NOTE: COLOURS THAT YOU MIGHT CONSIDER NEAR UNREADABLE WERE CODED TO BE NEAR UNREADABLE FOR SPEED IN THE EXAM WHEN LOOKING THROUGH THESE SHEETS. Of course you should change the colours.

Moreover, these were VERY QUICKLY made from a full set of notes the day before the exam. It is highly likely that in this very broad course a lot of important material has been missed out – it was just a few key points. I also have a tendency to leave out some of the material which I find most obvious – but it may be very important. So please do not rely on these!

ACQUISITION OF TERRITORY

First, the doctrine of inter-temporal law means that juridical facts must be appreciated in light of the law contemporary with it (*Island of Palmas*). But the continued existence to a right of territory requires that the claimant to the territory must follow the conditions required by the evolution of law (*Island of Palmas*).

Critical date: No evidence pertaining to sovereignty may be submitted after the date at which the dispute crystallised (*Eastern Greenland*) (*unless Acts are a normal continuation of prior acts* (*Sovereignty over Pulau Ligitan*)).

Uti possidetis: Colonial boundaries are to be respected, even if this does conflict with the right of peoples to self-determination (*Frontier Dispute*).

Nemo dat quod non habet accepted in *Island of Palmas*.

Everything is relative: " … in many cases, the tribunal has been satisfied with very little in the way of the 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" (*Eastern Greenland*).

<u>Discovery</u>

Discovery created an inchoate title. To be effective, there had to be effective occupation of the territory within a reasonable time (*Island of Palmas*).

Territory inhabited by indigenous people was still regarded as *terra nullius* and could be acquired (*Mabo*). This is no longer the case (*Western Sahara*).

Worth noting, though, that in *Clipperton* arbitration it was noted that usually *corpus occupandi* requires the state to establish in the territory itself an organisation capable of making sure its laws are respected. However, there may be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its 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*). [France did also issue guano licence].

Force/Conquest/Annexations/Subjugations

These were previously acceptable, <u>art 2(4) UN Charter</u> prohibits the use of force in international relations against the territorial integrity of any state. Cannot acquire territory through use of force (e.g. SC Resolution 242 (1967) adopted following the Six-Day-War; and SC Resolution 2334 (2016) confirming Israel's settlements are a flagrant violation of international law). Also confirmed by UN GA in Resolution 2625.

<u>Cession?</u>

Cession was once valid (e.g. Treaty of Paris) but with the recognition of the right to self-determination, the modern view is that cession requires the will of the "ceded" people.

"A claim to sovereignty … involved two elements each of which must be shown to exist: intention and will to act as sovereign, and some actual exercise or display of such authority" (*Eastern Greenland*).

It is "beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation (*Clipparton Island*)

First address whether *animus occupandi* exists. Should be clear.

Second, address whether *corpus occupandi* exists, this will be less clear.

It would be "inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right" (*Island of Palmas*).

- "… continuous and peaceful display of the functions of the State within a given region is a constituent element of territorial sovereignty" (*Island of Palmas*)

The requirement will be different "according to conditions of time and place" (*Island of Palmas*). Limited acts of government may be enough if territory is inhospitable or difficult to access (*Eastern Greenland*).

To acquire the land from someone with earlier good title, undisturbed possession of the territory for a long period of time is required (*Eastern Greenland*)

No principle of contiguity applies (*Island of Palmas*).

Displays of acts a titre de souverain include legislative acts and acts of administrative control aimed at showing the exercise of state functions (*Minquiers and Ecrehos*)

Acts showing effective display of authority include public administration and legislation, regulation of economic activities, public works, law enforcement measures, navy visits (search and rescue operations) and consular representation (*Nicaragua v Colombia*)

But

Where there is continued protest to the occupation of the land, the claim of prescription will not be valid (*Chamizal*)

A failure to protest over an assertion of sovereignty by another state amounts to acquiescence and abandonment of a state's claim to the territory (*Temple of Preah Vihear*)

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.
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
Concession may be made through the publication of official maps (*Temple of Preah Vihear*)

There is also a strong presumption *against* relinquishment of a title (*Clipperton Island*).

NOTE ALSO
If they are a colonised people, then post General Assembly Resolution 1514 in 1960, colonised people have this right to self-determination. However, you will then have to move into a discussion about self-determination.

Self-determination

While self-determination is mentioned in the UN Charter (see art 1; art 55) it is never defined. It is accepted as applying in both colonial and non-colonial contexts – *erga omnes* (*Wall* opinion) but what it means in different contexts varies (*Quebec*).

Regarding decolonisation, post GA Res 1514 and 1541, which demonstrated customary international law (*Namibia AO*), colonised peoples have a right to external self-determination. GA 1541 offered 3 main options –
(1) become independent;
(2) establish a relationship of free association e.g. Niue);
(3) integration into a pre-existing state (e.g. Mayotte Islands).

However, the existence of a right to external self-determination in non-colonised states is contested. ICCPR art 1 recognises that "all people have the right of self-determination", but GA Res 2625 notes that it should not be construed as authorising/encouraging any action that would dismember or impair the territorial integrity/political unity of states (conducting themselves in compliance with the principle of equal rights and self-determination, possessed of a government representing the whole people belonging to the territory).

Bangladesh was allowed independence after atrocities committed by Pakistani army. A lot depends on how the international community reacts (Former Yugoslavia). Compare to Biafra and Katanga, which was not accepted/recognised.

While the right to remedial secession has not been officially dealt with, the Quebec reference distinguished colonial and non-colonial rule. Where the central authorities are listening, external self-determination may only be achieved through negotiation. Self-determination through secession painted as a "last resort".

Indigenous groups will still have the right to internal self-determination (arts 3 & 4 UNDRIP, art 1 ICCPR).

Note: A declaration of independence is not *per se* illegal (*Kosovo*). They could raise objections where they are connected with the unlawful use of force or other egregious violations of international law norms (*Kosovo*). Some are illegal, such as that by Southern Rhodesia and Cyprus. But it would need to be made *intra vires* (which is why in *Kosovo AO* they said that it was made by a body that was separate from that set up by UNMIK, under which this declaration could not have been made).

Statehood

Only states may become members of the UN (art 4 UN Charter); only states may call upon the UN SC if there is a threat to world peace and security; and only states may appear before the ICJ in contentious cases (art 34 ICJ Statute).

International law norms have their genesis in the consent of state – "the rules of law binding upon States therefore emanate from their own free will … Restrictions upon the independence of States cannot therefore be presumed" (*Lotus*).

To be a state, must meet four criteria (art 1 Montevideo Convention):

(1) Defined territory (does not need to be completely defined – Israel)
(2) Permanent population (size not an issue – Niue; Loose interpretation (link to territory sufficient) – *Western Sahara*)
(3) Government in control of its population and territory (part of the territory may not be under control – Guinea-Bissau)
(4) Capacity to enter into relations with other states (*Wimbeldon* case; Holy See)

Generally, modern practice follows the declaratory approach, so recognition is not a pre-condition. However, if countries all refuse to recognise the state, it may not meet (4) – capacity to enter into relations with other states. See also EC practice concerning Soviet Union and Former Yugoslavia (only recognise states if they were to, for example, enter into HR treaties).

Practical requirements are also found in GA Res 2625 (1970): Freedom from political control of other states; creation without the illegal use of force/violation of any other principle of international law (cf Crimea) and willingness to observe international law (Rhodesia – condemned by SC Res 216, also called upon all states to refuse to recognise the regime).

<u>Continuation of a state</u>

This is not dealt with in the Convention. If statehood is lost, then it will become a legal person with limited rights and duties at international law. The best way to ensure it can retain statehood is by entering agreements about maritime zones.

Entering into treaties is not giving up sovereignty – it is an attribute of sovereignty (*Kiel Canal*).

