

INTERNATIONAL LAW EXAM NOTES

Notes to students using the Note Bank:

- This course is huge so I cannot be certain that everything we needed for the exam is actually in here. I focused on what we did in class which may change from year to year, and the order of the course may also change so the content of the exam could be quite different.
- The state responsibility section is so huge because I did one version, decided it wasn't well-structured, so began another version, but basically just ended up structuring it the same way so I basically just repeat myself and then couldn't be bothered cleaning up the notes.
- This course might look big and scary, but I loved it and found almost all of it genuinely fascinating. Hopefully with the notes bank, studying for it should be a bit more straightforward 😊

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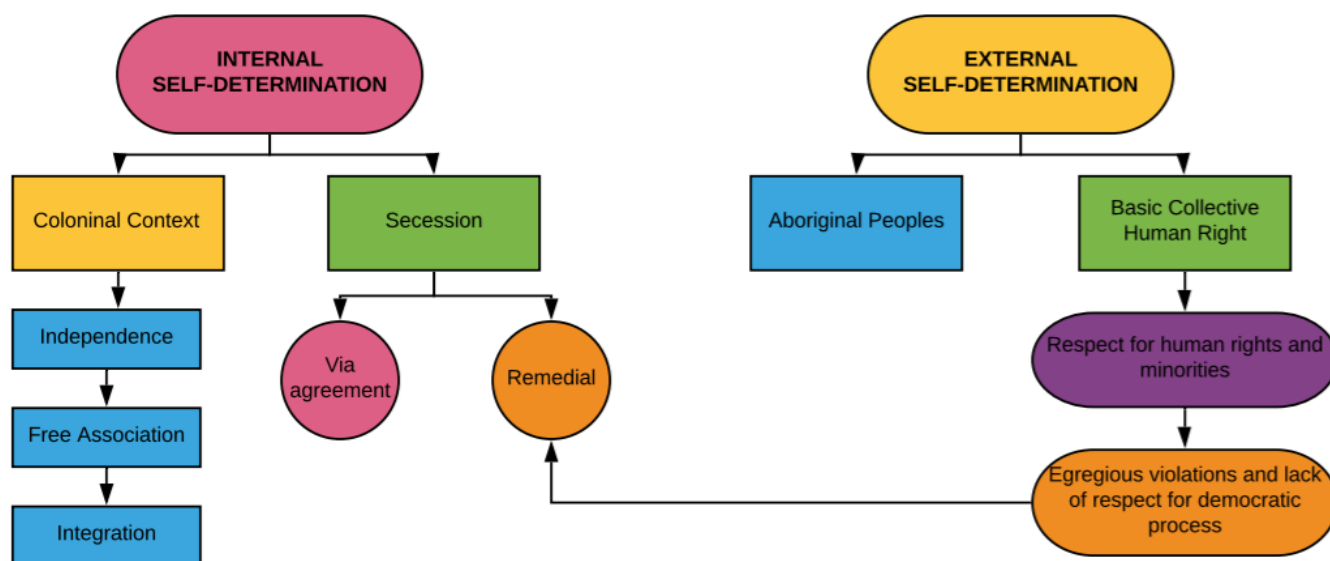
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SELF-DETERMINATION

I. ACTION PLAN

1. Is this occurring in the colonial context?
 - (a) If yes, they have the right to secede (UN Charter, arts 1 and 55, ICCPR, art 1, Resolution 1514 *Quebec*)
 - (i) Then need to identify independence, free association or integration (Resolution 1541)
 - (ii) *Friendly Relations*: Cannot impair the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
 - (iii) This tells us ***you cannot change the boundaries of the external state but says nothing about internal boundaries***
 - (iv) Note ***who does not need to change*** – states acting with human rights and representing the whole state
 - (b) If no, there still may be the capacity to engage in self-determination
2. If not in the colonial context
 - (a) Usually, unilateral secession not possible – need to negotiate with all parties (*Quebec*)
 - (b) Exception to this in cases of remedial secession – where people do not have a voice or their rights are violated (*Quebec*)
 - (c) *Kosovo Advisory Opinion*: Unilateral declarations may be fine. What really matters is that objections are taken where the declaration is in violation of jus cogens or something similar
3. Remember some general restrictions
 - (a) *Uti posseditis*: colonial boundaries remain (*Frontier Dispute, Declaration on Friendly Relations*)

II. GENERAL



4. UN Charter provides for the right of self-determination
 - (a) Art 1 (general) and art 55: one of the purposes of the UN is to try to achieve self-determination of peoples

5. Developments with Resolution 1514
 - (a) Non-binding resolution but is adopted by many states
 - (b) Recognises the rights of people under colonial rule to self-determination
6. Resolution 1541 develops mechanisms available for those under colonial rule who wish to exercise self-determination:
 - (a) **Independence:** those living under foreign rule should be able to be independent (preferred option)
 - (b) **Right of free association:** right to enter into associations with other states (so might not be completely independent but can count on other states)
 - (c) **Integrated into an existing state:** not the preferred option
7. Is self-determination only accepted in a colonial context?
 - (a) No – wording of the Charter is broader than that, art 1 of ICCPR says “all people”
 - (b) *Western Sahara Advisory Opinion:* rejected notion of terra nullius, and found there were people in Western Sahara, even if they may have been living in a nomadic fashion without formal Western institutions
 - (c) *Frontier Dispute:* lays out the concept of *uti possidetis* – colonial boundaries remain to ensure certainty in international relations, but has some problems
 - (d) *East Timor:* argument the case could not be heard in the absence of one of the parties, but the Court was clear that self-determination is *jus cogens* (certainly in the colonial context, as it was)
 - (e) *Namibia Opinion:* suggests it is *jus cogens*
8. Some restrictions from *Declaration on Friendly Relations*
 - (a) The external boundaries of a state should not be modified or amended as a result of self-determination
 - (b) Only a government that complies with international legal principles is entitled to continue to control the territory – so if you cannot get your ideas heard or authorities egregiously violate your rights, you may have a pathway to secession e.g. Bangladesh and India
 - (c) *Reference re Secession of Quebec:*
 - (i) In a colonial context, there is always a right of secession
 - (ii) But in a non-colonial context, you need to look at everything more holistically
 - (iii) Need to consider whether the group is able to be heard and if their rights are violated
 - (iv) In Quebec, they had elected representatives in government, so not possible to say they were not heard
 - (v) So if you can be heard, no right to secession, but if some groups cannot be, then perhaps you can

A. *Kosovo Advisory Opinion*

1. Kosovo unilaterally applied to secede. Question was whether they could do so
2. Can the GA ask a question to the ICJ? Can ICJ decline or refuse?
 - (a) All unanimously agreed no problem with jurisdiction because it is a legal question but this was criticised because the issue was also highly political and controversial
 - (b) Court could decline but often does not do so in order to clarify international law
 - (c) It can rephrase the question which it does not choose to do

(d) Completely fine for GA to deal with something relating to peace and security

3. Is the declaration lawful?

(a) Yes, but there are situations where it would not be

(b) [81] Previous state objections have not stemmed from the fact the claim to independent was unilateral, but due to the fact they were connected with the unlawful use of force or other egregious violations of norms of general international law, in particular jus cogens.

(c) Therefore no general prohibition against unilateral declarations can be inferred

4. Is the declaration valid? Court confuses to consider the question of whether Kosovo has a right to secede

5. What about the limits of Declaration 1244

(a) How did the Assembly not violate the limits imposed by that declaration?

(b) They did it as individuals, rather than members of the Assembly, which seems odd, because surely the vote only had legitimacy because they were members of the Assembly

(c) Kosovo now for all intents and purposes a state, although not a member of the UN

RECOGNITION

I. GENERAL

1. Recognition is both legal and political in nature but does not have to be formal.
2. Generally, you cannot revoke your recognition later, but can refuse to recognise a government (e.g. Iran ending diplomatic ties with Israel)
3. Does a *state require recognition for personhood? Two schools of thought:*
 - (a) **Declaratory:** the modern version is that the state can declare itself
 - (i) We do not question the existence of states and recognition just recognises an already-existing situation, rather than creating a situation where a state now exists
 - (ii) Usually adopted today
 - (b) **Constitutive:** recognition is a necessary precondition of statehood
 - (i) Requires the consent of existing state, as most things do in international law
 - (ii) Means the State will only be recognised if they comply with certain conditions
 - (iii) See this in European Community practice re Soviet Union and Yugoslavia, requiring them to enter into human rights treaties and protect minorities even though this was not a condition in the Montevideo Convention
4. There is *no duty to recognise a State*
 - (a) Primarily a political act and each state determines its own political system
 - (b) However SC and GA have passed resolutions in the past, e.g. forbidding States recognising Southern Rhodesia due to apartheid
5. Requirements for recognition
 - (a) No requirement that a State be part of UN, e.g. Kosovo (and remember that membership is subject to veto, so who gets membership is partially political)
 - (b) Just because two states are both part of the UN does not mean that they recognise each other, e.g. Saudi Arabia and Israel
 - (c) Instead you need to look at their actions towards each other more holistically
 - (d) The fact that one state does not recognise another does not mean that the state can violate international law against the other

II. EFFECTS OF RECOGNITION

1. Recognition is the legal acknowledgement of the practical affairs of a state and from that moment onwards, it confers rights on the other state
2. E.g. enter NZ, have an embassy here, diplomats entitled to immunity, State, governmental or sovereign acts cannot be prosecuted or sued before Court of NZ, recognises succession rights
3. Non-recognition does not deprive the unrecognised entity of rights and duties under international law but it may affect the unrecognised entity in asserting rights and duties on the international plane
4. There are also domestic implications: courts will usually follow the position of the executive; foreign state may sue before courts and may be granted immunity from suit; legislative and executive acts of recognised state will usually be given effect by recognising state; diplomatic and consular representatives will be able to claim immunity

III. RECOGNITION OF GOVERNMENTS

1. Can recognise the state but not the government, e.g. due to a coup, etc.
2. Today, recognition often not given formally, but informally, and often uncertainty can be the best policy
 - (a) Estrada doctrine: should not positively or negatively judge governments since doing so would be a breach of state sovereignty. Aimed for peaceful relations between states.
 - (b) Tobar doctrine: should only recognise constitutionally viable governments and cannot take a position on whether they came into power legitimately or not

B. *Jones v Fiji: Contemporary Practice*

1. This case is about the recognition of **government NOT states**
2. Facts
 - (a) Diplomatic premises of Fiji in NZ in a lease by Bob Jones
 - (b) Coup in Fiji. After the coup, Bob Jones said they would repossess the premises since they no longer had diplomatic dealings with NZ
 - (c) Fiji sued in the HC to prevent BJ from doing this, but BJ claimed they had no standing because they were not a recognised government in NZ
3. NB: AC says that the logic is true: if they were not a recognised government in NZ, Fiji would not have standing in NZ courts
4. Asks the government for their position
 - (a) Does not believe formal recognition is necessary, and instead needs to be inferred
 - (b) Distinguishes between state and government
 - (c) Lays out some ways in which they have dealings, but acknowledges NZ has disapproved of the coup
5. **Jeffries J suggests you need:**
 - (a) Overall, considering ***the nature and level of dealings between NZ and Fiji***
 - (b) Effective control
 - (i) Does the new regime have effective control over most of the State's territory? Is this control likely to continue?
 - (c) Dealings with NZ, e.g. not thrown out of the country (which was good enough for judge here)
 - (d) MN's notes also suggest you need the consent of the people without substantial resistance and willingness to comply with obligations under international law and then it is a political judgment

