

- "Armed attack" under art. 51 is an attack perpetrated by a State, and self-defence can only be used against such attacks
- Thus, in *Nicaragua*, **the act of private individuals supplying weapons to foreign insurgents only generates consequences under the law of State Responsibility**, but not entitlement to use force.
- In the *Wall* advisory opinion, the ICJ rejected the claim that non-State actors could perpetrate armed attack within the meaning of art. 51.

²⁵ This is customary international law, according to *Nicaragua v. US*.

- Thus, self-defense may only be used to respond to attack perpetrated by one State against another State

- Instead, *all foreign intervention without the territorial government's request are all illegal*

The Standard: Necessity and Proportionality

- The force used in self-defense must be necessary to repel the armed attack and proportionate to it
- The permissible uses of force under art. 51 are restricted to the **necessary minimum required to repel** an attack²⁶
- Necessity and proportionality must be measured with a view to the **ends pursued** (definitive repulsion of the attack or of the actual danger of its repetition, preservation or restoration of the *status quo ante*), and with regard to the **means employed** in self-defence (proportional to the violation that gave rise to self-defence)

Civil wars

- Definition: A war between two or more groups of inhabitants of the same State, one of which may be the government
 - A civil war may be fought by rebels or insurgents for the control of the government of a State, or it may be caused by the desire of part of the population to secede and form a new State.
 - Alternatively, a rebelling group may simply be trying to force the government to make concessions (e.g., to grant regional autonomy).
 - A civil war may even be fought between parties while the government remains neutral or ineffective
- Treatment: Civil war is an internal conflict
 - The policy of the UN is to prevent the interference with domestic affairs of the State on whose territory civil war is ongoing
- There's no rule in IL against the waging of civil wars
 - **Art. 2 (4) only applies to use/threat of force in international relations only**
 - Thus, rebels waging war are not violating IL
- Foreign States are forbidden to give help to insurgents in a civil war
 - *Nicaragua*: US broke IL when it aided the *contras* who were rebelling against the Sandanista government
 - Participation in a civil war by organizing or encouraging the rebels/armed bands for incursion was an act of **illegal intervention** and a **violation of the principle of the prohibition of the use of force**
 - By contrast, mere supply of funds to the *contras* does not in itself amount to a use of force, but an **act of intervention**
- IL does not recognize any concept of "counter-intervention"

Intervention by invitation

- A State may always help the established authorities of another State against foreign subversion or domestic insurgency if invited to do so.
 - This is a manifestation of State sovereignty
- It is always lawful for a foreign State to supply weapons to the established authorities, whether or not the insurgents have received weapons from another foreign State
- The government is the agent of the State, and until it is definitely overthrown it remains competent to invite foreign troops into the State's territory and to seek other forms of foreign help
- Recognition of belligerency in relation to rebels would be intervention in the internal affairs of the State, a wrongful act.
 - Hence, it cannot be a lawful tool through which a State could unilaterally modify the rights or status of either a government or insurgents in another State

"Humanitarian intervention"

- A doctrine of intervention which professes to protect citizens from the oppression of their own government
 - The UN charter prohibits this
 - On the contrary, as typically consisting of invasion and bombardment of State territory, "humanitarian intervention" is a prime example of aggression
- The adoption of the comprehensive prohibition of the use of force under the UN Charter has streamlined the law and undercut the basis on which any claim of "humanitarian intervention"
- *Nicaragua*: Where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves
 - You don't just bomb them.

Chapter 13: State responsibility

Anytime a State violates any rule of IL, it incurs responsibility for it.

The work of the International Law Commission (ILC)

- The rules of State responsibility are not primary rules relating to what States are entitled to do or obliged to do, but **secondary rules**, coming into play only after the State violates a primary rule of IL
- In 2001, the final version of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts was finalized and adopted
 - The ILC articles have **no** binding force, but some of their provisions **reflect preexisting CIL**

²⁶ Because forcible reprisals, retaliation and punitive measures are forbidden.

Basic concepts of responsibility and liability

- At times, conduct required under secondary rules of responsibility is similar to conduct required under primary rules of conduct, e.g.:
 - Expropriation is conducted without compensation will the duty to compensate arise as a matter of State responsibility
 - Boarding a ship on the high seas, but compensation for damage caused thereby must be paid
- **Liability** – Obligations of states arising from harmful consequences of hazardous activities not prohibited by IL
 - Liability for acts not prohibited by international law operates on the plane of primary norms
- Primary rules of civil liability can be formulated in treaties creating substantive rights and obligations for States
 - The liability regime does not distract from the universality of the State responsibility regime, and the two regimes exist upon different planes
 - When applicable primary obligations are complied with, there will be no internationally wrongful act
 - If no relevant treaties apply to the incident in question, the State will still be responsible for breach of the duty not to let its territory be used to harm other States

General law of responsibility and 'self-contained regimes'

Art. 55 *Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

- A self-contained regime may express precisely the *lex specialis* nature of arrangements undertaken with regard to secondary norms governing responsibility relations

The doctrine of 'abuse of rights'

- A right can be abused without being violated
 - The principle of good faith requires a State not to make another State's exercise of right unreasonably difficult
- The doctrine of *abus de droit* prohibits the abusive exercise of a State's rights and enjoins that whenever the assertion of a right impinges on the field covered by a treaty obligation, it must be exercised *bona fide* (in good faith), i.e., reasonably

- To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members
- Abusive exercise of rights has no bearing on determination of the existence of an internationally wrongful act and abuse of rights was a matter of *primary rules* regulating how rights ought to be exercised
- Abuse of rights is not an exception to the alleged general principle that only wrongful acts give rise to State accountability
 - If a general law of IL prohibits abuse of rights, then, any abuse of right means a **breach of that general rule and is, therefore, an international wrong**
- Most, if not all "abuses" are violations of some requirements of positive law; or excesses of power granted to a State or institution under a treaty
 - There is little discrete content in the general doctrine of abuse of rights, which, by definition, would encompass the operation of every single international legal right, and effectively turn much of the law into equity
 - General IL does not endorse such a general abuse of rights

Basis and attribution of State responsibility

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- is attributable to the State under international law; and
- constitutes a breach of an international obligation of the State.

- The underlying idea is not what the State has in fact done, but what the law considers *it should be responsible for*
- Art. 2 does not refer to the subjective element (*mens rea*), but this element cannot be ruled out
- If the primary obligation requires a particular standard of care or due diligence, that factor will be taken into account when determining whether an internationally wrongful act has been committed
 - However, international courts have no authority additionally to require fault to ascertain a breach when facts point out that such breach has in fact been perpetrated

- In any case, *most internationally wrongful acts involve some element of culpability*; a reasonable degree of awareness as to the nature and effect of what exactly is being done is almost invariably present
- The relevance of fault may become greater when the capacity of the relevant State to commit the pertinent wrongful act, or its awareness of that act, is not obvious, or in other cases of vicarious responsibility involving non-State actors and individuals
- There could also be de facto organs for whose conduct a State is responsible, even though art. 4 does not mention them
 - Art. 4 must be read with art. 7: whether the relevant State organ or official acted in excess of their authority or in contravention to instructions is immaterial, and the State will be responsible regardless
 - The State is identified with its governmental apparatus, not with the population as a whole
- Art. 5 also provides that States are responsible for the conduct of a non-State private entity which acts in the exercise of governmental authority which the State has delegated or outsourced to it
 - “Privatization” matters

Corfu Channel Case (U.K. v. Albania)

[ICJ, 1949]

FACTS: On Oct. 22, 1946, two British cruisers and two destroyers, coming from the south, entered the North Corfu Strait. The channel they were following was regarded as safe as it had been swept in 1944 and check-swept in 1945. One of the destroyers, the *Saumarez*, struck a mine and was gravely damaged. The other destroyer, the *Volage*, was sent to her assistance and, while towing her, struck another mine and was also seriously damaged. Forty-five British officers and sailors lost their lives, and 42 others were wounded.

ISSUE: Is Albania responsible under international law?

HELD: YES. It was Albania’s duty to notify shipping and especially to warn the ships proceeding through the Strait on Oct. 22 of the danger to which they were exposed. In fact, nothing was attempted by Albania to prevent the disaster and these grave omissions involve her international responsibility. The mere fact that mines were laid in Albanian waters neither involves *prima facie* responsibility, nor does it shift the burden of proof. Two facts to be considered:

1. The laying of mines took place in a period in which it had shown its intention to keep a jealous watch on its territorial waters and in which it was requiring prior authorization before they were entered.
2. It is possible to observe minelaying from the Albanian coast. Geographically, the channel is easily watched.

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

- Art. 4 is premised on the principle that the status of State organs is determined through the internal law of the State

Application of the Genocide Convention (Bosnia v. Serbia)

[ICJ, 2007]

FACTS: The dispute arose following the 1992 break-up of the Socialist Federal Republic of Yugoslavia (SFRY) and the subsequent declaration of independence by the Republic of the Serb People of Bosnia and Herzegovina, later known as the Republika Srpska (RS). While the RS never attained international recognition as a sovereign State, it maintained de facto control over substantial territory with the political, financial, and military support of the Respondent (then the Federal Republic of Yugoslavia). Bosnia and Herzegovina instituted proceedings in March 1993, alleging that the Respondent was responsible for a campaign of “ethnic cleansing” and atrocities—including massive killings and mistreatment in detention camps—perpetrated by its organs and entities like the RS and the army of the Republika Srpska (VRS) against the Bosnian Muslim and non-Serb populations. These events culminated in the 1995 Srebrenica massacre (Bosnian Serb forces killed over 7,000 Bosnian Muslim men and boys), leading to the Applicant’s claims that the Respondent violated its obligations under the Genocide Convention to prevent and punish the crime of genocide.

ISSUE: Were the acts of genocide attributable to Serbia on the basis that those acts were committed by its organs or persons who acts are attributable to it under customary rules of State Responsibility?