While the modern view is that recognition of states is purely political, it will have legal effects – diplomatic relations, embassy, ambassador/state immune before the courts, entering into treaties. It acknowledges the recognised state's rights to territorial sovereignty and integrity, succession to the state property of predecessor state.

Recognition of governments is different. We don't really do formal recognition now (seen in *Bob Jones v Fiji*).

Instead, the modern approach is simply to ask (*Bob Jones v Fiji*)

- 1) Is the government in *de facto* control of the territory and in possession of the machinery of the state?
- Is it complying with obligations under international law?
- 2) If yes, then the recognising state makes a political judgement. Whether recognition of the government has been made is dependent on whether it ought to be inferred from the *nature and level of dealings* with such Governments. Relations between states can rarely be characterised in black and white or absolutist terms.

There is no obligation to maintain diplomatic relations or "do business" with a new government (*Bob Jones v Fiji*).

New governments will still be bound by the predecessor government's treaties and obligations (*Tinoco Arbitration*).

For statehood – becoming a member of the UN … must be a peace loving state accepting of and willing to carry out obligations in the Charter (art 4 UN Charter). Admission requires both a 2/3s majority of the members present and voting at GA (art 18(2)) but may also be blocked by the veto (because admission is on the recommendation of SC (art 4)).

STATE SUCCESSION

There is considerable uncertainty in this area – it mostly depends on the circumstances. 1978 Vienna Convention is not all customary international law – only 22 signatories.

The *uti possediti* rule is binding on newly independent states (*Frontier Dispute*). See also art 22 1978 Vienna Convention.

Colonial

Still bound by customary international law.

Clean slate doctrine – emerging state not bound by colonial power's treaty obligations (arts 2(1)(f) and 16 1978 Vienna Convention), but may establish its status by a notification of succession (unless incompatible with object and purpose) (art 17).

For multilateral treaties, it is usually easy for a state to succeed anyway because they want lots of parties.

Regarding human rights treaties, some say that there should be a presumption of continuity (but goes against consent).

Non-colonial *everything but certainty*.

When part of the territory of a state becomes part of the territory of another state, then the predecessor's treaties no longer apply and the successor's do (art 15 1978 Vienna Convention) (unless against object and purpose etc.).

For uniting states, the treaty obligations continue to affect the successor state, unless they are incompatible with the object and purpose of the treaty (art 31 1978 Vienna Convention) (unless against object and purpose etc.).

For states dissolved, then adopting the continuity principle, the new state(s) will succeed to treaties (art 34 1978 Vienna Convention). This allows for stability in international relations, but some practice goes against this (e.g Czechoslovakia and EU).

Regarding succession to property/debts/archives: generally, title to property follows territory. There are no firm rules regarding succession to public debts. Much will need to be negotiated. It will, once again, depend **a lot** on the reaction of other states – it was very easy for Russia to succeed from Soviet Union, but Yugoslavia found it much more difficult.

TERRITORY

A state's territory includes the land territory, internal waters, and territorial sea to its bed and subsoil (art 2 UNCLOS). '

See LAW OF THE SEA for notes on territorial seas and right to innocent passage.

It also includes the airspace above the state's territory and territorial sea (arts 1&2 Chicago Convention; *Nicaragua*).

Note that the skies are open to civil/commercial aircraft (art 3 Chicago Convention) (but states can place restrictions). Military aircraft are agents of the state, and must get permission to fly. States must refrain from use of weapons against civil aircraft in flights (art 3*bis*) – but may require civil aircraft flying about its territory to land at a designated airport.

All of the land mass of the planet falls under the exclusive territorial sovereignty of any one state, except for Antarctica, for which competing claims to jurisdiction were "frozen" by art IV 1959 Antarctic Treaty). Generally people in Antarctica are regulated by the state of their nationality.

Some land may be created as the result of a natural event (e.g. Iwo Jima – within the territorial sea of Japan though; Volcanic Island of Surtsey which was terra nullius because on High Seas but quickly captured in 1963).

Deep seabed/the Area (beyond continental shelf) may not be claimed by anyone. Resources are the common heritage of humankind: states with the technology to extract resources must share them with the states without the means. UNCLOS.

Outerspace (area beyond the reasonable upper limits of flying): may not be claimed by anyone. Resources are the common heritage of humankind: states with the technology to extract resources must share them with the states without the means. Governed by 1979 Outer Space Treaty (non-appropriation, peaceful purposes) and 1979 Moon Agreement (idea of non-appropriation). Counterfactual: Luxembourg, USA.

Note also that the 1972 Liability Convention creates strict liability – the launching state is responsible for any damage caused to the surface of the plant, or to an aircraft in flight (art 2). See Kosmos 954.

High Seas are *res communis*: No one can lay a claim to ownership, but states may exploit the resources for their own benefit.

JURISDICTION

Prescriptive Jurisdiction

A state may make laws, many different bases accepted (see *Lotus* and practice).

States do not need positive authorisation at international law to extend their prescriptive jurisdiction: "restrictions upon the independence of States cannot therefore be presumed". States have a "wide measure of discretion". (*Lotus*).

Territoriality: State where conduct occurs has prescriptive jurisdiction (universally recognised; trumps all other jurisdiction claims). Both subjective territoriality – act commenced or completed on state territory (*The Tennsyson*); and objective territoriality – act has effects on state territory e.g. economic regulation, criminal conspiracy (*DPP v Doot*) fall under this principle. Regarding the "effects doctrine", states must be careful not to interfere in the affairs of another state (*Swiss Watchmakers*).

Nationality: there is both the active nationality (perpetrator) and passive nationality (victims) principle.

The basic rule is that the attribution of nationality is within the domestic jurisdiction of the state.
However, the grant of nationality at international law is only opposable if "genuine or effective link" between a person and state of nationality (*Nottebohm*). There must be a close factual connection: You cannot extend nationality at will.
For companies, the state of incorporation or the location of the registered head office of corporation is sufficient (*Barcelona Traction*).

Passive nationality is more controversial, but in the last 40 years has found its way into many multilateral treaties e.g. drug-trafficking, hijacking, torture, counter-terrorism etc. '

Protective or security principle: There is very limited state practice. Essentially, crimes committed abroad by aliens that jeopardise state security (such as espionage, counterfeiting, treason). See *DPP v Joyce*; *Eichmann*. Limited support beyond crimes that threaten the *vital interests of the state*.

Universal Principle: Jurisdiction over extraterritorial acts by aliens regardless of links to state that is based on the idea that all states have an interest in punishing some serious criminal offences and that states, in doing so, are acting on behalf of the international community (*In re Piracy Jure Gentium*). Piracy, slavery, torture, war crimes, genocide. Usually provided for by treaty and requiring some kind of link with the prosecuting state.

Enforcement Jurisdiction

A state can force compliance with its laws and regulations if it has enforcement jurisdiction. Sovereignty over territory generally means capacity to exercise sovereign powers over people and things in that territory. But, failing the existence of a permissive rule to the contrary, the state may not exercise its power in any form in the territory of another state (*Lotus*).

EXTRADITION

Extradition may yet be requested from the state where the individual is located. Extradition treaties often contain these requirements:

1) Nationality – some say their citizens won't be extradited
2) Double criminality – offence for which extradition sought must exist in both states (and be criminal in both when it was committed) – *Pinochet*
3) Speciality – can only try extradited person for offence in respect of which extradition sought.
4) Political offence exception
5) *Ne bis in idem* (refused if individual already tried for same offence)
6) Diplomatic assurances e.g. make sure no capital punishment.