IV. CONTINUITY OF STATES

1. **Principle of continuity of states:** internal domestic and policy changes within a state do not affect the position of a state at international law (*Tinoco Arbitration*)
2. If the govt has done something, then the state is responsible (In *Tinoco*, actions clearly by the govt who had effective control over the majority of the territory at the time)
 - (a) **Non-recognition of a govt based on illegitimacy of way it came into power will not be enough to displace this doctrine (*Tinoco*)**
 - (b) And was recognised by other states (although not recognised by the UK)
3. Therefore was ***entitled to enter into contracts and other states entitled to expect those contracts to be respected***

4. However companies did not have clean hands since they knew, so some of the money was deducted
5. Note that recognition is not something you only do once, since allegiances can change

C. Recognition of IGOs

1. Relations with member states

- (a) Legal personality in domestic law is conferred by the constituent instrument and host country agreements e.g. agreement between UN and USA re Headquarters of the UN
- (b) The main source for UN is art 104-105 of the Charter
- (c) See also *Headquarters Agreement ICJ Advisory Opinion*
 - (i) Permanent Observer Mission of the PLO to the UN in NY set up the UN Headquarters District after invitation to participate in the work of the GA as an observer
 - (ii) 1987 Anti-Terrorism Act makes it unlawful maintaining within the US an office of the PLO
 - (iii) On 11 March, UN SG was informed the US AG had determined the legislation requirement him to close the PLO office, but if legal actions were needed to ensure compliance, no further action to close it would be taken pending a decision in litigation
 - (iv) ICJ asked whether the US was under an obligation to arbitrate in accordance with s 21 of the Agreement in absence of settlement by negotiation
 - (v) UN SG accepted the US did not consider contacts and consultations to be within the framework of s 21 and that the US believed it could not enter into dispute settlement procedures in s 21 pending evaluation of the situation
 - (vi) ICJ held the SG had exhausted the possibility of negotiation and no other agreed mode of settlement was possible
 - (vii) *US bound to respect the obligation to enter into arbitration, recalling the fundamental principle that international law prevails over domestic law*
 - (viii) ICJ said the US, as a party to the agreement, was under an obligation, in accordance with s 21, to enter into arbitration to settle disputes between itself and the UN

2. Relations with other IGOs

- (a) IGOs may conclude agreements with other IGOs and IGOs may establish “international-organisational” organisations

3. Relations with Non-Member States

- (a) An IGO may not impose obligations upon non-member states but check art 2(6) UN Charter
- (b) Recognition by non-member states may still occur
- (c) See *Arab Monetary Fund v Hasim (No 3)*
 - (i) Arab Monetary Fund created by 20 Arab states and the POLO in 1976
 - (ii) Independent legal personality with its own right to contract and litigate
 - (iii) Q: does it have legal personality to bring suit in the UK against former Director-General for allegedly misappropriating funds of the organisation?
 - (iv) UK not a member of the Fund and had not formally recognised it
 - (v) HOL allowed Fund to sue – had requisite legal personality because it had been constituted under the laws of its headquarters state and could be recognised under “conflict of laws” rule

5. Important in two ways

- (a) Because US has entered into agreement with UN, they recognise rights to UN within domestic legal system of US
- (b) Principle that you cannot use domestic law to set aside your international obligations
 - (i) Can change your domestic law but it cannot prevail over international obligations
 - (ii) We will come back to this obligation at the end of the course

6. For non-member states

- (b) Reparation for Injuries case
 - (a) Since UN recognised objectively as an independent entity, it could take a claim against a non-member
 - (c) So a way to ensure arbitration is recognised even for non-members

7. *Arab Monetary Fund v Hashim and Others (No 3)*

- (a) Someone in Arab Monetary Fund embezzled, someone wanted to bring case against fund
- (b) UN not a member, not formally recognised it
- (d) Courts engaged in the fiction, since the Fund was well-recognised among a number of states, therefore it could be said to be a legal person

TERRITORY

I. ACTION PLAN

This action plan is for a question re whether a state has done enough to acquire territory

1. Note that territory is required for statehood, and you can exercise jurisdiction in your territory.
2. Identify how the acquisition is said to occur, and then use the sub-headings that are accurate
3. Before you begin, identify ***the critical date***
 - (a) The date from which the dispute is deemed to exist
 - (b) Acts or statements after the critical date will be of limited utility or relevance to dispute (*Eastern Greenland*)
 - (c) The Court cannot consider acts having taken place after the date on which the dispute between the Parties crystallised unless such acts are ***a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them*** (*Sovereignty over Pulau Ligitan and Pulau Sipidan*)
 - (d) Critical date in *Eastern Greenland* was day of Norwegian occupation of the territory since prior to that date, Denmark was the only possible sovereign power in the region

A. By Acquisition

1. State must show occupation or possession of the territory (*corpus occupandi*) as well as the intention of acting as the sovereign over the territory (*animus occupandi*). ***Therefore discovery not sufficient alone – give an inchoate title that you need to perfect.***
2. Continuous and peaceful displays of territorial sovereignty is as good as title.
 - (a) Note the law that says often not much required
3. Is it a remote island or not?
 - (a) If remote, far less is needed (*Island of Palmas*). With a remote island, isolated acts of sovereignty would be sufficient to overrule the continuity of title
 - (b) *Eastern Greenland*: Tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.
 - (c) Sovereignty over minor maritime features may be established on the basis of relatively modest display of state powers in terms of quality and quantity (*Territorial Maritime Dispute*)
 - (d) But even though limited action is required, *some action* still needed – occupation alone is insufficient (*Minquiers and Ecrehos Case*)
 - (e) The action should relate to the relevant area (*Sovereignty over Pulau Ligitan and Pulau Sipadan*)
 - (f) The ***Act needs to be done by the state, in some official capacity*** – acts cannot be seen as effectivités if they do not take place on the basis of official regulations or under govt sovereignty, so Indonesian fisherman using the surrounding waters was insufficient (*Sovereignty over Pulau Ligitan and Pulau Sipadan*)
 - (g) How can you show this?
 - (i) *Territorial Maritime Dispute*: sovereign acts can include legislative acts or acts of admin control, acts relating to the application and enforcement of criminal or civil law, acts regulating

immigration, fishing or other economic activities, naval patrols, search and rescue operations, public works e.g. maintenance of a lighthouse and consular representation

- (ii) Send scientific vessel, map the area, proclaim the land belongs to Spain (*Island of Palmas*)
 - (iii) A range of administration activities, e.g. issuing warrants, collecting taxes, conducting an inquest re a body and conducting navigational aids (*Minquiers and Ecrehos Case*) – this is a straightforward way of demonstrating sovereignty
 - (iv) *Clipperton Island*: no landing on island or physical sign, but there was a proclamation in a newspaper, licence issued
 - (v) Constructing a lighthouse usually not enough but could be in the case of small islands insufficient (*Sovereignty over Pulau Litigan and Pulau Sipadan*) (also the turtle case)
- (h) If completely uninhabited: if a territory, but virtue of the fact that it is completely uninhabited, is, from the first moment when the occupying state makes an appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed (*Clipperton Island*)

4. Some elements *are not enough*

- (a) Proximity / contiguity
 - (i) Proximity does not mean there is a presumption of jurisdiction over the land (*Island of Palmas*)
 - (ii) No rule of international law that islands situated outside territorial waters should belong to a state from the mere fact that its territory is the nearest continent or island of considerable size (*Island of Palmas*)
- (b) Silence: entirely contrary to the principles to suppose sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose a part of his territory (*Island of Palmas*)

5. BUT where there is continued protest, claim of prescription will not be enough (*Chamizal*)

- (a) Failure to protest an assertion of sovereignty amounts to acquiescence of it (*Temple case*)
- (b) Where territory is in dispute, and more than one State is able to show some acts to support its sovereignty, the behaviour of one State showing it concedes sovereignty to another may establish the other State's sovereignty over the territory.
- (c) Concession may be made inadvertently, through the statement of senior officials (Eastern Greenland – Foreign Minister Ihnen who had conceded Danish sovereignty at a dinner in Paris some years before); or
- (d) Concession may be made through the publication of official maps (Temple of Preah Vihear)
- (e) There is also a strong presumption against relinquishment of a title (*Clipperton Island*).

6. Look for estoppel or concession of sovereignty at the end

B. By Discovery

1. Discovery is of limited utility in establishing title to territory alone
2. Merely gives inchoate (yet to be perfected) title. In order to perfect the title, the State must settle the land within a reasonable period of time

C. By Accretion

1. When the land changes, either naturally or artificially
2. Where natural, not very contentious

- (a) If it occurs immediately adjacent to another state, that state will usually seek to receive it, e.g. Island of Surtsey re volcanic eruption
- 3. Is contentious where artificial – if artificial, it must be done without infringing on the rights of other states (Lautherpacht)
 - (a) No state is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of a neighbouring state territory without previous agreement
 - (b) Singapore and Malaysia re dredging of seabed around Singapore to increase the size of Singapore Island
 - (c) Rivers: *Chamizal Arbitration*: river shifted to give more territory to US

D. *By Cession*

1. Cession is the transfer of territory from one state to another, but you only get the rights that are given to you, e.g. if there is some problem in the title. **Modern view is cession now requires consent of ceded people.**
2. Annexation is where the state asserts their right, usually following a military occupation but today annexation is often viewed as illegal due to prohibition on use of force, and right to self-determination under modern view requires land cannot be ceded without the will of the ceded people

Remember: when assessing title, assess it according to the international standards prevailing at the time of acquisition of territory e.g. territory acquired centuries ago through conquest will not be rendered invalid simply because it would be unacceptable today.

II. GENERAL INFO

1. A state's territory is the area that is controlled where there is no state claiming to do the same
2. **What is it comprised of?**
 - (a) The land territory, internal waters and territorial sea to its bed and subsoil (art 2 UNCLOS)
 - (b) Airspace (highest altitude where a plane could fly) but **not** outer space (so in outer space anyone can fly satellites over the territory) (see arts 1 and 2 Chicago Convention on International Civil Aviation)

A. *Outer Space*

(i) *Satellites*

1. For satellites – need to consider the state that launched it and where it is registered. There is **strict liability of the launching state if something happens (art 7 of the 1967 Treaty)**
2. A state who launched a satellite retains jurisdiction and control over it (art 8)
3. You are meant to keep other nations informed of your space activities (art 11)

(ii) *Celestial Bodies*

1. Can you conquer planets or the moon, etc.?
 (a) Orthodox position is there is no appropriation of outer space bodies (Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space 1967, art 2)
- (b) Art 1 says exploration of celestial bodies shall be carried out for the benefit and interests of all countries, and shall be the province of all mankind
 - (i) See also the Moon Agreement 1979 – the moon and its natural resources are the common heritage of mankind, not subject to national appropriation, neither the surface nor substance of the moon nor its natural resources shall become the property of any state

(c) What about the exploitation of resources on those bodies?