HOLDING: NO.

The question of attribution of the Srebrenica genocide to Serbia on the basis of the conduct of its organs

The conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule first calls for a determination whether the acts of genocide committed were perpetrated by “persons or entities” having the status of organs of the FRY under its internal law, as then in force.

- It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres.
- It has however not been shown that there was any such participation in relation to the massacres

committed at Srebrenica. Further, neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law.

- No evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre in Belgrade were, according to the internal law of the Respondent, officers of the army of the Respondent – a de jure organ of Serbia.

Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed. According to *Nicaragua v. US*, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument.

- In the present case, the Court however cannot find that the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it.
- Neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy.
- The Court further states that it has not been presented with materials indicating that the “Scorpions” were in fact acting in complete dependence on Serbia.

The question of attribution of the Srebrenica genocide to Serbia on the basis of direction or control

The applicable rule, which is one of customary law of international responsibility, is that the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. **It must be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.**

- It has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of Serbia.
- It has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which constituted the crime of genocide, were perpetrated.
- All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

- The relevant cases indicate that a State is liable for the acts of its officials, even when they exceed or

disobey their instructions, *provided that they are acting with apparent authority or they are abusing powers/facilities placed at their disposal by the State*

- A State is *not* responsible for the acts of private individuals, unless they were acting on behalf of that State or exercising elements of governmental authority
 - However, States may be liable if the acts of private individuals are accompanied by some act or omission on the part of the State

Six acts of the State which may arise to State Responsibility for the acts of private individuals

1. Encouraging individuals to attack foreigners
2. Failing to take reasonable care
3. Obvious failure to punish individuals
4. Failure to provide an injured foreigner with an opportunity to obtain compensation from wrongdoers in local courts (denial of justice)
5. Obtaining some benefit from the individual’s act
6. Express ratification of the individual’s act

Case Concerning US Diplomatic and Consular Staff in Tehran (US v. Iran)

[ICJ, 1980]

FACTS: The dispute between the United States and Iran originated on Nov. 4 1979, when a group of militants identified as “Muslim Student Followers of the Imam’s Policy” launched an armed attack on the United States Embassy in Tehran. During this assault, the militants overran the premises, seized its inmates as hostages, and appropriated embassy property and archives. The Iranian government failed to take appropriate steps to prevent the attack or secure the release of the diplomatic and consular staff, and eventually endorsed the occupation. Consequently, the United States instituted proceedings against Iran on Nov. 29 1979, alleging that these events, along with related situations at its consulates in Tabriz and Shiraz, constituted a violation of Iran’s international legal obligations.

ISSUE: Is Iran responsible for the acts complained of? YES

HELD:

The events of Nov. 4, 1979 (first phase)

The first phase of the events underlying the US’s claims covers the armed attack, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives, and the conduct of the Iranian authorities in the face of these occurrences. The conduct of the militants on that occasion could be directly attributed to the Iranian State only if it were established that they were in fact acting on its behalf. The information before the Court did not suffice to establish this with due certainty. However, the Iranian State—which, as the State to which the mission was accredited, was under obligation to take appropriate steps to protect the US Embassy—did nothing to prevent the attack, stop it before it reached its completion or oblige the militants to withdraw from the premises and release the hostages. The Court is therefore led to conclude that on Nov. 4 1979 the Iranian authorities

were fully aware of their obligations under the conventions in force, and also of the urgent need for action on their part, that they had the means at their disposal to perform their obligations, but that they completely failed to do so.

Events since Nov. 4, 1979

The second phase of the events comprises the whole series of facts which occurred following the occupation of the Embassy by the militants. Though it was the duty of the Iranian Government to take every appropriate step to end the infringement of the inviolability of the Embassy premises and staff, and to offer reparation for the damage, it did nothing of the kind. Instead, expressions of approval were immediately heard from numerous Iranian authorities. Ayatollah Khomeini himself proclaimed the Iranian State's endorsement of both the seizure of the premises and the detention of the hostages. He described the Embassy as a "center of espionage," declared that the hostages remain "under arrest" until the US had returned the former Shah and his property to Iran, and forbade all negotiations with the US on the subject. Once organs of the Iranian State had thus given approval to the acts complained of and decided to perpetuate them as a means of pressure on the United States, those acts were transformed into acts of the Iranian State: the militants became agents of that State, which itself became internationally responsible for their acts.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

- ILC: The cases envisaged by art. 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases
 - Art. 9 is not customary law

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

- Art. 10 deals with responsibility for the conduct of rebels and insurrectional movements, namely with

cases if the rebellion is crushed or if it leads to the establishment of a new State.

- So long as the old government is still in power, a wrongful act of an insurrectional movement operating in the territory of the State shall not be considered as an act of that State under international law
- However, it will be considered as an act of that State (in a retroactive sense) if the insurrectional movement becomes the new government or, if the insurrectional movement forms a new State

Responsibility of a State owing it its presence in, or control of, another State's territory

- By assuming actual (including unlawful) control of a relevant territory, a State assumes wider responsibility for all wrongful acts perpetrated therein, both those it directly perpetrates and those it fails to perpetrate
- Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States (*Namibia case*)
- A State unlawfully annexing or occupying another State's territory is liable to third parties for injury to their nationals' rights, as well as human rights violations, as part of its liability for aggression
- However, an occupying State's BITs cannot be validly extended to the occupied territory while the territorial State, for the time being, has no ability to enforce its own BITs there
- From the doctrine of nonrecognition, an occupying State is not permitted to tear up treaties applicable to a territory it illegally occupies
 - It is responsible towards States who would be owed rights under such treaties by the territorial State but for the foreign occupation or annexation

Action directed or controlled by the State

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

- It's necessary to distinguish between a State organ and some other unit controlled or directed by the State
 - "High degree of dependence and general control"
- It has to be specifically established that the State controls the relevant conduct (*Nicaragua case*)
- *Bosnia case*: The Court had to examine whether they could be deemed completely dependent on it, which was the only precondition of equating them to the organs of the FRY for the purposes of attribution and responsibility

- Test of **dependence and control**
- Having found *neither* a structural connection of the perpetrators with FRY, nor complete dependence of their action, the ICJ applied the test of **direction and control**
 - The art. 8 test is applicable—not overall control test

Aid or assistance

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- that State does so with knowledge of the circumstances of the internationally wrongful act; and
- the act would be internationally wrongful if committed by that State.

- Art. 16 does not specify how the aiding/assisting State relates to the responsibility for the ultimate wrongful act
- The aiding and assisting State could be fully responsible (on a “doing so” basis) for the wrongful outcome perpetrated or at least finalised by the State that has received the aid or assistance
- Any other outcome would obscure the fact that the difference between aiding or assisting and co-perpetrating is relative at most
 - Aid/assistance (generic sense) can include financial help or weapons provision, provision of air space or of means of transportation
 - In all such cases, the ultimate wrongful act is informed by, or consequential upon, the provision of such aid and assistance
 - The whole conception of “aid or assistance” as an *autonomous wrong* is in principle *misconceived*
 - Many strong cases of “aid or assistance” will be primarily classifiable as instances of joint responsibility
- Some activities generically resembling aid or assistance can also amount to a discrete wrongful act (e.g., transfer of prohibited weapons, breach of the principle of nonrefoulement)
- Not all elements of art. 16 reflect customary law
 - But the ICJ in *Bosnia v. Serbia* said it was so
- Requisites for art. 16:
 - The relevant State organ/agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful

- The aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so
- The completed act must be such that it would have been wrongful had it been committed by the assisting State itself²⁷
- The first and second conditions hardly sit well together
 - The second requires intentionality (with a view to), but the first one requires “awareness” only, which is a lesser threshold

Circumstances precluding wrongfulness (defenses)

Article 23

Force majeure

- The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
- Paragraph 1 does not apply if:
 - the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - the State has assumed the risk of that situation occurring.

Article 24

Distress

- The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.
- Paragraph 1 does not apply if:
 - the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - the act in question is likely to create a comparable or greater peril.

Article 25

Necessity

- Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

²⁷ Akehurst: This is not reflective of general international law.

- b. does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
- a. the international obligation in question excludes the possibility of invoking necessity; or
 - b. the State has contributed to the situation of necessity.

- Circumstances precluding wrongfulness, especially the state of necessity, should not be confused with the legal position in relation to treaty regimes under which the criteria of emergency conduct are defined and circumscribed
 - The latter involve primary norms relating to State conduct, while defences under the law of State responsibility involve secondary norms
- Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations

Consequences of an internationally wrongful act

The injured State and reparation

- "Injured state" – A State whose right or legal interest has been infringed by the internationally wrongful act of another State
 - However, even third States which are not directly affected by the illegal act of one State, may be entitled to react to a serious breach of international law if the obligation in question is an obligation *erga omnes*, in the protection of which all States have a legal interest (arts. 42, 48)
- The wrongdoing State is obliged to cease the illegal conduct and "offer appropriate assurances and guarantees of nonrepetition" (art. 30)
- To determine what kind of remedy would be appropriate, the court takes into account the nature of the violation (*Jadhav case*)
- The injured State is entitled to claim "full reparation," in the form of restitution in kind, compensation, and satisfaction, either singly or in combination (art. 31, 34)
 - The wrongdoing State cannot rely on its internal law to avoid providing full reparation (art. 32)
- Restitution in kind means that the wrongdoing State has to reestablish the situation that existed before the illegal act was committed, provided that:
 - It's materially possible
 - If impossible, compensation for the damage caused by the act must be paid

- Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation (art. 35)
- Relationship between restitution and compensation: The amount of compensation should reflect the extent of duties required by the restitution
- Compensation covers any economically assessable damage suffered by the injured State and may include interest and lost profits
 - In various areas, such as human rights violations or environmental harm, the amount of compensation will depend on the causal connection between State conduct and the injury suffered, as well as on appropriate proof
 - When private individuals are injured, the compensation obtained by the claimant State is usually calculated by reference to the loss suffered by the individual, not by reference to the loss suffered by the State
- Satisfaction (art. 35) is a further remedy which is particularly appropriate in cases where there is no material damage (and instead there's *moral damages*)²⁸
- Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology or material compensation for moral injury.
- Nominal damages may be payable for satisfaction, meaning that the wrongdoing State pays a symbolic amount to satisfy the honor of the injured State
- In certain situations, damages reflecting the gravity of infringement (at times known as punitive damages) may also be warranted.
- The nature of a specific violation is crucial in determining the availability and extent of compensation for non-pecuniary injury

Countermeasures

- **Countermeasures** – Coercive acts of retaliation traditionally known as "reprisals"
 - They consist of acts that would otherwise be prohibited by IL
- States *not directly* injured have standing to raise the matter of violation of *erga omnes* obligations (art. 48)
- Legal limits:
 - Prohibition of armed reprisals (art. 2 (4), UN Charter)
 - The countermeasure has to be proportionate to the initial wrongful act
 - Countermeasures which violate basic human rights or a peremptory norm of IL are impermissible
- The legality of countermeasures is also conditional on the resort, by the injured State, to any available means of dispute settlement (art. 52)

²⁸ For example, moral damage arising from insulting a foreign head of State or from the killing, torture, or unlawful detention of individuals; or some other form of intervention into another State's domestic affairs.

Responsibility for the acts of international organizations

- Applicable rule: Draft articles on the responsibility of international organizations (DARIO), adopted in 2011
 - Patterned after ARSIWA
- However, IOs differ from States because:
 - They have derivative/secondary legal personality
 - They don't have territory and independent material base
- ~

Chapter 19: International criminal justice

Basic concept

- The concept of individual criminal responsibility was first elaborated upon in the ILC's Nuremberg principles
 - Any person who commits an act which constitutes a crime under IL is responsible therefor and liable to punishment (art. 1)
 - The fact that internal law does not impose a penalty for an act which constitutes a crime under IL does not relieve the person who committed the act from responsibility under IL (art. 2)
- There is *no incompatibility* between individuals being responsible for a particular crime, and the State being internationally responsible for the same activities
 - Individual criminal responsibility, when operating in relation to State agents, may be viewed as one aspect of State responsibility
 - The entire concept of individual criminal responsibility operates as a matter of rights and obligations of States
- Criminalization is *not* addressed to individuals directly; but as a consequence of criminalization, States become entitled or obliged to exercise their jurisdiction with a view to prosecution and punishment of perpetrators
- *In relation to individual perpetrators*, individual criminal responsibility is not about whether the individual is bound by relevant rules of IL, but whether those rules were applicable whenever and wherever the relevant crimes were committed
- As long as conduct is criminalized if perpetrated by individuals, including in an official capacity, their individual responsibility will follow
 - Thus, there's no need to stipulate a discrete rule about criminal responsibility of individuals
- Individual criminal responsibility also operates in an objective manner
 - Objective treaty obligations – those intended by States-parties to operate in an indivisible manner, rather than as a network of mutual, bilateral, or reciprocal engagements between them

- **International criminal justice** is a **multi-level arrangement** consisting of national and international courts that have jurisdiction to prosecute individuals for core international crimes, such as genocide, war crimes, and crimes against humanity
 - The purpose of the allocation of jurisdiction is to **avoid impunity**
- National prosecution remains the principal way through which States ought to fulfill their obligations in this area
 - The most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level (RS, pmb.)
- Recognition by the international community as a whole of the duty to prosecute *jus cogens* crimes is also mirrored in UNGA Res. Nos. 2840(1971) and 3072(1973).
 - Res. 3074 requires that States shall assist each other in detecting, arresting, and bringing to trial persons suspected of having committed war crimes and crimes against humanity
 - This statement implies the requirement that jurisdiction shall be exercised with a view to prosecution or extradition
 - Res. 2840 – The refusal of States to cooperate in the arrest, extradition, prosecution, and punishment of persons guilty of war crimes and crimes against humanity is contrary to generally recognised norms of international law
 - It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes (RS, pmb.)
- Sources of international criminal accountability:
 - International criminal law
 - International human rights treaties (ICCPR, ACHR)
 - Customary law requirements arising out of the *jus cogens* nature of core international crimes
- Core international crimes constitute “acts the prohibition of which has acquired the status under IL of *jus cogens*”
 - This compels all States to refrain from such conduct under *any* circumstances and *imposes* an obligation *erga omnes* to punish such conduct (*Pinochet case*)
- When a suspect is not extradited on the preceding grounds nor tried in the forum State, the forum State incurs a breach of the obligation *aut dedere aut judicare* (either to extradite or prosecute)
- Core crimes are not considered political offenses for the purposes of the interpretation of “political offenses” clauses in extradition treaties
- Criminal responsibility abroad, on the basis of extraterritorial, particularly universal, jurisdiction cannot be avoided on the ground that the defendant

National prosecution

has received an amnesty or pardon in the State where their alleged crimes took place

- Amnesties granted to perpetrators of war crimes, torture, and other core international crimes are void for being in conflict with treaties that impose *aut dedere aut judicare* obligation on States, and with the *jus cogens* nature of prohibition of relevant crimes
- Even the institution of truth and reconciliation commissions cannot evade the obligation to prosecute or extradite
- In any case, persons pardoned remain prosecutable within any State where jurisdiction over the relevant crime can be established
- International criminal responsibility arrangements are meant to address both:
 - The State's involvement in the commission of core international crimes, and
 - Its reluctance to hold perpetrators accountable
- The modern multi-level arrangement gives States an opportunity to fulfill their obligations through the action of their national law-enforcement agencies, but *their failure to do so will not prevent other States or international tribunals from trying the relevant persons*

International Criminal Court

Establishment and jurisdiction

- The Statute of the ICC was adopted at the Rome Conference in 1998 and entered into force in 2002
- It consists of:
 - Presidency
 - Pre-Trial Chamber
 - Trial Chamber
 - Appeals Chambers
 - Prosecutor's Office
 - Registry
- The ICC can exercise jurisdiction over:
 - Crimes against humanity
 - War crimes
 - Genocide
 - Crime of aggression
- The ICC's jurisdiction can be exercised only in relation to crimes committed **after** the entry of the RS into force, **or** after its entry into force for a State that has acceded to it afterwards, whichever is later
- The ICC can exercise jurisdiction over a crime if either, or both, the State of nationality of the perpetrator or the State where the crime has occurred are parties to the Statute
 - Thus, jurisdiction may be had over nationals of a non-State-party as well as over crimes committed on the territory of a non-State-party²⁹

- The preconditions for the exercise of the Court's jurisdiction is, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a state-party
- RS's object and purpose preclude a restrictive reading of art. 12.
- Jurisdiction of the ICC could be exercised over a situation referred to the ICC either by:
 - The UN Security Council
 - A State-Party
 - Where the prosecutor has initiated the investigation
- As to the *crime of aggression*, the ICC may exercise jurisdiction over it arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar

Role of the UNSC

Art. 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

- To adopt decisions within the scope of art. 16, the UNSC has to identify the existence of a threat to international peace and security
 - It must be a threat that can be suitably dealt with through the deferral of prosecution

Admissibility of cases and complementarity

- The admissibility requirements under art. 17 RS are centered around the idea of complementarity underlying the relationship between the ICC and national judicial authorities
- The role of national courts should be preserved unless the State is unwilling or unable to genuinely carry out the investigation or prosecution
- The ICC cannot proceed with trying any possible perpetrator of international crimes simply because it prefers to do so

article 5. 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national. 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

²⁹ See art. 12 (preconditions for the exercise of jurisdiction): 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in

- Any crime that falls within the ICC’s jurisdiction has to be tried at some level, either before national courts or before the ICC
- Admissibility of a case before the ICC is not prejudiced by whether the relevant State has opened an investigation or decided to prosecute the relevant person
 - The ICC assesses the totality in which the relevant national legal system operates, what means are available to the State and how it uses them
- Generally, the State has to demonstrate that its legal system is appropriate for trying the person
 - If a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case
- RS does not accommodate national amnesties for perpetrators of core crimes
 - Granting amnesty to perpetrators is an obvious proof of a genuine unwillingness of the State to prosecute the relevant crimes

Art. 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - a. The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - b. The case is or would be admissible under article 17; and
 - c. Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
 - a. There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
 - b. The case is inadmissible under article 17; or
 - c. A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and

the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3.
 - a. At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
 - b. In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

- Even if the crime is under the ICC jurisdiction and even if the case is admissible, the Prosecutor is still required to take into account the gravity of the crime and the interests of victims, and query whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice
- The Prosecutor has no arbitrary power to establish substantial grounds that prosecution is not in the “interests of justice,” and his decision can be reviewed by the PTC
- There is not much practice in terms of evaluating the parameters of the criteria of “sufficient gravity,” “interests of justice” or “interests of victims”
 - “Sufficient gravity” arguably refers to the magnitude and scale of crimes
 - The latter two are more elastic and politically manipulable
 - The “interests of justice” criterion becomes relevant only after it has been ascertained that crimes in question are not of sufficient gravity and thus possesses a much more limited importance than a broader notion inviting the Court to search for appropriate criteria of justice with regard to every case before it³⁰

³⁰ In any case, it is difficult to think of cases that could fall within the scope of art. 53 without compromising the complementarity arrangement; deciding not to prosecute individuals whose cases are admissible under art. 17 would lead to impunity contrary to the Statute.

