# Introduction

## History of Public International Law

### Late Medieval Century

* 1. Holy Roman Empire in decline
  2. Emerging nation-states and principalities
  3. Scientific progress and innovation
  4. Greater amount of people and goods
  5. No big empire or religion
  6. Only bilateral agreements

### Classical Period (17th – 18th Century)

* 1. Grotius
     1. Laws of Peace and War
     2. “Pacta sunt servanda” – agreements must be respected
     3. Moves away from natural law as religious concept to reason
     4. Positivism – attached primary or major weight to customary and treaty rules
  2. Peace of Westphalia (1648)
     1. Series of bilateral agreements
     2. Freedom of religion by more about power stability
     3. Three concepts (apply only to parties to agreement)
        1. Sovereign equality
        2. Independence
        3. Non-intervention
     4. Colonialism flourished
     5. Maintained via balance of power and self-regulation
  3. Hobbes Leviathan
     1. Sovereign/Leviathan is in self-interest (keeps us safe)
     2. No natural law, just self-interest
     3. System is voluntarist
     4. Still believes in pacta sunt servanda

### 18th – 19th Century

* 1. Rise of nation-state
  2. War made state-state made wars
     1. Push to economies of scale
  3. Jeremy Bentham – uses term “international law” and defines it
  4. War just happens – no need to justify it, just explain it
  5. Professionalization of international law
  6. First multilateral treaty

### 20th Century

* 1. Innovations lead to more communication and travel
  2. Need multilateral set of rules
  3. WWI
  4. League of Nations
  5. UN Charter
  6. UN Declaration of Human Rights
  7. Women’s suffrage
  8. Racist and Feminist Critiques

### Post-Cold War

* 1. Fukuyama: The End of History
     1. Liberal capitalism has won. Rest of world will follow
     2. Solidarist, one world community will rise

### 9/11

* 1. Shakes belief that Fukuyama was right
  2. Can we have one global order?
  3. Should we have one global order?

## Theories of International Law

### Realism

* 1. Most dominant school
  2. Anarchic system (no central enforcement/adjudication)
  3. All that matters is power
  4. Security dilemma
  5. No exogenous force
  6. International Law will reflect existing balance of power and won’t change it

### Institutionalism

* 1. Representative institutions shape interests in cooperation, not just reflect them.
  2. International law is exogenous power.

### Radical Approaches

* 1. Liberalism
     1. States are fiction
     2. Preferences of states are not monogamous or fixed
     3. Domestic constituencies change behavior and adopt different preferences
  2. Constructivism
     1. Ideas matter – they shape how you use and think about power and why you want power
     2. International law is reflection of norms and generator of norms (ideas)

### Feminism

* 1. Reexamine and reform norms and processes so as to take account of women.

### Third World

* 1. View colonialism as permanently embedded concept.
  2. Examined dependency of many states and societies on Western conceptions of international law and have sought to challenge them.

# International Law and International Politics; the UN as a Case Study

## United Nations

### Overview

* 1. Purpose – pacifying mechanism
     1. Member that is not “peace-loving” can be expelled but this has never been done because to be world government, you have to govern everyone.
  2. Membership – open to all nations which accept obligations of the Charter (all “peace-loving” nations)
  3. Structure – six principal organs, 15 agencies, and several programs and bodies.
  4. General Assembly – main deliberative organ, composed of all Member States
  5. Security Council
  6. Economic and Social Council – coordinates the economic and social work of the UN and the specialized agencies and institutions; 54 members
  7. International Court of Justice – principal judicial organ of the UN; settles legal disputes between states
  8. Secretariat – international staff that carries out the diverse day-to-day work of the Organization
  9. Budget – about $5.6 B; main source of funds is contributions of Member States; many Member States fail to pay their assessed contributions
     1. Free-riding Problem: 113 members refuse to contribute so don’t have a problem with raising budget. US pays most (~$22M).
     2. Power of the purse – US refused to pay one year until structural reforms were made. Rotating members on Security Council get more foreign aid when they are on.

### Security Council

* 1. Membership – 5 permanent members (China, France, Russian Federation, United Kingdom, and U.S.) and 10 elected by GA
  2. Voting – procedural matters require 9 votes; substantive maters require 9 votes and no vetoes by 5 permanent members
  3. Primary responsibility – maintenance of international peace and security
  4. Recommend admissions of new members
  5. Decisions are binding. But Cf. Ch. 6
  6. Elect Secretary General and generals of ICJ

### Human Rights Council

* 1. 47 members
  2. 3-year terms
  3. Address human rights violations
  4. Half of resolutions in first year involved Israel
     1. Palestine is only permanent agenda item
  5. Only member without term limits is Palestine

## International Law v. Constitutional Law

### Introduction

* 1. Jack Goldsmith and Daryl Levinson
  2. “Public Law” = constitutional and international law
  3. “Ordinary domestic law” = statutes and common law that apply to private actors within a state.

### Comparison

|  |  |
| --- | --- |
| **International Law** | **Constitutional Law** |
| No coercive enforcement mechanism   * Consent-based * Greater diversity of opinion * Citizens less likely to buy into global world order. However, research shows that states overwhelming follow international law.   + Selection-bias in what states agree to   + Law creates social norms against defection (public sharing, reputation, etc.) | No coercive enforcement mechanism   * Consent-based – Lacks enforcement authority capable of coercing powerful political actors to comply with unpopular decisions * Fewer challengers * Citizens more likely to buy into their Constitution |
| No centralized legislature | No centralized legislature   * Constitutional systems have quasi-legislative conventions and amendment procedures but they are not designed to update the law or resolve legal uncertainty on a continuous basis, in the manner of a legislature. |
| No hierarchical court   * Legislative limitations shift the burden of uncertainty to courts. But compared to domestic law courts, international courts have a greater burden to resolve uncertainty and less capacity to resolve it. | Hierarchical court   * When constitutional courts interpret constitutional law in ways that are politically unacceptable to powerful groups, constitutional amendment hurdles leave little legal recourse other than convincing the court to change its mind. |
| Threat to state sovereignty | Threat to state sovereignty   * Domestic constitutional law also poses a threat to national sovereignty. E.g., constitutional constraints on national legislative decision making. |

# Sources of International Law

### Sources of International Law

* 1. Domestic
     1. Case law
     2. Constitution
     3. Agency regulations
     4. Statutes
  2. International
     1. No central judiciary (no stare decisis)
     2. Statute of the ICJ Art. 38
        1. International conventions (agreements)
        2. International custom
        3. General principles of law recognized by civilized nations
        4. Teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

### Treaties

* 1. Overview
     1. Based on:
        1. Voluntarism
           1. Pluralist as opposed to solidarist order (allows states to be different from each other)
           2. Since 1946 – more multi-lateral treaties with universal aspirations 🡪 move to solidarist order
        2. State sovereignty
        3. Reciprocity
     2. Contract and Legislation
     3. Types
        1. Bilateral – e.g. extradition, security
        2. Multilateral – e.g. environment, common good-type treaties
           1. Benefits – simplicity, efficiency, fair?, uniformity
  2. Definition and Governing Law
     1. Vienna Convention on the Law of Treaties (VCLT)
        1. Customary international law so binding on everyone (note: US never ratified)
        2. Only applies to treaties between states
     2. Definition (VCLT 2) – “Treaty” means an international agreement concluded between states in written form and governed by international law.
        + 1. R301 cmt. – under customary international law, oral agreements are no less binding
     3. Distinguishing Treaties from other Agreements
        1. Political Commitments
           1. Benefits – flexibility, don’t need domestic approval
           2. Distinguish from treaty

E.g. Burkina Faso v. Mali (ICJ) – Mali president makes boundary statement at press conference. ICJ said it was political statement so no force.

* + - * 1. May contribute to soft law
      1. Commercial transactions – not treaties
         1. E.g. Rental agreement for embassy property
      2. Common subjects of treaties – territory boundaries; sovereignty (e.g. US and UN agreement on UN in NYC)
      3. Factors to consider:
         1. Which law governs?
         2. How is agreement treated domestically?
         3. Who participated?
         4. Did parties intend document to be legally binding?
  1. Formation of Treaties
     1. Initiation
        1. Anyone can initiate – e.g. UN, state, civil society
     2. Negotiation
        1. Complicated
        2. Expensive – lots of delegates; NGOs taking over states roles because of costs
     3. Drafting
        1. Lawyers
        2. Lots of fighting
     4. Voting and Adoption
        1. 2/3 participants
        2. One country – one vote
     5. Signing Ceremony
        1. For serious treaties, signing just approves language of text.
     6. Ratification
        1. Expresses intention/consent to be bound
        2. Domestic process
        3. Accession – people who are not original signatories can sign on
     7. Registration
        1. Deposit treaty with UN
     8. Enters into Force
        1. Usually require certain number of signatories before it can enter into force
  2. Obligation not to Defeat the Object and Purpose (VCLT 18)
     1. “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”
     2. Not the same as having to comply with all provisions or there would be no difference between signing a treaty and becoming a party to it through ratification.
  3. Effects on Third Parties
     1. VCLT Art. 34-36 – treaty does not create obligations or rights for a third party without its consent. Although a treaty may affect third parties, not every externality creates an obligation.
  4. RUDs
     1. General
        1. Must be in writing
        2. US Congress can add to RUDs to treaties before ratification – binding on President and President can’t get rid of them.
     2. Reservations (VCLT 19-23)
        1. Definition (VCLT 2) – “’reservation’ means a unilateral statement…made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;
        2. Permissibility
           1. Must be made when you sign/ratify
           2. Permissible unless treaty says otherwise
           3. Permissible unless against object and purpose of the treaty
        3. Effects
           1. The Genocide Convention Handout Examples
           2. VCLT Art. 21

Reservations modify provisions for the State in relation to other parties and for other parties in their relations with the reserving State.

* + - * 1. Acceptance

If explicitly allowed, no need for other parties to accept

If limited number of parties, everyone needs to accept.

If large number of parties, reservation applies between parties that accept.

* + - * 1. Objection

Have to object in writing within one year.

If party objects, party can (1) have provision with reservation not apply or (2) have whole treaty not apply between two parties.

Party can object for any reason

* + - * 1. Human Rights Treaties Exception

HRC can declare reservations impermissible and thus party is still subject to provision.

* + 1. Understandings
       1. Agree if it means a specific thing
    2. Declarations
  1. Treaty Interpretation
     1. Everyone interprets
     2. Bilateral treaties – interpretations agreed upon by both parties
     3. VCLT 31
        1. Duty to interpret treaties in good faith
        2. Text
        3. Context – preamble, annexes, other agreements/instruments in connection to treaty – in light of Object and Purpose
        4. Subsequent agreements, practice in application of the treaty, relevant rules of international law
        5. Special meaning if established that parties so intended
     4. VCLT 32
        1. Legislative history/drafts of treaty – can be used to confirm meaning resulting from application of VCLT 31 or to determine meaning when VCLT 31 leaves meaning ambiguous or leads to meaning that is absurd or unreasonable.
     5. Different languages – assume treaties are the same and intend the same thing; choose interpretation that best accommodates both texts and then look at context, purpose and intent.
  2. Invalidity
     1. Pacta sunt servanda (VCLT 26) trumps voluntarism
     2. Can’t rely on domestic law to not abide by treaty (VCLT 27)
     3. Exceptions to pacta sunt servanda
        1. Ultra vires (VCLT 36) – person who entered into treaty clearly did not have power to
        2. Coercion (VCLT 52)
           1. Physical force or threat of force in violation of UN Charter
           2. Political/Economic coercion not included
           3. Inducements not allowed
           4. No coercion when “forced” to stop doing something that is wrong or to give up something that is not yours. E.g. Iran-U.S. Claims Tribunal
        3. Jus cogens
           1. VCLT 53 – Treaty is void if it conflicts with jus cogens. E.g., use of force, genocide, slavery, torture
           2. VCLT 64 – Treaty is void if it conflicts with jus cogens that arises
        4. Fraud (VCLT 49) – party was induced to conclude treaty by fraudulent conduct
           1. ILC commentary to draft VCLT – “fraudulent conduct” includes: “any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give consent to a treaty which it would not otherwise have given.”
        5. Material breach (VCLT 60)
        6. Impossibility to perform (VCLT 61)
        7. Fundamental Change in Circumstance (VCLT 62)
     4. ***East Timor v. Australia***
        1. Synopsis: Timor Leste instituted arbitral proceedings against Australia at the Permanent Court of Arbitration (PCA). Timor Leste alleges that the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (SMATS Treaty) is invalid because Australia did not conduct the CMAT negotiations in good faith by engaging in espionage.
        2. Tools: (1) Unclear whether breach to negotiate in good faith is a ground for invalidity of treaty. (2) Treaty may be invalid if espionage constitutes fraud.
  3. Withdrawal
     1. Party pay withdraw in conformity with provisions of the treaty or at any time by consent of all the parties. (VCLT 54)
     2. If treaty does not say anything can only withdraw if it is established that the parties intended to allow for it or the right to so is implied by the nature of the treaty. E.g., can likely withdraw from trade agreement but not from boundary agreement because would threaten peace and stability. (VCLT 56)
  4. Amendment/Modification
  5. Termination
     1. Material breach (VCLT 60)
        1. Renders treaty voidable, not void
        2. When multilateral treaty, parties decide whether treaty is breached just toward the other state or with all parties.
        3. For non-material breach, parties can only engage in reprisal.
     2. Impossibility to perform (VCLT 61)
        1. Has to be external factor that renders treaty impossible to perform
     3. Fundamental Change in circumstances (VCLT 62)
        1. Usually has to be unforeseen.
     4. E.g. ***Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)***
        1. Synopsis: Hungary claimed that changed circumstances (Article 62) made enforcement of a treaty to build and operate a system of locks along the Danube River with Slovakia impossible (Article 61). Court found that Hungary’s termination of the Treaty was premature.
        2. Tools: (1) A fundamental change of circumstances must have been unforeseen and the existence of the circumstance at the time of the treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound. (2)The doctrine of impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from the party’s own breach of an obligation flowing from the treaty.

### Custom

* 1. Overview
     1. Elements of custom:
        1. Consistency
        2. General Practice
        3. Opinio Juris – done out of legal obligation/acceptance as law
     2. Binding on everyone
     3. Can only be changed via:
        1. New treaty
        2. Change in custom (requires breaking customary international law in the first place)
        3. New jus cogens (only way to change if it is a jus cogens)
     4. Relationship with Treaties
        1. Treaties reflect CIL
        2. Treaties create CIL
        3. CIL can emerge and void treaty but very difficult
        4. Treaties preferred over CIL because written, more stable, clearly consent-based
        5. CIL advantages over treaties – universal, apply to almost everyone (except persistent objector), can’t withdraw, becomes domestic law in many countries without having to go through domestic ratification process.
     5. Regional/Limited custom allowed
  2. Evidence – Conventions, court decisions, resolutions, state courts, scholars
     1. ***The Paquete Habana (SCOTUS 1900)***
        1. Synopsis: Fishing vessels engaged in fishing on the coast of Cuba sailed under the Spanish flag was stopped by the blockading squadron. Vessel had only fish and no arms or ammunitions on board. U.S. condemned Spanish fishing vessels off of coast of Cuba as prize of war. Court ruled in favor of fisherman finding that international custom calls for exempting fishing vessels from capture as prize of war, because this has been the practice for a long time with few interruptions.
        2. Tool: Where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to general practice; official practice; treaties; and the works of jurists and commentators well acquainted with the subject at hand.
        3. Note: Only looked at Europe. Probably because needed to look at states, which mostly existed in Europe at the time and states with ships.
  3. Consistency
  4. General Practice
     1. Official practice – national law, executive decrees, acts of military commanders, judgements of national tribunals
     2. Factors (***North Sea Continental Shelf Cases***)
        1. Look at “Specially Affected” States
        2. Fundamentally norm-creating character
        3. Settled Practice
           1. Possibility of Instant Custom – possible for customary norm to develop quickly but that requires very general and consistent practice. E.g., War on Terrorism by U.S.
        4. Widespread and representative participation
        5. Reservations
     3. ***Filartiga v. Pena Irala (CA2 1980)***
        1. Synopsis: P sued D on the premise that he tortured their relative to death in Paraguay under the Alien Tort Statute in support of federal jurisdiction. Court found there was federal jurisdiction under Statute because federal courts have jurisdiction over law of nations and torture violates the law of nations.
        2. Tool: (1) ATS provides that “The district court shall have original jurisdiction of 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.” (2) Torture violates the law of nations, because it has become part of customary international law (looked at various UN declarations and that it has been renounced in constitutions of over 55 nations. (3) Fact that most countries actually did practice torture, so a lack of general practice, did not prevent torture from being deemed customary international law. However, most countries say openly that they don’t torture or what they do doesn’t meet threshold to constitute torture.
  5. Opinio Juris
     1. Subjective and Objective Evidence
     2. Subjective – states act because of sense of legal obligation
     3. Objective – Point to legal practice
        1. ***Legality of the Threat or Use of Nuclear Weapons (ICJ, Advisory Opinion 1996)***
           1. Background: The UN GA asked the ICJ for an advisory opinion on the following question: “Is the threat of or use of nuclear weapons in any circumstance permitted under international law?”
           2. Holding and Analysis: ICJ can’t reach definitive conclusion as to the legality or illegality of use of nuclear weapons by a State in an extreme circumstance of self-defense in which survival would be at stake.