Aut dedere aut judicare: is recognised in most multilateral treaties dealing with international crimes, terrorism, hijackings and torture (e.g. art 5 CAT). Such a provision imposes an obligation on certain criminal conduct, and, where the state has jurisdiction over a perpetrator of such criminal conduct to prosecute that person, or, alternatively, extradite them to another state if they are unable or unwilling to do so (*Belgium v Senegal*). Importantly, the foremost obligation is to **prosecute**. Extradition is an option.

ABDUCTION

Abduction may involve a serious infringement of state sovereignty/territorial integrity, as well as violation of the legal process of that state, violation of extradition treaty oblgiations, breach of human rights norms etc.
A state may protest the abduction at the diplomatic level against another state.
A state may decide to use countermeasures and refuse to cooperate with the sponsoring state.
The abduction may be raised at the SC or be the object of a contentious case before the ICJ (sometimes) or handled by a human rights body (sometimes).
Individuals who have suffered abductions might be able to bring a civil claim against the perpetrators of the abduction.

IMMUNITY

Sovereign Immunity

Rooted in "perfect equality and absolute independence of sovereigns" (*Schooner Exchange*).
Immunity of states from jurisdiction of foreign courts is universally recognised (*Jurisdictional Immunities*).

Ask – does sovereign immunity apply?
Restrictive sovereign immunity is the contemporary norm: the state is immune from suit in cases involving injuries that are the result of its *acta jure imperii* (*Governor of Pitcairn v Sutton; Jurisdictional Immunities*). This means that the state is not immune from when injuries result from *acta jure gestionis*.
To distinguish between the cases, we look at the "nature of the acts" test; and the "purpose" test if the nature test is inconclusive (*I Congresso del Partido*).

If sovereign immunity does apply, it is procedural in nature (*Jurisidictional Immunities*). Even if *jus cogens* breaches, no impact on the procedural issue.
If sovereign immunity does not apply, must note that even if there is no immunity, decision cannot be enforced *except by express consent*. [Or there is a statement in *Jurisdictional Immunities* case which says measure of constraint only permitted over property used by the state for commercial purposes].

If this is an intense problem question on this for some reason, turn to page 108 of notes.

Immunity of State Officials

Immunity rationae personae: "personal immunity" attaching to select state representatives by virtue of the office they occupy. It covers private and public acts, and includes inviolability and immunity from criminal jurisdiction. Limited temporally.
Immunity *rationae materiae*: "functional immunity" attaches to official acts of state representatives once they have left office: acts performed in an official capacity.

Immunity is only a bar from process of foreign courts.

Pinochet v Arrest Warrant

Regarding a current official: A current foreign minister is immune from prosecution in another state (*Arrest Warrant*). They are awarded immunity "not … for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states". In *Pinochet*, 5/6 of the Lords in the majority also held that a current HOS continues to enjoy absolute immunity under international law for acts of torture.

Regarding a former official: *Pinochet* (UKSC) held that a former HOS only has immunity *rationae materiae*, and that acts of torture, being a "full constituted international crime" cannot constitute an official act (at least where a state has ratified the CAT). A former HOS may therefore be prosecuted. By contrast, while it did not deal directly with the situation, the Court in *Arrest Warrant* suggested that there was no special rules where someone is suspected of having committed war crimes or crimes against humanity. They laid out 4 instances under which high officials could be prosecuted internationally – one being in respect of acts committed before/after office, or during in a private capacity, but they did not suggest that torture (as in *Pinochet*) cannot be committed in a private capacity.
[The concurrent opinion by Higgins, Kooijmans and Buergenthal, though, does point more towards the findings in *Pinochet* – they stated that such crimes "cannot be regarded as official acts because they are neither normal state functions nor functions that a state alone can perform".]

Diplomatic Immunities

1961 Vienna Convention largely represents customary law (*US v Iran*).

Establishment of diplomatic contact is purely a matter of consent (art 2 1961 Vienna Convention). Once they have done so, the obligations of the receiving state are applicable even during armed conflict (art 44).

While there are immunities for the sending state's officials, as per art 41 they are still under an obligation to obey local law, not interfere with the internal affairs of the state, and must not use the premises of the mission in any manner incompatible with the functions of the mission.

Diplomatic Premises

Territory is that of the receiving state (*Radwan*), but the inviolability of the premises is still crucial (art 22 1961 Vienna Convention). This such that in *Libyan People's Bureau Incident*, despite a British policewoman being shot by sniper fire from within the embassy, the UK did not immediately go in: They severed diplomatic relations with Libya instead, then later searched.
Archives and documents are inviolable (art 24 1961 Vienna Convention)
Must provide full facilities (art 25 1961 Vienna Convention).
Allowing some protest on the street will not violate art 22 (*Roques*): but need to keep them safe (*US v Iran*).

Diplomatic Staff

"The person of a diplomatic agent shall be inviolable" (*US v Iran*); (art 29).
Officials are immune from criminal and civil jurisdiction (arts 29–31) and from taxes (art 23).

Diplomatic Communications

There is freedom of diplomatic communication (art 27 1961 Vienna Convention).
The diplomatic bag must be allowed through without inspection (art 27(3)); UK says it can scan bags. Sniffer dogs okay.
Remedy on believing there is bad stuff is to ask the country if they can search it; or to send it back.
Requires certain visible external marks (art 27(4)) – the lack of which allowed UK to find Dikko in crate.

REMEDIES FOR HOST STATE

They can refuse to receive specific diplomatic staff.
They may declare someone *persona non grata* (art 9), and if the sending state does not recall the diplomat they will lose protected status.
They may break diplomatic relations and require withdrawal of mission (*Libyan People's Bureau Incident*).
If there is a good relationship, may ask the state to waive immunities (art 32)/send them back (Malaysia/NZ e.g.).

1929 – French officials entered the Soviet Embassy in Paris after allegations that persons were being detained and might be executed there, which Sibert argues was consistent with international law: "no civilised state could permit a foreign legation to be made a place of imprisonment, or, *a fortiori*, a place of execution".

Consular Relations

Governed by 1963 Vienna Convention – immunities are more limited in scope. Inviolability of consular premises (art 31); freedom of communication (art 35); facilitation of contact with nationals of sending state (art 36 and *Lagrand*); Immunity of consular agents only in relation to official acts (arts 41, 43); sending state may waive privileges and immunities (art 44); Families do not enjoy the same extensive immunities.

Immunities of IGOs

IGOs have functional immunity: Necessary to allow the IGO to fulfil its purposes; and their representatives will have immunities to allow them to do their job. Certain officials of the UN will also be entitled to diplomatic immunities.

Article 105 UN Charter: UN to have privileges/immunities necessary for the fulfilment of its purposes; and representatives and officials will also enjoy such privileges and immunities as are necessary for the independent exercise of their functions.
See also the 1946 General Convention on the Privileges and Immunities of the UN.

Special Rapporteur entrusted with a mission for the UN is to be regarded as an expert on mission under article VI, s22 of 1946 Convention on the Privileges and Immunities of the UN. As such, Cumaraswamy, who made comments to the media in his official capacity, was immune from proceedings. Malaysia breached international law by failing to notify the courts of this.

Section 8 of the IMF constituent document entitles certain officials to immunity from legal process with respect to acts performed by them in their official capacity, except when the Fund waives the immunity. The IMF waived Strauss-Kahn's immunity to be clear.

LEGAL CAPACITY

States are the top. Only states may become members of the UN (art 4 UN Charter); only states may call upon the UN SC if there is a threat to world peace and security; and only states may appear before the ICJ in contentious cases (art 34 ICJ Statute). International law norms have their genesis in the consent of state – "the rules of law binding upon States therefore emanate from their own free will … Restrictions upon the independence of States cannot therefore be presumed" (*Lotus*).