- Art. 53 (2) thus envisages reviewing decisions *not to proceed with investigation* but not to decisions to proceed
- After the adoption of the RS, the US (which is a nonparty) negotiated with and obtained from about 100 States agreement exempting its personnel from transfer to the ICC (e.g., US-RP Non-Surrender Agreement)
- A view has been expressed that art. 98 agreements are contrary to the RS's object and purpose, though this has not been tested in the ICC practice.

Immunity of State officials before international criminal tribunals

- A State-party which has received the notice of warrant shall proceed with arresting and surrendering the person to the ICC (art. 59)
- States-parties are obliged to comply with arrest and surrender requests issued by the Court (art. 89)

Art. 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

- Art. 27 provides for the irrelevance of official capacity of the accused and that any immunity available under national or international law for any official, including for heads of State or government, does not bar prosecution or prevent the exercise of the ICC's jurisdiction
- Art. 27 (1) is about the lack of defense to a crime or possibly also rationalizes the unavailability of immunities *ratione materiae*
- In contrast, art. 27 (2) could be seen as barring immunities available before courts other than the ICC at the moment of the trial and prosecution (for instance, heads of State)
 - It seems to remove immunity *ratione personae* as well

Art. 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the

requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender
- The effect of this provision is neither straightforward nor self-explanatory
 - Art. 98 (1) does not discretely confer immunity on any official. It's a referral clause which deals with immunities that may exist elsewhere
 - Thus, the court would have to examine the position under general international law and such treaties as may be applicable, and identify a rule of positive law that confers immunity to the category of officials to which the relevant State official belongs
 - Art. 98 (2) does not speak of immunities available in the ICC proceedings, but merely about immunities which the requested State should respect
 - Overall, art. 98 is about what the Court ought to do about immunities that might be available under international law; it does not suggest that the relevant immunities are indeed available or define their scope.
 - It is obvious that immunities *ratione materiae* can never be recognised by the Court even in relation to non-States-parties' nationals, both owing to the effect of art. 27 (1) and the position under general international law, which does not recognise immunity *ratione materiae* for any official implicated in the perpetration of any of the core international crimes
 - In relation to immunity *ratione personae*, art. 98 (1) does not produce any fresh conferral of immunities either
 - The ICC as a court of law has to examine positive international law to ascertain whether the relevant official enjoys immunity *ratione personae* from any legal proceedings
 - The issue of whether the case concerns a non-State-party's official is not crucial
 - Acceptance of art. 27 (2) implies waiver of immunities for the purposes of article 98(1) with respect to proceedings conducted by the Court

- With respect to States not parties to the Statute, international law afforded no immunity to heads of States in respect of proceedings before international courts
- *Bashir case*: The Appeal Chamber further connected the duty to cooperate with the ICC when this court exercises its jurisdiction over crimes listed in Article 5 of the Statute to the doctrine of jus cogens and “the obligation erga omnes to prevent, investigate and punish crimes that shock the conscience of humanity, including in particular those under the jurisdiction of the Court”
 - Thus, the duty to cooperate with the ICC is positioned within the context of the multi-level architecture of international criminal justice that revolves around the requirements of the peremptory (jus cogens) duty of all States to extradite or prosecute perpetrators of all core international crimes
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESR)
- The only compulsory mechanism under the Covenant is a reporting system (Article 40), requiring States to submit reports on their national human rights situation every five years

Generations of human rights; progressive realization of rights

First generation	Civil and political rights in the sense of individual freedoms from State interference
Second generation	Social rights that require positive State contribution in terms of material resources such as the right to claim welfare benefits from the State, right to work, or the right to education
Third generation (?)	Comprise, for example, the right to peace, the right to self-determination, the right to development, minority rights and the right to a clean environment

Chapter 16: International human rights law (IHRL)

Basic concept of human rights

- Under modern international law, every individual has certain inalienable and legally enforceable rights protecting him or her against State interference
- Human rights violations no longer belonged to the domestic jurisdiction (domain réservé) of States (protected by Article 2(7) of the UN Charter), and they may now be taken up not only within the UN, but also in multilateral or bilateral relations between States generally
- Human rights operate to the benefit of individuals as such, regardless of their nationality, and apply to relations between an individual and their State of nationality or any other State
- A “human right” refers to an obligation imposed on States under a particular source of international law to treat or **not to treat an individual in a particular way**
- Individual rights have to be handled as rights owned by States of nationality, and human rights have to be handled as rights that are not owned or disposable by States
 - Thus, certain basic rights of the human person, such as protection from slavery, racial discrimination or genocide are obligations *erga omnes*

UN human rights system

- Universal Declaration of Human Rights (1948)
 - Its provisions cover civil and political rights, as well as economic, social, and cultural rights
 - It is plausible at least that most if not all rights mentioned in the UDHR may subsequently have become binding as a new rule of customary international law
- Twin bill of rights (1976):

- According to the UDHR, all human rights are indivisible
 - Hence, the distinction between civil and political and socio-economic rights is not as rigid as might be imagined.
 - Some civil and political rights require a positive contribution of resources by the State
- The lack of **progressive realization** of economic and social rights invariably turns on large-scale failure of a State to make the required progress, and allocate the required resources
 - While individual rights have to be progressively realised, the progressive realization process itself engages a duty of immediate implementation
- “Progressive realization” requires the use of “maximum available resources”
 - Thus, it is incumbent on every State party to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights
- “Progressive realization” under Article 2 ICESCR relates only to full realisation of all Covenant rights, not to the realisation of *each and every such right*

Emergency derogations

- Emergency derogation clauses in human rights treaties, such as Article 15 ECHR, or Article 4 ICCPR,

determine strict conditions under which the enjoyment of relevant human rights can be restricted in times of war or other public emergency situations, including those of terrorist threat.

- **Unless the relevant requirements are met**, the very declaration of the State of emergency will be considered as a breach of the relevant treaty instrument and will not be given effect in determining the ultimate legality of the action of the State-party
- Some rights under human rights treaties **cannot be derogated from even in times of emergency**
 - The emergency derogation clauses themselves identify the range of such rights

Doctrine of equivalent protection

- There is a presumption that a State has not departed from the requirements of the Convention where it has taken action in compliance with legal obligations flowing from its membership of an international organization
- State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.
- Rationale: That which is taken from individuals in the alleged pursuance of public interest within the framework of international organisations should be compensated to them with a thing that has equal value (*aequi valere*)

Group rights and nondiscrimination

- At times, being part of a particular group confers additional rights to an individual
 - Under the ICCPR, art. 27 only applies to persons belonging to minorities
- Identification of groups:
 - By the group's aspirations and identity
 - From outside by the external observer
- *Bosnia v. Serbia*: A group must have particular positive characteristics and not be defined "negatively"

Nondiscrimination

- Central legal framework: 1965 Convention on the Elimination of Racial Discrimination (CERD)
 - CERD provides for various guarantees of non-discrimination, including equality before the law or access to courts and other civil rights
 - If a group is not identifiable as ethnically discrete, it is not entitled to protection under the CERD
 - The CERD outlaws discriminatory practices, and victims of those practices are not required to show discriminatory intent behind those practices

- Nevertheless, special measures taken to the benefit of certain racial or ethnic groups/individuals requiring such protection is not racial discrimination
- 1979 Convention on the Elimination of Discrimination Against Women (CEDAW)
 - States are responsible for private persons' conduct if they fail to act with due diligence to prevent those violations of rights or to investigate and punish acts of violence, or to provide for compensation

Minorities and indigenous peoples (IP)

- **Minorities** – A group numerically inferior to the rest of the population of a State, in a nondominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language
 - There is no generally agreed definition of a minority under IL
- **Indigenous peoples** – Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them

Self-determination

Entities entitled to self-determination

- All "peoples" have the right to self-determination (art. 1, ICCPR)
 - People = collective
 - Peoplehood signifies:
 - A common subjective attachment to the idea of becoming an independent State, or
 - Relatively objective criteria of a common territory, ethnicity, language or culture
- Self-determination is a **right conferred to an entity by IL**, not inherently a product of the entity's own ambition; it is not inherently about will expressed by a "people", but **about "people" being entitled by international law to express that will accordingly in the first place**³¹, about the status and qualification that IL bestows to the relevant people, thus entitling them to determine their own future, independently of the will of any State
- Self-determination does not extend to or protect all national or ethnic groups that aspire to separation, secession or independence

Colonial and noncolonial context

³¹ Not necessarily to have a new state.

- No distinction—applicable to both, *i.e.*, to all populations in territories which are unlawfully placed under the control or authority of a State
- The right to self-determination remains live after the attainment of independence and, latently at least, continues as a safeguard against foreign occupation or intervention as a tool of disrupting the ability of the relevant people to choose their political status and organization

General law and unilateral claim or concession

- Self-determination is an entitlement conferred to the relevant entity under general IL
 - An occasional expression of political will or consensus will not make an entity a self-determination unit
- Therefore, genuine cases of self-determination are ones that produce that right regardless of the will, indeed even against the wishes, of mother States

Legal entitlement and processes of political transition

- Their right to choose their political status is derived from that entitlement, which accrues to that unit on the basis of general international law, and requires no additional confirmation or approval in the relevant case; it is not derived from the grace or transfer of authority from the colonial or occupying power
- The right to self-determination entitles the relevant people to freely determine their political status and future
- Entitlement to statehood is not obstructed by the fact that the colonial or occupying power refuses to respect it. **Instead, such powers are under immediate duty to withdraw from the territory in question.**
- *Chagos advisory op.*: The peoples of nongoverning territories are entitled to exercise their right to self-determination in relation to their territory as a whole

Internal and external self-determination

- No genuine distinction between the two under IL
- Moreover, the notion of “internal” self-determination is inimical to the very concept of self-determination as an entitlement to determine a nation’s political future
 - In other words there is no self-determination unit that has the right to “internal” self-determination but not to “external” self-determination.