Treaties showed no conventional rule

Did not find customary international law

Non-utilization of weapons since 1945 but no evidence that state practice is due to a belief that it is legally obliged to not use nuclear weapons. States have reserved the right to use nuclear weapons in self-defense which contributes to deterrence and thus the fact that they have not been used since 1945.

GA resolutions that affirm the illegality of nuclear weapons received many negative votes and abstentions so no opinio juris.

International Humanitarian Law – use of nuclear weapons would generally violate these principles but could not conclude definitively that in all circumstances the threat or use of nuclear weapons was unlawful.

* + 1. ***North Sea Continental Shelf Cases*** – customary international law requires evidence of opinion juris.
  1. ICJ Jurisdiction
     1. ***Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (ICJ 1986)***
        1. Background: US contested jurisdiction of court due to reservation it had made in accepting the ICJ’s jurisdiction that its acceptance would not apply to certain disputes arising under multilateral treaties – in this case, the UN Charter.
        2. Holding: ICJ has jurisdiction because UN Charter Art. 2(4) is customary international law due to parties consent to GA resolution 2625 and that state representatives often refer to Art. 2(4) as being customary international law and just cogens.
  2. Persistent Objector – ***International Law Association***
     1. “Persistent objector rule” – “If whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it.”
     2. No “subsequent objector rule” – Applies only when the customary rule is in the process of emerging. Does not benefit States which came into existence only after the rule matured or which became involved in the activity in question only at a later stage.
     3. Objection must be expressed publicly and often (“persistently”). Verbal protests are sufficienct. States do not need to take physical action.
     4. Jus Cogens – cannot be persistent objector to jus cogens
  3. American Courts
     1. ***Filartiga***
        1. ATS provides that “The district court shall have original jurisdiction of 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
        2. Opened doors to waves of litigation in US under ATS.
        3. ATS is only universal civil jurisdiction country in the world
     2. ***Sosa v. Alvarez-Machain (U.S. Supreme Court 2004)***
        1. Synopsis: A Mexican torturer brought suit for damages against the U.S. and the individual who abducted him and brought him to the U.S. for trial.
        2. Tool: (1) The Alien Tort Statute (ATS) does not create a cause of action for individuals who are victims of violation of international law. While no legal development has precluded federal courts from recognizing claims under international law as an element of common law, the discretion accorded federal courts in fashioning such claims should be restrained for the following reasons: (a) conception of common law has changed (made no discovered); (b) Erie – no federal general common law; (c) creating private right of action better left to legislature; (d) risk of adverse foreign policy consequences; (e) no congressional mandate to do so; (2) Abduction of a foreign national from his country for criminal trial in the U.S. does not support a claim against the U.S. government under the Federal Torts Claims Act.

### General Principles of Law and Equity

* 1. Look to principles when no controlling treaty or custom
  2. Two Major Approaches
     1. Principles – Natural laws you can’t operate without
     2. Modern – Comparative studies, look to major legal domestic systems and glean common principles from them.
        1. E.g. Drazen v. Erdovic – civil countries recognize duress defense for murder while common law countries don’t. Decide it affects sentencing but not verdict (later reversed and recognized it as defense).
  3. Type of Principles
     1. Administrative – due process, impartiality of judges, fair hearing, res adjudicate
     2. Substantive – fill gaps
        1. E.g. UK v. Albania (ICJ) – Albania had good faith reasonable obligation to warn other countries of mines it put in waters
  4. Different from CIL – having different principles of criminal liability is no necessarily violation of CIL.

### Judicial Decisions and Publicists

* 1. Are they sources of CIL or evidence of CIL?
  2. International tribunals
     1. No hierarchy
     2. Decisions not binding – no stare decisis
  3. Scholars
     1. Used more as sources by international courts than domestic courts

### Soft Law

* 1. International instruments not intended to be binding. E.g. GA Resolutions
  2. But evidence of CIL. E.g., ***Nicaragua***, so can become CIL and/or later be codified in treaties.

### Global Administrative Law

* 1. Exists between soft and hard law
  2. International organizations promulgate codes and standards
     1. E.g. International Standards Organization – not a governmental organization but sets standards. Not binding but if you don’t adopt and others do, then can’t export to these countries so in theory its voluntary but practically it is not.
     2. E.g. Olympics – can’t do drugs
     3. E.g. More official – IMF, WTO, World Bank, WHO
  3. Concerns
     1. Democratic deficient – who are these agencies accountable to?

# International Law in the U.S.

## Approaches

1. Monist – international and domestic law are one. E.g., EU
2. Dualist – international law can’t have effect on domestic law without additional step. E.g., UK parliament must legislate treaty
3. Mix – U.S.

## Separation of Powers

### Art. I – Legislature

* 1. Sect. 8 Powers
     1. “Power of the Purse”

### Art. II – Executive

* 1. Commander and Chief
  2. Power to receive and appoint ambassadors
  3. Treaties: Sec. 2 – The President “shall have Power, by and with the advice and consent of the Senate to make Treaties, provided two thirds of the Senators present concur…”

### Art. III – Judiciary

* 1. Courts hesitant to intervene in power struggle between President and Legislature.
     1. Political Question – questions, in their very nature political, or which are, by the Constitution and laws, submitted to the executive, are not amenable to adjudication in the courts.
     2. Twilight Zone
        1. *Youngstown v. Sawyer* 
           1. Synopsis: Truman sends troops to S. Korea to help defend against N. Korea. Didn’t get Congressional approval. Steelworkers threatening to go on strike (need steeek for war). Truman takes over steelmills.
           2. Holding: SCOTUS holds President can’t do this. Justice Jackson calls this Twilight Zone where Congress doesn’t say anything and Court must decide if President is allowed to do what he did.

### Federalism

* 1. Art. I, Sect. 10 – lack of state power in international law (“No state shall enter into any treaty, alliance, or confederation…”)
  2. ***Crosby v. National Trade Council (U.S. Supreme Court 2000)***
     1. Synopsis: Massachusetts passed a law barring state entities from buying goods or services from companies doing business with Burma. Subsequently, Congress imposed mandatory and conditional sanctions on Burma. An action was brought claiming the state statute was invalid under the Supremacy Clause of the Constitution owing to its threat of frustrating federal statutory objective.
     2. Tool: Even without an express preemption provision, state law must yield to a congressional act if Congress intends to occupy the field, or to the extent of any conflict with a federal statute. The Court will find preemption where it is impossible for a private party to comply with both state and federal law, and where the state law is an obstacle to the accomplishment and execution of Congress’s full purposes and objectives.

## Treaties

### Treaty Formation

* 1. Member of executive branch goes to conference
  2. President decides
  3. Goes to Senate – needs 2/3 vote
  4. President can proceed to ratify, bound by Senate’s RUDs

### Supremacy Clause

* 1. Constitution, federal laws and treaties are “the supreme Law of the Land” (Art. VI)
  2. Trump state law
     1. ***Asakura v. City of Seattle (U.S. Supreme Court 1924)***
        1. Synopsis: Asakura (P), a Japanese national residing in Seattle, engaged in business there as a pawnbroker, and brought suit against the City of Seattle (D) attacking the validity of a city ordinance denying a license to engage in pawnbroking to anyone not a citizen of the U.S. and seeking an injunction against its enforcement.
        2. Tool: Pursuant to Article VI of the Constitution, a treaty (note: this is a self-executing treaty) made under the authority of the U.S. shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Treaty making power is not limited by any express provision of the Constitution but does not extend so far as to authorize what the Constitution forbids. The treaty stands on the same footing of supremacy as for the provisions of the Constitution and laws of the U.S.
     2. ***Crosby***.
  3. Equal with Federal Law
     1. Later in Time – treaties and federal statutes have essentially equal status under U.S. law, such that the later in time will prevail under U.S. law in the event of a conflict.
        1. ***Breard v. Greene (U.S. 1998)***
           1. Synopsis: Breard (P) claimed that his conviction should be overturned because of alleged violations of the Vienna Convention on Consular Relations, specifically, the arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate. Court found that P’s argument must fail because the Antiterrorism and Effective Death Penalty Act was enacted after the Vienna Convention and provides that a habeas petitioner alleging that he is held in violation of a treaty will not generally be afforded an evidentiary hearing if he has failed to develop the factual basis of the claim in state court.
           2. Tool: (1) Absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. (2) When a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.
     2. Treaty v. Federal Law Pros/Cons
        1. Bicameral/Presentment process should lead to federal law trumping treaty
        2. State can’t use domestic law as excuse for not following treaty so treaty should trump federal law
     3. Charming Betsy Canon – an act of Congress ought never to be construed to violate the law of nations and international agreements if any other possible construction remains.
  4. Unclear Limitation by Constitution
     1. ***Missouri v. Holland (US 1920)***
        1. Synopsis: Missouri (P) brought suit to prevent Holland (D), a game warden of the United States, from attempting to enforce the Migratory Bird Treaty Act on the ground that the statute was unconstitutional interference with the rights reserved to the states by the Tenth Amendment. Court found for D.
        2. Tool: Acts of Congress are the supreme law of the land (Supremacy Clause) only when made in pursuance of the Constitution (limited by. 10th), while treaties are declared to be so when made under the authority of the United States (suggests not limited by 10th Amendment). Congress unable to pass similar legislation so suggests that Necessary and Proper Clause allows Congress to legislate via treaty is can’t legislate without treaty.
        3. Led to Federalism concerns but still good law 🡪10th Amendment does not impede treaty-making power.
     2. ***Bond v. United States (US 2014)***
        1. Issue: Do federal laws banning the use or possession of chemical weapons apply to a purely local crime: an amateur attempt by a jilted wife to injure her husband’s pregnant lover, which ended up causing only a minor thumb burn? Court found that they don’t because there was no clear indication that Congress intended the chemical weapons ban to apply to the types of chemicals Bond used.
        2. Majority: (1) Courts should find that a federal law overrides the states’ powers only if Congress clearly intended to do so. (2) Constitutional avoidance.
        3. Dissent: federal chemical weapons law applied to Bond but the mere fact that the Constitution authorizes congress to approve treaties does not automatically mean that laws passed to put the treaties into effect are constitutional and in this case the federal ban on chemical weapons is not. Strike down idea that Necessary and Proper Clause allows Congress to legislate something via treaty that it can’t legislate without treaty.
        4. Dissent (Thomas): Government had no authority to enter this treaty in the first place. It should only enter treaties that touch on international issues and not state issues.
     3. ***Reid v Covert (U.S. 1957)***
        1. Synopsis: Civilian spouses of soldiers who murdered their husbands were tried by court-martial under the Uniform Code of Military Justice, without grand jury or jury trial and were sentenced to death. Court found that civilian dependents could not constitutionally be subjected to military court-martial for offenses committed overseas, despite treaties or executive branch agreements to the contrary.
        2. Tool: (1) There is nothing in the language of the Supremacy Clause that intimates that the treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. (2) U.S. is entirely a creature of the Constitution” and thus must act, even outside U.S. territory, in “accordance with all the limitations imposed by the Constitution.”
        3. Reconcile with Missouri because Reid is about individual rights (5th and 6th Amendments), which court thinks need more protection than states who are more powerful.
        4. If treaty violates Bill of Rights, then invalid
        5. Treaties can’t conflict with Bill of Rights or delegate power

### International Limitations

* 1. VCLT
     1. VCLT 27 – a party can’t use internal law as justification for failure to perform a treaty
     2. VCLT 46 – unless violation of internal law was manifest and concerned a rule of fundamental importance when party consented to treaty. Must be objectively evident.

### Self-Executing v. Non-Self Executing

* 1. Self-Executing Treaties – become domestically enforceable federal law upon ratification
  2. Non-self-executing treaties – only become domestically enforceable through implementing legislation passed by Congress.
  3. Geneva Convention III – unclear what status is
     1. Self-Executing
        1. ***US v. Noriega (SD FL. 1992)***
           1. Synopsis: General Noriega (D) of Panamanian Defense Forces contends that the Geneva Convention III is applicable law that the Court must recognize and that he is a POW.
           2. Tool: Geneva III is self-executing given the language and spirit of the treaty and provides D with a right of action in a US court for violation of its provisions. If we didn’t allow people to make claims under Geneva III, then it would be moot.
     2. Overturned and found to be Non-Self-Executing
        1. ***Hamdi v. Rumsfeld (CA4 2003)***
           1. Synopsis: Hamidi (P) who fought for the Taliban, claimed he was unlawfully detained by the U.S. government (D). Court found that despite status as American citizen, D is not entitled to a searching review of the factual determinations underlying his seizure because D was a POW.
           2. Tool: (1) Geneva III is not self-executing and does not create private rights of action in the domestic courts of the signatory countries. (2) Quirin Principle- one who takes up arms against the U.S.in a foreign theater of war, regardless of citizenship, may properly be designated an enemy combatant and treated as such.
  4. ***Medellin v. Texas (U.S. Supreme Court 2008)***
     1. Synopsis: After Texas (P) convicted Jose Medellin (D), he appealed on the grounds that P failed to inform him of his right to have consular personnel notified of his detention by the state, as required under the Vienna Convention. On appeal to SCOTUS, D argued that a case decided by the ICJ suggested that his conviction must be reconsidered to comply with the Vienna Convention.
     2. Tool: (1) U.S. Constitution does not require state courts to honor a treaty obligation of the U.S. by enforcing a decision of the ICJ. (2) The President does not have the constitutional authority to unilaterally convert a non-self-executing ICJ decision into a self-executing one that applies domestically to the U.S. (3) Starting presumption that a treaty the U.S. has ratified is non-self-executing – Two ways international treaty may become legally binding in the U.S.: (a) can be a self-executing treaty containing express language regarding its binding effect domestically and (b) Congress can enact legislation implementing the treaty if the treaty itself does not contain the self-executing language.
  5. Uncertainty
     1. When is treaty SE or NSE?
     2. Presumption of SE or NSE? ***Medellin*** says NSE.
     3. Senate now puts explicit language whether SE or NSE.

### Treaty Termination

* 1. US Constitution is silent on this
  2. People who make it break it
     1. President and Senate; or
     2. President alone; or
     3. Entire Congress alone.
  3. Political Question
     1. ***Kucinich v. Bush (DDC 2002)***
        1. Synopsis: Treaty allowed for termination with six months of notice. (Note: Even if it didn’t explicitly say so, could probably imply termination allowed because involves national defense.) 32 members of the House of Representatives (P) brought action challenging President Bush’s (D) unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty without the approval of Congress. Court found for D because P has not alleged the requisite injury to establish standing to pursue their claims and the treaty termination issue is a nonjusticiable political question that cannot be resolved by the courts.
        2. Tool: Baker held that courts should analyze 6 criteria to determine whether a case presents a political question: (1) presence of a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; (6) the potentiality of embarrassment from multifarious pronouncements by various department on one question. Any one of these characteristics may be sufficient to preclude judicial review under the political question doctrine.