IGOs have functional capacity: whether conferred by constituent treaty or implied powers necessary to perform functions effectively. UN has legal capacity in member states (art 104 UN Charter) and can bring claims *against* non-member states (*Reparation for Injuries Advisory Opinion*). It also has rights of mission (legation) and privileges and immunities (art 105 UN Charter) "such as are necessary for the fulfilment of its purposes".
Whether international organisations can enter treaties depends upon the rules of that organisation (1986 Vienna Convention) – but there can also be an implied power to enter into treaties (*Reparation for Injuries, Certain Expenses, WHO Nuclear Weapons*).

Individuals have an extensive range of rights but limited procedural capacity. They also have obligations at international law, such as responsibility for crimes.

MNCs are not international persons, but in practice they have an important role on the international plane. They function as economic and political actors with limited international rights. They can enter into contracts with governments which may even be governed by international law (*Texaco v Libya*), but they cannot enter into treaties or bring claims before the ICJ (*Anglo-Iranian Oil Co*).

NGOs are part of "international civil society". They have limited personality depending on the consent of states. Many have consultative status with the UN, and observer status in IGOs and international conferences. They may have an important role in the creation, monitoring and enforcement of international law (human rights, international environmental law, armed conflict). See also IUCN and ILO, who even have state representatives + some other people involved in their organisation.

Insurgents/terrorists/national liberation movements may lack formal personality but can influence international affairs e.g. PLO liked to do a lot of aircraft hijacking, so many of the conventions about crimes against aircraft stem from these terrorist attacks.

Indigenous peoples have an increasingly important role. But the most important question is whether they have a right of "external self-determination". While UNDRIP does, under article 3, state that "indigenous people have the right of self-determination", it is then stated that while they have the right to autonomy and self-government in relation to internal affairs (article 4 UNDRIP), the territorial integrity of the state is protected by article 46 UNDRIP. There is no right to form a separate state. Therefore, indigenous peoples seemingly have a right to *internal self-determination;* rather than external self-determination.

COLLECTIVE MEASURES/SELF-DEFENCE etc.

Security Council

The SC has primary but not exclusive responsibility for peace and security (art 24 UN Charter; *Certain Expenses of the UN AO, Kosovo*), and is the only organ that can pass enforcement measures (ch VII UN Charter).

The SC determines when a situation threatens international peace and security (art 39 UN Charter). May give a broad definition of this (even intra-state e.g. Somalia). There must be a 9/15 vote in favour of the threat's existence (art 27), including no veto. This triggers arts 41 (non-force measures – sanctions, embargo, economic and trade sanctions) and 42 ("all necessary measures" – including the use of force). May then make resolutions concerning these actions (still 9/15 + no veto – art 27).

All members must carry out (or at least not frustrate) these resolutions (art 25 UN Charter).

Member states undertake to make available to the SC, on its call (and in accordance with a special agreement), what the UN needs (armed forces, assistance, facilities, rights of passage) to maintain international peace and security (art 43 UN Charter).

Could also make non-binding recommendations using chapter VI powers, or use chapter VIII to get regional enforcement action (perhaps there is a better, localised actor – broad understanding e.g. NATO). Article 53 UN Charter allows arrangements with regional organisations for to resolve such disputes, but only with explicit authorisation by the SC. They will have to keep the SC informed of their activities at all times (art 54 UN Charter).

Art 51 of the Charter specifically recognises the inherent right of individual or collective self-defence if an armed attack occurs against a member of the UN *until the SC has taken the measures necessary to maintain international peace and security*.

General Assembly

GA can pass (non-binding) recommendations regarding peace and security (and anything else! Art 10 UN Charter), as long as the issue is not before the SC (art 12 UN Charter).

Uniting for Peace: Resolutions may be made under GA Res 377 1950 if the SC is *not exercising its functions* due to veto on the SC (interpretation of art 12 UN Charter). GA can meet on the request of the SC (procedural vote only – any 9 members) or majority of members of the GA. There must be a judgment that the SC is unable to act and then recommendations passed by a 2/3s majority of the members present and voting (art 18(2) UN Charter) (as recommendations with respect to the maintenance of international peace and security require a 2/3s majority of the members present and voting). This is, however, very rare.

If the SC has not even noticed – GA can call attention of SC to situations likely to endanger international peace and security (art 11). One of the six committees that the UN mainly acts through may help.

It might be that the state affected wants a UN presence through a PKO – if so, this is not enforcement action, so the GA may authorise (*Certain Expenses*).

A member against which preventative or enforcement action has been taken by the SC may be suspended from membership (e.g. South Africa in 1993) (art 5 UN Charter); or could be expelled (art 6 UN Charter – never happened) through a 2/3s vote of the members of the GA (art 18(2) UN Charter).

Secretariat

UN Secretariat (over 40,000 people) or the SG may take measures to restore peace. SG may have active role (like Hammarskjold/Annan – "good offices"). Will be involved if PKOs are wanted.

ECOSOC

Has an advisory and monitoring role (art 62 UN Charter). May be needed in the aftermath.

Also supervises UN specialised agencies (arts 63–64 UN Charter) who may be of some use (e.g. IMF in development or WHO).

ICJ

May help in the aftermath.

ICJ

CONTENTIOUS JURISDICTION

There is an obligation on all states to resolve disputes peacefully (art 2(3) UN Charter).
Only states may bring a contentious claim before the ICJ (art 34 ICJ Statute).

State may bring a case when

a) It is the victim of a breach of international law
b) On behalf of one of its nationals once the person concerned has exhausted local/judicial remedies (diplomatic protection)
c) Perhaps against another state that has breached an obligation *erga omnes* e.g. torture, genocide.

State needs a *legal dispute* to have arisen: Court will not handle political matters. There must be a clash of opposing views, with state A opposed to state B. The defendant state must be aware, or at least could not have been unaware, that there was a dispute between it and the claimant state (*Marshall Islands*).
The ICJ must have jurisdiction. Jurisdiction requires consent.

1) *"Compromis"*
    I. *Danube Dam* case; *North Sea Continental Shelf* cases. No interlocutory proceedings necessary.
2) *Forum prorogatum*
    I. Other party conveying assent to voluntary submission after the case is referred e.g. *Haya de la Torre; Certain Criminal Proceedings in France*
3) *Compromissory or jurisdictional clause*
    I. Look to see what the Treaty says about how disputes are to be resolved.
    II. E.g. art 9 Genocide Convention and art I of the Optional Protocol to the 1963 Vienna Convention on Consular Relations both provide specific jurisdiction to the Court.
    III. But *lots do not* give exclusive jurisdiction to the court e.g. art 22 CERD requires negotiation first – and this requires *genuine negotiation* before it is exhausted (*Georgia/Russia*)
4) Optional Declaratoin (art 36(2))
    I. State parties may at any time declare that they recognise the jurisdiction of the Court in all legal disputes concerning
        i. the interpretation of a treaty;
        ii. any question of international law;
        iii. the existence of any fact which, if established, would constitute a breach of an international obligation;
        iv. the nature or extent of the reparation to be made for the breach of an international obligation.
    II. **Principle of reciprocity**: both states must have accepted the jurisdiction of the Court.
    III. Reservations? Each state may make use of the other's reservations (*Norwegian Loans*)
    IV. It's fine if the State has entered the jurisdiction without putting a time limit on when it accepts disputes from (*Interhandel*)

Applicable Law

The court can use treaties, custom, general principles and subsidiary sources – judicial decisions and teaching (art 38(1) ICJ Statute). The fact that a particular treaty is not available for the Court to use does not mean that it cannot use the customary law that that treaty may also express (*Nicaragua*). Custom is not subsumed into treaty. It continues to have its own existence (*Nicaragua*).
General principles of law include duty to provide reparation for an injury (*Chorzow Factory*); use of circumstantial evidence (*Corfu Channel*); doctrine of estoppel (*Eastern Greenland; Temple of Preah Vihear*); doctrine of equity (*North Sea Continental Shelf*; *Frontier Dispute* (Burkina Faso/Mali).
Parties could also agree to have the Court decide the case *ex aequo et bono* (art 38(2) ICJ Statute), but never have.