(i) Consider state practice

- Luxembourg and USA have both indicated that they would allow permits to explore and exploit *but this is not sufficient to make it CIL*.
- Luxembourg does not have the resources to actually exploit celestial resources. Remember that we care the most about directly-affected bodies (*North Sea Continental Shelf*) so we really only have the USA acting

(d) No nuclear weapons – must be peaceful (art 4)

B. Air Space

1. Where airspace becomes outer-space is not exactly defined, but roughly air space extends to the height where a plane can fly
2. Rules relating to airspace set out in the **Chicago Convention on International Civil Aviation 1944**
 - (a) Applies to civil, not state, aircraft (art 3(a)) i.e. not military, customs and police units (3b)
 - (b) No state aircraft can fly over another state without special agreement (3c)
 - (c) 3bis: refrain from resorting to use of weapons against civil aircraft in flight and the lives of persons on board should not be endangered
 - (d) In the exercise of its sovereignty, every state is entitled to require civil aircraft to land at a designated airport (3bis b) – **turn to pg 113 of Vol 2 if this is relevant**. Civil aircraft must comply (3 bis c)
 - (e) Art 5 gives aircraft the rights to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission (but this does not include aircraft engaged in scheduled international air service)
 - (i) But then **scheduled international air service is covered by the Chicago International Air Services Transit Agreement 1944**: each contracting State grants to the other contracting States the following freedoms in the air in respect of scheduled international air services: (1) the privilege to fly across its territory without landing; (2) the privilege to land for non-traffic purposes (art 1) (**so skies are open to commercial aircraft**)
 - (f) Art 7: aircraft have the nationality of the State in which they are registered
3. **States take the view that, other than in the case of entry in distress, international trespass by military aircraft (with the exception of military transport aircraft) may be met by the use of force without warning** (following U-2 Incident where US plane shot down by USSR and the US did not protest).

C. General Principles of Territory1. **Res communis**

- (a) Anyone can go on the high seas and exploit the fish stocks beyond the jurisdiction of any state
- (b) Otherwise the same as common heritage of mankind

2. **Common heritage of humankind**

- (a) Notion created by Pardo who did not think that resources should only be exploited by wealthy nations

- (b) Resources may be exploited and mined but the profits should not only go to those who do the exploiting and mining – so the company keeps part of the profit but some of it has to be shared (and one of the reasons the US did not sign up to UNCLOS because this notion was in there)
- (c) Airspace belongs to state to upper limit, but after that, it cannot be appropriated and part of the common heritage
- (d) High seas are *res communis* – just like for common heritage, no one claim ownership *but they can exploit the resources*

D. Legal Regimes Applicable to the Arctic Region

1. Claims on territory is frozen. The Arctic should only be explored for scientific purposes.
2. 1959 Antarctic Treaty
 - (a) Non-militarisation (art 1, Antarctic Treaty 1959)
 - (b) Scientific exploration (art 1(2))
 - (c) Sovereignty claims on hold (does not mean we waive them) (art 4)
 - (d) Nuclear free (art 5)
 - (e) Compliance through inspection by other parties' inspection (art 7)
3. Claim in the Arctic region
 - (a) North Pole is frozen water rather than land but there are still ways of making claims
 - (b) Competing notions
 - (i) **Theory of segments** (enjoyed by Canada), continuation and prolongation of territory
 - (ii) **But disagreement, particularly by US:** the US therefore patrols the waters and they have icebreakers. The fact that they *act and react is important*.

E. Acquisition of Territory

1. Territory is necessary for statehood
2. Within your territory, you can exercise your jurisdiction – make and enforce laws
3. Starting point is that the state can only enforce its territory in the areas over which it has sovereignty (*Lotus case*)
 - (a) Sovereignty in the relation between States signifies independence. Independence in regard to portion of the globe is their right to exercise therein, to the exclusion of any other State, the functions of a state (*Island of Palmas*)
 - (b) A state ought to be able to effectively control its own territory and is deemed responsible for acts occurring in its territory (*Trail Smelter*). If a State can assert control over territory, without effective protest from other States, over a long enough period of time, it may be able to claim the territory.
4. Territory is two-sided (*Island of Palmas case*)
 - (a) You have territory over which you can exercise jurisdiction and that has to be respected by other states
 - (b) But it also means that you have to respect the sovereign territory of other states
- (i) ***State liable for damage caused to another state on the original state's territory (Trail Smelter)***
 - (c) Smelter on border between Canada and USA
 - (d) Polluted the river that ran between them

- (e) Tribunal insisted that state is responsible for actions committed on their territory and if that pollutes the river, they are responsible for that

(ii) ***States Sovereign but cannot do actions that harm the interests of another state***

5. See also *Corfu Chanel*: states are **sovereign but cannot do actions that harm the interests of another state**, e.g. sending in minesweepers as a form of self-help without the consent of the state

(iii) ***Estoppel***

6. **Notion of estoppel: prevents a person who makes or concurs with another person from later asserting a different state of affairs after the latter had relied on their prior agreement** (*Temple case*, by past conduct had accepted that the territory fell in Cambodian territory; *In the case Concerning Sovereignty Over Pedra Branca / Pulau Bat Puteh, Middle Rocks and South Ledge*, the letter by Acting State Secretary of Johor that the govt did not claim ownership of Pedra Branca was raised by the ICJ in favour of its conclusion that sovereignty over the island belonged to Singapore)

(iv) ***When have you done enough to acquire territory?***

4. State must show occupation or possession of the territory (*corpus occupandi*) as well as the intention of acting as the sovereign over the territory (*animus occupandi*)

5. *Island of Palmas* case

- (a) Spain “discovered” Island of Palmas but did very little, e.g. did not settle people
- (b) At some point later, Spain ceded the territory to the US (but then discovered there had been Dutch presence because there were people speaking Dutch)
- (c) The question was whether Spain had title over the Island of Palmas, which mattered because they possibly could not cede what they did not have
- (d) Tribunal said:
- (i) In the 16th century it may have been enough to plant a flag, but times have changed and more is expected today

6. Numerous arguments from Spain that it was their territory that failed:

(a) ***The island was a continuity of the Philippines due to proximity: no, proximity does not mean that there is a presumption of jurisdiction over the land***

- (i) You must look for ***continuity***

(b) ***Merely a remote island***

- (i) Tribunal laid out different standards for what is needed to acquire and preserve sovereignty depending on the type of land
- Where a remote island like this, not much is needed – isolated acts of sovereignty would be sufficient to overrule the continuity of territory title e.g. send scientific vessel, map area, proclaim the land belonged to Spain
 - But even though very limited action is required, it still requires *some* action
 - You can only ***perfect an inchoate title*** through these acts of sovereignty

7. Occupation as a means of occupying territory

- (a) A State can assert sovereignty on the basis unoccupied land had been appropriated by its citizens and, with the approval of the state, occupied it

- (b) Hard today because you have to find unoccupied land which basically does not exist and we are displacing the notion of *terra nullius*

8. *Minquiers and Ecrehos Case (France v United Kingdom) 1954*

- (a) France drove UK forces from most of the area but not these islands
- (b) UK said it had taken a range of administrative activities: issuing of Treasury warrants referring to the islets, collection of taxes, conducted an inquest re a body and construction of navigational aids
- (c) This was sufficient to have exercised state functions. Court was clear that admin action, like taxes or an inquest, is a ***straightforward way of demonstrating sovereignty***.
- (d) Occupation alone is insufficient to assert sovereignty

9. *Clipperton Island case (France v Mexico) 1932*

- (a) French boat arrived on the island and purported to claim it for France
- (b) No landing on the island and no physical sign it was proclaimed, e.g. a flag
- (c) But published a proclamation in a newspaper, issued a licence, and island remained uninhabited
- (d) USA tried to raise their flag and then somehow later Mexico had a claim
- (e) The actual taking possession of is a requirement for occupation
 - (i) Usually has to be done by establishing itself as capable of making its laws respected in that region
 - (ii) But for uninhabited regions, from the first moment when the occupying state makes its appearance there, as the absolute and undisputed disposition of the state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed

10. *Island of Palmas case (Netherlands v US) 1928*

- (a) Continuous and peaceful displays of territorial sovereignty (peaceful in relation to other states) is as good as title. Requires rules for acquiring sovereignty and also for maintaining it
- (b) Territorial sovereignty involves the exclusive right to display the activities of a state. Corollary duty: must protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war, and rights states may claim for their nationals
- (c) Manifestations of territorial sovereignty assume different forms, according to conditions of time and place
 - (i) Continuous in principle, but sovereignty does not have to be exercised at every moment in every part of the territory
 - (ii) Inheritance and discontinuity differ according to whether the region is inhabited or not, or regions enclosed within territories in which sovereignty is incontestably displayed, etc.
- (d) Spain could not transfer more rights than she herself possessed
- (e) Entirely contrary to the principles to suppose such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose a part of his territory – ***silence not enough***
- (f) An inchoate title could not prevail over the continuous and peaceful display of authority by another State (and indeed, the latter could defeat an earlier definitive title)

- (g) Contiguity: it is impossible to show the existence of a rule of international law that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms *terra firma* (nearest continent or island of considerable size)
- (h) The acts of sovereign display were not numerous and there were several gaps
 - (i) But manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent
 - (ii) Not necessary for it to go back to a long period
- (i) Moreover, no evidence which would establish any act of sovereignty by Spain or another power to counter-balance or annihilate the manifestations of Netherlands sovereignty
- (j) An inchoate title cannot prevail over a definite title founded on continuous and peaceful displays of sovereignty

11. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia / Malaysia) 2002*

- (a) Court will only consider acts constituting a relevant display over authority which clearly reference the relevant islands in dispute
- (b) Acts cannot be seen as effectivities if they do not take place on the basis of official regulations or under government sovereignty (so the mere fact Indonesian fishermen used the surrounding waters is not sufficient)
- (c) Passing regulations to control the collecting of turtle eggs and the establishment of a bird reserve were regulatory and admin assertions over authority over territory specified by name
- (d) Constructing a lighthouse may be enough
 - (i) Not normally considered a manifestation of state sovereignty
 - (ii) But can be relevant in the case of very small islands

12. *Case Concerning Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) 2008*

- (a) No new law

13. *Territorial Maritime Dispute (Nicaragua v Colombia) 2012*

- (a) Sovereign acts can include legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations
 - (i) Also considered public works, e.g. maintenance of lighthouse
 - (ii) Consular representation
- (b) Sovereignty over minor maritime features may be established on the basis of relatively modest display of state powers in terms of quality and quantity
- (c) Also consider whether there is another state competing for sovereignty
- (d) *Eastern Greenland*: Tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries

F. Critical Date

1. The critical date is the date from which the dispute is deemed to exist from (usually)
2. Acts or statements after the critical date will be of limited utility and relevance to the dispute (*Eastern Greenland*)
 - (a) Critical date in *Eastern Greenland* was day of Norwegian occupation of the territory since prior to that date, Denmark was the only possible sovereign power in the region
 - (b) The Court cannot consider acts having taken place after the date on which the dispute between the Parties crystallised unless such acts are **a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them** (*Sovereignty over Pulau Ligitan and Pulau Sipidan*)
 - (c) This is to stop states acting merely to pursue their own interests in the dispute
 - (d) The critical date can change e.g. after the date of a Tribunal award (*El Salvador v Honduras*)
 - (e) **Concession of sovereignty**, e.g. through statements of officials (*Eastern Greenland*) or through official maps (*Temple of Preah Vihear case*) but maps alone should not be treated as indicating sovereignty in the absence of behaviour showing reliance on the map and the data in it (*Frontier Dispute*)