### Treaty Reinterpretation

* 1. Unclear whether the President has the constitutional authority to interpret a treaty in a way that conflicts with the interpretation given its terms at the time of ratification.
  2. Reagan reconciled Star Wars initiative with Anti-Ballistic Missile Treaty saying that parties would not have imagined future technologies. Congressmen disagreed.
  3. Since then, Senate now attaches interpretive guidance to treaties in RUDS and/or holds budgetary appropriations subject to certain interpretations. Also, Senate adds RUDs saying to terminate, need to get approval from Congress (not clear this would be upheld).

### Executive Agreements

* 1. Only 5% of US international agreements are treaties. Others are executive agreements. But in the eyes of the rest of the world, they are all treaties.
  2. Three Types
     1. Executive Agreements pursuant to a treaty
        1. Definition – President may conclude an international agreement pursuant to a treaty whose provisions constitute authorization for the agreement by the Executive without subsequent action by Congress. Dept. of State Circular 175.
     2. Congressional Executive Agreement
        1. Definition – President may conclude an international agreement on the basis of existing legislation (approved in advance – ex ante) or subject to legislation to be enacted by Congress (approved after the fact – ex post). Dept. of State Circular 175.
        2. E.g. NAFTA (would not have gotten 2/3) – CA11 said non-judicial question (political question?)
        3. Pros/Cons
           1. Congress can pass bills by a majority
           2. Not in Art. II
        4. Currently accepted as legal
        5. Probably bound by Art. I powers so likely can’t conflict with Art. X (Missouri) but no cases on this
     3. Presidential Executive Agreement
        1. Definition – The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional sources of authority for the President to conclude international agreements include:
           1. (1) The President's authority as Chief Executive to represent the nation in foreign affairs;
           2. (2) The President's authority to receive ambassadors and other public ministers, and to recognize foreign governments;
           3. (3) The President's authority as “Commander-in-Chief”; and
           4. (4) The President's authority to “take care that the laws be faithfully executed.”
        2. Validity upheld by SCOTUS
        3. Limited by Congress: Case Act – requires the Secretary of the State to transmit to Congress a copy of all international agreements concluded by the United States.
        4. Hierarchy
           1. Presidential executive agreement cannot conflict with previous federal legislation
           2. ***Dames & Moore v. Regan (U.S. 1981)***

Synopsis: Dames & Moore (P) obtained a favorable judgment against the Iranian government. Then, President Carter issued an executive order invalidating all unexecuted judgments against Iran. P challenged validity of this order. Court found for D.

Tool: (1) The President may issue an order nullifying judgments against a foreign state because Congress has acquiesced in a long-standing practice of claims settlement by executive agreement (read in implicit authorization from Congress). (2) Solving international crisis is issue that generally falls under President’s Constitutional powers.

## Customary International Law

### Overview

* 1. Constitution refers to “law of nations” but unlike treaties, doesn’t says its supreme law of land or that there is federal court jurisdiction.
  2. Hierarchy
     1. SCOTUS has never addressed CIL’s relation with federal and state law
     2. Options:
        1. CIL is like federal common law so trumps
        2. CIL is state law and only applies to federal law when specifically stated in federal statutes. E.g., ATS
  3. President can violate international law within constitutional powers
     1. Courts have not struck down acts of high level officials because they violate international law

### US Court Decisions

* 1. ***Paquete Habana (US 1900)*** – Where there is no treaty and no controlling executive or legislative act or judicial decision, courts should resort to customary international law
  2. ***Filartiga (CA2 1980)*** – ATS provides that “The district court shall have original jurisdiction of 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.
  3. ***Sosa (US 2004)*** – The Alien Tort Statute (ATS) does not create a cause of action for individuals who are victims of violation of international law. While no legal development has precluded federal courts from recognizing claims under international law as an element of common law, the discretion accorded federal courts in fashioning such claims should be restrained.
  4. ***Kiobel v. Royal Dutch Petroleum Co. (US 2013)***
     1. Synopsis: Nigerians (P) sued Royal Dutch (D) for complicity in Nigerian government’s acts of torture, killing, and abuse. Court ruled in favor of D finding that the Alien Tort Statute generally only applies only to conduct within the United States or on the high seas.
     2. Tool:
        1. ATS applies only to conduct within the United States or on the high seas unless the matter "touches and concerns" the United States with "sufficient force."
        2. “the presumption against extraterritoriality”: Congress is presumed not to intend its statutes to apply outside the United States unless it provides a “clear indication” otherwise.
        3. Unclear about corporate liability in international law.

# Subjects of International Law

## State Formation and Recognition

### Statehood General

* 1. Primary Actors – only full repositories of international law
  2. Different from individuals although individuals are bearers of some rights and duties under international law.
     1. E.g., UN official immune from certain crimes; laws of war can apply to insurgent groups; corporations can sue/be sued under international law (?)
  3. Major Rights of States (R206)
     1. Legal control of territories
     2. Regulate nationals
     3. Capacity to own, acquire and transfer property, to make contracts and enter into international agreements
     4. Become member of international organizations
     5. Pursue and be subject to legal remedies
     6. Obvious treaty participants
     7. Use of force
     8. Right against other states not to interfere in internal affairs
  4. Creation of State
     1. Break up – E.g., former Soviet Union, Yugoslavia, Czechoslovakia
     2. Reunification – E.g., East/West Germany
     3. Secessions – E.g., Bangladesh from Pakistan, E. Timor, Quebec trying to secede from Canada
  5. Special Status States
     1. Not states in legal sense but have some rights and duties
     2. E.g. Vatican; Palestine; Puerto Rico; EU; North Carolina; multi-nationals corporations
  6. Conditions for Statehood – Montevideo Convention Art. 1 (also see R201)
     1. Territory
        1. Does not need to be final boundary
        2. Includes subsoil, airspace and territorial waters
        3. Cannot be acquired by use of force
        4. E.g. Sealand can’t be state because it is floating, doesn’t have land (and likely no effective government)
     2. Population
        1. Fixed number but not final count
        2. Small sufficient (Antarctica still not enough)
     3. Government
        1. Doesn’t matter what form of government
        2. Has to be effective government
           1. E.g. Finland secedes from Russia then has civil war. League of Nations decides can’t be state until civil war ends. This doesn’t matter if civil war erupts after state is recognized. This is because international community does not want to be an interventionist. Want to endorse status quo 🡪 stability
     4. Foreign Relations
        1. Capacity to engage in foreign relations with other states
           1. About legal capacity, not technical capacity

Some state turn foreign relations/defense to other states. E.g., Monaco to France and Micronesia to U.S.

### Recognition of States

* 1. Theories
     1. Declaratory
        1. Have to meet criteria
        2. Recognition is not sufficient
        3. Pros: Objective; other countries can’t impose values; less interference with affairs of new state
     2. Constitutive
        1. Recognition brings state into being
        2. Pros: ensures political accountability – need to behave well to be recognized; will be arbitrary anyway
  2. UN Membership – UN Charter Preamble, Art. 1-6, 9
  3. Practice
     1. Not clear theory makes difference. If not recognized by states, can’t benefit much from being a “State” under Declaratory Theory.
     2. States recognize/don’t recognize other states for political reasons despite criteria.
  4. Kosovo (ICJ)
     1. Synopsis: Kosovo unilaterally declares independence from Serbia. Kosovo recognized by many states and neighbors. Kosovo espouses constitutive theory while Serbia espouses declaratory theory.
     2. Holding: ICJ ducks question saying there is nothing unlawful about unilateral declaration of independence and does not answer whether Kosovo is a state or not.
     3. Note: In 2013, Serbia pressured by EU to sign Brussel’s agreement with Kosovo. Kosovo treats it as a treaty and goes through domestic ratification process. Serbia never calls it a treaty and does not domestically ratify it (like entering into agreement with multi-national corporation).
  5. Additional Criteria
     1. According to US, Montevideo criteria necessary but not sufficient.
     2. Additional Criteria:
        1. Peaceful and democratic determination of future government
        2. Respect for existing borders
        3. Rule of law
        4. Safeguarding human rights of minority
        5. Respecting international law more generally
        6. Arbitration/agreement (peaceful) to settle disputes
        7. Non-proliferation
        8. No use of aggression
        9. How new state affects neighboring states
     3. Political Act – Soft law
        1. Therefore, not yet binding
        2. Not customary international law (most countries didn’t meet criteria)
        3. Can become customary international law

### Duty to Recognize/Duty to Not Recognize

* 1. Formal recognition – political act, no duty to formally recognize a state
  2. Treatment – duty to treat (although not recognize) entity as a state if it meets R201 criteria unless it obtained statehood through threat or use of armed force in violation of UN Charter. R202
  3. Possible duty to not recognize
     1. When in the middle of civil war. UN Charter 2(7)
     2. Come into being by violating international law. See R202(2); TRNC
        1. E.g. Revolution? Tricky
        2. Racist intent – E.g., S. Rhodesia
  4. United States – President has exclusive authority to recognize or not to recognize a foreign state. This is implied in President’s express constitutional powers under Article II to appoint and to receive ambassadors.
  5. TRNC (Northern Cyprus)
     1. Should be recognized – recognized by Turkey, population fixed, status quo, have government and elections
     2. Shouldn’t be recognized – other states have not recognized TRNC, don’t have real government (puppet state of Turkey), minorities not treated well, in violation of standing Security Council resolution

### State Succession

* 1. E.g. new state totally absorbing the first (conquest, annexation, or merger); becoming independent of the first state (as with US colonies); or taking only party of the territory of another, or a state dissolving into two or more states.
  2. Uti possidetis juris or uti possidetis iuris (Latin for "as you possess under law") – newly formed sovereign states should have the same borders that their preceding dependent area had before their independence.
     1. Promote stability
  3. Treaties – Vienna Convention on State Succession in Respect of Treaties (much of it is CIL)
     1. Previously colonized – new states start with clean slate. Art. 16.
     2. Not previously colonized – maintain same treaties
     3. Human Rights Treaties – invested with people not state so can’t take away
  4. International organization membership
     1. When break up, new states need to reapply unless dominant state emerges; that dominant state doesn’t need to reapply but smaller ones do.
  5. Liability for wrongs
     1. Successor state is not responsible for international wrongful acts of parent state
     2. Successor state is responsible for its acts as a secessionist movement, not the parent state.
  6. Assets and Debts (Vienna Convention on Succession for States in Respect of State Property 🡪 not in force)
     1. State unite – easy cases where successor inherits all assets and debt. Otherwise…
     2. Assets
        1. Previously colonized – Entitled to immovable property unless contrary agreement
        2. Not previously colonized – if no agreement, immovable state property passes to successor. Movable state property passes to successor if connected to territory.
     3. Debt
        1. Not previously colonized – debt settled by agreement or split in equitable proportion
        2. Previously colonized – does not inherit debt
  7. Nationality
     1. Each states decides for itself the rules of how one becomes a citizen
     2. Per international law, states should avoid leaving people stateless

### Self-determination

* 1. Definition – right of the people in non-self-governing territories freely to determine their political status
  2. Legal Sources
     1. UN Charter Art. 1 and 55 – order respect for principle of equal rights and self-determination
     2. ICCPR
     3. ICSPR
     4. Declaration on Granting Independence to Colonial Countries and Peoples
     5. Become Customary International Law (some believe it is jus cogens)
  3. Challenges International Law as follows:
     1. Territorial Integrity/Non-Interference v. Right to Self-Determination
        1. Territorial integrity/state sovereignty are jus cogens so for right to self-determination(for people as opposed to state as a whole) to be valid, needs to also be jus cogens.
     2. Human Rights because self-determination calls for interest of state trumping interest of individual
     3. Universalism because self-determination tendencies directly conflict – e.g., Scotland from UK
  4. Factors to consider
     1. Distinct people; why they want to secede; interest of stability; economic viability; trusted to have effective government structure; how many people who claim they want secession actually want it; political process of original country for how to secede; use of force?; were democratic institutions in place?
  5. Post colonialism
     1. Right to self-determination becomes international norm
  6. Quebec
     1. Secession at International Law
        1. Scope of the Right to Self-determination- right to self-determination is normally just through internal self-determination (a people’s pursuit of its political, economic, social, and cultural development within the framework of an existing state). A right to external self-determination (potentially means secession) arises only in extreme circumstances: (1) colonial peoples can break away from imperial power; (2) oppressed peoples (alien subjugation, domination or exploitation; (3) and when a people is blocked from exercising right of self-determination internally (not clear this third one is international standard)
     2. Recognition of a Factual/Political Reality: the “Effectivity” Principle
        1. International law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation.
        2. However, international recognition is not alone constitutive of statehood, and does not relate back to the date of secession to serve retroactively as a source of a “legal” right to secede in the first place. Recognition occurs only after a territorial unity has been successful, as a political fact, in achieving secession.
  7. E. Timor (ICJ)
     1. Synopsis: Portuguese withdrew and Indonesia intervened and occupied territory. Security Council called for all States to respect inalienable rights of the East Timor people to self-determination; for Indonesia to withdraw; and for Portugal to facilitate such self-determination. Indonesia did not obey and Portugal initiated ICJ proceedings against Australia which had entered into a treaty with Indonesia concerning exploration and exploitation of the continental shelf in the Timor Gap.
     2. Holding: Indonesia could not be made party so ICJ dismissed but did provide dictum that East Timor remained non-self-governing territory and its people had right to self-determination.
     3. Note: Indonesia had domestic political crisis and had UN administer a vote in which East Timor overwhelming expressed their wish for independence. Indonesia recognized the results and East Timor is a new member state of UN formally known as Timor-L’Este.
  8. The Future of the Nation State

### Recognition of Governments

* 1. Significance
     1. Get seat at the table
     2. Make claims on behalf of assets
     3. Foreign government officials generally enjoy some immunities in domestic courts of other countries
     4. (CB p. 440)
  2. Procedure
     1. In US, President has exclusive right to recognize or not recognize government. R3d 205
     2. Government representation is procedural as opposed to state membership (substantive) so Security Council does not have to decide.
  3. Doctrines
     1. Traditional
        1. Factors: (1) effectiveness of control; (2) stability and performance; (3) popular support/consent of governed; (4) ability and willingness to fulfill [international] obligations
     2. Tobar Doctrine – don’t recognize until free elections held
     3. Estrada Doctrine – none of the rest of the world’s business. Should recognize every government no matter how it came into being. Tobar is Western and discriminatory (didn’t apply this to Europe)
        1. US began embracing Estrada Doctrine but on rare occasions makes it clear that it’s not recognizing the government. E.g. Taliban in Afghanistan; Noriega in Panama
     4. R3d 203
        1. “(1) A state is not required to accord formal recognition to the government of another state, but is required to treat as the government of another state a regime that is in effective control of that state, except as set forth in Subsection (2).
        2. (2) A state has an obligation not to recognize or treat a regime as the government of another state if its control has been effected by the threat or use of armed force in violation of the United Nations Charter.
        3. (3) A state is not obligated to maintain diplomatic relations with any other state.”
  4. China/Taiwan (PRC/ROC)
     1. Background: PRC and ROC both claimed to control all of China.
     2. Issue: Which government should countries recognize?
     3. Decision: UN Charter Art. IV suggests to look at effectiveness of government (favors PRC). However, most UN members thought that it was more important that the government recognized should further the purposes and principles of the Charter (favors ROC because PRC at the time was involved in Korean War) Many countries recognized only ROC. 20 years later, GA decides PRC, not ROC represents China. 9 years later, US follows suit so it has to revoke Taiwan Defense Treaty and enacts Taiwan Relations Act. There is American Institute (not embassy) in Taiwan. China won’t have diplomatic relationship with anyone that has diplomatic relationship with Taiwan. Taiwan admitted into WTO as separate customs area.

Note: Procedural decision about government representation not membership (substantive) so Security Council did not have to decide.