Provisional Measures

The Court can order provisional measures (art 41 ICJ Statute). These may be justified to "prevent irreparable prejudice to the rights which are the subject of the dispute" (*Nuclear Tests*) – must be linked to the claim or rights that are the subject-matter of the proceedings (*Temple of Preah Vihear*). These measures will be binding (*LaGrand*).

Rights of Third Party affected?

If the rights of a party are so linked with another state which has not consented to the Court's jurisdiction, then the Court may refuse to hear the case (*East Timor; Monetary Gold*). In *Monetary Gold*: Albania's legal interests would "not only be affected by a decision but would form the very subject-matter of the decision".

Third Party Intervention?

Article 62 ICJ Statute: A state which considers it has an interest of a legal nature in a dispute that may be affected by the decision in the case may submit a request to intervene. Court will decide whether to accept this, with the burden on the state requesting intervention to show convincingly that it has an interest of a legal nature (*El Salvador v Honduras*). Will only be able to intervene if the case proceeds to the merits. The intervening party does not become a party to the dispute and so is not bound by the Court's final judgment. See *El Salvador v Honduras*.

Article 63 ICJ Statute: A state which is party to a convention the construction of which is before the ICJ (but not the main proceedings) may file a declaration of intervention limited to point of interpretation at issue in the proceedings (*Whaling in the Antarctic*). If conditions in rule 82 of ICJ Rules are met then able to intervene. Consequence is that the state is bound by the construction of the Convention (*Whaling in the Antarctic*). [See also *Haya de la Torre*; *Wimbledon* case).

One State not appearing?

The Court must still decide the claim is well-founded in fact and law before it can rule in its favour (art 53 ICJ Statute), may look to early pleadings/public statements (as in *Nicaragua*).

Judgment?

Only legally binding on the parties (art 59 ICJ Statute) – although also the construction of a convention which a state has successfully intervened on through art 63 ICJ Statute (but not art 62 ICJ Statute).

But only way to get the state to comply with the judgment is to get the SC to put binding measures on the state.
No right to appeal (*Temple of Preah Vihear*). Can request interpretation (art 60 ICJ Statute) or revision (art 61 ICJ Statute).

ADVISORY OPINIONS

ICJ may give an AO on any *legal question* at the request of whatever body that may be authorised by or in accordance with the UN Charter to make such a request (art 65 ICJ Statute).
Article 96 UN Charter says GA and SC may request AO on any *legal question*; other bodies only on legal questions arising within the scope of their activities (e.g. *WHO*).

In determining scope of activities, can look at both constituent instrument and practice of the organisation to determine what their competence is (*Certain Expenses*). For WHO, nothing in constituent instrument suggesting they had this role, objectives were to attain highest possible level of health for people (not affected by legality of the use), and the principle of speciality means important that they do not encroach on the responsibilities of other organisations (*WHO*).

ICJ takes a broad view of what a legal question is (*Kosovo AO*). ICJ has discretion as to whether to answer a legal question, too (*Immunity of Special Rapporteur*), but the burden is on the Court to provide a reason as to why it should decline jurisdiction (*Kosovo*). They can also reformulate it.

AOs may be decisive if a Treaty between the UN and its members provides (1946 Convention on Privileges and Immunities of the UN art VIII s 30 and *Immunity of Special Rapporteur*). But normally not.

Does a rule of customary law exist?

Customary law – general practice accepted as law – is a source for the ICJ (art 38 ICJ Statute). It requires both state practice and *opinion juris* before it is custom.

State practice may be found in statements by competent government officials, diplomatic correspondence and other diplomatic exchanges, opinions of government legal advisers, treaties, domestic legislation, international and national court decisions, statements and voting patterns in international organisations, and so on. The value of these acts must be weighted according to their reliability. It will depend on:

(1) Uniformity and consistency
   a. Extensive but not universal (*Asylum*)
   b. Absolute uniformity not essential (*Nicaragua*)
   c. Look at the practice of specially affected states (*North Sea Continental Shelf*)

(2) General application (*North Sea Continental*)
   a. Practice must be applied by a sufficient number of states.
   b. Regional and local custom is possible (*Asylum; Right of Passage*) but the more localised the custom, the more you must have an almost absolute practice (*Asylum*). And cannot conflict with *jus cogens*.

(3) Duration
   a. Least important element – flexible if uniformity and generality are present (*North Sea Continental Shelf* cases) "state practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked"
   b. Instant custom is possible (see airspace after WWII or law of sea and UNCLOS perhaps)

Opinio juris: the practice must be undertaken in the belief it is required by law. Existence of a subjective element is implicit in the very notion of the *opinion juris sive necessitates* (*North Sea Continental Shelf*); although *Nicaragua* seemingly allows us to deduce the attitude of the parties from their practice.

Following the rules after becoming party to a treaty that contains the purported custom does not show *opinio juris* as then they may just be acting in the application of the Convention (*North Sea Continental Shelf*).

May also acquiesce to custom (a failure to protest is normally taken as acquiescence to custom).

Changing customary law: can enter into a treaty altering it (unless it is *jus cogens* customary rule); can persist with contrary behaviour and trust other states will begin to act this way (e.g. EEZ & UNCLOS).

Rule of the persistent objector: If the state is opposed before it becomes a rule, and signalled as such through protest, diplomatic notes etc.; persisted during formation and afterwards, then they will not be bound by the custom (*Anglo-Norwegian Fisheries*). However, newly independent states will have to accept the customary law.

USE OF FORCE

Self-defence

1) Armed attack?
    - Armed attack is "not merely actions by regular armed forces across an international border" but also
    - "the sending by or on behalf of a State of **armed bands**, groups, irregulars or mercenaries, which carry out acts of armed force against another State **of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces**" (*Nicaragua*)
    - "if such an operation, **because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed forces**" (*Nicaragua*)
        - Unclear, however, what "an armed attack rather than a mere frontier incident" means.
        - In *Nicaragua*, "mere incursions"
2) Request by the victim state
    - Declare you are victim of armed attack (to UN/another body), call on assistance (e.g. Kuwait when invaded by Iraq)
3) Necessity?
4) Proportionality?

Countermeasures

If you fall below the threshold of an armed attack, there is a right to **individual** counter-measures but not collective ones (*Nicaragua*).

Countermeasures require (*Danube Dam*)

- Wrongful act (by the other State)
- Remind the other State of their obligations
- Proportionality (Czechoslovakia breached this element – they could develop some of Variant C but were not permitted to put it into operation. This was disproportionate – unilaterally assuming control of a shared resource).

<u>Non-interference</u>

Resolution 2625 (Friendly Relations) 1970 requires non-interference in the affairs of another state (reflected by art 2(1) UN Charter too).

Non-interference breached by laying mines, overflights, forcing Nicaragua to reconsider position (*Nicaragua*). Economic sanctions would have been fine though (*Nicaragua*).

Treaties

VCLT IS CUSTOMARY INTERNATIONAL LAW (*Danube Dam*).

Treaties enter into force in such a manner/on such a date as it may provide/the States agree (art 24 VCLT).
After entry into force should be transmitted for registration (art 80 VCLT). Treaties may only be invoked before an organ of the UN if they have been registered (art 102 VCLT), although despite a failure to do so, the agreement "remains no less binding upon the parties" (*Qatar/Bahrain*).

A treaty is a binding agreement between parties governed by international law. Rule of *pacta sunt servanda* applies: must be performed in good faith (art 26 VCLT).