G. Discovery

1. Discovery is of limited utility in establishing title to territory by itself – more of a precursor
2. Discovery gives an inchoate (yet to be perfected) title. In order to perfect the title, the State must settle the land concerned within a reasonable period of time

H. Accretion

1. This happens when the land changes, either naturally or artificially (*Lauterpacht*)
2. Where it occurs immediately adjacent to another state, they will usually aim to receive it. This is not very contentious where it occurs naturally (e.g. Island of Surtsey formed due to a volcanic eruption) but will be contentious if artificial (and if artificial it must also be done without infringing on the rights of other states).
 - (a) *Lauterpacht*: no state is allowed to alter the natural condition of its own territory to the disadvantage of the natural conditions of a neighbouring state territory without previous agreement of the state
 - (b) Singapore and Malaysia have referred a dispute to a tribunal re harm to dredging of the seabed around Singapore to increase the size of Singapore Island
 - (c) **Rivers: Chamizal Arbitration**: The river shifted and more territory given to US

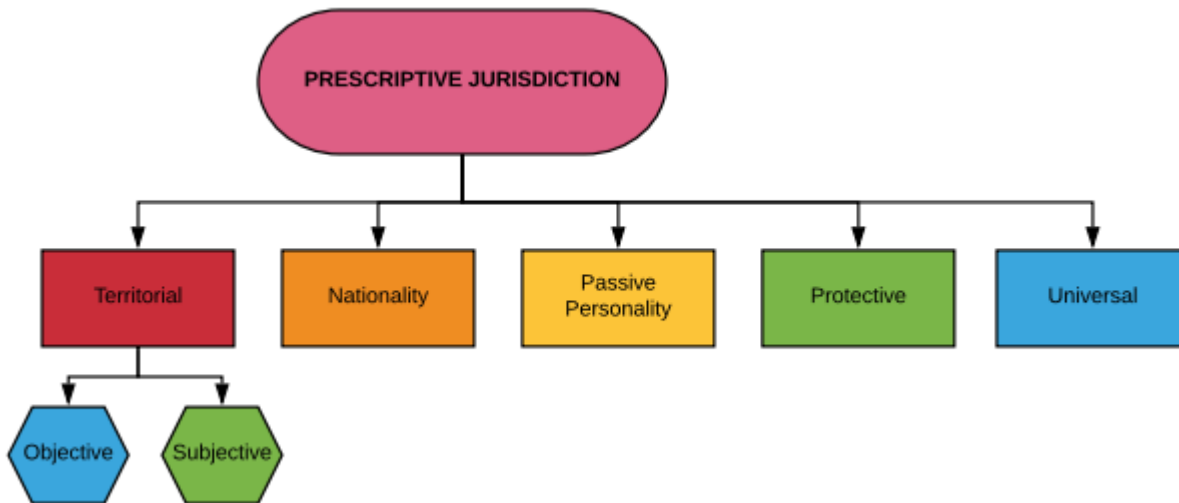
I. Cession and Annexation

3. Cession is the transfer of territory from one state to another, but you only get the rights that are given to you, e.g. if there is some problem in the title
4. Annexation is where the state asserts their right, usually following a military occupation but today annexation is often viewed as illegal due to prohibition on use of force, and right to self-determination under modern view requires land cannot be ceded without the will of the ceded people

Remember: when assessing title, assess it according to the international standards prevailing at the time of acquisition of territory e.g. territory acquired centuries ago through conquest will not be rendered invalid simply because it would be unacceptable today.

JURISDICTION

I. PRESCRIPTIVE JURISDICTION



1. Jurisdiction is an aspect of sovereignty: it refers to a state's competence to regulate the conduct of natural and juridical persons.
2. The starting point is the presumption that jurisdiction is territorial and may not be exercised extra-territorially without some specific basis in international law (*Lotus case*)
3. Sovereignty over territory means the capacity to exercise sovereign powers over people and things in the territory

A. Territorial

1. Universally recognised that the courts of the place where the crime is committed may exercise jurisdiction – application of essential territoriality of sovereignty
 - (i) **Subjective and Objective Territory**
 2. **Subjective:** jurisdiction over crimes commenced within the state even if completed or consummated abroad
 3. **Objective:** jurisdiction exists where any essential constituent element of a crime is consummated on the forum state's territory (supported by *Lotus* and applied to international waters)
 4. This means where it occurs across a boundary, both states have jurisdiction
 5. Trumps other jurisdiction claims
 6. Line between real consequences and potential threats? *The Tennyson* says both state where act started and completed have jurisdiction

B. Nationality

1. Reliance on residence also or other connections as evidence of allegiance
2. Usually need to be national at the time of the offence

C. Passive Personality

1. Aliens may be punished for acts abroad harmful to the nationals of the forum

2. E.g. *Lotus*: Turkish penal code provided for punishment of acts abroad by foreigners against Turkish nationals but court did not assess the law as such
 - (a) France argued Turkey needed to prove authorisation at international law for extending their prescriptive jurisdiction to where the victims were Turkish (passive personality) / where effects mostly felt in Turkey (objective territorial principle)
 - (b) Turkey argued they were free to do what they wanted unless there was a rule to the contrary – succeeded
 - (i) Emanates from state's own rule – do not overstep limits that international law places on you
3. Today, exists in many multilateral treaties for offences like drug-trafficking, hijacking, torture and counter-terrorism

D. Protective Principle

1. States assume jurisdiction over aliens for acts done abroad which affect the internal or external security or other key interests of a state (variety of offences, not necessarily confined to political acts)
 - (a) Currency, immigration and economic offences included
 - (b) E.g, *DPP v Joyce*
2. But the categories are not closed and could be expanded
3. ***Effects Doctrine***
 - (a) Where an extra-territorial offence causes some harmful effect in the prescribing state without meeting the criteria of territorial jurisdiction or representing an interest sufficiently vital to the internal or external security of the state to invoke the protective principle
 - (b) Controversial but not always objected to – acknowledged in *Lotus* and *Arrest Warrant*
 - (c) *Aloca*: any state may impose liabilities, even upon persons not acting within its allegiance, for conduct outside its borders which has consequences within its borders which the state reprehends

E. Universal Jurisdiction

1. Assertion of criminal jurisdiction by a state in the absence of any other generally recognised head of prescriptive jurisdiction
2. Usually, states allow this as a matter of public policy. Universal jurisdiction is therefore defined by the character of the crime concerned rather than by the presence of some kind of nexus to the prescribing state
3. Today, usually extends to core crimes of CIL, e.g. genocide, crimes against humanity and breaches of the laws of war. Torture is also likely to fall in this category
 - (a) Questionable whether aggression would fall into this category
 - (b) Probably no ability to exercise in absentia

You could also get jurisdiction in a special scenario based on a treaty

F. Jurisdiction Over Ships and Aircraft

(i) Ships

- (a) The law of the flag depends on the nationality of the ship
- (b) Flag state has regulatory responsibility for and jurisdiction over the ship
- (c) When a foreign ship enters a port, except in a consequence of distress, temporary allegiance is owed to the territorial sovereign and concurrent jurisdiction arises
- (d) Derogation from the exercise of local criminal jurisdiction is a matter of comity and discretion, but may be invoked where (a) the act in question disturbs the peace and good order of the port; (b) assistance is requested by the captain or a representative of the flag state; and (c) a non-crew member is involved.
- (e) Port state jurisdiction is increasingly recognised as a remedy for the failure of flag states to exercise effective jurisdiction and control of their ships

(ii) Aircraft

- (f) Tokyo Convention – state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board and requires the state to take necessary measures to claim jurisdiction over such acts (art 3)
- (g) Art 4 prohibits states other than the state of registration interfering with an aircraft in flight, save where an offence committed on board
 - (i) Has effect in the territory of the intercepting state
 - (ii) Has been committed by or against a national or permanent resident of the state
 - (iii) Is against the security of the state; or
 - (iv) Consists of a breach of any rules or regulations relating to the flight of aircraft

G. Civil Jurisdiction

1. Common law vs civil law over how to get jurisdiction – serving vs domicile
2. Individuals subject to civil jurisdiction include:
 - (a) Nationals of the forum state, whether physically present or not
 - (b) Natural persons physically present within the state
 - (c) Natural persons domiciled in the state
 - (i) Can do so by appearing in court after a suit has commenced, appointing an agent within the state to receive service of process or agreeing to the personal jurisdiction of a particular court in the forum selection clause in a contract
 - (d) Natural persons who consent to a court's jurisdiction

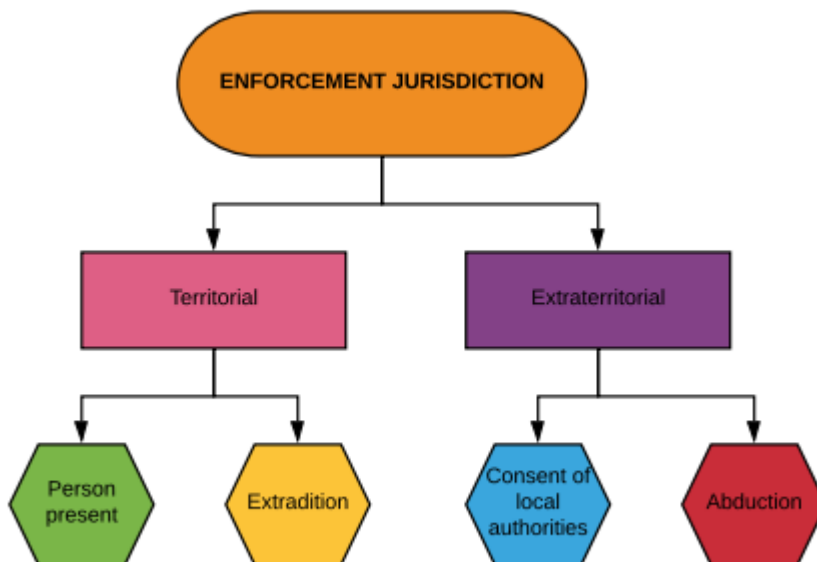
- (e) Juridical persons e.g. business entities and foreign governments that are subject to the *in personam* jurisdiction of a municipal court include domestic entities and foreign entities recognised as juridical entities by the forum state

3. Where there is a conflict, defer to the other country's laws, based on comity principle and good relations

H. Consequence of Excess of Prescriptive Jurisdiction

1. If enforcement action is taken in a case of exorbitant jurisdiction with consequent injury, an international wrong will presumably have been committed
2. Mere passage of legislation asserting exorbitant legislation may not
3. Confused due to *Lotus* statement re a state being able to do what it pleases unless international law prohibits it, with cases like *Arrest Warrant* suggesting a different position
4. Action unlikely unless prescribing state attempts to enforce the jurisdiction claims

II. ENFORCEMENT JURISDICTION



1. State's enforcement of jurisdiction within own territory is uncontroversial, but unilateral extra-territorial use of enforcement jurisdiction is impossible (*Lotus*) – requires consent
2. This means things like persons may not be arrested, no summons, no police or tax investigations, no orders for documents, etc.