* 1. Effects of change in government
     1. New governments bound by predecessor’s rights, contracts and duties. R208 Reporters’ Note 2.
     2. Odious debts – only exception to above is odious debts
        1. Debts incurred for purposes that don’t serve the population. E.g. Iraq after Saddam Hussein (CB 449)

## State Responsibilities and Remedies

### General Principles of International Responsibility

* 1. Primary v. Secondary
     1. Primary rules – everything we’re talking about
     2. Secondary rules – international responsibility – what happens when you breach primary rules
  2. International Law Commission (ILC) – rules on state responsibility
     1. Not in treaty, some rules considered CIL while others hotly debated
  3. Problem – Horizontal Enforcement
     1. Risk of escalation – every measure can be countermeasure
  4. Questions to ask:
     1. Was a treaty/obligation in force?
     2. Was the obligation breached?
        1. Elements of breach of international law (ILC Art. 2)
           1. Wrongful act can be attributed to the state
           2. Breach of an international obligation of the state

Mens rea – determined by primary rule

Actual injury required? – determined by primary rule. E.g., human rights – can’t show injury to state

* + 1. Was there a valid excuse for the breach?
    2. Was it a countermeasure?
  1. How do you invoke responsibility?
     1. Diplomacy
     2. Relevant Judicial Forum
     3. Self-Help
  2. Who can invoke responsibility?
     1. Party responsibility was owed to – ILC 49
        1. Diplomatic Protection – means for a State to take diplomatic and other action against another State on behalf of its national whose rights and interests have been injured by the other State.
     2. Party to a treaty and obligation owed breached whether to you or other party and obligation was for collective interest.
     3. Ergo omnes – anyone (e.g. environment, human rights, violations of UN Charter, jus cogens) – ILC 41
     4. E.g. ***Barcelona Traction*** case – TLP incorporated in Canada with majority of stakeholders in Belgium. Spain changes laws that hurt TLP. Belgium brings claim against Spain but ICJ says Belgium has no standing.

### Attribution

* 1. Why no strict liability?
     1. Difficult to know who is really responsible. E.g. Cybercrimes can be attributed to location but not person
     2. State might become repressive in order to avoid liability
  2. When is there attribution?
     1. ILC Art. 4 – State Organ
        1. Does not matter whether in official capacity, on vacation, against order, etc.
        2. E.g. SCOTUS, police office
     2. ILC Art. 5 – Person or entity exercising elements of government authority
        1. Limited to actions within official capacity but doesn’t matter if you do it poorly as long as tied to official capacity.
        2. E.g., government contractor
     3. ILC Art. 8 – Conduct directed or controlled by a state
     4. ILC Art. 11 – Conduct acknowledged and adopted by a State as its own
  3. Cases
     1. ***Case Concerning U.S. Diplomatic and Consular Staff in Tehran (USA v. Iran) (ICJ 1980)***
        1. Synopsis: Iranian militants overtook US Embassy and took hostages. ICJ found in favor of US because although initial militants acts were not imputable to the State, Iran’s inaction and endorsement of the acts allow for attribution of later acts.
        2. Holding:
           1. Actions were a violation of international law – breaches of Vienna Convention and bilateral treaties (not “good relations”)
           2. Some actions can be attributed to state or Iran – Iran not responsible for militants’ initial actions but is responsible for not intervening in the first phase (providing protection to diplomats under treaty and is also CIL) and responsible under ILC Art. 11 for continued holding/occupation of the embassy in the second phase because didn’t do anything and Ayatollah endorsed actions (just congratulating them in the beginning was not enough) declaring that hostages do not enjoy diplomatic respect and would not be handed over unless US handed over former shah.
        3. Note: ICJ upset that US sent military units – undermines process
     2. ***Military and Paramilitary Activities (Nicaragua v USA) (ICJ 1986)***
        1. Synopsis: Nicaragua claims three bad actors: (1) US – overflights, attacks on ports, oil installations, etc. (2) Unilaterally Crucial Latino Assets (UCLA) – mining of port waters with no warnings. (3) Contras – raping, looting, acts of war, etc.
        2. Tool:
           1. Effective control test – if state “participated in the planning, direction, support and execution” of violent acts, the imputability to the state of such action is established. Imposes for the injured state an obligation to provide evidence of specific instructions or directions of the host state relating to the terrorist attack.
           2. Not any frontier incident is armed attack.
        3. Holding: (1) US directly responsible for its own acts (Art. 4). (2) UCLA acts can be attributed to US because under direction and supervision of CIA, CIA was with them, UCLA employee of US (Art. 5). (3) Contra acts not attributable to US under Art. 8 utilizing “effective control” and “complete dependency” tests (two sides of same coin). Not enough evidence to support that US financing was essential to ALL contra acts and thus Court doesn’t know if US was essential to acts in which violations occurred.
        4. Note: ICJ likely did not want to establish attribution for financial support since states provide aid to other states all the time.
     3. ***Tadic (ICTY)***
        1. Background: Tadic is Serb (FRY) and organizes VRS army to go to war with Bosnia/Herzegovina to unify states. Tadic wants to show that acts of VRS are not attributable to Yugoslavia because wants NIAC laws as opposed IAC laws to apply (at time, more laws for IAC than NIAC).
        2. Issue: Are VRS acts attributable to Yugoslavia?
        3. Tool:
           1. Effective Control test applies to individuals but not organized groups
           2. “Overall control test” should be used for paramilitary/military groups, because they have their own system of organization and hierarchy. Financing and providing equipment is not enough but need evidence of suprevision and planning to establish overall control.
     4. ***Bosnia & Herzegovina v. Serbia & Montenegro (ICJ 2007)***
        1. Background: Serbian forces massacred 8,000 Bosnian Muslim men.
        2. Issue: Were the acts committed at Srebrenica committed by an organ of Serbia (ILC Art. 4)? In no, were they committed by persons acting on instructions, or under the direction or control of Serbia (ILC Art. 8)?
        3. Tool: Nicaragua effective control test applies. Tadic overall control test applies to paramilitary/military groups only when determining whether IAC or NIAC, not when determining whether there is ILC Art. 8 responsibility.
        4. Holding: No Art. 4 or 8 attribution. However, Serbia had responsibility to prevent genocide once it started happening so there is Art. 11 attribution?

### Circumstances Precluding Wrongfulness

* 1. Allows for temporary non-compliance for as long as circumstances are in place.
  2. ILC Art. 26 – some obligations not subject to preclusion; mainly jus cogens
  3. Consent (ILC Art. 20)
     1. Official giving consent has to be authorized to do so
     2. Consent cannot preclude wrongfulness to third party
     3. E.g. allowing military base on territory
  4. Self-Defense (ILC Art. 21)
     1. Use of force regulated by UN Charter
     2. If at war with another state and have treaty obligations with that state, self-defense excuses not complying with treaties.
  5. Force Majeure (ILC Art. 23)
     1. “Material impossibility”
     2. E.g. storm throws ship into another state’s waters
  6. Distress (ILC Art. 24)
     1. Conformity is possible, but it would result in loss of life
     2. ***Rainbow Warrior (New Zealand v. France) (France-New Zealand Arbitration Tribunal, 1990)***
        1. Synopsis: France and New Zealand submitted dispute to arbitral tribunal. France claimed it did not breach international obligation under theories of force majeure and distress.
        2. Holding:
           1. Under ILC Article 31, force majeure doesn’t apply because it generally applies to involuntary or unintentional conduct and doesn’t apply to circumstances rendering performance more difficult or burdensome, but they must be “materially impossible.”
           2. Under ILC Article 32, distress means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question.

Distress applied in situation of Major Mafart (health) but France breached obligation when they allowed Mafart to stay once healthy enough to return to island.

Distress did not apply to Captain Prieur (father) and she also should have been returned after father died so Franch breached obligation twice in Prieur’s case.

* 1. Necessity (ILC Art. 25)
     1. Cannot be invoked if state contributed to situation of necessity
     2. ***CMS v. Argentina***
        1. Synopsis: During financial crisis, Argentina took steps that hurt American corporations and thus violate Bilateral Investment Treaty with US. Argentina claims necessity defense.
        2. Tool:
           1. “Cumulative test” – all conditions governing necessity under ILC Art. 25 must be satisfied.
           2. ILC Art. 25: Elements of Necessity – The act not in conformity with an international obligation (1) is the only way for the State to safeguard (2) an essential interest (3) against a grave and imminent peril; and (4) does not seriously impair an essential interest of the State or States towards which the obligations exists, or of the international community as a whole. (5) The international obligation in question does not exclude the possibility of invoking necessity. (6) The State has not contributed to the situation of necessity.
        3. Holding: Argentina does not meet cumulative test. (1) Not sole way. (2) Economy is “essential interest.” (3) There was grave and imminent peril. (4) Do not seriously impair. (5) Necessity can be invoked. (6) Most crises in global economy have domestic and international roots. Therefore, the question is if Argentina’s contribution to the crisis was substantial. Court finds that Argentina did significantly contribute to crisis and have taken steps to ameliorate crisis.
        4. Note: Court likely concerned about moral hazard and protecting the integrity of the international investment system.
        5. ***Gabcikovo-Nagymaros Project (Hungary/Slovakia) (ICJ 1997 (Dam Case)***
           1. Synopsis: Hungary claimed that necessity permitted it, without incurring state responsibility, to suspend and abandon work on a system of locks along the Danube River with Slovakia that it was committed to perform in accordance with the 1977 Treaty and related instruments.
           2. Tool:

ILC Commentary defining necessity – “the situation of a State whose (1) sole means of safeguarding an (2) essential interest threatened by a (3) grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State.

“essential interest” – doesn’t have to relate to “existence” of a state. Court finds that Hungary’s natural environment is an essential interest.

“grave and imminent peril” – Hungary uncertain as to the ecological impact of putting in place the Gabcikovo-Nagymaros barrage system. Uncertainties cannot establish existence of peril.

“only means” – Hungary could have resorted to other means

### Consequences of a Breach

* 1. Reparations – covers various methods by which a state can discharge or release itself from its responsibility.
     1. Purpose is to restore status quo, not to punish.
     2. Restitution in-kind (restablishing the status quo ante) v. compensation – not clear which one is favored by courts
        1. ILC Art. 35 – restitution is not the required remedy if it is not materially possible or imposes a “burden out of all proportion to the benefit deriving from restitution instead of compensation.”
        2. Scope of compensable damages – depends but has included direct, indirect and future damages
           1. No punitive/exemplary damages allowed in principle

Problem – difficult to deter wealthy countries. E.g. EU banned GMO’s. U.S. and Argentina rely on GMO exports. EU chose to compensate over complying with trade agreements.

* + 1. “Satisfaction” (ILC Art. 37(2))– e.g. apology, assurance that won’t do it again, mere court finding of wrongdoing, should not be form of humiliation
    2. Specific performance – e.g. US Diplomatic and Consular Staff in Tehran (US v. Iran) and Gabcikovo-Ngymaros Project (Hungary/Slovakia)
  1. Serious Breaches – ILC 40
     1. Types – Crimes, jus cogens, gross systematic failure to fulfil obligations
     2. Consequences
        1. Don’t recognize acts
        2. Shouldn’t render aid to country committing serious breach
        3. All countries in the world should cooperate to address serious breach
     3. Ergo omnes
        1. All countries are party to serious breach
        2. Obligation to address serious breach
     4. Effectivity Principle can never apply
     5. Obligation to respond to and not recognize serious breach – ILC 41

### Countermeasures (ILC Art. 22)/Self-Help

* 1. “Self-help” or “countermeasures” – a state injured by another state’s violation of an international obligation is entitled to take measures against the offending state as a means of inducing that state’s compliance. ILC 49(1)
  2. General Requirements
     1. Cannot include use of force. ILC Art. 50
     2. Proportionality. ILC Art. 51.
  3. Two kinds:
     1. General – unlawful breaches of international obligations, but become lawful because of prior breach.
     2. Originally lawful
  4. Originally Unlawful - Reprisals
     1. Elements
        1. Taken in response to a previous international wrongful act of another State and must be directed against that State
        2. Procedural Requirements: ILC Art. 52 – advanced warning, negotiate, stop when violation ceases, have to go through dispute resolution system if in place.
        3. Lawful only if imposed to conduce compliance, must be taken in way to allow party to comply.
        4. Measure must be reversible (ILC Art. 49(3))
        5. Can’t be Jus Cogens: ILC Art. 50 – lists peremptory norms that are never lawful countermeasures even if violation was violation of peremptory norm.
     2. Can sometimes be imposed on individuals
     3. Reciprocal measures – non-performance by the injured state of its obligations toward the offending state when such obligations correspond to or are directly connected with the obligations breached.
     4. Proportionality - ILC 51
        1. ***Gabcikovo-Nagymaros Project (Hungary/Slovakia) (ICJ 1997)***
           1. Synopsis: Czechoslovakia contended that it was entitled to implement a significant variation from the original plan for the Danube River project, known as “Variant C,” in response to Hungary’s previous repudiation of the plans established by the 1977 Treaty between the parties. ICJ determined this was not a lawful countermeasure.
           2. Tool: A countermeasure is justifiable if (1) it is taken in response to a previous international wrongful act of another State and must be directed against that State; (2) State called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it; (3) it is proportional with injury suffered; (4) its purpose must be to induce the wrongdoing State to comply with its obligations under international law; and (5) the measure must be reversible.
           3. Holding: Diversion of the Danube was not a lawful countermeasure because it was not proportionate. Czechoslovakia did not respect proportionality by assuming control of river and thereby depriving Hungary of its right to a share of the natural resources of the Danube.
        2. ***Air Services Agreement Between France and the USE, Arbitral Award***
           1. Synopsis: US claimed France violated bilateral Air Services Agreement of 1946 by refusing to allow a smaller Pan Am plane to be substituted in flights to Paris via London. France contended this was not allowed by Agreement without French consent. US disagreed. France compelled Pan Am to stop its flights to Paris. US protested and proposed arbitration. US also suspended French flights to Los Angeles that were authorized by the Agreement. France contended that US retaliation was illegal because (1) the Treaty provided for arbitration and retaliatory measures were undertaken when the arbitral compromise was being negotiated and (2) it was grossly disproportionate.
           2. Tool:

In determining proportionality of countermeasures, should take into account not just injuries suffered but also the questions of principles arising from the alleged breach.

Countermeasures are not excluded until the tribunal is in a position to act.

* + - * 1. Holding:

US actions were proportional – Should take into account not just injuries suffered but also the questions of principles arising from the alleged breach.

US actions were valid because they occurred before the dispute was brought before the tribunal was set in motion. Arbitration takes years so don’t want to put injured party at disadvantage.

* 1. Originally Lawful - Retorsion
     1. In-between diplomatic and legal responses
     2. Only limitation – can’t be used for unlawful ends

# International Dispute Resolution

## General

1. Definition
   1. Dispute – Disagreement of law or fact that has practical effects (impacts obligations)
2. UN Charter
   1. Obligation to resolve disputes peacefully
3. Current State
   1. On top of ICJ, there has been proliferation of other tribunals
   2. No hierarchy of Courts
   3. Consent-based system
      1. Why do courts agree to jurisdiction of ICJ?
         1. No other enforcement mechanism
         2. Correct power imbalances
         3. Option of opting out (but don’t do this often)
         4. Political out – politicians can blame ICJ for making them do things

## Peaceful Settlement Of Disputes

1. Negotiations
   1. Most common way to resolve disputes; general obligation to negotiate in good faith.
2. Inquiry Commissions
   1. Fact-finding team
3. Mediation
   1. Ask third-party to mediate
4. Conciliation
   1. Put up commission that gathers info and makes recommendation of what settlement should look like.
5. Arbitration
   1. Permanent Court of Arbitration
   2. International Chamber of Commerce
   3. ICSID (CMS v. Argentina case)
   4. NY Arbitration Court

## Adjudication – ICJ

### General

* 1. Principal judicial organ of the UN
  2. UN Charter Art. 92-96 and Statute of the ICJ
  3. Arbitration-like features
     1. Consent-based
     2. No stare decisis
     3. Limited in reparation/punishment (unlike ICC)
  4. Court-like features
     1. Don’t choose judges
     2. Don’t choose procedures
  5. Three Functions
     1. Jurisdiction over contentious cases
     2. Advisory opinions
     3. Appellate jurisdiction over administrative courts
  6. Structure
     1. UN members automatically parties to the Statute of the ICJ
     2. Judges
        1. 15 judges that are elected by a majority of votes in the both the GA and SC. 9 represent major legal systems.
        2. No two judges can be nationals of same state.
        3. Judges are nominated by national groups appointed by individual governments.
        4. Ad hoc judges – if a party does not have a national on the court, it may designate a judge to sit on the case.
        5. Independent – don’t represent their state
  7. Problems
     1. Takes a very long time
     2. Has limited to none enforcement capabilities.
  8. Results
     1. No right of appeal but can get interpretation
     2. Only binding on parties in case and to that case – ICJ Statute 59
     3. Every UN member takes to comply with ICJ decisions

### Procedure

* 1. Provisional measures – Art. 41
     1. ICJ may issue a preliminary order granting some interim relief
     2. Legally binding according to the ICJ. US has argued they aren’t because of “indicate” and “ought to be taken” language.
     3. In order to take provisional measures, jurisdictional basis invoked must appear prima facie to afford a basis on which the jurisdiction might be founded.
  2. Admissibility
     1. See p. 322 for examples of grounds for objecting to admissibility of a claim.
     2. ***Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (ICJ 1984)***
        1. Synopsis: US argued that this is political issue so it should go to Security Council and not ICJ
        2. Tool: Application of case to ICJ is not inadmissible just because it deals with politically sensitive use of force issues that are not judicial in nature, or because the case might also be under review by the Security Council.