Disruptions to the exercise of the right to self-determination

- The right to self-determination cannot be violated by conduct of an independent State’s own government against its own population, unless the whole State is subject to a racist minority regime
- IL prohibits the disruption of geographical unity of the territory and population of the self-determination unit

Permanent sovereignty over natural resources

- The principle of permanent sovereignty over natural resources reflects the connection between the self-determination right of a people, sovereignty of the State established as a result of the realisation of that right, and the disposal or management of natural resources in the relevant territory
- Any act impeding the free exercise of national will or control of natural resources can amount to the breach of self-determination
- Permanent sovereignty over natural resources is affected through such activities that either:
 - prevent the actual or prospective State from freely disposing of its natural resources or
 - deny the means of subsistence to its population
- The development or disposal of natural resources within the territory of a self-determination unit must be conducted exclusively with the consent of that unit
- The very permanence of control over natural resources means that whenever a self-determination unit is prevented from governing their natural resources, they retain entitlement to it
 - Regardless of occupation or alien domination
 - As the population of a territory under foreign occupation or colonial domination becomes entitled to self-determination, their permanent sovereignty becomes activated and opposable to the occupier

Chapter 21: International humanitarian law (IHL)

Sources and development of IHL

- Jus in bello consists of the rules of IHL, dealing with:
 - protection of civilians and combatants during an armed conflict and
 - other rules that determine the legality of State action in relation to another belligerent or third State
- 1949 Geneva Conventions
 - Sick and wounded soldiers
 - Sick and wounded sailors
 - Prisoners of war
 - Civilians
 - Two additional protocols (1977)
- The codification of the laws of war in treaties has not diminished the continuing role of customary law in this area
- Fundamental principles of IHL are part of customary law; they constitute intransgressible principles of international customary law
- **Martens clause:** Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised

nations, from the laws of humanity and the requirements of the public conscience

- This was an early anticipation that treaty and custom coexisted and applied in parallel

Applicability of IHL

General concepts

- The application of IHL does not depend on the state of war being officially declared or recognized
 - Common Art. 2 applies to declared war or armed conflict involving a declaration of war
- **Armed conflict** – Exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State (ICTY)
 - In terms of an inter-State conflict, some **sustained or protracted armed confrontation is required**, not merely a one-off use of force by one State against another.
 - Thus, it is the existence of armed conflict, not any one-off use of force as such, that makes humanitarian law applicable

Situation	Legal consequences
One-off use of force	IHL not applicable But victim State and affected persons are entitled to reparation for breaches of jus ad bellum (laws regulating going to war) and extraterritorial human rights norms
No declaration of war with armed conflict	IHL applies in full The law governing belligerent activities applies
Declared war, but no armed conflict	IHL not applicable, unless and until sustained military confrontation begins States are entitled to take such belligerent actions as a state of war legally permits
Declared war with armed conflict	IHL applies in full The entirety of <i>jus in bello</i> applies

Laws of war and aggressor discrimination

- The aggressor State cannot claim the use of belligerent rights to derive legal fruits from its waging of an aggressive war

- As for IHL specifically, it continues to apply to all parties to an armed conflict even if it was initially launched through an act of aggression
 - Because IHL protects humanity/individuals

Interaction of IHL with IHRL

- Both IHL and IHRL apply in parallel in situations of armed conflict
 - There is no conflict between them, and HR Law does not get displaced by humanitarian law standards
- Human rights law, which applies both in peacetime and in wartime, recognizes that some matters to which it applies are regulated by humanitarian law in greater detail and more suitably for an armed conflict
 - Thus, IHL provides for even more detailed protection as is indeed in the conditions of an armed conflict

Classification of conflicts; civil wars

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b. taking of hostages;
 - c. outrages upon personal dignity, in particular humiliating and degrading treatment;
 - d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further

endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict

- CA 3 tried to remedy the situation by extending some of the more basic laws of war to civil wars
 - *Nicaragua*: This is an expression of fundamental general principles of humanitarian law, which are legally valid independent of any treaty basis
 - It's part of customary law
 - Its applicability does not depend on any recognition of belligerency, nor on any commitment that any non-State entity might unilaterally assume
- Civil wars are often fought by guerrillas or other irregular forces, which makes it difficult to distinguish between combatants and civilians
- An internal conflict taking place within the territory of a single State could be **internationalized** through foreign intervention that utilizes some indigenous or foreign elements as its own *de facto* organs
 - Aggression against a State can indeed be committed through the use of such *de facto* organs, for instance pursuant to Article 3(g) of the 1974 Definition of Aggression
 - It must be shown by evidence that those elements indeed act as a warring arm of the intervening State, rather than merely receiving help and assistance from the latter
- There is no such thing in law as "hybrid" conflict, transnational conflict or global conflict such as "war on terror"
 - A State cannot be in an armed conflict with a terrorist group or a similar entity or organisation, unless such entity or organisation fulfils the criteria of belligerency under the Additional Protocol II 1977
- The existence of an armed conflict is a matter of factual requirements, prescribed by law, and its existence has to be ascertained on the ground through an impartial observer such as:
 - A tribunal
 - An investigatory panel/commission established within the UN
 - Similar institutional framework
- Attacking and fighting any entity on a State's territory, even the rebels or related groups that the territorial government is fighting, *without that government's consent*, **generates an international armed conflict** as between the attacking and territorial States
 - Despite being aimed primarily at a non-State entity, such attacks and

operations are inevitably conducted against the territory of the victim State and thus constitute acts of aggression

- Under the existing codified humanitarian law, only local governmental forces are combatants and only governments' military targets are legitimate targets
 - But if armed operations on the territory of a State are conducted *with that State's consent* and in a pre-existing internal armed conflict, then there is no unlawful intervention
- Spillovers: Some elements of the internal conflict spills over into the territory of another State and that the State engages in a military confrontation with them, then, a new internal conflict is generated on the territory of the latter state
- An internal conflict can be transformed into an international conflict when external intervention takes place *against the will of the territorial government*.
 - But once a conflict becomes an international conflict, it cannot be treated as an internal conflict even if the intervening State fights against non-State entities (e.g., rebels)
 - There's no going back!

Wars of national liberation

- If the people of a particular territory possess under international law a legal right of self-determination but the State administering that territory refuses to let them exercise that right, they may need to fight a war of national liberation in order to achieve self-determination in practice
- **The use of force to prevent the exercise of self-determination is unlawful**
 - There is a legal duty not to use force to frustrate the exercise of a legal right to self-determination
- Unlike ordinary civil wars that form part of domestic affairs of territorial States, the violation of the right of self-determination is a serious violation of international law
- Wars of national liberation are classified as international wars
- While ordinarily civil war is a domestic affair, and rebels can be tried as criminals by the territorial State, **internal wars fought for self-determination are exempted from that position**

Belligerent rights

- Definition: It includes any right that the law allows the State to take against the adversary or a neutral State during the state of war, whether available under treaties or under general international law
- The **requirements for belligerent rights to arise** are:
 - a state of war and

- the proper lawful status of belligerency, which depends on the legality of war³²
- Belligerent rights cover, more broadly, rights arising out of a state of war, and rights which deviate from the peacetime calculus of rights and obligations, such as stopping and searching vessels involved in military help to the adversary, prize rights, economic boycott and sanctions on grounds not ordinarily available to States in peacetime
- Measures during war or armed conflict might operate the same way as countermeasures and generically resemble them
- In relation to the exercise of belligerent rights in relation to an internal conflict, the guiding principle is that of non-intervention by third States, as an extension of the general principle of non-intervention into a State's internal affairs
- Third States are entitled to remain neutral in relation to an internal conflict by refraining from dealing with both sides
- Rebels possess no territorial sovereignty and thus they are *not entitled to exclude*, through the use of belligerent rights, the territorial sovereign's dealings with third States in relation to any part of the territory

Combatants and protected persons under IHL and human rights law

- Combatants – Those who take part in hostilities, namely members of armed forces and those who are not members of armed forces but fight as part of a *levée en masse*, or as a part of militia or voluntary corps belonging to a party to the conflict
- Both combatants and non-combatants enjoy prisoner of war status if captured by the enemy
 - However, chaplains and medical personnel, while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war
- **Presumption of POW status:** In case of doubt, Additional Protocol I require that they should be deemed to have prisoner of war status until the opposite is established
- Anyone who is not a combatant is to be regarded as a civilian
 - Those who lack combatant status are not supposed to take part in hostilities
- Humanitarian law recognises no such category as “unlawful combatant”
- All persons who took part in hostilities have to be repatriated after hostilities are over, subject to arrangements on prosecution of core international crimes or under the capturing State's law for any criminal offence they may have committed
- Exceptions (no POW status):
 - Spies when wearing no uniform (can be tried for espionage)
 - Mercenaries

Lawful and unlawful means of waging war

- Combatants are lawful military objectives in an armed conflict
 - For the purposes of attack, the distinction is between **members of armed forces** or **persons taking part in hostilities** (including both combatants and non-combatants) and civilians
- Medical personnel enjoy protection from attack,
 - Except: They commit acts harmful to the enemy (which does not include having and using light weapons for self-defense)
- **Rules on targeting and proportionality** under Additional Protocol I are part of **customary law** and apply to the conduct of States who have not ratified this Protocol

Military necessity

- Acts of war should not cause unnecessary suffering, that is, suffering out of all proportion to the military advantage to be gained from those acts
 - “Unnecessary suffering” means suffering which would produce no military advantage, or a military advantage which was very small in comparison with the amount of suffering involved
- Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money
- It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, **but does not permit the killing of innocent inhabitants** for purposes of revenge or the satisfaction of a lust to kill
 - Destruction as an end in itself is a violation of international law
- While gaining military advantage is a legitimate part of any warring exercise, it may not be legitimately obtained through attacks on protected, undefended and civilian objects.