After signing, there is an obligation to act in good faith prior to its entry into force (art 18 VCLT).
However, a state only has to refrain from acts which would defeat the purpose and object of a treaty until it has made its intention clear not to become party to the treaty. A state is never obliged to ratify a treaty (e.g. Rome Statute and US).

Domestic law is no justification for failure to perform the Treaty (art 27 VCLT). *Unless art 47 VCLT* applies (consent to be bound is invalidated because the consent was expressed in violation of a provision of internal law regarding competence to conclude treaties … and that violation was manifest and concerned a rule of its internal law of fundamental importance. Manifest means objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.

Treaties cannot create obligations or rights for a third state without it consent (art 34 VCLT), however, if it creates rights it will be assumed the third state accepts them (art 36 VCLT). Obligations may be expressly accepted in writing, too (art 35 VCLT).

And a treaty can become binding upon a third state as a customary rule of international law (art 38 VCLT).

The UN Charter has priority over any other treaty obligations that conflict with it (art 103 UN Charter). If the SC adopts a resolution that contravenes a treaty, the SC resolution will govern (*Lockerbie* – SC Resolution 748 conflicted with Montreal Convention).

Companies cannot enter treaties (*Anglo-Iranian Oil*); but commercial agreements between states and legal persons may refer to and be governed by international law (*Texaco v Libya*).

Can also have other binding law e.g. unilateral statement by state representatives (*Nuclear Tests*; *Frontier Dispute* (Burkina Faso/Mali). "It all depends on the intention of the State in question…" (*Frontier Dispute*).

Treaty rights/obligations are not retroactive (art 28 VCLT), absent a contrary intent.

Does UN Charter bind non-UN members? Article 2(6) UN Charter gives this impression (the organisation shall ensure that states which are not members act in accordance with these principles so far as may be necessary for the maintenance of international peace and security); but ICJ AO on South West Africa (Namibia) states that they are not. However, non-members are still bound by the general principles of customary international law, and in 1991 it was clear that regimes of apartheid were unacceptable.

Repealing a treaty

- When a state becomes party to a subsequent treaty that is either wholly or partly inconsistent with the provisions of an earlier treaty…
    - The prior treaty prevails over the later one if the later claims to be subject to it or not incompatible (art 20(2) VCLT)
    - If all the same parties in both, then the earlier treaty applies to the extent still compatible with the latter (art 30(3) VCLT)
    - If there is a disparity between the parties to two treaties, earlier treaty applies between those party to both to the extent that it is not incompatible with the later treaty; but the treaty to which both are parties governs *their* mutual rights and obligations (art 30(4) VCLT).
- If all the parties to a later treaty relating to the same subject-matter pass a new treaty where it seems that they intend the matter should be governed by that treaty, or the new treaty is so incompatible with the earlier one that the two cannot be applied at the same time, then the earlier treaty is terminated (art 59 VCLT).
- *But the UN Charter prevails over subsequent inconsistent treaties (art 103 UN Charter).*

Reservations

A reservation is a unilateral statement made by a State which purports to exclude/modify the legal effect of certain provisions of the treaty (art 2(d) VCLT). Must be formally confirmed in writing on ratification (art 23(2) VCLT).

By art 19 VCLT, reservations are permissible unless they are not permitted by the treaty (see art 309 UNCLOS; art 120 Rome Statute) or they are incompatible with the treaty's object and purpose (UN Charter).

No acceptance is needed if a reservation is expressly authorised by a treaty (art 20(1) VCLT).

Acceptance by all the parties is required if it appears from the limited number of negotiating states and the object/purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound (art 20(2) VCLT).

Where a treaty is a constituent instrument of an international organisation (and unless it otherwise provides), a reservation requires the acceptance of the competent organ of that organisation (art 20(3) VCLT) e.g. Human Rights treaty.

In cases not falling under these, and unless the treaty otherwise provides (art 20(4) VCLT):

- Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State;
- An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting state;
- An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

If no objection is made within 12 months, the reservations are deemed to have been accepted (art 20(5) VCLT).

Per arts 20 and 21 VCLT, acceptance and objection modify treaty relations between the objecting and reserving state(s), like a series of bilateral treaties (see also *English Channel Arbitration)*. The reservation will have reciprocal effect.

May be able to make late reservations (contrary to ILC Guide to Practice on Reservations of Treaties) – it just depends on the reactions of other states. Ultimately, whether other states accept reservations is up to them (*Genocide AO*).

Can also withdraw reservations (or objections), unless the treaty otherwise provides (art 22 VCLT).

If a treaty is invalid because of reservations between two parties, general principles of law/custom may still be used (*English Channel Arbitration*).

States may also make interpretative declarations as to how they consider the treaty should be interpreted. These must *not* purport to exclude or modify the legal effects of a treaty (*Belilos*). Whether it is a declaration will depend on what it seeks to achieve, which will be determined by interpreting the text of the declaration and its legal effect (*Belilos*).

Modifying a treaty

Treaties may be amended by agreement between the parties (art 39 VCLT), although need to check what the provisions of the Treaty say.

Amendment (art 40 VCLT): This is a proposal to change a treaty, amongst all parties, and entitles a party to also be party to new instrument. See International Whaling Convention article V, also, which says that amendments will become effective with respect to contracting governments ninety days following notification of the amendment by the Whaling Commission unless they have objected (so binding unless objection, rather than, as is normal, the other way around).

Modification (art 41 VCLT): This is a side agreement by two or more parties to a treaty. It must not have a negative effect on the other parties to the agreement, nor have a negative effect on the other parties to the agreement.

Interpretation of a treaty

Should look to the intention of the parties, ordinary meaning of the words, and the aims and objectives of the treaty (see arts 31 and 32 VCLT – see also *Golder v UK*). This includes looking at subsequent agreements, practice, relevant rules of international law applicable to party relations, any "special meaning" (art 31 VCLT); and supplementary means of interpretation such as the travaux preparatoires are allowed (art 32 VCLT).

Where treaties were authenticated in two + languages, they are assumed to be equally authoritative unless parties agree that a particular version shall prevail in case of divergence; alternatively if the divergence cannot be removed by using arts 31 and 32, "the meaning which best reconcile the texts, having regard to the object and purpose of the treaty, shall be adopted" (art 33 VCLT). See *Lagrand* (regarding whether provisional measures are binding – art 41 ICJ Statute).

INVALIDITY OF TREATIES (things leading up to the adoption of the treaty + jus cogens)

Validity may only be impeached through VCLT provisions; while termination can only occur via application of the provisions of the treaty or of the VCLT (art 42 VCLT).

Treaties are **voidable** if

- Manifest violation of internal law regarding competence to conclude treaties that concnerd a rule of its internal law of fundamental importance (art 46 VCLT) – manifest means objectively evident to any State conducting itself with normal practice and in good faith.
- Negotiator failed to follow instructions and other state knew (art 47 VCLT)
- Treaty is based on an error related to fact/situation which was assumed by the State to exist at the time the treaty was concluded and formed an *essential* basis for its consent to be bound (art 48 VCLT – mainly boundaries – *Temple*)
- Fraudulent conduct of another negotiating state (art 49 VCLT)
- Corruption or bribery of the state's negotiating representative (art 50 VCLT)

Treaties are **void** if

- Negotiator lacks authority (but see arts 7–8 VCLT)
- Expression of consent procured by coercion of the representative through acts or threats directed against him or her (art 51 VCLT)
- State was coerced by threat or use of force (art 52 VCLT)
- There is a conflict with a rule of *jus cogens* (art 53 and art 54 VCLT); see *Barcelona Traction*

If the treaty is void, then per art 69 VCLT, the provisions will have no legal force. If acts have been performed in reliance on the Treaty, each party may require the other to put it back in the situation that would have otherwise existed; but acts performed in good faith before invalidity invoked not unlawful by reason only of invalidity of treaty except for party to which fraud, corruption or coercion imputable.