### Jurisdiction

* 1. Only states may be parties, and only states that are parties to the ICJ Statute of the UN Charter (UN members)
  2. Over all legal disputes concerning: (ICJ Statute 36)
     1. a. the interpretation of a treaty;
     2. b. any question of international law;
     3. c. the existence of any fact which, if established, would constitute a breach of an international obligation;
     4. d. the nature or extent of the reparation to be made for the breach of an international obligation.
  3. 3 Ways to Establish Jurisdiction
     1. Special Agreement
        1. Statute of ICJ Art. 36: “1. 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.”
        2. Once a dispute arises between countries, they may conclude a special agreement or “compromis,” to submit the matter to the ICJ. The compromis will define the question or dispute the parties wish the Court to resolve.
           1. Parties may disagree on scope of question. E.g. Bahrain v. Qatar (p. 299) (ICJ found that meeting minutes signed by both parties constituted an international agreement as to the scope of the territorial dispute).
     2. Dispute Settlement Clause in a Treaty
        1. ICJ dispute resolution clauses, “compromissory clauses” may be included in treaties.
        2. ***Oil Platforms (Islamic Republic of Iran v. United States of America)(ICJ 1996)***
           1. Synopsis: The U.S. (D) destroyed several Iranian oil production platforms in the Persian Gulf. Iran challenged U.S. actions, arguing that the ICJ had jurisdiction through the dispute resolution clause in Article XXI of the 1955 U.S.-Iran Treaty of Amity. D argued that the ICJ did not have jurisdiction, and that the law regulating the use of force and self-defense governed the dispute. Court found that ICJ did have jurisdiction because the Treaty covered the destruction of the platforms and thus the ICJ dispute resolution clause applies.
           2. Tool: The ICJ has jurisdiction to hear disputes about the interpretation or application of a treaty, if that treaty applies and contains an ICJ dispute resolution clause.
     3. Jurisdiction Under the Optional Clause
        1. Statute of ICJ Art. 36:
           1. “2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

* + - * 1. 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.”
      1. Most declarations have reservations. Note: Reservations can be added to declarations whenever unlike with treaties
      2. Out of Big 5, only UK has submitted to 36(2) jurisdiction
      3. Self-Judging Clause
         1. ***Certain Norwegian Loans (France v. Norway) (ICJ 1957)***

Synopsis: France (P) believed that Norwegian bonds held by French nationals should have been redeemed in gold. D disagreed. P accepted compulsory jurisdiction of ICJ to resolve disputes but limited its acceptance to matters that did not fall within national jurisdiction, which P alone would identify (“self-judging” clause). D’s acceptance was unconditional. Court found that ICJ had no jurisdiction because D claimed the matter fell within its jurisdiction and ICJ jurisdiction is limited to the extent to which the parties’ declarations overlap.

Tool: The jurisdiction of the ICJ over a dispute between two nations is limited by the extent to which their declarations accepting compulsory jurisdiction of the ICJ overlap in conferring it.

Dissent: French reservation invalid which would make declaration invalid and thus thrown out France’s claim and had same outcome.

* + - 1. Restrictions on declarations
         1. ***Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (ICJ 1984)***

Synopsis: The U.S. (D) had accepted ICJ jurisdiction through a declaration reserving the right to terminate its declaration, with the stipulation that termination would take place six months after it was made and another declaration that ICJ jurisdiction won’t extend to disputes arising under a multilateral treaty. Just as Nicaragua (P) was filing charges against D in the ICJ, D notified the UN that it exempted from ICJ jurisdiction actions by Central American states, effective immediately. Court found there was jurisdiction because: (1) “termination” includes temporary “termination”/modification; (2) Nicaragua did not have same 6 month requirement but this does not matter because reciprocal principle only applies to substantive commitments; (3) even if reciprocal principle applied, immediate termination is not allowed because good faith requirement implies a reasonable time for withdrawal as required in treaties that contain no provision regarding duration; and (4) US multilateral treaty reservation does not prevent Nicaragua from bringing claims based on customary international law and general international law just because they are enshrined in multilateral treaties.

Tool: (1) Principle of reciprocity concerned with the scope and substance of commitments (advance consent to compulsory ICJ jurisdiction under Optional Clause) entered into, and does not relate to the formal conditions of their creation, duration, or extinction. (2) No right of immediate termination of declarations with indefinite duration. Requirements of good faith require a reasonable time for withdrawal from or termination as required in treaties that contain no provision regarding the duration of their validity. (3) Multilateral treaty reservations do not prevent jurisdiction just because claims arising from customary and general international law are enshrined in multilateral treaties.

US withdrew from ICJ.

### Third Parties

* 1. Interested affected parties can ask to appear in proceedings
  2. ICJ cannot proceed when third party needed by refuses to join.
     1. E. Timor case – E. Timor was previously occupied by Indonesia. Portugal entrusted with safeguarding interests of E. Timor. Indonesia negotiates with Australia on maritime boundary. Portugal worried that Indonesia didn’t take E. Timor’s interest into account. Portugal takes issue to ICJ. E. Timor doesn’t accept ICJ jurisdiction. ICJ agrees with Australia that third party to ICJ dismisses case.

### Advisory Opinions

* 1. UN Charter, Art. 96/ICJ Statute, Art. 65
  2. Jurisdiction – “competent” agencies can request advisory opinions
     1. GA and SC may request ICJ advisory opinion on any legal question.
     2. Other UN organs and specialized agencies may be authorized to request advisory opinions on legal question within the scope of their activities.
        1. ***Nuclear Weapons*** case – WHO asked about legality of use of nuclear weapons. ICJ found this was not within scope of WHO. GA asked about legality of use of nuclear weapons. ICJ sort of responded.
     3. States cannot request advisory opinions
  3. Not binding
  4. Court does not have to give opinion
  5. The Wall – barrier erected by Israel that runs along would-be boundary between Israel and West Bank with most of it on West Bank line. GA asks ICJ about legality of barrier. (Note: has to be advisory opinion because Palestine is not a state so can’t be party to ICJ.) Israel says this is contentious issue in disguise. This is meant to bypass jurisdictional powers of ICJ. ICJ says just because it is bilateral issue, there are still questions of law that ICJ can address. Israel says that ICJ lacks expertise on issue and refuses to cooperate. ICJ says that it is Israel’s fault for not cooperating, not ICJ’s for lacking expertise.

# National Jurisdiction

## General

1. Definition – powers a state exercises over person, objects, events
2. States have jurisdiction within their territory, issues arise when states try to exercise jurisdiction outside their territories.
3. Three different types of authority/jurisdiction: (1) Legislate – a state’s right to prescribe or apply law to certain persons or activities (R402 and 403); (2) Enforce – a state’s right to enforce that law by applying sanctions to a violator; and (3) Adjudicate – a state’s right to adjudicate the legality of conduct.

## Jurisdiction to Prescribe

### Territorial

* 1. States possess jurisdiction over all persons and things within its territorial limits.
     1. Customary that state territory includes the maritime coastal belt or territorial sea and a ship bearing the flag of the state wishing to exercise jurisdiction.
  2. Effects doctrine – extension of objective territorial principle – country in the territory of which the effects or results are felt of action taken by the head office (in another country) of the MNC is entitled to exercised jurisdiction, e.g. against the servants or assets of branches or subsidiaries locally situated. Applied by US but many countries claim it is contrary to international law and have passed “blocking” statutes to preclude the enforcement in the objecting countries of any American court proceedings or judgments.
  3. State has to affirmatively prove jurisdiction.
     1. Lotus
        1. Anything that is not prohibited is allowed.
        2. This assumption has been reversed in area of jurisdiction due to globalization 🡪 too many activities of one state will affect the other.
  4. Stronger Interest
     1. When more than one state can hold jurisdiction, state with stronger interest favored.
  5. US Canon
     1. US laws should be construed to only apply within the territorial jurisdiction of the US unless a contrary intent appears.
     2. Canon rebutted in some instances
        1. Sherman Act
        2. Rico
        3. Securities Fraud
        4. Foreign Corrupt Practices Act – US companies can’t accepts bribes outside US. This put US companies at disadvantage, so US extends Act to apply to all companies linked to US (including those with US bank accounts).
        5. Noriega
           1. Effects doctrine – how direct and intentional do effects have to be?

### Nationality

* 1. Jurisdiction is assumed by the state of which the person, against whom proceedings are taken, is a national.
     1. E.g. taxes, military service
  2. Blackmun
     1. US citizen, Blackmun, residing in Paris. Summoned to testify in DC trial but doesn’t want to go. Charged with contempt. Court says they have jurisdiction. SCOTUS affirms – US possesses power over nationals when in national interest.
        1. National interest includes taxes
  3. US company – counts as natural person and extended to subsidiaries of US companies
     1. EU – told US it doesn’t have jurisdiction over EU subsidiaries of US companies. EU passed “blocking” statutes.
        1. Blocking statutes – laws passed by countries that make it illegal for persons subject to the jurisdiction of those countries to comply with certain extraterritorial laws and regulations, and forbidding enforcement of certain judgments based on them.
     2. US withdrew?

### Protective

* 1. Jurisdiction over crimes against its security and integrity or its vital economic interests.
     1. E.g. espionage, counterfeiting currency, etc.
  2. ***United States v. Romero-Galue (US 11th Cir. 1985)***
     1. Synopsis: Romero-Galue (D) was charged with violation of U.S. narcotics laws after US Customs boarded his ship, of Panamanian registry, on the high seas. Court found that US courts had jurisdiction because bilateral treaty extended custom waters and US would either way have jurisdiction under protective principle.
     2. Tool: (1) States can enter treaties to extend custom waters and reach of domestic law into high seas. (2) Protective Principle – the smuggling of narcotics would, in most circumstances, be a sufficient threat to security so as to invoke the protective principle.

### Passive Personality

* 1. Jurisdiction is assumed by the state of which the person suffering injury or a civil damage is a national.
  2. Weakest basis for jurisdiction
  3. Recognized as applied to terrorist/organized attack on nationals because of their nationality.
     1. Can often be covered by Protective Principles.
     2. But sometimes used when not intended to attack people because of their nationality.
  4. Fawat Unisa
     1. Synopsis: Shiites want to expel Palestinans from Lebanon. Hijack plane with two American passengers. FBI lures Unis wither potential drug deal onto yacht and arrests him when yacht reaches international waters.
     2. Holding: Hijacking plane falls under universal jurisdiction. Hostage Taking Act applies when American. Unis said he didn’t know they were Americans. US court says too bad. Fact that they were American creates jurisdictional link.
  5. Columba Cullela
     1. Synopsis: Cullela agreed to sell stolen car from Texas in Mexico. Cullela was British but resided in Mexico. Pled guilty but subject to contested jurisdiction. Act probited receiving stolen property in foreign commerce.
     2. Issue: Whether receiving stolen property had to be in US borders.
     3. Holding: Court says this goes too far.
     4. Congress not happy with decision and amended statute saying US has jurisdiction when offender knows victim is US citizen. Note: Federal statute trumps CIL in US.

### Universal

* 1. Offense comes under jurisdiction of all states wherever it be committed when it is contrary to the interests of the international community
     1. Certain offenses are of universal concern – E.g., jus cogens; treaties with universal reach (e.g. hijacking)
  2. Spain relied on Torture Convention to indicted Pinochet, Chilean leader.
  3. Belgium had universal statute for war crimes/crimes against humanity.
  4. US – only US law with criminal universal reach is torture. US has ATC with civil universal reach.
  5. Downside
     1. Politicized
     2. States don’t often look at themselves – hypocritical
     3. Due process issues (not familiar with foreign rules)
     4. Undermines political reconciliation processes

## Jurisdiction to Enforce

1. Definition
   1. Enforcement jurisdiction is territorial and the limits much more strictly observed than with prescriptive jurisdiction. Limits on power of courts/agencies to serve process across national boundaries.
2. Relationship with other Jurisdictions
   1. State may not exercise authority to enforce law that it has no jurisdiction to prescribe.
   2. A state that has jurisdiction to prescribe may enforce its law through its courts if it also has jurisdiction to adjudicate, but even if it does not have jurisdiction to adjudicate, it can enforce through nonjudicial means.
   3. Judicial enforcement measures – fines and imprisonment, specific performance, sanction, freezing assets, etc.
   4. Nonjudicial enforcement measures – denial of opportunities normally open to the person, such as denial of the right to export/import; removal of eligibility to bid on government contract; denial of permit to engage in business activity; and prohibition of the transfer of assets.
3. Extradition
   1. Based mostly on bilateral treaties and limited to most seriously offenses
   2. Most countries won’t extradite to US only US promises not to use death penalty
   3. Most countries won’t extradite their own nationals
   4. If country refuses to extradite, only way to get person is to kidnap them.
4. Cases
   1. Argentina contested Israel’s jurisdiction to enforce (Israel abducted Nazi). They agreed that Israel had jurisdiction to prescribe and maybe adjudicate. Security Council adopted Resolution over abductions and concerns over them.
   2. Eichmann
   3. Alvarez Machum
      1. Synopsis: Extradition treaty in place but Mexico refused to extradite so US abducted Machum.
      2. Holding: SCOTUS – extradition treaty covers just one way to extradite, it is no exhaustive. Treaty doesn’t explicitly forbid abductions. Executive can violate CIL if he wants to.
      3. Problem: Reciprocity in interpretation of treaty as not providing for exhaustive methods of extradition.

## Jurisdiction to Adjudicate

1. Some states have criminal trials and abstentions
2. Reasonableness factors
   1. Where person resides
   2. Where activity occurred
   3. Advanced notice given?
   4. Fairness
   5. Which state has stronger ties to case

# The Use of Force: Jus Ad Bellum

## General Just War Theory

1. War is just if:
   1. Just cause
      1. Akin to Punishment – punishment for transgression; measure of deterrence; vindicate rights; but never vengeful
      2. Restore Order
   2. Carried out for right intention; Authorized by competent authority; Declaration of war (no surprise); Last resort; Proportionality; Probability of success
2. Rise of Positivism
   1. Just saying what the law is. No longer about judging war but explaining war
3. Rise of Total War
4. WWI
   1. League of Nations
      1. Forced states to go through procedure – first try peaceful means, then announce to GA
   2. Kellog-Briand Pact – Prohibits resort to war. Unclear whether it prohibits use of force in all circumstances. Also, some states made reservations to treaty.
5. WWII
   1. Nuremberg Charter and Tribunal – made it a crime against peace to engage in “planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties.” “Wanton destruction of cities, towns or villages” and “devastation not justified by military necessity” were war crimes.
6. UN Art. 1 – Maintain peace and security

## UN Charter

### The Purposes of the United Nations

* 1. Art. “1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
  2. 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
  3. 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
  4. 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.”

### Prohibition on the Use of Force

* 1. Art. 2
     1. “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.
     2. 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…
     3. 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.”