Principle of distinction

- The essence of the principle of distinction is not to require inquiry into whether attacking a particular person or object is necessary in war, but to specify that certain persons and objects should not be attacked under any circumstance in the first place
- The parties to the conflict shall at all times **distinguish between the civilian population and combatants and between civilian objects and military objectives** and accordingly shall **direct their operations only against military objectives**
- **This is customary law**
- In case of doubt, an object shall be presumed not to be a military objective

Nuclear weapons

³² If the war was initiated unlawfully and constitutes an act of aggression, all activities performed by the aggressor State in the course of that war are unlawful as well.

- *ICJ advisory op.*: There is neither in customary nor conventional law “any specific authorization of the threat or use of nuclear weapons, but also no comprehensive universal prohibition
 - A threat or use of force by means of nuclear weapons that is contrary to art. 2 (4) UN Charter and that fails to meet all the requirements of art. 51, is unlawful
- Akehurst: It is clear that, as such, the use of nuclear weapons is not compatible with any meaningful notion of distinction and proportionality

Free goods (e.g., luxuries)	Never liable to seizure
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- Belligerent States have broad discretion in determining whether vessels, aircraft and goods have “enemy” character
- Private enemy property, unless it enjoys special protection, may be captured and seized if it is found outside neutral jurisdiction
- The law of prize applies in an international armed conflict irrespective of whether there is a “state of war”

Belligerent occupation

- Territory is considered occupied when it is actually placed under the authority of the hostile army
- For a territory to be occupied, not only should foreign armed forces be stationed in a State’s territory, but also that they substitute their own authority (*DRC v. Uganda*)
 - In other words, occupation involves:
 - factual armed presence in a foreign territory and
 - the exercise of authority which is distinctly occupier’s authority and is not to be confused with the totality of domestic governance and State authority exercisable in peacetime
- Humanitarian law applies to any case of occupation, whatever the motives which caused it, such as regime change, regardless of the existence of any resistance within the territory, and even “if the population of the territory in question welcomed the intruders as liberators”
- A state of occupation can only commence after hostilities between two or more States
 - IHL continues to apply until the original occupation is terminated
- The regime of occupation is premised on the continued existence of the State whose territory is occupied, and thus the occupying power acquires no sovereignty!
- The occupier is not entitled to perform such acts as would indicate that it has usurped sovereign public authority in the territory it occupies
- The use of *natural resources* in occupied territories is regulated by the principle of permanent sovereignty over natural resources

Reprisals

- Reprisals are one of the main means of forcing States to obey the laws of war—and indeed of forcing them to obey international law in general
- A reprisal is an act which would *normally be illegal* but which is **rendered lawful by a prior illegal act** committed by the State against which the reprisal is directed; it is a **form of retaliation** against the prior illegal act
- Reprisals undoubtedly have deterrent effect
- Articles 20 and 51 to 54 Additional Protocol I prohibit reprisals against civilians and protected persons and objects, such as cultural objects and objects necessary for the survival of the civilian population

Chapter 17: Protection of the environment

Scope and nature of international environmental law (IEL)

- The UN Conference on the Human Environment (Stockholm, 1972) was the first truly international conference to broach environmental concerns
 - Then, the UN Conference on Environment and Development (Rio de Janeiro, 1992)
- The instruments adopted are not formally binding, but some of their provisions embody customary law
- Principle 21, Stockholm Declaration: Responsibility of all States to ensure that the activities within their jurisdiction and control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction

Nature of rules and regimes

- States are responsible towards other States and discretely in relation to the environment
- **Environmental damage** – Damage caused by the hazardous activity to the environment itself with or without simultaneously causing damage to persons or property and hence is independent of any damage to such persons and property

Definitions of environment

- ILC – Natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape
- *Iron Rhine* – As including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate

The law of neutrality and economic uses of maritime warfare

Cargo classification	Status during seizure and conditions
Absolute contraband (e.g., gunpowder)	Always liable to seizure
Conditional contraband (e.g., food, cloth)	Conditionally liable to seizure, only if the goods are intended for the enemy government

Bilateralism and community interest

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Stockholm; Principle 2, Rio).

- Principle 21 of Stockholm Declaration and Principle 2 of the Rio Declaration speak of *environment of other States or of beyond the limits of national jurisdiction*
 - The prohibition is not to *knowingly* allow its territory to cause damage to the environment of other States
- Customary IL relied on a few canonical cases (*Train Smelter* arbitration)
 - No State may knowingly allow its territory to be used in a manner that would cause serious physical injury to the environment of another State
- *Pulp Mills*: Breach of environmental obligations is contingent on the affected party raising objections to the proposed activities
- Sources of obligation (*Iron Rhine*)
 - Obligations under international environmental law
 - Residual freedom States-parties enjoy beyond the scope of their treaty obligations, which freedom they can use to protect their own environment
- However, whatever the basis and origin of environmental principles, their reach seems to extend as far as restraining States-parties in the course of their treaty-based activities
- The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment
- This points to the *emergence of environmental duties to the international community*: This concept of the *obligatio erga omnes* could in the future be of relevance when global environmental problems are at issue
- IEL possesses an objective community dimension, especially with regard to areas not subjected to any State's jurisdiction
 - Thus, the legal interest arising for States-parties in terms of compliance with or violation of environmental rules and agreements does not exclusively turn on the relevant State being a directly "injured State"

Basic features of treaty instruments on environmental protection

1. Activities prohibited
2. Activities allowed up to a certain level
3. Activities lawful as such but placed under control and procedural observation

Customary law and general principles of environmental law

General principles

- 1992 Rio Declaration:
 - Principle 1: Human beings are at the center of concerns for sustainable development, and entitled to a healthy and productive life in harmony with nature
 - Principle 3: Intergenerational equity
 - Intergenerational equity could also be used as an interpretative tool, rather than a fixed legal concept
 - Principle 2: Prohibition of transboundary harm, **which is recognized as part of customary law**
 - Principles 18 and 19 are procedural rules recognized in customary IL
 - Not customary:
 - Public participation (Principle 10)
 - Precautionary approach (Principle 15)
 - Polluter-pays principle (Principle 16)
 - EIA (Principle 17)
- The normative status of these principles, such as the precautionary principle, is also reinforced by their generic similarity to other requirements to **prevent transboundary harm**, which require a State to exercise due diligence within its territory and with regard to relevant activities

General duty of prevention

- There is a duty to prevent, or at least mitigate environmental harm, which is a principle of general IL (*Iron Rhine*)
- The general duties in treaties or under customary law are stated in conjunction with more specific duties of precaution, prevention, and consultation, and thus particular regimes provide for the modalities through which the violation of the general obligation may be avoided
- Whenever procedural obligations of consultation, cooperation and provision of information are involved, these are also factored into substantive obligations of prevention
 - *Pulp Mills*: The ICJ considered the due diligence obligation informing the *sic utere tuo ut alienum non laedas* principle to oblige the State "to use all the means at its disposal" to avoid environmentally harmful activities
- Thus, there's an obligation to notify another contracting party regarding intended activities,

giving them the possibility to object, suggest changes in the project or even leading to a subsequent negotiation period

- The substantive prevention of environmental harm obligation under general international law would then determine the legality of these activities and provide the measure for determining the responsibility of a party for them
- The intent behind specific treaty regimes and provisions is to deal with the risk factor through the prescribed process, rather than affect, let alone alter, the basic nature of the general prohibition of environmental harm and the responsibility that its breach discretely produces
- Therefore, the customary law obligation remains in the background when specific treaty regimes are applicable, and regulates the consequences of, and responsibility for, any failure to discharge specific treaty obligations

Environmental principles

1. Sustainable development
2. Principle of preventative action (CIL, principle 21)
3. Principle of common but differentiated responsibility
4. Precautionary principle
5. Polluter-pays principle

Sustainable development

- **Definition:** Development that meets the needs of the present without compromising the ability of future generations to meet their own needs (1987 Brundtland Report of the World Commission on Environment and Development)
- *Iron Rhine:* Some environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts”, but dealt with this in terms of the harm prevention and mitigation duty
- Wholesale idea: It requires the moderation of economic interest in utilization of natural resources or in handling the natural environment more generally so that they are used in a manner that preserves them for future generations
 - Contra: The *ratione materiae* scope of due diligence, prevention, and precaution duties relates to risks engaged in the course of particular activities
- Sustainable development is about how natural resources of a particular kind ought to be used to preserve their continuity and sustainability, rather than how a State has conducted itself with regard to a concrete situation

Precautionary principle

Principle 15

In order to protect the environment, the precautionary

approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (*Rio*).

- The precautionary duty is preventive in nature, but goes further than the ordinary prevention duty, and applies to situations where the proof of a causal connection between an activity and potential damage is not obvious
 - Akehurst: Not customary (WTO, ICJ)
 - In other words, the burden of proof requirement does not operate so as to subvert the substantive condition of scientific uncertainty that triggers the precautionary principle in the first place
- However, there is more to this issue than recognition of the precautionary principle discretely, because the precautionary principle may in some cases anyway operate as an element of the general customary duty of prevention
- Disregarding risks is the key element of the breach of a precautionary principle
- It does not reverse the burden of proof—the person alleging must still prove the damage

Polluter pays

Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment (*Rio*).

- This focuses on the principle of ensuring “prompt and adequate” compensation by the operator, which should be perceived from the perspective of achieving “cost internalisation”
- It argues for internalizing the true economic costs of pollution control, clean-up and protection measures within the costs of the operation of the activity itself
- It mainly refers to the primary rules of conduct
 - To the extent to which it does not succeed in redressing the actual damage, *general rules on State responsibility will enter the scene!*

Environmental impact assessment (EIA)

- *Pulp Mills:* It may now be considered a requirement under general IL to undertake an EIA *where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context*, in particular, on a shared resource
- To fulfill its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity

having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment (*Costa Rica v. Nicaragua*)

- EIA requirement could also be an aspect of the precautionary duty
- The general duty of prevention requires assessing whether there is environmental risk
 - And if this's the case, the EIA should be undertaken
- The duty to undertake an EIA may be triggered in circumstances similar to those that make the precautionary principle applicable
- Assessment of whether the proposed activity carries environmental risks is not that different from the ambivalence or uncertainty of evidence available that triggers the precautionary duty

Principle of common but differentiated responsibility

Principle 7

States shall cooperate in a spirit of global partnership to conserve, and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command (*Rio*).