A. Territorial

B. Extra-Territorial

3. Not infringed just because a state takes action within its own borders with respect to acts done in another state State
4. States in some instances may extend the application of their laws and jurisdiction of their courts to persons, property and acts outside their territory (*Lotus*)

(i) Abduction

1. Sometimes states will abduct an individual who cannot be extradited lol

2. This could involve a breach of sovereignty and territorial integrity of the state of refuge, a violation of the legal processes of that state, a violation of extradition treaty obligations, a breach of human rights norms (like fair trial)
3. Could attempt to justify the abduction
 - (a) If the other state consents to it
 - (b) Self-defence or preemptive right of self-defence
 - (c) Right to protect nationals abroad
4. Even if abduction done illegally, they can proceed with the prosecution of the alleged offender. Some have aimed to ensure respect for international law and stayed proceeding
5. Can object to the abduction and use countermeasures, etc. Could raise it before ICJ
6. Note also the rise of *extraordinary renditions*
 - (a) Simply to combat impunity
 - (b) Increased post 9/11 – basically to interrogate and torture people and is outside appropriate legal processes

Extradition

1. Because enforcement jurisdiction is territorially limited, extradition must be requested from the state where the individual is located. In custom, there is no right to extradition, no duty to extradite and no bar to extradition
2. Conditions for extradition – often contained in treaties
 - (a) Nationality
 - (b) Double criminality – offence for which extradition sought must exist in both the requesting state and the extraditing state (Pinochet)
 - (c) Person extradited can only be tried for offence for which extradition was sought
 - (d) Political offence exception
 - (e) Extradition may be refused if individual has already been tried for the same offence
 - (f) Diplomatic assurances, e.g. no death penalty

(iii) *Obligation to Extradite?*

1. Often, provision for the state to prosecute a perpetrator of certain criminal conduct or extradite them to another state where the state is unable or unwilling to do so (*Belgium v Senegal*)
2. *Belgium v Senegal*: extradition is an option, prosecution is an obligation
 - (a) Thought Senegal did have appropriate means to prosecute him but had delayed too much
 - (b) So I think Senegal either *had* to prosecute or extradite under their treaty
 - (c) National law cannot be used as an excuse to perform international obligations

LAW OF THE SEA

I. SECTIONS OF THE SEA

1. Various sections of the sea:
2. Territorial waters – 12 nautical miles out – full jurisdiction (and this includes the airspace above)
 - (a) All waters to the landward side of the baseline are internal waters, e.g. ports and rivers
 - (b) A state *has full sovereignty over internal waters* and there is no right of entry *except in cases of distress*
 - (c) A state *has full jurisdiction over all ships in its territorial waters BUT* states refrain from exercising criminal or civil jurisdiction over matters that affect only the internal discipline of the ship (*US v Wildenhus*)
 - (d) However, also the right *of innocent passage*
 - (i) Ships must be in continuous and expeditious passage (art 18)
 - (ii) Must be acting innocently under arts 19 and 20, e.g. not conducting military exercises, not threatening the sovereignty or territorial integrity of the state, launching or taking on board aircraft and military personnel, spying on the state to their detriment, etc.
 - (iii) Coastal states may regulate innocent passage (art 21) but may not hamper (art 24)
 - Art 21: can regulate for things like laying cables, safety of navigation and protection of navigational aids, conservation and preservation of various marine things, assisting custom and immigration laws
 - (iv) Innocent passage rights may be temporarily suspended under art 25(3)
 - (v) Coastal state may take necessary steps to exclude passage that is not innocent, including arrest and expulsion from the sea (art 25)
 - (vi) Jurisdiction *over vessels in the territorial sea*
 - Criminal jurisdiction where ship has not visited port under art 27
 - Consequences of the crime extend to the coastal state
 - Crime of a kind to disturb the peace or good order of the coastal state / non-crew member involved
 - Assistance requested by ship or flag state
 - For the suppression of drug trafficking
 - Art 30 and warships: If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

- When a foreign ship enters port, except as a consequence of distress, temporary allegiance is owed to the territorial sovereign and concurrent jurisdiction arises

(vii) UNCLOS also applies a transit passage for straits which is similar to right to innocent passage.

- An international strait is a narrow body of water connecting high seas or exclusive economic zones (EEZs) with other high seas or EEZs and used for international navigation (art 37)
- Transit passage similar to innocent passage except
 - Coastal state may not suspend right of transit passage, limited rights of regulation over passage
 - Right of overflight for aircraft
- Vessels may proceed in their normal mode of transit

3. Contiguous zone – 12 nautical miles from territorial waters

(a) An additional 12 nm from the territorial sea within which coastal state may exercise control

- To prevent infringement of its customs, fiscal, immigration or sanitary laws within its territorial sea
- To punish such infringement

4. EEZ – 200 miles

(a) ***Coastal state's rights***

- Coastal state has sovereign rights “for the purpose of exploring and exploiting, conserving and managing the natural resources” of waters and seabed (art 56)
- Jurisdiction regarding installations and structures; marine scientific research; protection of the marine environment
- Coastal state may arrest vessels breaching laws relating to management of living resources (art 73)
- Also have fishing obligations:
 - Exclusive fishing rights – coastal state regulates fishing in the EEZ – as long as it can catch the fish, no requirement to share
 - Ensure the living resources are not endangered by over-exploitation (art 61)
 - coastal state must ensure that fisheries are managed sustainably, set a total allowable catch using best available science
 - Maintain the fish stocks at level to produce maximum sustainable yield -- Establish the total allowable catch (TAC)

- Where the coastal state does not have capacity to catch the entire TAC, must give access to other states (art 62)
- Coastal state can enforce its regulations on foreign vessels in their EEZ (art 73)

(b) *Other states' rights*

- (i) Freedoms of navigation, overflight, laying cables and pipelines, etc (art 58) Chiefs
- (ii) High seas regime (arts 88-115) apply where “they are not incompatible”
- (iii) Conflicts to be resolved using equity and taking into account the respective importance of the interests of the parties and the international community (art 59)

5. Continental Shelf

- (a) Out to 200 nm regardless of the physical characteristics of the shelf (art 76)
- (b) If the physical shelf extends beyond 200 nm, can claim the extent of the shelf, with limits, roughly 350 nm
- (c) Rights in the continental shelf
 - (i) Exclusive sovereign rights over the resources of the shelf for exploiting natural resources (art 77)
 - (ii) Sedentary species: “organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil”
 - (iii) Rights over the shelf do not affect the legal status of the waters above (art 78)
 - (iv) Exercise of the rights of the coastal state must not infringe or result in any unjustifiable interference with navigation and other rights (art 78)

6. Then after that is the high seas

- (a) Basic rule: exclusive flag state jurisdiction on the high seas (art 92)
- (b) No state can subject part of the high seas to its territory
- (c) Freedoms of the high seas include (art 87)
 - (i) Freedom of navigation, overflight, lay submarine cables and pipelines, construct artificial installations, fishing and scientific research
- (d) Exercising jurisdiction over a vessel on the high seas
 - (i) A flag state can always exercise jurisdiction over a vessel on the high seas
 - (ii) If not the flag state, can only board and inspect a vessel in limited circumstances (art 110)
 - The ship is engaged in piracy
 - The ship is engaged in the slave trade

- The ship is engaged in unauthorised broadcasting and the warship is of a state that is the receiver of the broadcast
- The vessel is without nationality

A. Hot Pursuit

1. Art 111: May be commenced in any maritime zone over which a state has jurisdiction, for the purpose of enforcing coastal state regulation against a vessel believed to have violated coastal state laws
2. Hot pursuit is only lawful if
 - (a) It is commenced while the vessel is still in the maritime zone
 - (b) A visual or auditory signal to stop is sent
 - (c) It is undertaken by a military or authorised vessel of the coastal state
 - (d) Pursuit of the vessel is not interrupted
 - (e) Pursuit must cease if the vessel enters the territorial sea of another state

B. Piracy

1. 101: Piracy consists of “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft...
 - (b) Against a ship, aircraft, persons or property outside the jurisdiction of any state”
2. Any state may seize a pirate ship or one under the control of pirates, and arrest the persons on board
3. The pirates may be prosecuted by the seizing state (art 105)

C. Islands, Rocks and Reefs

1. Art 121(3): “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”
2. Human habitation: requires a stable community of people for whom the feature consists of a home
 - (a) No dependence on external supply
 - (b) More than a matter of mere survival
3. Economic life of its own
 - (a) Oriented around the features and not just the surrounding waters
 - (b) Extractive activity is not enough
4. Illustrated by *Spratley Islands* case
 - (a) 46 hectares, fresh water supply, ability to grow papayas, had sustained life when some fishermen had been stranded there but no sizeable population

- (b) Conclusion: The Tribunal sees no indication that anything fairly resembling a stable human community has ever formed on the Spratly Islands. ... The introduction of the [EEZ] was not intended to grant extensive maritime entitlements to small features whose historical contribution to human settlement was as slight as that”
- (c) Key takeaway is that the court was reluctant to allow a state to artificially create something to sustain life that could not do so before

II. SHIPS

1. Basic rule: jurisdiction over ship from the flag state
2. Art 92: shall sail under one flag only (UNCLOS)

RELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL LAW

1. International law prevails over domestic law (*Headquarters Agreement Advisory Opinion*)
2. State has to protect and not violate individual rights

IMMUNITIES

I. ACTION PLAN

1. Is the state acting in its public/constitutional role, or within a private commercial role?
 - (a) Need to look at all the detail and underlying substance. Not enough that the state is doing something that private parties could do e.g. an employment contract (*Sutton*)
 - (b) Consider *nature and purpose*
 - (c) Performing state admin work and being in a position of trust and confidence suggest that the contract relates more to the public aspect (*Sutton*)
2. If state, then they will have immunity, and if commercial, they will not (UN Convention on Jurisdictional Immunities of States and their Property)
3. If against a person:
 - (a) Immunity will apply if needed to ensure the effectiveness of the role. Will probably apply to a Minister of Foreign Affairs (*Arrest Warrant*)
 - (i) Diplomatic and consular agents, holders of high-ranking office enjoy civil and criminal immunities from jurisdiction in other states for their term of their office (*Arrest Warrant*)
 - (b) If it does apply, a breach of rule of jus cogens will not prevent it applying
 - (c) However, will not apply if:
 - (i) In their own state
 - (ii) Waived by that state
 - (iii) If they are now a former head of state
 - Can be charged for acts before or after their period
 - Or for acts during done in a private capacity
 - (iv) Can be brought before some international tribunals
- (i) ***Vandalism of Embassy***
4. *US v Iran*: US Diplomatic and Consular Staff in Tehran
5. ***Private act by students but there is an obligation on the part of the local authorities to ensure protection of the premises***
6. Mere protest is fine e.g. *R v Roques* – allowing anti-apartheid protestors outside embassy
7. But here, not only was nothing done, the state authorities condoned it – violated Vienna Convention and CIL because vital that diplomatic staff can do their jobs – necessity to maintain official secure contact between states