### Limited Exceptions

* 1. Self Defense
     1. Art. 51 – “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”
     2. (1) Unilateral right; (2) can join others to repel an armed attack (ICJ in ***Nicaragua*** case – state which is victim must decide whether it was an armed attack and must request assistance); (3) interim response; (4) limited to when “armed attack” occurred (important because before, customary international law was generally understood to allow “anticipatory self-defense”); (5) has to be illegal armed attack; (6) Can’t claim self-defense if initiated attack
     3. Inherent right to self-defense – general acceptance that customary right to self-defense is broader than Art. 51 but unclear how broad
  2. Collective Self-Defense – Nicaragua.
     1. Suffer armed attack
     2. Declare you suffered armed attack
     3. Ask for assistance
  3. Armed Attack – Tension between Art. 2(4) and Art. 51
     1. Art. 2(4) – what does “force” mean?
     2. Art. 51 – What is an “armed attack”? 🡪 narrower than Art. 2(4)
        1. Necessity – have to use force to fend off immediate invasion or broader threat
        2. Proportionality – can’t use force to cause disproportional harm
     3. ***Nicaragua***: Nicaragua assisting rebels. Court said need to look at scale and effect (“scale and effect” test) to determine whether armed attack.

|  |  |  |
| --- | --- | --- |
| Art. 2(4) and 2(7) | Dropping Bombs | Art 51 |
| Sending Armed Mercenaries |
| Arming Rebel Groups | Not Art. 51 |
| Funding Rebel Groups |

* + 1. If US thinks Nicaragua arming rebels, not armed attack so no right to use “self-defense” but can impose sanctions.
  1. Attribution – see ILC and DRC v. Uganda and US unable and unwilling test
  2. Attempted Assassination of Bush
     1. Synopsis: Bush Sr. visits Kuwait. Kuwait security forces apprehend people who they say were about to assassinate Bush Sr. US determines people were with Iraq. US bombs Iraq intelligence headquarters.
     2. Is bombing an Art. 2(4) violations? Yes
     3. Does Art. 51 exemption of self-defense apply?
        1. Armed Attack? No actual attack
        2. Necessity? No, bombing happened long after. No impending threat but could argue deterrence
        3. Proportional? President wasn’t injured
     4. When self-defense doesn’t apply, US argues can utilize armed reprisals.

### Security Council Policy

* 1. Collective use of force at the behest of the Security Council upon determination under Article 39 that there exist what 2(4) forbids – a threat to the peace, breach of the peace, or act of aggression.
  2. Art. 41 – “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”
  3. Art. 42 – “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”
     1. When Security Council authorizes use of force, has to rely on member states to do it.
  4. Designed to kick in when system fails

### General Assembly Role

* 1. “United for Peace” (See UN Charter Art. 11(2))
     1. If Security Council can’t make decision, GA can step in
     2. Not binding decisions
     3. Uniting for Peace Resolution by the General Assembly – “if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security.”
     4. ICJ asked for advisory opinion when Uniting for Peace was used to authorize UN intervention in the Congo in the face of Security Council deadlock. ICJ reasoned that while Art. 24 was clear in giving the Security Council primary responsibility, that term itself implied a secondary responsibility which the General Assembly could exercise when the Security Council was stymied by a veto.
  2. Peacekeeping Forces
     1. “Chapter 6 ½”
     2. Authorizes UN blue helmet military operations

## Expanded Notions of Self-Defense

### Armed Reprisals

* 1. *Naulilaa* case: Reprisals are only legitimate if
     1. (1) previous violation of international law by the other party;
     2. (2) preceded by an unsuccessful demand for redress; and
     3. (3) reasonably proportionate to the injury suffered.
  2. Also needs necessity – tough question is, what if you know it was one-time attack? Some may argue necessary for deterrence.
  3. Only allowed if violation involved use of force (don’t need armed attack)
  4. Not countermeasure because ILC Art. 50 says you can’t utilize “use of force” as countermeasure
  5. Have armed reprisals lasted past Art. 51?
     1. Debate about whether you can use armed reprisals when use of force (Art. 2(4)) does not rise to level of armed attack (Art. 51).
     2. Did Charter leave exception or is it customary international law?
     3. US believes in armed reprisals
        1. E.g. Bush Sr. in Kuwait
  6. ***Iran v. US (Oil Platform Case, ICJ 2003) (Separate Opinion)*** – Iran’s unlawful use of force against US did not amount to armed attack, but were a lower level of hostile military action, which could have been countered by proportionate counter-measures. However US actions did not fulfill conditions of necessity and proportionality. Iran’s attacks were not sporadic.

### Hostages

* 1. AirFrance – Entebbe operation
     1. Synopsis: Palestinians took over flight to Paris in Uganda. Separated Jews from non-Jews. Israel sends special operations which successfully frees hostages.
     2. Did Israel violate Art. 2(4)? Yes, sent armed team to Uganda.
     3. Does Art. 51 exception apply?
        1. Look at text
           1. Is attack on citizen an attack on “a Member of UN”? Diplomatic Protection?
           2. Does attack by non-state actor count? Debate about this.
        2. Look at purpose of UN Charter (Art. 1)
           1. Peace most important but also built in exception for breaking the peace in Art. 51.
           2. Necessity
           3. Proportionality
           4. Should they have gone to Security Council for permission first? This could have put hostages in greater risk of harm.

### Insurgents and Civil War

* 1. Consent – Okay if invitation to help by government in power
  2. Insurgency – can intervene on behalf of government but not rebels until it becomes a civil war (at that point, it is unclear who the controlling group is so can’t intervene for anyone).
     1. Why no intervention on behalf of rebel group?
        1. Art. 51 says armed attack occurs to “Member of UN”
        2. Purpose – does intervention support peace? Not likely…?
  3. Civil War
     1. Cannot intervene
     2. Once one party intervenes, other party can invite another state to intervene on its behalf.

### Restoring Democracy

* 1. African Union Ousting
     1. Synopsis: Haitian president ousted. Security Council authorizes military operation to restore him. Amass forces around Haiti, Haitian military forces step down.
     2. Art 2(4) violation? Not if former leader can give consent ex-ante to be restored. African Union Charter does this.

### Attacks on States Hosting Terrorists

* 1. Text – Art. 51 says has to be state actor but terrorists are non-state actor
  2. Purpose?
  3. ***DRC v. Uganda (ICJ 2005)***
     1. Synopsis: ADF (rebel group) attacks Uganda and Uganda decides to respond with force in DRC. Difficult to show that DRC had “effective control” of ADF because no effective government in DRC, which is in major civil war.
     2. Tool: No right to self-defense against terrorists unless you can show attribution to country in which terrorists reside.
     3. Holding: No consent so Art. 2(4) violation by Uganda. Art. 51 exception does not apply because no evidence of armed attack by DRC – ADF acts cannot be attributed to DRC.
     4. What should Uganda have done? Gone to Security Council or renegotiated agreement with DRC.
  4. Afghanistan
     1. Synopsis: US and UK said they were going to war in Afghanistan under Art. 51 self-defense exception.
     2. Tool: US test – “unable or unwilling” – if host government is unable or unwilling to deal itself with terrorists, US has right to use force against those terrorists (not state). ICJ decision in Uganda conflicts with this.
     3. Note: similar situation in Syria with US fighting ISIS without Syrian consent.
  5. Competing International Law Concepts
     1. Right to self-defense
     2. Sovereignty

### Anticipatory Self-Defense

* 1. “Caroline” incident
     1. Synopsis: During an insurrection in Canada in 1837 directed against British authorities, the insurgents found refuge, recruits, and other private support from the U.S. About 1,000 insurgents were camped on the British and U.S. side of Niagara River. The Caroline was a small steamer that the insurgents used to cross the river. A group of armed men under the command of a British officer boarded the boat, set it on fire and killed and wounded some people on the boat including US citizens. British ambassador justified the actions claiming “the necessity of self-defense and self-preservation.” Eventually U.S. said that employment of force was not justified because no necessity of self-defense existed – Necessity of self-defense should be confined to cases in which it is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation” – and use of force was subject to a requirement of proportionality.
     2. Was UK attack justified? Art. 2(4) violation. Doesn’t fall under Art. 51 because no “armed attack” had occurred…
  2. Two potential reduction ad absurdum: (1) No law should be interpreted to compel that states must await a first military strike before using force to protect themselves; (2) The law cannot have intended to leave every state free to resort to military force whenever it perceived itself grievously endangered by actions of another, for that would negate any role for law.
  3. When should anticipatory self-defense be allowed? Necessary and Proportional
     1. UN panel report: A threatened state, according to lone established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate.”
  4. White House National Security Policy (2002)
     1. Read to allow preemptory wars (expansion of anticipatory self-defense) – Bush doctrine of pre-emptive war was met with much international backlash.
  5. Other Option – give permission ex-post rather than ex-ante. If wrong, pay for it.
  6. Merely accumulating weapons is not violation of international law
  7. Timing difficult
     1. By the time a state gets WMD, it’s too late

### Humanitarian Intervention

* 1. Biafrin War in Nigeria
     1. Massive famine, televised, led to establishment of NGO’s. Countries started using humanitarian intervention as reason to intervene.
  2. Kosovo (1999)
     1. Kosovo is area within Serbia that is quasi-autonomous, 90% Albanian. Kosovo Liberation Army goes to war. Serbian massacre of Kosovo Albanians prompts NATO into action. Ergo omnes obligations breached by Serbia. Russia blocked Security Council approval. NATO engages in bombing campaign without approval. Milosevich withdraws from Kosovo. UN employs peace keeping forces. Serbia bring claim against 8 NATO countries, claiming violation of 2(4) and 2(7); no Security Council resolution; and disproportionate response.
  3. Balkans Wars
     1. Last for a decade in Europe’s backyard. Leads to 800,000 refugees which is destabilizing for whole region.
     2. Purpose – Art. 1 talks about human rights
     3. Art. 51 leads to expanded notion of self-defense
     4. Possible Belgian defenses: humanitarian concerns are ergo omnes; collective self-defense argument on behalf of population as opposed to state.
     5. ICJ dismissed for lack of jurisdiction
  4. Raises issues with humanitarian intervention:
     1. Need procedural system – didn’t go through Security Council because Russia would have vetoed
     2. Refugees warrant self-defense?
     3. Stretching UN Charter to allow for intervention
     4. Mitigating factor – not unilateral 🡪 NATO
  5. Responsibility to Protect
     1. Canadian Conference
     2. Illegal but morally legitimate
     3. Changed from humanitarian intervention to responsibility to protect (R2P).
     4. Three Stages of R2P
        1. Prevent
        2. React (when can’t prevent)
        3. Rebuild – raises threshold for intervention because have to consider costs
     5. Criteria:
        1. Multi-lateral
        2. Last resort
        3. Reasonable prospect of success
        4. Abide by laws of war
     6. Short-lived: GA report to Security Council
        1. Humanitarian intervention has to go through Security Council (Russia and China not fans of such intervention)
        2. Reject illegal but legitimate
  6. Requests to Security Council to Intervene under UNC Ch. VII
     1. Myanmar – rejected
     2. Libya – limited intervention approved. (NATO helps rebels defeat Kadafi under expanded interpretation of limited intervention.)
     3. Syria – blocked by Russia and China
  7. Geneva Convention – says you have to intervene, but does this mean you can circumvent Security Council?
  8. Five attitudes or approaches to humanitarian intervention in the absence of Security Council authorization:
     1. (1) Status Quo approach – categorically affirms that military intervention in response to atrocities is lawful only if authorized by the UN Security Council or if it qualifies as an exercise of the right to self-defense.
     2. (2) Excusable breach approach – humanitarian intervention without a UN mandate is technically illegal under the rules of the UN Charter but may be morally and politically justified in certain exceptional cases.
     3. (3) Customary law evolution of a legal justification for humanitarian intervention in rare cases.
     4. (4) Advocate for codification of a clear legal doctrine or right of humanitarian intervention.
     5. (5) Prof Glennon – UN Charter’s use of force regime has collapsed. The de jure system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The de facto system consists of state practice in the real world, in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the dejure system.

### Iraq

* 1. 1990 – Iraq invades Kuwait. Security Council condemns act and calls for withdrawal. Under Ch. VII, Security Council decides to impose trade embargo against Iraq ships. Security Council Resolution 678 authorizes UN members “to use all necessary means” = use of force. (magic words)
  2. 1991 – US withdraws. Resolution 687 calls for UN investigation of WMD. Iraq doesn’t comply with 687. US and UK amount air strikes against Iraq. Security Council Resolutions recognized breach but didn’t authorize use of force.
  3. 2002 – Resolution 1441 declared that Iraq was in material breach of its obligations under past resolutions but decided to afford Iraq a final opportunity to comply with its disarmament obligations or it will force “serious consequences” if it doesn’t. A month passes. US and UK convinced Iraq still committing beach with WMDs. Weapons inspectors say they need more time. Secretary Powell presents to Security Council. France, China and Russia will veto use of force. No Security Council Resolution but US and UK decide to invade Iraq.
     1. US justifications for use of force: (1) “serious consequence” warning; (2) 678 (still stands) with 687; (3) anticipatory self-defense; (4) humanitarian intervention to protect Kurds and Shiites

# The Laws of War: Jus in Bello/International Humanitarian Law

## Background

1. Purpose
   1. Minimize cruelty/harm of war
   2. IHL takes war as a given
2. History
   1. Christian wars – no distinction between in bello and ad bellum
   2. Medieval – rules developed by nobility for nobility
   3. Crusades – rules only applied to war with Christians
   4. Napoleonic Wars – large armies, now need rules that apply to everyone
   5. Battle of Solferino (1859) – solder writes memoir about wounded in battle with nobody to tend to them 🡪 Beginning of Red Cross
   6. Order 100 – Frances Liebart called on President Lincoln to come up with code of conduct for North in Civil War
3. Sources of Law
   1. Hague – targets, methods, means
   2. First and Second Geneva – provide for protection of wounded and sick soldiers and sailors – require that the wounded and sick be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical establishments, transports and equipment must be spared.
   3. Third Geneva - status and treatment of prisoners of war (POWs).
   4. Fourth Geneva - treatment of civilians who have fallen into the hands of the enemy – mandates respect for fundamental rights of such persons and prohibits ill-treatment. Also regulates the internment or placing of assigned residence of enemy aliens in the territory of the warring party.
   5. Additional Protocol I – IAC, mostly customary international law, permissible means of war, US is not a party
      1. International human rights law 🡪 shapes and complements international humanitarian law
   6. Additional Protocol II – NIAC
      1. Turns international humanitarian law into individual criminal liability
4. Applicability
   1. International Armed Conflict (IAC)
      1. “Common Article 2” is common in all the Geneva conventions and says, “…the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”
      2. International armed conflict encompass any difference arising between two States and leading to the intervention of members of the armed forces regardless of the length of the conflict or the casualties.
      3. Rome Statute Art. 7 for ICC crimes
   2. Non-International Armed Conflict (NIAC)
      1. Definition - “armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” Rome Statute Art. 8(2)(f).
      2. “Common Article 3” is common in all the Geneva conventions and applies in “an armed conflict not of an international character occurring in the territory of one of the parties to the Conventions. Extends minimal set of rights to non-international armed conflicts.
      3. Fewer treaty provisions 🡪 states don’t want as many restrictions within their territory
      4. No POWs.
      5. For purposes of the exam
         1. Reference Common Article 3 or if not specific enough reference API and say its custom so applies to NIAC’s.
         2. NIAC rules similar to IAC rules – only big difference is no POW’s in NIAC.
         3. Rome Statute Art. 8 for ICC crimes
   3. Independence of jus ad bellum from jus in bello
5. Enforcement
   1. Traditional – reciprocity was enforcement mechanism
   2. Modern – rights belong to individual and for government to trade
   3. Belligerent reprisals – you violate IHL, I violate IHL
      1. Prohibited toward POWs/civilians – API 20
   4. Reservations to API (UK and US)
      1. If there are persistent, continuous violations toward our citizens, we reserve right to respond in kind as last resort and in proportionate manner
      2. Note: Reciprocity principles as applied to treaties means other countries can adopt this position toward UK and US.
   5. Military
      1. State has duty to train military members in laws of war
      2. If you violate laws of war, tried by military
   6. International criminal law

## Laws of Warfare

### Four Principles

* 1. Military necessity
     1. Enabling and limiting concept
     2. “weaken military forces of enemy” 🡪 allows killing of military combatants ; can’t inflict excessive harm; can’t be cruel
     3. Limited by entire body of jus in bello
  2. Distinction (pillar of IHL) (API Art. 48-on 🡪 CIL so applies to NIAC too)
     1. Only allowed to intentionally target combatants and military targets
     2. POW is immune from criminal liability – privileged combatants but can’t commit war crimes
     3. Civilians cannot be intentionally attacked unless directly participates in hostilities
  3. Proportionality – API 57/CIL/NATO Bombings
     1. “reasonable military commander”
     2. Any intentional attack on civilian is war crime
     3. Allows for collateral damage when targeting military target as long as it is not excessive in relation to military advantage to be gained
  4. Humanity
     1. Prohibits employment of weapons that cause excessive suffering

### Targets

* 1. People Targets
     1. Unlawful
        1. Civilians. API 48.
     2. Lawful
        1. Combatants – can be targeted at any time. API 48?
           1. Definition:

Member of armed forces. API Art. 43

Should (1) distinguish himself from civilians or (2) carry his arms openly during military engagement and before launching of attack. API Art. 44.