Interaction of environmental law with other areas of IL

- Environmental protection measures undertaken by the State can come into conflict with other international obligations of that State
- Overall, unilateral action to protect the environment is generally discouraged
- Rio Declaration: Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus
- Environmental concerns furnish a prime example of the public interest, and could be ones that justify expropriation in exchange for compensation
 - But even measures laudable and beneficial to society require compensation
- In human rights treaty regimes, environmental concerns are parasitical on human rights protection

Conclusion

- The bulk of environmental obligations operate through the complex and interrelated framework that includes the requirements of consultation and verification

- For instance, consultation or undertaking an EIA are ways in which prevention and due diligence obligations should be implemented
 - More broadly, all these specific elements are fortified by the more general and substantive principle of the avoidance of environmental harm
- On that position, customary law, similar to certain treaty regimes, recognises both substantive and procedural (or process-related) principles of environmental protection

Chapter 18: International economic relations

Introduction

- Trade relations between the territories of two or more States are entirely conditional upon the requirements arising under treaties relating to that subject matter
- When not constrained by treaty obligations, any State can refuse to trade with another State or discontinue existing trade

Mapping the area

- IL regulates:
 - Movement of foreign businesses into the territory of other States; and
 - Economic relations between entire States or customs territories concerning goods, services, and capital
- **International trade** – About movement of goods and services across borders as an aspect of relations between 2 or more national economies
 - Investment as a form of capital export attracts protection under both treaties and general international law rules regarding the treatment of aliens
- **Trade law** – About the access of foreign goods and services to host State markets under treaty-based requirements that have no analogue under general IL
- International trade law is based upon treaties reflecting the commercial principle of reciprocal exchange of benefits and advantages between States
- **Customary IL is not predominant**
 - Under customary law, **States have always been free to regulate their economic and monetary affairs as they see fit**
 - Thus, principles of the freedom of commerce, the MFN treatment or the convertibility of currencies are not guaranteed by customary law
- Under general international law, no State is obliged to trade with anyone, lend credit to anyone, or provide any development assistance to anyone
- With regard to the customary law these declarations show the intention to create the number of objecting States was too small to prevent its formation or enhance the prospect of customary law of different content developing

The meaning of free trade

- Free trade ordinarily includes access by States to each other's markets, goods and merchandise
- Trade law obligations are about access to market and equality guarantees, not about economic conditions
- Not all domestic decisions that place foreign traders at a disadvantage are outlawed
- In other cases, free trade carries with it elimination of most or all trade and customs tariffs, and customs unions and common markets (e.g., EU)
- A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation (*Nicaragua v. US*)

The WTO and international trade system

- The agreement on the WTO entered into force on Jan. 1, 1995
- WTO membership is restricted to States and customs territories (e.g., the European Union and Hong Kong), which accept both a GATT Schedule of trade concessions as well as the General Agreement on Trade in Services (GATS) Schedule of services concessions

The GATT and other trade agreements on goods

- GATT establishes general principles and rules for the liberalisation of international trade by reducing customs barriers and other barriers to trade and by eliminating discriminatory treatment between States in international commerce
- Overall, the doctrine of *lex specialis* will be relevant only when a particular measure is unlawful under one treaty and lawful under another treaty and one treaty purports to displace the requirements under another treaty
- GATT general obligations are *subsidiary* to specific tariff concessions made by States
- The **MFN clause** under art. 1 is the central principle of GATT: Nondiscrimination among trading partners by requiring all GATT members to grant all other members of the Agreement treatment (concerning any tariff or other concession) as favorable as they accord to products from any other country
 - Once products have passed customs, GATT members are obliged to treat them on the basis of complete equality with "like" products of national origin
 - This is to prevent the use of internal regulations to discriminate against imported products which would in effect undermine the reduction of tariffs and other trade liberalisation measures through the back door
- If a country wishes to protect its own producers against foreign competition, it may do so under the GATT, but **only by using customs tariffs**
- The WTO concept of **non-discrimination** bars providing advantages, favours or privileges that

place particular products on different footings by granting them more favorable competitive opportunities

- Art. XI prohibits the use of quantitative restrictions (QR)³³ as a form of protectionism

Nonviolation complaints

- Art. 23 (1) enables a State-party to complain when any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement
- There is no obligation to suspend or withdraw the measure impairing the benefit; only recommendations are possible on this subject matter, not binding decisions

General Agreement on Trade in Services (GATS)

- Layers:
 - First, there is a framework agreement which applies to any service in any sector, except a service provided in the exercise of governmental authority
 - Second, there are various types of "commitments" in "national schedules" to take care of the fact that most barriers to international trade in services do not arise from border measures (as in the case of goods) but from domestic regulations
 - Third, individual (more sensitive) service sectors have found special treatment

The agreement on intellectual property rights (TRIPS)

- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is concerned with a variety of private rights, such as the protection and enforcement of copyrights and related rights, trademarks, geographical indications, industrial designs, patents, lay-out designs, and undisclosed information

Exceptions and waivers in the WTO system

- The MFN rule does not apply if GATT members form a customs union or a free trade area or if they offer developing countries preferential treatment
- The GATT has also managed to keep developing countries within the system by granting them non-reciprocal preferential treatment
 - Most prominent has been the nonreciprocal tariff concession for poor countries

Exceptions invocable by States-parties

- Serious balance-of-pay difficulties

³³ For example, import or export quotas, restrictive use of import or export licences, or controls of payments concerning product transactions.

- To restrain the harmful effect of foreign trade on its domestic production
- If this is necessary to meet concerns as to public order, protection of natural resources, security or public morals, and in both agreements “subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”
- Security exceptions (if necessary for the protection of its essential security interests)
- As letters of intent are submitted by central banks or treasuries, the treaty-making competence issue would arise under the VCLT (full powers)

The Fund's supervision of members' compliance with its Articles of Agreement

- Section VIII of the IMF Articles of Agreement imposes significant limits on the economic sovereignty of member States
 - No member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions
- Art. V(5) of the IMF Articles of Agreement provides for a member's ineligibility to use Fund's resources, “[w]henver the Fund is of the opinion that any member is using the general resources of the Fund in a manner contrary to the purposes of the Fund”.
 - A rather controversial issue in this connection is the “conditionality” of loans offered by the IMF to developing countries. Under so-called stand-by arrangements between the IMF and the debtor country, the debtor country must formally declare to undertake certain economic reform measures to counter its balance-of-payment deficit.
 - This is a condition of the IMF for offering the loan, but it does not amount to a treaty obligation.
 - Therefore, if the debtor State does not comply with the condition, it does not commit an internationally wrongful act.
 - However, there might be difficulties in obtaining further loans from international institutions which in fact makes it difficult not to comply.
 - Such required structural adjustment policies often have painful social consequences for the populations of developing countries
- Conditionality has been the principal method by which the IMF has endeavoured “to impose its discipline on member States in relation to their monetary and fiscal policies”, with implications for their overall economic policies
- Conditionality enhances the IMF's discretionary treatment of member States' conduct and policies and is virtually free of subject-matter limitations; any aspect of domestic policy could be encapsulated within it, ranging from currency control to commodity export restrictions, from labour law to counterterrorism
- The place of conditionality within the overall framework of the IMF increases the element of political discretion and political selectivity

The framework for international financial organizations

The International Monetary Fund (IMF)

- The Bretton Woods Conference in 1944 led to the creation of the IMF and the World Bank (International Bank for Reconstruction and Development)
- Essential purpose: To provide a framework that facilitates the exchange of goods, services and capital among countries, and that sustains sound economic growth
 - Premise: Forex restrictions hamper trade
- Obligations for convertibility of currencies serve the aim to foster trade
 - States are generally required to ensure currency convertibility and to eliminate exchange measures when joining trade organisations
- Under general international law, a State is entitled to regulate its own currency,
- The IMF's resources are composed of mandatory contributions from members according to their quotas, and credits from Fund's members
 - These funds create a pool of financial resources from which members can borrow, the money requiring to be repaid within a specific period with interest
- The rights and duties of members are based upon the size of such “quotas”
- The main organ of the IMF is the Board of Governors composed of one Governor and one alternate nominated by each member
 - The voting system is weighted and puts the actual decision-making power into the hands of the group of Western States with the largest quotas
- So-called special drawing rights (SDRs) play a particular role in providing the required liquidity
 - The SDR is an asset allocated to members by the Fund as a reserve asset or for use in support of their currencies

The reduced relevance of legal requirements for financial transactions

- It's the consistent practice of the IMF not to regard loan agreements and letters of intent, whereby the State undertakes structural and economic reforms as conditions for obtaining a loan from the Fund, as international treaties

The World Bank (WB)

- Purposes:

- assist in the reconstruction and development of territories of members
- promote private foreign investment by means of guarantees or participation in loans and other investments made by private investors
- provide (under certain circumstances) finance for productive purposes
- promote the long-term balanced growth of international trade and the maintenance of equilibrium in balances of payment
- arrange its lending policies to give priority to the more useful and urgent projects
- conduct its operations with due regard to the effect of international investment on business conditions in the member States
- WB was originally concerned with reconstruction after WWII and is now primarily occupied with granting loans to developing countries to finance particular projects to improve the infrastructure and economic development in the South in general
- WB membership requires IMF membership
- WB makes loans out of its own capital funds, or re-lends funds it raises in the market or guarantees loans made to members through commercial investment channels
- In view of strong criticism directed against the pure economic criteria applied in the Bank's policy in the past, it has also become somewhat sensitive to the social and environmental consequences of the projects it finances throughout the world.
- United States
- Russia
- Ten other members are periodically elected by the UNGA for a 2-year term
- It has the primary responsibility for the maintenance of international peace and security
 - The UNSC acts on States' behalf (art. 24)
- Member States will accept and carry out the decisions of the Security Council in accordance with the present Charter
 - Thus, UNSC decisions may have binding force on States
- Decisions of the UNSC on procedural matters are made by an affirmative vote of nine members, while decisions on all other matters are made by an affirmative vote of nine members including the concurring votes of the permanent members
- The existence of the veto acts as an important safeguard against the over-extended use of the UNSC's authority, was a condition for the adoption of the Charter, and is thus the price which must be paid for the unusually large powers conferred on the UNSC
- Resolutions adopted by the Security Council are agreements between States, in their essence almost indistinguishable from any other treaty

Chapter 22: The UN and international peace and security

Normative foundations of the United Nations

- Six principal organs:
 - General Assembly
 - Security Council
 - Economic and Social Council
 - Trusteeship Council
 - Secretariat
 - ICJ
- Functions in the area of peace and security
 - Political role of UN organs in the peaceful settlement of disputes
 - Enforcement action
 - Peacekeeping operations
- The UN may not intervene in matters which are essentially within the domestic jurisdiction of any State

Membership

- Admission is effected by a decision of the UNGA upon recommendation of the UNSC

Security Council

- The UNSC consists of 15 members, five of which are permanent members:
 - China
 - France
 - United Kingdom

General Assembly

- UNGA consists of all UN member states
- The UNGA approves the budget and fixes the amounts of the budgetary contributions which each member State must pay
- Decisions of the General Assembly on important questions, including matters of peace and security, budget and election of members of other principal organs, shall be made by a two-thirds majority of the members present and voting
 - Other issues: simple majority
- On certain questions concerning the internal running of the UN, the UNGA may take decisions which are binding on member States or have dispositive effect
- But as regards other questions (for example, disputes between member States, or questions of human rights), the UNGA has no power to take binding decisions, nor does it have any power to take enforcement action; it can only make recommendations

Overlapping competence of the UNSC and the UNGA

- The effective interpretation of the Charter endorses the parallelism of competences of various organs, so that the organisation is not paralysed when the Charter does not impose a prohibition on a particular organ acting in the relevant manner
- On the broad range of matters, such as dispute settlement, investigation and inspection, or peacekeeping, the powers of the Security Council and General Assembly run in parallel
- In cases where the Security Council has been unable to reach a decision on a question because of the veto, it has adopted the practice of removing the

question from its agenda (this decision is procedural, so the veto does not apply), in order to leave the General Assembly free to deal with the question

Pacific settlement of disputes under the UN Charter

- A dispute may be brought before the Security Council by a member State, whether a party to the dispute or not; by a non-member State; by the General Assembly; and by the Secretary-General
- It is for the Security Council to decide whether to accede to that request by placing the dispute on its agenda

Statutory basis and requirements for collective security and enforcement action under chapter VII

- The Security Council possesses this authority exclusively³⁴
 - No other organ can make such determinations to trigger the application of Chapter VII and resort to measures provided for therein
- There is nothing in the Charter to expressly suggest that a “threat to the peace” necessarily connotes action by a State or a breach of international law
 - But nearly every art. 39 trigger involved serious breaches of IL
 - However, in its practice, the Security Council has made some purely political determinations under art. 39 that have no factual basis
- The Council may also “call upon” (i.e., order) States to comply with provisional measures to prevent an aggravation of the situation
- Enforcement action *stricto sensu* can take two forms:
 - Art. 41 – measures not involving use of armed forces
 - Art. 42 – use of armed forces
- Provided that the resolution authorising the use of force remains within the bounds of the Council’s vires, it is binding upon the target State with the effect that it is barred from invoking self-defence, or later claiming reparation

UN peacekeeping

- They have always been based upon the consent of the conflicting parties to the deployment of peacekeeping troops and military observers under the auspices of the UN
- From 1960 onwards, all United Nations peacekeeping forces have been created by the Security Council
- General Assembly Resolution 377(1950), known as “Uniting for Peace”, and adopted in the context of the Korean crisis, states that if the Security Council fails in its primary responsibility of maintaining international peace and security, the General

Assembly can make recommendations for collective measures including the use of armed force where necessary

- Akehurst: The legality of Resolution 377 is dubious. For one, it contradicts Article 11(2) of the Charter, which gives the Security Council a monopoly over “action”

Chapter 23: Settlement of disputes

General background

- The UN Charter requires all members to settle their international disputes by peaceful means, such as:
 - Negotiation
 - Enquiry
 - Mediation
 - Conciliation
 - Arbitration
 - Judicial settlement
 - Resort to regional agencies or arrangements
- **Legal dispute** – A disagreement between States concerning a point of fact or law, or a conflict of legal views or interests

The International Court of Justice

- All UN members are automatically ICJ members
- Two functions:
 - Settle legal disputes submitted to it by States (contentious jurisdiction)
 - Give advisory opinions on legal questions referred to it by international organs and agencies duly authorised to do so (advisory jurisdiction)
- The Court consists of fifteen judges; five are elected every three years to hold office for nine years
 - Their election requires an absolute majority of votes in both the UNGA and UNSC
 - The Court may not include more than one judge of any nationality, but the composition of the bench should represent the principal legal systems of the world
- If a State appearing before the Court does not have a judge of its own nationality at the Court, it may appoint an *ad hoc* judge for the particular case

Jurisdiction in contentious cases

- Only States may be parties in contentious proceedings before the ICJ
- Jurisdiction is dependent on the consent of States:
 - The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force (art. 36, ICJ Statute)
- The Court has held that a defendant State may also accept the jurisdiction of the Court after proceedings have been instituted against it; such acceptance may take the form of an express statement, or it can be implied if the defendant State

³⁴ The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security (art. 39, UN Charter).

defends the case on the merits without challenging the jurisdiction of the Court

- States can also agree in advance by treaty to confer jurisdiction on the Court; that is what Article 36(1) ICJ Statute means when it refers to “matters specially provided for [. . .] in treaties”
- Jurisdictional clauses under treaties are at times subject to reservations entered to them by States-parties

Jurisdiction under the Optional Clause

- If State A has accepted the Optional Clause and State B has not, State A cannot be sued by State B.
- If the claimant State has accepted the Optional Clause subject to reservations, the defendant State can rely upon the claimant State’s reservations by way of reciprocity
- A State may reserve the right to subsequently amend the declaration and modify the scope of disputes that fall within or outside the Court’s jurisdiction

The absent third-party doctrine

- A third State whose interests may be affected by proceedings can request to intervene in the proceedings, provided that it accepts that the judgment rendered will be binding on it
- When third States choose not to take advantage of this opportunity, the Court has to assess what impact its decision will have on States absent from proceedings

Provisional measures

- The ICJ can be requested to indicate provisional measures under Article 41 of its Statute “to preserve the respective rights of either party”
 - Orders containing provisional measures have binding force
- The requirements traditionally held applicable in this kind of proceedings are irreparable harm, urgency, and *prima facie* jurisdiction

Advisory opinions

- Unlike judgments, advisory opinions are not as such binding
- Who may request for an advisory opinion:
 - UNGA
 - UNSC
 - Specialized agencies so authorized by the UNGA

Arbitration

- Arbitration gives the parties wider choice as regards the seat of the tribunal, the appointment and selection of arbitrators and their qualifications, the procedure to be applied and the regulating the power of the tribunal through formulating its terms of reference (*compromis*)
- A frequent pattern in arbitration treaties is for each of the two parties to appoint an arbitrator; the two

arbitrators thus appointed agree on the choice of the third arbitrator

- The tribunal consists of three (or more) persons, who can decide by majority vote

Admissibility of claims before international tribunals

Exhaustion of local remedies

- An injured individual (or company) must exhaust remedies in the courts of the defendant State before an international claim can be brought on his behalf
- When the injury is inflicted directly on a State, there is no need to exhaust local remedies
- For an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success (*ELSI*)
 - Of course, local remedies do not need to be exhausted when it is clear in advance that the local courts will not provide redress for the injured individual

Applicable law

- Article 38 ICJ Statute requires the sequence of the sources of law stated in that article to be observed, but also to make sure that the Court applies the law in a way that avoids making decisions that contradict the rights and obligations of States under the applicable law
- The *lex specialis* principle provides that a treaty can derogate from, and exclude in mutual relations between its States-parties, other rules of international law concerning the same matters

Binding force, interpretation and revision of judgments

- All judicial and arbitral decisions are binding on parties to proceedings
- Arbitral awards are binding and shall be executed without delay
- Judgments of the ICJ are binding under Article 59 of the Court’s Statute
 - Art. 94 UN Charter authorizes the UNSC to make recommendations or decide upon measures to be taken to give effect to the judgment
- The Court will not prescribe particular ways to implement its judgment, nor will it *a priori* contemplate that its judgment will not be implemented by a party
- The Court has specified that the meaning of *res judicata* in relation to the ICJ is as provided in Articles 59 and 60 of the Statute: binding force as between parties and in relation to the particular case, and the lack of possibility of appeal
- The jurisdiction of the Court to give an interpretation of its previous judgment is a special jurisdiction deriving directly from Article 60 of the Statute
- The Court’s revision jurisdiction under Article 61 of the Statute can be exercised only if it relates to the

decisive factor that led the Court to make a previous decision, not one that was simply addressed in pleadings or judgment

- This is about facts that existed before the judgment challenged was delivered that would have made that reasoning different, but which were not known at the time yet were discovered afterwards
- This leaves open the possibility that a judgment wrongly decided may stand as *res judicata*, and cannot be undone through the revision proceedings

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