If the treaty is void because it is in conflict with a rule of *jus cogens*, then, per art 71 VCLT, there must be an elimination of any act performed in reliance on any provision conflicting with *jus cogens*; and must bring actions into conformity with *jus cogens*.

NORMAL Withdrawal/Denunciation/Termination/Suspension

- Termination and withdrawal may only take place by operation of provisions of the treaty or by consent of all the parties to the treaty (art 54 VCLT)
    - Doesn't matter if so many withdraw that it's less than what entered into force (art 55 VCLT)
- If the treaty does not say anything about its termination, and which says nothing about denunciation/withdrawal, cannot be denounced/withdrawn unless it is established that the parties intended to admit the possibility of denunciation or withdrawal; or a right to do so may be implied by the nature of the treaty (art 56 VCLT)
    - A party acting under this must give at least 12 months' notice of its intention to denounce or withdraw the treaty (Art 56 VCLT).
- Termination is usually of the agreement as a whole (art 56 VCLT). It requires the agreement of all parties.
- Suspension is effectively a temporary termination (art 57 VCLT).
- Could also be terminated by operation of law (art 73 VCLT), but not discussed further in VCLT.
- Terminated by new treaty relating to the same subject matter (art 59 VCLT).

EXCEPTIONAL CIRCUMSTANCES – TERMINATION/SUSPENSION

Material breach (art 60 VCLT) means not performing a fundamental provision of the Treaty that thereby deprives it of any meaningful purpose. There was a potential material breach in October 1992 in *Danube Dam*, but the termination was in May 1992, when no such breach had occurred.

Supervening impossibility of performance resulting from the permanent disappearance or destruction of an object indispensable for the execution of the treaty (art 61 VCLT). *Danube Dam* did not determine whether an "object" could be understood to embrace a legal regime, as, even if this were the case, the regime had not ceased to exist. Possibility for the parties to ensure the object did not disappear through renegotiating the Treaty (through its articles 15, 19, 20). They could, at any time, make the required readjustments between economic imperatives and ecological imperatives (*Danube Dam*).

Fundamental change of circumstances (art 62 VCLT). The existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change must be to radically transform their remaining obligations. Can only apply in "*exceptional circumstances*". *This cannot be invoked where the treaty establishes a boundary or if the fundamental change is the result of a breach of an obligation*, as for Hungary/Slovakia.

State responsibility: If there is a *state of necessity* argued by a party, this is really saying that they accept they have breached an obligation but want to say that it is acceptable. Necessity will only suspend the application for the period of necessity (*Danube Dam*). Necessity requites that the essential interests of the state are engaged and that there is a grave and imminent peril. While a need to protect the environment can be included within essential interests, in *Danube Dam* there was no

grave and imminent peril (something that might occur but which had not occurred; and Hungary could easily take other steps using articles within the treaty between the states).

COUNTER MEASURES MAY BE POSSIBLE IN RELATION TO SOME WRONGFUL STUFF EVEN IF THESE DON'T APPLY ☺

CONSEQUENCES OF VALID TERMINATION/SUSPENSION

A valid termination only has prospective effect; parties are released from further performance; no requirement to return to *status quo ante* (art 70 VCLT).

A valid suspension means that the affected parties are released from performance during suspension, but the parties cannot obstruct resumption of the operation of the treaty (art 72 VCLT).

State Responsibility

Breach of an international obligation entails an obligations to make reparation (*Chorzow Factory*; ILC art 1 – ILC draft articles reflect customary law).

An "internationally wrongful act" includes breaches of all forms of international legal obligation. It can be an action (*Nicaragua*) or an omission (*Tehran Hostages*).

In general, a strict theory of liability prevails, although there may be specific fault requirements in the primary obligations (*Corfu Channel*) e.g. intention may be important to prove genocide (*Genocide*).

Reparation is due even when the "injury" is moral (ILC art 31(2); *Rainbow Warrior*).

<u>Are they responsible for actions</u>?

Conduct of organs of government (legislature, judiciary, executive, administration, armed forces), or those acting as agents of the state may be attributed to the state (art 4 ILC).
Conduct of a person other than an organ that is empowered by the law of the State to exercise elements of governmental authority is an act of the state (art 5 ILC).
State is responsible for acts done by officials and entities within their express *and* apparent authority (art 7 ILC).

The state is not prima facie responsible for:
Acts of private persons *unless* they exercise in fact elements of governmental authority and in circumstances such as to call for the exercise of those elements of authority (art 9 ILC) (*quite hard to show – NZ lucky with Rainbow Warrior*).
Conduct of an insurrectional or other movement (art 10 ILC). If that conduct is successful, it becomes that of the new state; if it is unsuccessful, the conduct is only attributable to the state if it failed to exercise due diligence (*Sri Lanka AAP ICSID award*).
Conduct of non-state actors, unless it is acknowledged and adopted by the state as its own (art 11 ILC). Generally, purely private acts do not engage the responsibility of the State (*Mellen*), but if condoned or taken over by the state, such acts may entail their responsibility (*Tehran Hostages*). Ayatollah declared the American Embassy was "a centre of espionage and conspiracy" and that they do not enjoy diplomatic respect; would not hand back premises/hostages. The approval then "translated continuing occupation of the Embassy and detention of the hostages into acts of that State".

Alternatively, conduct of non-state actors if the State had "effective and complete" control (*Nicaragua*, *Bosnia/Serbia genocide*)

The state is also liable for aid or assistance that is in violation of international law (art 16 ILC) if the aiding state is bound by the respective rule, acts with knowledge of the circumstances of the violation, and does so with a view to facilitating the commission of the violation and actually does so. It is quite hard to be caught by this.

<u>Standard of liability</u>

In terms of taking due diligence, states must take all reasonable measures within their powers to prevent and repress international law violations (art 4 ILC). A "State cannot be under an obligation to succeed" (*Genocide*).
In *Armed Activities in DRC*, Uganda was responsible for "any lack of vigilance" in preventing breaches of international law.
It is irrelevant if the acts are *ultra vires* internal law (art 3 ILC); international law relies on "apparent" authority (*Caire*).

<u>Bringing a claim against another state</u>

1. Injured state entitled to invoke responsibility of another state (art 42 ILC), if the obligation is owed to that state individually, or obligation *erga omnes* (art 48 ILC; *Barcelona Traction*)
   But can modify these rules (see Iran-US Claims Tribunal)
2. A state can espouse claims of its nationals (*Panevezys-Saldutiskis*).
   The claim of nationality must be a "genuine link" with the sponsoring state (*Nottebohm*).
   For companies, this can be the place of incorporation or the place of head office *Barcelona Traction*).
3. All local remedies must be exhausted in the foreign state to espouse claims of nationals (*Ambatielos*)
   Unless there are no "effective and adequate" remedies (*Finnish Shipowners*)
   The requirement was waived by treaty (*ELSI*)

Circumstances Precluding Wrongfulness of the Act

No circumstances may preclude wrongfulness of a *jus cogens* norm.

Domestic law is not an excuse (art 32 ILC).