II. TYPES OF IMMUNITY

8. There are potentially four types of immunity
 - (a) State immunity (of agents and institutions)
 - (b) Diplomatic and consular immunities
 - (c) IGOs
 - (d) And immunity for state officials, e.g. *Pinochet*
9. The notion of immunity comes from the idea that all states are equal (*Schooner Exchange*)
10. *Parlement Belge* says it is a traditional and absolute rule of immunity – even if you are acting for bad purposes, the immunity still exists
11. 20th century was more hesitant, however, and began developing new rules – distinguishes between the state acting in its sovereign capacity and state acting in its commercial capacity
 - (a) Commercial activities of the state are no longer protected (*Sutton*)

A. *Sutton*

1. Governor able to claim immunity on behalf of the queen
2. No evidence Parliament explicitly overruled immunity from the Employment Act – sufficiently plain positive indication would be required to come to that conclusion
3. She was an important part of the administrative wheel and not engaged in anything particularly commercial
4. To figure out if commercial, need to look at the functions of a contract – not enough to say any private individual can hire another private individual and therefore this act is private, not public. Since she was involved in admin, trust and confidentiality, this was within the public sphere

B. *Jurisdiction Immunities (Germany v Italy)*

1. Key thing is that even when violates rule of jus cogens, still the immunity applies, e.g. immunity for German troops ordered under the armed forces who were part of Germany at the time
2. Could not use a particular residence because Court accepted the argument that Germany used it for official purposes
 - (a) In the absence of express consent, state practice established that a measure of constraint was only permitted over property used by the state for commercial purposes. Since the property was used for non-commercial purposes, the legal charge violated the immunity from enforcement enjoyed by Germany under CIL
 - (b) State practice supports the position that state immunity for official acts extends to civil proceedings for occasioning death, personal injury or damage to property committed by the armed forces and organs of the State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum state

C. *Arrest Warrant*

1. Purpose is to ensure the effective performance of functions on behalf of state, rather than for personal benefit

2. Since a Minister of Foreign Affairs needs to be able to travel, is very important, can bind the state just by virtue of their position, a Minister throughout the duration of their office enjoys full immunity from criminal jurisdiction and inviolability
3. No distinction can be drawn between acts performed by a Minister of Foreign Affairs in their official capacity versus in their private capacity, or acts before and during the period of office – being arrested stops them being able to perform their function regardless of why they are arrested, and is therefore unlawful
4. Can immunities protect you against claims of crimes against humanity?
 - (a) Court says it cannot deduce from state practice that this exception exists
5. Immunity will not apply where:
 - (a) In their own countries – may be tried there
 - (b) State can waive the immunity
 - (c) After a person ceases to hold the office of Minister of Foreign Affairs
 - (i) States may try a former MfFA of another state in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity
 - (d) An incumbent or former MfFA may be subject to criminal proceedings before international courts where they have jurisdiction, e.g. ICTY or ICTR.

D. Diplomatic Relations

1. Establishment of diplomatic contact purely a matter of consent (art 2 Vienna Convention on Diplomatic Immunities)
2. Diplomatic immunity applies once that contact is established
3. Host state's basic obligations
 - (a) Facilitate establishment of diplomatic presence (premises, staff and services)
 - (b) Maintain security system sufficient to protect mission, personnel, etc.
 - (c) Respect immunities of mission, personnel and communications
4. Sending state's basic obligations
 - (a) Use mission only for diplomatic or other agreed purposes
 - (b) Ensure respect for local law
 - (c) Non-interference in local affairs
5. Territorial sovereignty limited by consent to diplomatic relations
 - (a) But it is still the territory of the receiving state but the members of the mission and their activities in the embassy are primarily under the control of sending state (*Radwan v Radwan*)

(ii) Host State Obligations

6. Inviolability of mission premises and archives

(a) Premises – art 22 1961 Vienna Convention on Diplomatic Immunities

(i) *Libyan People's Bureau Incident*: policewoman shot by sniper fire within the embassy but UK did not enter, just severed diplomatic ties

(b) Archives and docs – art 24

(c) Must provide full facilities – art 25

7. Inviolability of person, family and residence of diplomatic staff (*Case Concerning US Diplomatic and Consular Staff*) – not liable to any form of arrest or detention. Receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity

8. Inviolability of communications, including diplomatic bag and courier

(a) Freedom of diplomatic communication (art 27)

(i) Inviolability of official correspondence

(ii) Diplomatic bag not to be opened or detained

(b) Inviolability is cornerstone of diplomatic relations, and supplemented by immunities (arts 29-31)

(c) Exceptions for payments for services, local private contract, but effectively exempt from most local law

9. But remember they still have a duty to respect the law of the receiving state (art 41)

(iii) Host State Remedies

10. Refusal to send specific diplomatic staff

11. Revocation of prior acceptance and of diplomatic privileges

12. Breaking diplomatic relations and requiring withdrawal of mission (*Libyan People's Bureau*)**E. Immunity of NGOs**

1. Functional immunity: what is necessary to allow IGO to fulfil its purpose and for representatives to do their jobs

2. Certain officials of the UN are entitled to diplomatic immunities while other agents are entitled to functional immunities

3. Look at the constituent instrument and any other relevant practice and agreement of the IGO

4. Special rapporteur entrusted with a mission is to be regarded as an expert on a mission (*Difference Relating to Immunity from Legal Processes of a Special Rapporteur of the Commission on Human Rights*)

5. If this is needed, pg 114 of MN notes

STATE RESPONSIBILITY

I. ACTION PLAN

A. Where State is the Victim

1. General introductory material

- (a) The state is responsible for any violation of international law caused by ***an act or omission of the State or its agent*** and is bound to make reparation for any breach (*Chorzow Factory case*)
 - (i) ***Any violation by any state of any international obligation of whatever origin*** gives rise to state responsibility and the duty of reparation (*Rainbow Warrior*)

2. Establish *standing*

- (a) Has the state suffered injury itself? States have standing to sue in international law – full legal personality (*Reparation for Injuries*)
- (b) Has it accepted jurisdiction of the relevant Court?

3. Does the conduct ***constitute a breach of an international law obligation? Art 2(b) ILC***

- (a) Looking at the primary obligation here e.g. violation of airspace, maritime zone, territorial integrity. Omissions are also relevant, e.g. failure of Iranian authorities to protect US embassy
- (b) Art 3 ILC: Does not matter how if domestic law says it is lawful
- (c) Look for either ***intent or due diligence***
 - (i) Based on ***objective theory*** so state responsible regardless of fault or intention (although *primary obligation* may contain an intent element e.g. *Genocide Case* because genocide requires intent, or *Corfu Chanel* where Albania needed to know of the mines to use their territory in a way harmful to other states via mines)
 - (ii) Otherwise, typically the obligation is one of ***due diligence***: state must take all reasonable measures within their power to prevent and repress international law violations, but without warranting the event will not occur (art 14, *Genocide Case*)
- (d) No damage needed – moral injury is sufficient (*Rainbow Warrior*, art 31(2) ILC)
- (e) State responsible for ***assisting another state to breach their international obligations***
 - (i) Does state have knowledge of circumstances of wrongful act? Art 16(a)
 - (ii) Intent for the act to eventuate, and the act does eventuate (art 16 commentary)
 - (iii) Would the act be internationally wrongful if committed by that state (i.e. the assisting state)? Art 16(b)
 - (iv) Commentary suggests financing would be an example, facilitating abductions, etc.

4. Can the conduct be ***attributed to the State?***

- (a) A State will only be responsible for their acts, not an act outside their control
- (b) *Art 4*: conduct of any state organ can be attributed to state, e.g. decision by a court, police, armed forces, Parliament, agents sent overseas to represent NZ. Can be central or territorial and includes anyone with the status according to the internal law of the state (art 4(2))
- (c) *Art 5*: conduct of a person or entity that is not an organ of the state but is empowered by the law of the state to exercise elements of government authority shall be considered an act of the state provided they are acting in that capacity at the relevant time
- (d) *Art 6*: Conduct of an organ of State A placed at the disposal of State B will be attributed to State B if the organ is acting in exercise of elements of the governmental authority of State B e.g. providing health services to assist in overcoming a disaster
- (e) *Art 7*: State is responsible for acts done by officials and entities within their *express AND apparent authority* (i.e. presumption is an agent of the state is acting in their authority, so could be responsible even if they go beyond this)
- (f) Occasionally, the conduct of *private persons* can be attributed to the state
 - (i) *Art 8*: Private acts only attributable to states if individuals are acting on behalf of the state
 - *Nicaragua* “effective control” test
 - Reiterated in *Genocide Case*: Militia who carried out genocide were armed and supported by Serbia but not under Serbia’s effective control
 - (ii) *Art 9*: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.
 - (iii) *Art 10*: responsibility for insurgent movements
 - *10(1)*: Conduct of an insurgent group that becomes the government shall be considered an act of that government, or where established a new state (10(2))
 - But remember state will be responsible for *their own conduct in responding to insurgents* (Sri Lanka case re negligent bombing of chicken company when trying to attack the Tamil Tigers)
 - (iv) *Art 11*: Responsible for conduct acknowledged and adopted by the state has its own, e.g. *Tehran case* where the state did not organise attack on US embassy, but leaders publicly supported the move

5. Are there *circumstances precluding wrongfulness*?

- (a) **Consent** (to extent that it remains within consent) – art 20
 - (i) Could be before or after, i.e. through waiver or acquiescence (art 45)
 - (ii) Needs to be valid – authorised by someone in a position to do so, not coerced, etc.

- (b) **Self-defence** (art 21, referring to right to self-defence under art 51 of UN Charter). Precludes wrongfulness where acting in self-defence e.g. breaching a treaty owed to attacking party
- (c) **Countermeasures: injured state may take countermeasures (art 49)**
- (i) Can only do so to persuade a state to follow its international obligations (art 49)
 - (ii) The countermeasure must be non-performance of international obligations (49(2))
 - (iii) Shall be done to permit resumption where possible (49(3))
 - (iv) **Countermeasures may not be taken where:**
 - It relates to the obligation to refrain from use of force under Charter (50(a))
 - Obligations for the protection of fundamental human rights (50(b))
 - Obligations of a humanitarian character prohibiting reprisals (50(c))
 - Other obligations under peremptory norms of international law (50(d))
 - (v) State taking countermeasures not relieved of fulfilling international obligations under dispute settlement or respecting the inviolability of diplomatic or consular agents, premises, archives and docs (50(2))
 - (vi) **Proportionality** required, taking into account gravity of international wrong and right in question (51, *Air Service Agreement*)
 - (vii) Has the injured party fulfilled the necessary requirements before resorting to countermeasures?
 - 52 (a) call upon the state to fulfil its obligation
 - (b) notify state of decision to take countermeasures and offer to negotiate (but has the right to take urgent measures where necessary under 52(2))
 - May not be taken where wrong has ceased (52(3)(a)) or dispute pending before tribunal (b) but this does not apply if there has been a failure to act in good faith (4)
 - (viii) Must cease countermeasure when the state complies with obligation (53)
- (d) **Force majeure: occurrence of irresistible force or unforeseen event beyond the control of the state making it materially impossible in the circumstances to perform the obligation (23, *Rainbow Warrior*)**
- (i) Requires **absolute and material impossibility**: a circumstance that renders the performance **more difficult or burdensome does NOT constitute a force majeure** (RW) so health issues in that case not sufficient – could have sent back to finish their sentence
- (e) Distress (*Rainbow Warrior, art 24*) - where there is a threat to life, but not if partly fault of those invoking it or is likely to produce situation of comparable or higher threat (art 24(2))
- (i) Existence of a very exceptional circumstance of extreme urgency involving medical or other consideration of an elementary nature provided that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party