* + - * 1. Unless:

Surrender.

IAC – API 41

NIAC – Common Art. 3; Rome Statute Art. 8(2)(c)

Laid down their arms because of sickness, wounds, detention/capture.

IAC – API 41

NIAC – Common Art. 3; Rome Statute Art. 8(2)(c)

Medical team or Chaplain – API 43

* + - * 1. E.g. President, Queen of England (not prime minister)
      1. Civilians engaged in direct hostilities – only when engaged in such hostilities
         1. API 51(3)
         2. Military contractors? unclear
         3. Human shields (API 51(7))

Involuntary – still need to engage in proportionality analysis so not considered civilians engaged in direct hostilities

Voluntary – ICRC says same as involuntary. US says they are direct participants in hostilities in terms of collateral damage count but not for direct targeting.

* 1. Lawful Object Targets
     1. Lawful
        1. Military target
           1. API Art. 52

(1) “make an effective contribution to military action” and

(2) “whose total or partial destruction…offers a military advantage.”

* + - 1. Dual Use Targets
         1. Proportionality Analysis – does military advantage justify collateral damage. API Art. 57
         2. Special Protection – schools, churches, hospitals 🡪 must provide warning unless impossible. API 57 Hospitals you have to give warning no matter what or not target. CIL?
    1. Unlawful
       1. Civilian. API Art. 51
       2. Civilian Object. API Art. 52
       3. Indispensable to population. API Art. 54.
    2. Intent – mistakes not a war crime because need intent or recklessness (Rome Statute crimes)

### Methods

* 1. API
  2. Unlawful
     1. Indiscriminate. API Art. 35
        1. Recognize economic constraints
        2. E.g. NATO – ICTY says that planes didn’t have to fly lower to discriminate better but big debate around this.
        3. E.g. Nuclear weapons can’t discriminate between civilian and legitimate targets
     2. Disproportional – military advantage should justify collateral damage
        1. NATO – reasonable military commander does balancing
     3. Intent – need to intend to kill to be unlawful. API 57
  3. Lawful
     1. No duty to minimize harm to enemy combatants
  4. Collateral damage
     1. No gradations between types of people
        1. Exception – human shields. See API Art. 51.

### Means

* 1. API Art. 35
  2. Have to show specific prohibition of weapon in treaty or CIL
     1. E.g. expanding bullets, chemical warfare, cluster bombs, blinding laser
     2. US – only signed onto chemical or biological prohibitions
     3. Cluster bombs – hard to control targeting/to be discriminate; can be duds and become landmines

### Test Case – ICTY Report on NATO in Kosovo

* 1. Synopsis: ICTY formed NATO commission to study NATO bombing campaign against FRY for violations of international humanitarian law.
  2. Note: Only look at jus in bello, not ad bellum because Security Council has jurisdiction over ad bellum – want to encourage people to follow in bello even though war wrongful in first place.
  3. Environmental damage – ADI Art. 35(3) and 55 have a very high threshold of application because of adjectives ‘widespread, long-term, and severe.’ The NATO bombing does not reach this threshold.
  4. Target Selection
     1. Actus reus - losses to the civilian population and the damage to civilian property are proportionate to the concrete and direct military advantage anticipated
     2. Mens rea - intention or recklessness
  5. Train incident – train was not legitimate target but accident so no intent; railway was dual use target and report found legitimate given proportionality analysis.
  6. Convoy – Report found that it was mistake so no recklessness to meet requisite mens rea although they could have flown lower.
  7. Radio Station – served propaganda purpose and military communications purpose. If targeted because of latter and not former, then legitimate object. NATO should have given warning.
  8. Embassy – mistake so no requisite mens rea.
  9. Village – see human shields analysis supra.

## Occupation

### Source of law

* 1. Hague Regulations Art. 43 – emphasizes the duty of the occupying power to “take all measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. The lives and property of persons in occupied territory must also be respected.
  2. Geneva Convention IV – responsibilities of occupying power in case of military occupation to ensure humanitarian needs of the population.
  3. Protocols

### Occupation Status

* 1. Beginning – Occupation status obtained when belligerent exercises effective control over territory – when the government of the occupied territory is no longer capable of exercising its authority, and the attacker is in a position to impose its control over that area.
  2. End – Occupation formally ends with reestablishment of a legitimate government (or other form of administration, such as that by the UN) capable of adequately and efficiently administering the territory.
  3. Only applies to areas that the attacking forces actually control – can exercise partial occupation
  4. Justification for the conflict (e.g. liberation movement) has no bearing on whether laws of occupation apply.
  5. Rebels fighting against belligerent doesn’t nullify occupation
  6. Occupation doesn’t transfer sovereignty
     1. Administer territory in lieu of sovereign power

### Obligations

* 1. Maintaining Law and Order
     1. Keep laws/structure in place as much as possible
        1. Could justify changing some norms under human rights law – e.g. gender equality
     2. Members of the occupying forces are immune from the jurisdiction of local law enforcement
  2. Crime and Punishment
     1. Occupying authorities must allow domestic courts to continue to function as the judicial system of the occupied territory whenever feasible.
     2. Occupying power may establish tribunals to enforce the law of the occupied territory, but may not prosecute offenses committed before occupation.
  3. Taking Care of the Civilian Population
     1. Occupying powers are responsible for the health and hygiene of the civilian population. – GC IV 56
     2. If supplies are inadequate, foodstuffs and medical stores must be brought in. The Occupied Power is required to permit the delivery of relief supplies by other States or humanitarian organization if it cannot meet the needs of the civilian population, although it may place reasonable conditions on the delivery thereof. GC IV 55.
     3. Religious and cultural practices are to be respected.
     4. Individuals or groups may not be forcibly deported outside occupied territory. – GC IV 49
  4. Labor and Private Property
     1. Labor laws regarding wages and hours apply. GC IV 51
     2. May utilize existing institutions
        1. Nobody may be forced to perform political, judicial, or other executive functions. GC IV 54
     3. Real or personal property may not be destroyed unless absolutely necessary. GC IV 53
     4. Pillage, which is looting by occupation troops, is strictly forbidden.
     5. Seizing (temporally taking) property is allowed under certain circumstances.
  5. Public Property and Future of State
     1. May finance operations from local resources but not for personal profit.
     2. Enemy State-owned property other than real property, such as cash, funds, transportation, and other movable property, may be confiscated if it is usable for military purposes or for administering occupied territory.
     3. State-owned real property that is non-military in character, such as public buildings, parks, etc. can only be administered by the Occupying Power.
     4. Can only confiscate private property if provide compensation
     5. State-owned real property that is military in nature, is at the absolute disposal of the Occupying Power.
     6. Tax structure must remain in effect. The occupied territory can be required to bear the costs of its occupation so long as they are not excessive given the state of the economy.

### Iraq

* 1. US coalition of the willing invades Iraq
  2. Iraq comes under effective control of Coalition Provisional Authority (CPA) - occupation
  3. CPA appoints Iraqi leaders to form Coalition Government – still occupied because leaders appointed by CPA and troops still present (not at request of Iraqi leaders).
  4. Elections to Iraqi Transitional government. Transitional government writes constitution and prepares for future elections. If troops still there because at request of Transitional government, then no more occupation.
  5. Permanent government established in Iraq. American forces withdraw. Sign agreement with permanent government to keep some troops at their request. Occupation ended.
  6. What if Iraqi government tells US they have to stay or country will collapse?
     1. Unclear whether there is duty to rebuild – conflicts with sovereignty; could make CIL argument

# Human Rights

## General

### Aspire for Universality?

* 1. One ideological commitment that should win over others
  2. E.g. debates around circumcision – N. Africa/Middle East – female genital mutilation; male circumcision in Europe saw challenge
     1. Both justified under tradition, custom, religious freedom; anatomically difference and purpose is different?
  3. Conflicts with Sovereignty – Care about individual, not state

### Justifications for IHR

* 1. Natural law, divine prescriptions – Aristotle
     1. Religious origins don’t necessarily lend to universality
  2. Secular views – what makes sense
  3. Human dignity – humans should have capacity to exercise life worth of human being (circular)
  4. Human potential – but not universal because all have different abilities and will not agree on what is a “good life”
  5. Social contract theory – need IHR to live together as society but then are we talking about collective or individual rights?

### History

* 1. Peace of Westphalia – recognized some rights of minorities
  2. Treaties banning slave trade
  3. League of Nations – recognized some rights of minorities
  4. UN Charter
  5. Universal Declaration of Human Rights (UDHR) – universalized human rights, set standard later adopted into domestic constitutions
     1. UN Commission on Human Rights drafted a human rights covenant aimed at converting the Declaration provisions into binding treaty obligations. This led to two human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).
  6. 2006 Convention of Rights of People with Disabilities – US signed but didn’t ratify
  7. Regional Instruments

### CIL

* 1. Modern view of customary international law – accords the ability to create custom to non-state actors such as international organizations and certain NGOs that have a distinct, measurable impact on international affairs.
  2. Moderate view – (Restatement 702) “hard core” of human rights obligations exists as customary law today
  3. Traditional view – customary international law emerges from general practice and opinion juris (sense of legal obligation)
     1. When it comes to opinion juris in forming IHR CIL, what countries say rather than actually do is more important.

## Implementation and Enforcement

### Type of obligation

* 1. UN Charter
     1. Art. 1 “3.To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”
     2. Art. 55
  2. “International bill of rights”
     1. Universal Declaration of Human Rights – GA resolution but reflects a lot of CIL
     2. ICCPR – elaborate and precise (ratified by US)
        1. Applies to governments and private actors
     3. ICSCR – nice to the extent possible (not ratified by US)
  3. World Food Summit Declaration
     1. Soft Law/Political Commitment – not binding
     2. US adds reservation because worried it will become CIL
        1. Why is US worried?
        2. US has more capacity than any other country in the world and doesn’t want to be held responsible to provide access to food all over the world. Deep cultural commitment in US to capitalism so social rights not part of ethos. 🡪 shows problem of agreeing on universal IHR.

### Scope

* 1. Territorial – states owe rights to people within their territory
  2. ***Lustig v. UK (ECHR 1999)***
     1. Synopsis: L and B were officers of the Royal Navy. Ministry of Defence did not allow homosexuals to serve in the armed forces on the basis that their presence would have a negative effect on the operational effectiveness of the armed forces. The Royal Navy investigated L and B even after they admitted their homosexuality. L and B were subsequently discharged for their homosexuality. L and B complained to the ECHR that their investigation and discharge violated their right to privacy protected by Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedom’s and Art. 14’s guarantee against discrimination.
     2. Holding: Art. 8(2) permitted interference with the right to privacy where such was necessary in a democratic society to achieve a legitimate aim. Need to show:
        1. There was a violation of their privacy – Yes
        2. Have to have law in place – Yes, two parliament acts
        3. Aim is not legitimate – Operational effectiveness and national security are legitimate aims
        4. Proportionality – However, interference only need to be to extent necessary to promote that legitimate aim. Government went beyond extent necessary and the discharges had a significantly detrimental effect on their careers. No convincing evidence was offered to prove substantial damage to operational effectiveness would occur. Thus neither the discharge nor investigation were justified under Art. 8(2).
     3. Why submit to court? Political out, don’t want to be expelled from Council of Europe, and socialization to concept

### Derogations

* 1. ICCPR Art. 4 – allows parties to take measures derogating from their obligations under the treaty “[i]n time of public emergency which threatens the life of the nation.”
     1. Can derogate for some period of time from full commitment to particular rights
  2. HRC Comment 29 – Criteria for Derogation
     1. Public Emergency which constitutes a threat to the life of the nation
     2. Declare state of emergency (as provided for in the State’s law and practice in the field of emergency powers).
     3. Exceptional and temporary nature
     4. Provide careful justification for proclaiming state of emergency and measures taken
        1. Proportionality – must be limited “to the extent strictly required by the exigencies of the situation.”
     5. Cannot be used to violate humanitarian law or peremptory norms
     6. Certain rights cannot be derogated from – Art. 4(2)
        1. Certain rights even though not specifically listed as nonderogable in Art. 4, cannot be subject to lawful derogation – E.g. prohibitions on taking of hostages, abductions, or secret detentions
     7. Inform other State parties through UN Secretary General of derogation and reasons
     8. Must provide remedy for derogation – Art. 2
  3. Justification for allowing derogations
     1. Don’t want to scare parties away
     2. States sometimes need escape valve
  4. ***House of Lords Case***
     1. Synopsis: After 9/11, UK derogated from the right to liberty provided by Art. 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 5(1) guaranteed that no one was to be deprived of his liberty save in ‘the lawful arrest or detention of a person…against whom action is being taken with a view to deportation or extradition.’ Derogation was permitted by Art. 15[b] of the convention where there was a ‘public emergency threatening the life of the nation.’ Appellants were non-UK nationals who faced possible torture or inhuman treatment if returned to their own countries, who could not be deported to any third countries, and were not charged with any crime and so, without the derogation, could not have been detained. All had been certified as suspected international terrorists and detained under Sec. 23. Appellants contended that Sec. 23 and the 2001 order violated the prohibition on discrimination under Art. 14[d] of the convention as they allowed only suspected terrorists who were non-UK nationals while equally dangerous British nationals could not be detained.
     2. Holding: Court agreed there was public emergency. However, the way UK did it had no rational basis and was discriminatory

### Reservations

* 1. No reciprocity in IHR – less incentive to limit reservations to abide by object and purpose of treaty
  2. ICCPR –HRC says ICCPR reservations are null and still bound by treaty
     1. Citing the provisions in the VCLT that states may not make a reservation that is incompatible with the object and purpose of a treaty.
     2. Bound by jus cogens/CIL
     3. US objects to this view
  3. US Reservations to ICCPR
     1. Art. 20 – criminalizes inciting racial hatred
        1. Conflicts with First Amendment freedom of speech
     2. Art. 10 and 14 – banning death penalty for people under 18
     3. Art. 7 – agrees to extent they agree on what cruel and unusual punishment is

### International Enforcement

* 1. HRC
     1. ICCPR
        1. Created Human Rights Committee (HRC)
        2. Art. 40 – every country must submit report to HRC
        3. Art. 41 – state can “communicate” to other state about violation under ICCPR; voluntary whether accept state-to-state communication
           1. States have never used communications – nothing in it for them; fear of retaliation
     2. API – added communication by individuals (Note: US is not a party)
        1. Individuals use communications a lot
     3. HRC proceedings taken seriously
        1. Worried about it becoming soft law, peremptory norms
        2. Care about reputation
     4. HRC concluded that parties cannot withdraw from the ICCPR because rights belong to the people and devolves with territory and continues to belong with them notwithstanding change in government.
  2. Sanctions
     1. Under Treaty violation or CIL violation – human rights are ergo omnes
     2. Tying compliance to aid
  3. Expanded Notions of Self-Defense
     1. Justified under UNC Ch. VII but still need SC approval.