1. Consent
2. Countermeasures
    - These must be taken to (1) induce compliance with obligations; or (2) direct reparation
    - There must be:
        i. Wrongful act by the other state
        ii. Demand for compliance/redress; attempt to negotiate or engage dispute settlement; notification
        iii. Proportionate actions
            - Commensurate with the injury suffered (*Danube Dam* – Czechoslovakia went too far).
    - In taking countermeasures, the state is not relieved from fulfilling its obligations to settle the dispute and to respect the inviolability of diplomatic or consular agents, premises, archives and documents.
    - Countermeasures must be terminated as soon as the responsible state has complied with its obligations.
3. Force majeure
4. Necessity
    - Threat to the vital interests of the state, grave and imminent peril (*Danube Dam*)
        i. Can include ecological necessity (*Danube Dam*)
        ii. But can't just be a possibility of something happening (*Danube Dam*).
5. Self-defence

For self-defence (drawing out these elements)

1) Armed attack?
    - Armed attack is "not merely actions by regular armed forces across an international border" but also
    - "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces" (*Nicaragua*)
    - "if such an operation, because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed forces" (*Nicaragua*)
        - Unclear, however, what "an armed attack rather than a mere frontier incident" means.
        - In *Nicaragua*, "mere incursions"
2) Request by the victim state
    - Declare you are victim of armed attack (to UN/another body), call on assistance (e.g. Kuwait when invaded by Iraq)
3) Necessity?
4) Proportionality?

Remedies

There is still a duty of continuing performance of the obligation (art 29 ILC); and a duty to cease and not repeat violation (art 30 ILC).

Reparation (art 31 ILC) may be either through *restitution in integrum* or compensation if restitution inadequate/impossible.

Satisfaction (art 31 ILC) provides redress of "moral" rights, for instance through a declaratory judgment (*Arrest Warrant*) or a formal apology (*I'm Alone*).

The conduct of the injured state will be considered in determining the reparation (art 39 ILC)

Illegal action? – might yet be authorised (as SC Res 1483 did for US invasion of Iraq).

LAW OF THE SEA

First, what area are we in?
Internal waters – landward of baselines (art 8 UNCLOS); including rivers, ports etc.
Territorial Sea – 12 nm from baseline (art 3 UNCLOS); applies to seabed and airspace too (art 2 UNCLOS)
EEZ – up to 200nm from the baselines (art 57 UNCLOS); Islands which "can sustain human habitation or an economic life of their own can generate EEZ"
Continental Shelf – to 200nm regardless of shelf's physical characteristics (art 76 UNCLOS); up to 350nm if physical shelf extends.
High Seas – beyond the EEZ (200nm).

Nationality of ship?
Only the flag state can exercise jurisdiction over the vessel on the High Seas (art 92 UNCLOS).

Powers in these areas?
Internal waters – state has full sovereignty over internal waters, with no right of entry except in situations of distress. However, a state will refrain from exercising jurisdiction over matters that affect only the internal discipline of a foreign ship (*Wildenhus*).

Territorial sea – sovereignty is limited in respect of a vessel registered to another state. These vessels have the right to "innocent passage" (art 17 UNCLOS).

<u>Right of innocent passage</u>

To possess this right, ships must be in **continuous and expeditious passage** (art 18 UNCLOS), although there are exceptions for stops which are "incidental to ordinary navigation" or as a result of *force majeure*/distress/for the purpose of rendering assistance to persons, ships or aircraft in danger or distress (art 18 UNCLOS).

They must conduct passage innocently – not prejudice the "peace, good order or security of the coastal State" (art 19 UNCLOS). This is objective (*Corfu Channel*). Art 19(2): Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal State if the ship engages in any of the following:

a) Threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the UN Charter
b) Any exercise or practice with weapons of any kind
c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State
d) Any act of propaganda aimed at affecting the defence or security of the coastal state
e) The launching, landing or taking on board of any aircraft
f) The launching, landing or taking on board of any military device
g) The loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State
h) Any act of wilful and serious pollution contrary to this Convention
i) Any fishing activities
j) The carrying out of research or survey activities
k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State
l) *Any other activity not having a direct bearing on passage.*

Coastal states may regulate innocent passage for certain purposes (art 21 UNCLOS) (usually things like sea-lanes, pass rules around pollution and fishing, marine scientific research, protect cables and pipelines)

a) The safety of navigation and the regulation of maritime traffic
b) The protection of navigational aids and facilities and other facilities or installations
c) The protection of cables and pipelines
d) The conservation of the living resources of the sea
e) The prevention of infringement of the fisheries laws and regulations of the coastal State;
f) The preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
g) Marine scientific research and hydrographic surveys;
h) The prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

However, in so regulating, the coastal State must not hamper the innocent passage (art 24 UNCLOS).
The coastal state "may take the necessary steps in its territorial sea to prevent passage which is not innocent" (art 25(1) UNCLOS), which includes arrest or expulsion from the territorial sea (although can't arrest a warship because of sovereign immunity).
Innocent passage *may* be temporarily suspended (art 25(3) UNCLOS) but only if this is non-discriminatory, "essential for the protection of its security" and is duly publicised.

Rights in the EEZ

The coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources (living or non-living) of the water and seabed (art 56 UNCLOS) → oil, gas, fish.
It has jurisdiction regarding (i) the establishment and use of artificial islands, installations and structures, (ii) marine scientific research; (iii) the protection and preservation of the marine environment art 56 UNCLOS).
The coastal state may arrest vessels breaching laws relating to the management of living resources (art 73 UNCLOS).
Other states in the EEZ have the freedom of navigation, overflight, laying cables and pipelines (art 58 UNCLOS). The Freedoms of the High Seas (arts 88–115) exist as far as they are not incompatible with the rules above.
Here, states can do things listed in art 19 UNCLOS as long as they are not incompatible with the state's rights e.g. launching/landing.
Under art 61 UNCLOS coastal state determines allowable catch and ensures no over-exploitation;
Under art 73 coastal states have enforcement rights when exercising its sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ: may board/inspect/arrest/judicial proceedings.

Rights in Continental Shelf

The State has exclusive sovereign rights over the resources of the shelf for exploiting natural resources (art 77 UNCLOS).
Odd definition of sedentary species.
Rights over the shelf do not affect the legal status of the waters above (art 78 UNCLOS).

High Seas

Freedoms of the high seas include (art 87 UNCLOS) navigation, overflight, laying submarine cables and pipelines, freedom to construct artificial installations, freedom of fishing, freedom of scientific research.

The flag state has exclusive jurisdiction over ships bearing its flag (art 92 UNCLOS).
If not the flag state, can only board and inspect (but not arrest) a vessel in limited circumstances (art 110 UNCLOS)

- The ship is engaged in piracy
- The ship is engaged in 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.

Piracy

Piracy (art 101 UNCLOS) requires

1) Illegal acts of violence/detention/depradation
2) Committed by the crew/passengers of a private ship or aircraft
3) Committed for private ends (monetary gain but not political reasons – although same say both)
4) On the high seas/outside the jurisdiction of any state (no criminal rights in EEZ, so piracy can occur their cf T.S.)
5) Directed by one ship against another (not an internal situation)

➔ Any state may seize a pirate ship, arrest the persons on board, and prosecute them (art 105 UNCLOS). Cf: slave trade – board and inspect, release trafficked persons, but can't arrest.

Island

"An island is a naturally formed area of land, surrounded by water, which is above water at high tide" (art 121(1) UNCLOS).
"Rocks which cannot sustain human habitation/economic life of their own shall have no EEZ or continental shelf" (art 121).
Human habitation requires a stable community of people for whom the feature consists of a home, without dependent on external supply. It is more than matter of mere survival. (*South China Sea*).
Economic life of its own means one oriented around the feature and not just the surrounding waters. (*South China Sea*).

Rocks still have a 12nm territorial sea, but no EEZ/continental shelf. Islands allowed a 200nm EEZ and continental shelf.

In regards to Itu Aba, which is the largest of the Spratly Islands with a fresh water supply, ability to grow papayas, palm tress and other crops, but still unable to support a sizeable population; and which had had occupation by small groups of fisherman, and some mining of e.g. phosphate (finished 1933), the Tribunal said that it did not see anything "fairly resembling a stable human community" and that the EEZ was not introduced to grant "extensive maritime entitlements to small features whose historical contribution to human settlement was as slight as that".