- (ii) Reestablishment of the original situation of compliance as soon as the emergency disappears
- (iii) Existence of a good faith effort to try to obtain the consent of the other party
- (f) **Necessity – where vital interests of state at risk (art 25, Danube Dam)**
 - (i) Only way to protect against grave and imminent peril; and
 - (ii) Does not seriously impair an essential interest of States towards which the obligation exists, or the international community as a whole (art 25(1)(b))
 - (iii) Not available if the obligation excludes necessity or the State contributed to situation (25(2))
 - (iv) Health issues in *Rainbow Warrior* not sufficient because other ways of dealing with it
- (g) **General reminders about defences**
 - (i) **A defence is temporary** – lasts as long as relevant circumstances are present, and then state has to resume its obligations (*Danube Dam*, art 27)
 - (ii) May not relieve state of obligation to compensate (art 27)
 - (iii) **Defences are not applicable if the conduct violates a jus cogens norm (art 26)**

6. **Invocation of liability**

- (a) If obligations owed to that state specifically (42(a))
- (b) If obligation owed to the international community but where:
 - (i) State specially affected; or 42(b)(i)
 - (ii) Is of such a character as to radically change the position of all the other states to which the obligation is owed in respect of further performance of the obligation 42(b)(ii)
- (c) What if the state did not suffer the injury? Art 48
 - (i) If owed to a group of states of which that state is one, and established for collective security (1a)
 - (ii) **Obligation is owed to international community as a whole (1b)**
 - *Barcelona Traction*: any state has right to bring *erga omnes* claim e.g. basic rights of the human person like slavery and racial discrimination (high threshold)

7. What **reparations** are owed?

- (a) A breach involves an obligation to make adequate reparations (*Chorzow Factory*)
- (b) State still has an obligation to perform their international obligations (29)
- (c) Cessation of unlawful conduct and non-repetition (30)
- (d) Reparation, whether moral or material (31)

- (e) Remember domestic law not a valid excuse (32)
- (f) Types of reparation – art 34
 - (i) Restitution (turning back clock)
 - (ii) Satisfaction e.g. formal apology, ceremonial act, acknowledgement of breach
 - (iii) Compensation with interest
 - (iv) Contribution to the injury by wilful or negligent action or omission of the injured state will be taken into account – 39 ILC

B. When Victim is National

1. Does the State have *standing* to bring the claim?
 - (a) Starting point: only states and IGOs have standing to bring international claims unless otherwise provided for by a treaty
 - (i) States can do so even where the national has signed some kind of waiver
 - (b) *Reparation for Injuries*: diplomatic protection internationalises a claim that is otherwise a domestic dispute
 - (c) So have to consider what we need for standing
2. ***Nationality***: the bond of nationality between state and person alone confers upon the state the right of diplomatic protection (*Panevezys-Saldutiskis*).
 - (a) For the purposes of diplomatic protection, need nationality by birth, descent, naturalisation or succession of states, or any other means not inconsistent with international law (art 1, ILC Draft Articles on Diplomatic Protection)
 - (b) Then art 5: State is entitled to exercise diplomatic protection in respect of a person who was a national of the State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both of these dates.
 - (c) ***Nationality by naturalisation***
 - (i) States can decide their own rules for acquiring nationality (*Nottebohm*)
 - (ii) BUT what is required is “real and effective” nationality
 - (iii) At the time, is he more closely attached by his tradition, establishment, interests, activities, family ties, near intentions, to this state, or any other?
 - (iv) Factors to consider (*Nottebohm*)
 - Location of family and ties to them
 - Business interests
 - Place of abode (important) or intent to settle there

- Perhaps wishing to disassociate from the govt of that country, but unclear
- Returning to other nations periodically could count against
- Intent to pay taxes does not matter much
- Activities and interests there

(d) *Nationality of companies*

- (i) Distinction between *the rights of the corporation* and *the rights of shareholders* (*Barcelona Traction*)
- If the claim is about the rights of the corporation, then the company's nationality is that of where they are registered and only that nation can exercise diplomatic protection
 - If the rights of shareholders have been breached, you can consider the nationality of the shareholders

(e) Standing in cases of *erga omnes* (*Barcelona Traction*)

- (i) In view of importance of rights involved, all states can be held to have an interest in their protection
- (ii) Outlawing of aggression and genocide, principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination
- (iii) BUT there is no ability for a class action or for a state to represent another state

3. National must have *exhausted effective diplomatic remedies* (art 14, DA on Diplomatic Protection)

(a) This is a rule of customary international law (*Interhandel*)

(b) Requires exhausting both judicial and administrative remedies

- (i) Judicial: take actions through municipal court, appeal even if no right of appeal, so long as it gives the possibility of an effective and sufficient means of redress (*Nielsen v Denmark*)
- (ii) Admin: have to seek action that would result in binding decisions

(c) Art 15: Local remedies **do not have to be exhausted where:**

- (i) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress
- "Futility" or "ineffectiveness" exception e.g. appeal has no effect
- (ii) There is undue delay which is attributable to the state alleged to be responsible (and not to the aggrieved person)
- (iii) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury
- (iv) The injured person is manifestly precluded from pursuing local remedies; or

- (v) The State alleged to be responsible waives its requirement that local remedies be exhausted

After this, we know if the state can bring the claim. The question is then whether there has a breach of the relevant international law

4. *Standard of protection aliens get*

- (a) Contested notion: could be equal treatment of nationals and foreigners, but this was risky of laws of the state were too low, so instead a minimum standard was developed (*Chevreau*)

(b) ***Denial of justice*** *Neer, Mexico, Chevreau*

- (i) Denial, unwarranted deal or obstruction of access to courts
- (ii) Gross deficiency in the admin of judicial or remedial process
- (iii) Failure to provide guarantees considered essential to the good admin of justice
- (iv) Manifestly unjust judgments
- (v) Expulsion

(c) ***Expropriation*** (*Starrett Housing v Iran*)

- (i) Compulsory transfer of property rights (*Amoco*)
- (ii) Generally agreed that expropriation may occur, but developed states suggest it must take place in accordance with the international min standards, while developed states deny this and should be left to state to decide under their own law
- (iii) Consider whether there has been a transfer of title
 - Physical seizure, transfer under duress or taxation
 - State is NOT liable for economic injury which is a consequence of bon afide regulation within the accepted power of states, e.g. non-confiscatory taxation, exchange control and currency reevaluation
 - Could be “creeping” expropriation e.g. covert or incidental interference which has the effect of depriving the owner, in whole or in significant part, of the use or expected econ benefit (*Metaclad*)
 - Intent of govt is less important than the effects of the measure on the owner (*Tippets*)
 - Impossible to access building, wages set prohibitively high, visas denied, consider duration of interference (Explanatory Note, Harvard Draft Convention, art 10)
 - What property can be expropriated? All movable and immovable property (art 10(1) of Harvard Draft Convention) and also contractual rights (*Anglo-Iranian Oil*)
- (iv) Exceptions
 - AC says look for three elements:

- Public purpose
 - Must get compensation
 - Non-discriminatory (all below)
- To be lawful, must be in the public interest (*Amoco*). Public utility, judicial liquidation, etc. (*Amoco*) and discrimination (*Amoco*). Discrimination not absolute – discrimination reasonably related to the public purpose that underlies the expropriation is not illegal
 - Precise definition of public interest not given but wide margin of deference (*Amoco*)
 - *BP Case*: act of nationalisation not legitimate unless it is for a public purpose related to internal needs of taking state and followed by prompt, adequate and effective compensation. Measures which are arbitrary or discriminatory or motivated for a political considerations unrelated to the internal well-being of the state are invalid.
 - Cannot expropriate only for financial purposes

5. *Circumstances precluding wrongfulness, as above (pg 37)*

6. *Compensation*

- (a) ***Lawful expropriation***: loss amounts to direct loss, rather than looking at future profit – value of undertaking at the moment of possession (*Amoco*)
- (b) ***Unlawful expropriation***: obligation of reparation for all damages sustained by the owner, including lost profit (*Chorzow Factory*) and going concern is regarded as the best model

II. STATE RESPONSIBILITY GENERALLY

1. The state is responsible for any violation of international law caused by ***an act or omission of the State or its agent*** and is bound to make reparation for any breach (*Chorzow Factory case*)
 - (a) No distinction between breach of treaty, custom or general principle of law when we discuss breach of international law here
 - (i) *Rainbow Warrior*: any violation by any state of any international obligation of whatever origin gives rise to state responsibility and consequently to the duty of reparation
2. Often considered a system of ***primary and secondary liability***
 - (a) The primary obligation is the duty that the state has in international law
 - (b) The secondary obligation is to put right any breach of the primary obligation
3. A note on the ability to use the work of the ILC: AC says the it was stated in *Danube Dam* that it was customary international law

A. *Elements of State Responsibility*

1. Consider the conduct (art 2 ILC) – does the conduct constitute a breach of an international obligation by a state?
 - (a) Does the conduct consist of an act or omission attributable to the state under international law? E.g. violation of the airspace, maritime zone, violation of territorial integrity

- (i) We can also consider omissions here, e.g. failure of Iranian authorities to protect US embassy and staff
- (b) If the domestic law characterises the wrongful act as lawful, this makes no difference (art 3 ILC)
- (c) This is based on **objective theory** so the state is responsible regardless of fault or intention
 - (i) Although note that sometimes the primary obligation may contain an intent element, e.g. *Corfu Channel* (Albania allowed its territory to be used in a way harmful to other states i.e. mining which required it to know of the mines) and in *Genocide Case* – under Genocide Convention, intent needs to be proven
 - (ii) Otherwise, intent is not needed, and most obligations based on **due diligence**
 - (iii) Seems that states do not want their intent to be considered, as seen from the historical art 19 on International Crimes and Delicts where it was difficult to get the international community to consent to something with a criminal element
- (d) **The conduct does not need to cause damage – reparation due even when injury is moral**
 - (i) NZ did not suffer tangible injury in *Rainbow Warrior* re return of French Rainbow Warrior bombers to France and also set out in art 31(2) of ILC

2. **Attributability to a State**

- (a) States will only be responsible for their own acts, not for acts outside of their control
- (b) Whose conduct can we attribute to a state?
 - (i) *Art 4 ILC*: conduct of organs of government or those acting as agents of the state may be attributed to the state, e.g. decision by a court, police, armed forces, Parliament, agents sent overseas to represent NZ
 - (ii) *Art 5 ILC*: conduct of a person or entity that is not an organ of the state but is empowered by the law of the state to exercise elements of government authority shall be considered an act of the state
 - (iii) *Art 6 ILC*: Conduct of an organ of State A placed at the disposal of State B will be attributed to State B if the organ is acting in the exercise of elements of government authority of State B
 - (iv) *Art 7 ILC*: State is responsible for acts done by officials and entities within their express and apparent authority - If there is an agent, the presumption is that what they do is part of their authority
- (c) What about private acts?
 - (i) *Art 8 ILC*: Private acts only attributable to states if individuals are acting on behalf of the state
 - Use *Nicaragua* test of “effective control” here
 - Reiterated in *Genocide Case*: Serbia could not have committed acts of genocide because militia who did genocide were armed and supported by Serbia but not under Serbia’s effective control