### National (Domestic) Enforcement

* 1. E.g. ATS – until Sosa, wide latitude for human rights violations jurisdiction in US
  2. Individuals use domestic courts
  3. Death Penalty for Juveniles
     1. US – says it is not jus cogens but maybe CIL and that its persistent objector because added reservations to all relevant treaties
     2. ***Roper v. Simmons (US 2005)***
        1. Synopsis: Simmons killed a women by kidnapping her, binding her hands together, wrapping her face in duct tape, and throwing her off a bridge, thus drowning her.
        2. Tool: Federal Constitution’s Eight Amendment proscription of cruel and unusual punishment prohibits imposition of death penalty for crimes committed when offenders are under 18. Looked at foreign norms.
        3. Scalia dissent – court does not have power to ratify treaties, inconsistency in when to look at other nations
  4. American Exceptionalism – US exempts itself from many IHR treaties but sees itself as HR guarantor
     1. Federalism
        1. Senate worried about federalism after Missouri v. Holland
        2. President promised not to enter into IHR treaties because threatened federalism
        3. Carter began entering in IHR treaties again in 1970’s
        4. US adds many reservations
           1. But US outwardly cares about HR

Follows HR better than most countries

Writes reports about HR in other countries

Imposes sanctions for violations of IHR

Complains to other countries about IHR violations

* + - * 1. Why

US Constitution seen as bible so need nothing else

Federalism constraint and concerns

2/3 Senate ratification is anomaly (difficult with partisanship)

US can’t be marginalized while other countries

US takes obligations more seriously since people sue more – US has to deal with compliance more than other countries

# War on Terrorism

## Terrorism

### Definition

* 1. Disagreement
  2. Common phrases
     1. Violence intended to inflict fear and terror
     2. Non-state actor
     3. Disregards/targets safety of civilians
  3. Freedom fighter v. terrorist

### Shift

* 1. Not a new phenomenon
  2. Dealt with as a domestic criminal matter
  3. After 9/11, no longer a domestic police issue

### Impact

* 1. Many more homicide than casualties from terrorism
  2. However, effective, because we talk more about terrorism and invest more in combatting it

## War in Afghanistan

### Self-Defense Justification

* 1. UN Charter Art. 2(4) – War classifies as “use of force”
  2. UN Charter Art. 51
     1. Note: Art. 51 meant to give you means to urgently go to Security Council for permission. Not to bypass it.
     2. Al Qaeda attacks constituted “armed attack”
     3. However, non-state actor
     4. Attribution – attacks not by Afghanistan State so need to show effective (Nicaragua)/overall (Tadic) control
        1. If can’t show effective/overall control, then can’t go on territory – DRC v. Uganada
        2. “Unable or unwilling test” – US
  3. Security Council
     1. Resolution 1368
        1. Described terrorist attacks as a “threat to international peace and security,” thus bringing them within the scope of Ch. VII of the UN Charter, which raised the possibility of UN enforcement actions, including the authority to direct member states to take certain actions (as it did in Resolution 1373).
        2. Recognized the legal right of individual or collective self-defense in accordance with the charter (“Expresses its readiness to take all necessary steps…”).
        3. Many observers interpreted language to mean that the Security Council implicitly recognized that a state could respond militarily against those responsible for the attacks, even though the terrorists were not state actors. Prior to 9/11, the Security Council had failed to reach a unanimous position on unilateral retaliation for terrorist attacks.
     2. Resolution 1373
        1. Member states should implement domestic legislation that would fight the “international threat to peace and security” that terrorism had become and that all states shall take a number of other steps.
        2. Obligated member states to deny terrorists safe haven in their territories, to refrain from supporting terrorists, and to bring terrorists and their supporters to justice.
  4. Necessity/proportionality? Was it necessary to remove Taliban?

## War on Terrorism

### Classification of the war

* 1. US declared War on Terrorism in Conjunction with War in Afghanistan
  2. US authorized use of force against those behind attacks of 9/11
  3. Confusion – 9/11 attacks fall under crime but looks more like war – group/network as opposed to individuals.
  4. What law govern?
     1. No CIL because new
     2. Domestic v. International law
     3. Laws of war? IAC or NIAC?

### Targeted Killings

* 1. E.g. Drones
  2. Art. 2(4) Violation – Sovereignty (ad bellum)
     1. Consent?
        1. Tacit – US handles targeted killings as covert operations so that state doesn’t have to come out and say it gives US consent to operate drones over territory because that would be embarrassing
     2. Security Council Authorization – UN Charter Ch. VII
        1. US position – SC resolutions 1368 and 1373 adopted in the wake of 9/11 triggered Art. 51
     3. Art. 51 – Self-Defense
        1. Issue – Terrorists not state actors under Art. 51
           1. Have to show attribution – DRC v. Uganda
           2. US justifications

Unable or Unwilling test

Minority position but international community not protesting against US attacks on ISIS without Syria’s consent

* + - 1. Imminence - Most now accept that the use of force in self-defense is justified where an attack is imminent, but the threshold of imminence is the subject of dispute.
         1. Caroline formula – a State may act defensively when the necessity of self-defense is “instant, overwhelming, leaving no choice of means, and no moment of deliberation.” (period immediately before an attack).
         2. US interprets imminence standard flexibly considering the window of opportunity, the possibility of reducing collateral damage to civilians and the likelihood of heading off future disastrous attacks.
  1. Right to kill (in bello)
     1. NIAC?
        1. NIAC combatant – local government invites you to engage in NIAC
        2. US position- geography of conflict has evolved and there is no traditional battlefield. Point to absence of state practice or settled opinion juris on the issue.
           1. Global NIAC combatant – in war and war follows combatants. War between US and terrorists allows US to target terrorists anywhere.
     2. Assassination
        1. US prohibition against assassinations adopted by executive order
        2. DOJ White Paper (policy, not law)
           1. Synopsis: US citizen who was a senior operational leader of al-Qaida killed without due process
           2. Tool:

US government can target US citizen if they turn into enemy combatant. Criteria:

(1) Senior operational leader

(2) targeted individual poses an imminent threat of violent attack against the US;

(3) capture is infeasible; and

(4) the operation would be conducted in a manner consistent with applicable law of war principles.

Justifications

Constitutional powers of President to respond to imminent threat

Self-Defense under International Law

Congress authorized all necessary and appropriate use of force against enemy

Global NIAC

If no consent, than unable or unwilling test

14th Amendment – Due Process balancing test of Mathews v. Eldrige – public interest of national security greater than private interest in life

4th Amendment – reasonableness test - “where the officer has probably cause to believe that the suspect poses a threat of serious physical harm, either to the officer to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”

Note: If enemy combatant, shouldn’t have to meet any criteria because they can be killed at any time without reason. Sounds more like dealing with domestic crime so inspired more by human rights law than laws of war.

* + - 1. President extended this to non-US citizens and added additional requirements:
         1. Near certainty that (1) target will be present and (2) zero collateral damage
         2. Note: from policing laws, not laws of war
      2. Eric Holder – ‘President can’t authorize drone killing of US citizen on American soil that is non-combatant.
  1. Proponents
     1. No prohibition on killing known enemy combatants
     2. More moral than killing lots of men on battlefield
     3. Collateral damage happens in war too
     4. Not death penalty because about being threatening not “guilty”
  2. Opponents
     1. Not anonymous soldier on battlefield
     2. Imposing death penalty without due process – how can you be sure actually terrorist?
     3. Collateral damage still results even though have time to plan

### Detention and Trials

* 1. Battlefield (in Afghanistan and Iraq)
  2. American citizens captured in Afghanistan, brought to US and tried – subject to due process
  3. Black sites – secret
  4. Guantanamo Bay (Gitmo)
     1. Taliban and Al Qaeda members held
     2. What law governs detainment?
        1. US argued none because no IAC or NIAC; terrorists are not combatants; no CIL since new issue; and human rights don’t extend beyond borders (?)
        2. ***Hamdan v. Rumsfeld (US 2006)***
           1. Synopsis: President issued a military order, November 13 Order. Those subject to the Order include any noncitizen for whom the President determines “there is reason to believe” that he or she (1) “is or was” a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the US. Any such individual shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death.” President announced that Hamdan was subject to Order.
           2. Holding and Decision:

Procedures to try Hamdan violate the Geneva Conventions. Common Article 3 of the Geneva conventions which requires that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees, which are recognized as indispensable by civilized peoples.”

The military commission established to try those deemed “enemy combatants” for alleged war crimes in the War on Terrorism was not authorized by the Congress or the inherent powers of the President.

The rights protected by the Geneva Convention may be enforced in federal court through habeas corpus petitions.

# International Criminal Law

## General

### Rationale

* 1. Why put war criminal on trial?
     1. General deterrence
        1. Problem – most war criminals are good people in ordinary life. Commit war crimes for what they consider to be a just cause. Very few international criminal trials
     2. Retribution
        1. Problem – Very few international criminal trials. Can’t capture enormity of crime/evil
     3. Closure
        1. Problem – not best way to promote reconciliation. Can’t capture enormity of crime/evil
     4. Symbolism
        1. Recording “truth” – conception of who is good/bad guy
        2. Recorded by victors of war

### History

* 1. Hague Convention/Geneva Conventions – “great breaches” provisions ordering states to make them criminal in domestic law
  2. Treaty of Versailles – Germany refused to hand over Kaiser
  3. Nuremberg
     1. 22 major Nazi war criminals tried (how many seats they could fit in room)
     2. War crimes
     3. “New” crimes – crimes against peace and crimes against humanity
     4. Tools:
        1. Not all is allowed in war
        2. Accountability
        3. Acting under orders is not good defense
     5. Critique
        1. Victor justice – Allies didn’t look at own crimes
        2. Allies didn’t prosecute where they had interest – e.g. industrial parts of Germany
        3. Illegal – introduced new crimes
        4. Lack of due process
  4. ICTY and ICTR
     1. ICTY - Tadic argues Security Council does not have power to establish ICTY. If it did, ICTY does not have jurisdiction over lower courts. ICTY rejects Tadic’s claims.
     2. Critique
        1. Not easy to establish guilty. Nuremberg different because Nazi’s were organized and kept lots of evidence. Not so much in Rwanda or Balkans
        2. Judges don’t speak language, don’t know culture
        3. Expensive – better to just give country money to rebuild/invest
        4. Should have taken military steps earlier than having to build court later
        5. Criminals serve time in Western countries which have better prisons
        6. Choice of law issues

## ICC

### Rome Statute

* 1. 123 parties
     1. Don’t represent most of world population
     2. US and Israel eventually signed but then unsigned
  2. Effective 2002

### Jurisdiction

* 1. Time
     1. Crimes committed 2002 onward.
     2. When states join, they can join henceforward or retroactively, but at the earliest, 2002.
  2. Crimes
     1. Rome Statute Art. 5 – “over most serious crimes of concern to international community
        1. Genocide
        2. Crimes against humanity
        3. War crimes
        4. Crime of aggression – once provision adopted
     2. Rome Statute Art. 25 – incitement/complicity
     3. Rome Statute Art. 28 –command responsibility – military/civilian commanders held responsible for subordinates
        1. Mens rea
           1. Military commander – known or should have known
           2. Civilian – knew or consciously disregarded
  3. Territory and Person
     1. Party to Rome Statute or declaration that State accepts jurisdiction of the ICC for crime in question (Note: over “specific situations” which involve events, not specific crimes) and
        1. State of the territory of which the conduct in question occurred or state of registration of vessel or aircraft, and/or
        2. State of which the person accused of the crime (not the victim) is a national. Rome Statute Art. 12
     2. If nobody is a member need Security Council referral. Rome Statute Art. 13.
     3. Note: Problem with NIAC’s – state where crimes took place and where functionality of perpetrators
  4. Complementarity – ICC jurisdiction only kicks in if State is “unwilling or genuinely unable” to prosecute – RS 17
  5. Referral – referral required for ICC to look into situation
     1. Referral can be made by State; Security Council; NGO; individuals
  6. Why would party submit to ICC jurisdiction?
     1. Deal with insurgents in NIAC
     2. Forced by Security Council

### Crimes

* 1. Genocide
     1. Requires specific “intent to destroy in whole or in part, a national, ethnical, racial or religious groups, as such.”
        1. ***Prosecutor v. Krstic (ICTY 2004)***
           1. Synopsis: Krstic was charged with genocide for the killing of 10,000 Bosnian males in the Muslim community of Srebrenica. Krstic knew of the intention of the VRS military commander and other members to execute the Bosnian Muslims, and the use of Drina Corps (which he commanded) to carry out that intention. He also supervised the participation of his subordinates in carrying out the executions. ICTY found that his contact with the officers who were the main participants in the executions established only that Krstic was aware that the executions were taking place.
           2. Issue: Whether the killing of Bosnian muslim men satisfied the requirement of the Genocide Convention Art. 2 that the offender acted with “intent to destroy in whole or in part, a national, ethnical, racial or religious groups, as such.”
           3. Holding and Tool: A commander’s knowledge that mass executions are taking place with the help of his command is insufficient to support an inference that he shared the intent to commit genocide. The killing of the Bosnian Muslim men and boys was done with genocidal intent, but this intent can’t be attributed to Krstic, because the evidence only establishes that he was aware of the intent to commit genocide, and he did nothing to prevent the use of his command to facilitate those killings. Knowledge alone cannot support an inference of intent. By allowing the use of Drina Corps., he knew that he was making a substantial contribution to the execution of the prisoners, but he is at most an aider and abettor to genocide and not a perpetrator of genocide.
     2. International Criminal Tribunal for Rwanda (ICTR) found that commission of widespread acts of rape and sexual violence against Tutsi women constituted genocide.
  2. Crimes against Humanity
     1. Rome Statute Art. 7 – list of crimes
        1. Other category – may be illegal to be vague about crime
        2. Do not have to be perpetrated in times of war
        3. Widespread and systematic
        4. Mens rea – knowledge of attack
        5. Has to be by state or organization? Art. 7(2)(a).
     2. ***Prosecutor v. Kunarac et. al., Case No. IT-96-23 & 23/1 (ICTY 2002)***
        1. Synopsis: Kunarac (D) and other defendants were members of the Bosnian Serb military that in 1992 killed, raped, and tortured non-Serb civilians.
        2. Tool: Elements of crime against humanity are: (1) there must be an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; (5) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.
  3. War Crimes
     1. Rome Statute Art. 8 – lists crimes
        1. Part of a plan/policy or large scale commission of such crimes
        2. Distinction between IAC and NIAC
  4. Crimes of Aggression
     1. No Jurisdiction yet
        1. GA Resolution defines crimes of aggression
           1. Need 30 states to ratify
           2. State parties need to come together to activate which can happen no sooner than January 2017

### Drawbacks for States

* 1. US objection – ICC is empowered to exercise jurisdiction over US nationals even though the US has not become a party to the Rome Treaty.
  2. Potential drawbacks to compulsory adjudication before the ICC: (1) compromise outcomes may be desirable in interstate dispute type cases but such outcomes are unlikely to emerge from adjudicated rather than negotiated resolutions. (2) Political repercussions of ICC decision would be more substantial than same verdict rendered by a national court. (3) Decisions of international court more authoritative. This may be more law-making power than some states are comfortable granting to one international institution, especially in sensitive areas involving military activities and international security.
  3. Why hasn’t US joined?
     1. US has 200,000 soldiers all over the world 🡪 but can and has signed agreements under Rome Statute Art. 19 that gives peace-keeping forces immunity
     2. ICC Unchecked? Prosecutor with consent of two judges can decide when to bring cases.
     3. ICC is all politics?
     4. Constitution reflects popular sovereignty. ICC too remote, Rome Statue isn’t ours.

# International Trade Law

# Global Government?

Dante – one empire under one emperor

Peace of Westphalia – federation of states rather than empire that will subject itself to a court to deal with sovereign states as they deal with each other – this will lead to perpetuated peace

WWII – Albert Einstein says that fact that we came close to nuclear war, means we should rethink idea of world government. 🡪 should surrender weapons to central government.