- Use *Tadic* re “overall control” for armed conflict only (ICC)
- (ii) *Art 9 ILC*: State is not prima facie responsible for acts of private persons **unless** they exercise elements of government authority and in circumstances that call for the exercise of those elements of authority
- (iii) *Art 10 ILC*: State is not responsible for the acts of rebels or insurgents in a state but will be responsible for their own acts fighting against those insurgents
- ***If the insurgents are successful, however, the conduct becomes that of the state, but if unsuccessful, the conduct is only attributable to the state if it failed to exercise due diligence in suppressing the insurgency***
 - ***E.g.*** Sri Lanka example and ICSID award: Sri Lanka not responsible for the Tamil Tigers but were responsible for their own acts when trying to attack the TT, destroyed a poultry factory and killed many of the chickens due to negligence on the part of the govt. Company that owned the chickens due reparations.
- (iv) *Art 11 ILC*: State is responsible for conduct acknowledged and adopted by the State as its own. This can translate the act from being private to one by the state, e.g. *Tehran case* where the state did not organise an attack on US leaders, but was transformed into one when the leaders of Iran publicly supported the move

(d) Responsibility for ***assisting another state to breach international obligations***

- (i) State will be responsible for aiding and assisting another state in committing a breach of international law but only:
- If it has helped a state that is bound by a legal rule; and
 - With knowledge of the circumstances of that violation (so must know the aid or assistance will be used to commit a breach of international law and that breach in fact happens – art 16 ILC)
 - Maintenance of drones by a mechanic that goes on to be used for war crimes probably not sufficient

3. Has the state done their due diligence?

- (a) States must take all reasonable measures within their power to prevent and repress international law violations
- (b) Usually best effort obligations (according to art 14 ILC commentary) which requires states to take all reasonable or necessary measures to prevent a given event from occurring but without warranting that the event will not occur

4. Circumstances ***precluding wrongfulness***

(a) Consent

- (i) No responsibility if the injured state has validly waived the claim; or
- (ii) The injured state is said to have acquiesced to the lapse of the claim, by reason of its conduct, i.e. did not make a claim

(b) Self-defence

(c) Countermeasures

- (i) Essentially you need to first attempt to convince the state to change its behaviour before issuing counter-measures, and then you need proportionality

(d) Force majeure

- (i) Where compliance is impossible due to the occurrence of an event that is irresistible, unforeseen and external, so the state is unable to avoid or opposite by its own power (*Rainbow Warrior*)
- (ii) We are looking for ***absolute and material impossibility***: a circumstance that renders the performance ***more difficult or burdensome does NOT constitute a force majeure*** (RW)
- (iii) Health issues in the *Rainbow Warrior* not sufficient – could have sent them back later to finish their sentence
- (iv) Art 23(2): does not apply if partly due to conduct of state invoking it or state has assumed the riskSt

(e) Distress

- (i) Threat to life. Three conditions needed:
- (ii) (1) Existence of a very exceptional circumstance of extreme urgency involving medical or other consideration of an elementary nature provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party
- (iii) (2) Reestablishment of the original situation of compliance as soon as the reasons of emergency invoked have disappeared
- (iv) (3) Existence of a good faith effort to try to obtain the consent of the other party
- (v) E.g, 2001 American surveillance jet collided with Chinese jet. The reason for violating the airspace was that it was the only way the pilot could save the lives of those on board

(f) Necessity – where vital interests of the state at risk (*Danube Dam*)

- (i) Necessity must be of a vital interest to the state
- (ii) There must be no other way of dealing with the situation
- (iii) So in *Rainbow Warrior*, no necessity, because could have been returned when well or have better care brought to them on the island
- (iv) *Danube Dam* seemed to emphasise the importance of urgency or the imminence of the threat
- (v) E.g. last resort and necessary where oil tanker hit reefs in England, air force called in to bomb the ship, maritime catastrophe

(g) ***General reminders***

- (i) A defence is temporary – only as long as the circumstances are present, and then the state has to resume the application of its obligations (*Danube Dam*)
- (ii) May not relieve the state of an obligation to compensate
- (iii) ***Defences are not applicable if the conduct violates a jus cogens norm*** arts 26-27 ILC

B. Consequence of an International Wrongful Act: Reparations

1. A breach involves an obligation to make reparation in an adequate form (*Chorzow Factory case*)
2. Arts 29-31 ILC
 - (a) Continued duty of performance of the state's international obligations
 - (b) Cessation of unlawful conduct and non-repetition (often the first thing you will want)
 - (c) Reparation of the moral and material injury
 - (d) Remember domestic law is not a valid excuse
 - (e) No concept of punitive damages
3. Forms of reparation
 - (a) Turning back the clock – wipe out all consequences of the act, but not always possible
 - (b) Satisfaction e.g. formal apology, ceremonial act, acknowledgement of the breach
 - (c) Interest
 - (d) Contribution to the injury by wilful or negligent action or omission of the injured state will be taken into account – art 39 ILC
4. Invocation of responsibility
 - (a) Usually the injured state – art 42 ILC
 - (b) If obligation is owed to the international community, any state that is specially affected or the breach has radically changed their position relative to all the other states to which the obligation is owed ...
 - (c) Usually need some kind of interest, i.e. no action popularis

III. WHEN BREACH NOT AGAINST STATE DIRECTLY

1. Starting point is that only states and IGOs have standing to bring international claims unless otherwise provided by a treaty
 - (a) States have the right to protect their own interests but may also take up the claims of their nationals
 - (b) Separate from diplomatic immunity – just where the state decides, in their discretion, to represent a national whose rights have been violated
 - (c) There is ***never an obligation on a state to espouse the claim***

- (d) State free to take up a claim despite whatever the national signs up to e.g. waiver
- (e) *Reparation for Injuries*: diplomatic protection internationalises a claim that is otherwise a domestic dispute

A. Elements of Standing

2. State which brings a claim must be able to show it has standing
 - (a) Where the state itself has suffered the injury – no doubt
 - (b) Where a national suffers the injury, more complex

3. Where a legal or natural person suffers the injury
 - (a) **Nationality**: the bond of nationality between state and person alone confers upon the state the right of diplomatic protection (*Panevezys-Saldutiskis*). This is a **necessary condition**
 - (i) *Nottebaum case*: German national doing business in Guatemala. When war broke out, on opposite side, so he quickly got Leichtenstein citizenship. Then asked L to bring a claim against Guatemala.
 - ICJ: It is for each and every state to decide under their own rules how to confer nationality.
 - **BUT it IS** up to international law to consider whether the nationality can be opposed. Looked at whether he was effectively a Leichtenstein national and whether he had a genuine connection with the state, e.g. spending time there, and concluded no
 - (ii) *Barcelona Traction*: Canada did not make a claim on behalf of shareholders of a company that went bust. Majority shareholders were of Belgian nationality and asked Belgian govt to take the claim
 - Court distinguished between the rights of the corporation itself (whose nationality was Canadian, not Belgian, because that is where it was registered) and therefore only Canada was entitled to exercise diplomatic protection
 - If the shareholders own rights had been breached, rather than the rights of the company, then Belgium could have brought the claim but otherwise you accept the risks that come with investment
 - (b) *Barcelona Traction* also tells us there is no ability for a class action or ability for state to represent another state
 - (i) But acknowledged a possible difference with dealing with obligations *erga omnes* e.g. basic rights of the human person like slavery and racial discrimination (very high threshold) but in those cases, due to the nature of the rights at stake, it would be possible for any state to bring the claim

4. National must first have exhausted domestic remedies
 - (a) Includes procedural and substantive remedies available (*Ambatielos* arbitration)
 - (b) This is a rule of CIL – *Interhandel case*

(c) But only applies to *effective* remedies

- (i) Also if remedies inappropriate, then fine
- (ii) If appeal would have no effect
- (iii) Waiver of the requirement by the state or in treaty – *ELSI case*
- (iv) If pending proceedings are unreasonably prolonged through no fault of the aggrieved person

5. Standard of protection aliens get

(a) Contested notion: could be equal treatment of nationals and foreigners, but this was risky if the laws of the state were too low, so instead a minimum standard was developed (*Chevreau*)

(b) *Calvo* clause: founded on principles of sovereign equality of states and equality of nationals and aliens

- (i) Also means foreign nationals should abide by the laws of the host state

(c) Includes elements of:

(i) Denial of justice e.g. *Neer, Reports, Mexico, Chevreau*

- Denial, unwarranted deal or obstruction of access to courts
- Gross deficiency in the admin of judicial or remedial process
- Failure to provide guarantees considered essential to the good admin of justice
- Manifestly unjust judgments
- Expulsion

(ii) Expropriation (*Starrett Housing v Iran*)

- Does international law govern? If so, what are the rules? What compensation is the person entitled to and who determines this?
- It is accepted that states may expropriate and nationalise but the question is one of compensation
- Could also be indirect, e.g. government could make the environment hostile through the business through lots of regulations and taxes (*Starrett Housing*) and suggests a deliberate strategy on the part of the state

(iii) Western approach to expropriation

- International law governs; espousal of claim by nationality and then go to arbitration; and then consider the international standard (public policy (*Amoco*); Non-discrimination (*Amaco*); *Hull Formula*: prompt, adequate and effective compensation)

(iv) Latin American approach:

- National treatment only, no international min standard, national court jurisdiction, international adjudication is inadmissible to settle disputes with foreigners – Calvo clause

(iv) *Post-colonial developments*

- Declaration on Permanent Sovereignty over Natural Resources – state has a right to develop their economy and owner shall be paid appropriate compensation: adequate value + Hull formula
- Newly independent states wanted to exploit their natural resources and so questioned the traditional rules and developed the Charter of Economic Rights and Duties of States (just a GA resolution): appropriate compensation should be paid according to relevant law of the state, and if compensation is controversial, it should be settled by the law of the state – so states believe there is a duty to compensate but how this works should be determined by the state.
- Led to *Texaco v Libya* dispute: does Libya have to compensate for nationalising oil? Considered whether international law has changed so this is now a domestic question. Overall did not think the voting record clearly reflected this, but more of a political statement

6. Amount of compensation

- (a) **Lawful expropriation:** loss amounts to direct loss, rather than looking at future profit – value of undertaking at the moment of possession (*Amoco*)
- (b) **Unlawful expropriation:** obligation of reparation for all damages sustained by the owner, including lost profit (*Chorzow Factory*) and going concern is regarded as the best model

B. Objections to Jurisdiction

1. Lack of standing

- (a) Defendant state has not accepted jurisdiction of the court
- (b) Standing on the part of the state to represent individuals

2. Lack of nationality

3. Lack of a genuine link between state and the national

4. Failure to exhaust local remedies

5. Circumstances precluding wrongfulness