INTERNATIONAL LAW TEST 1 NOTES

2 marks per minute

- 10 marks every 5 mins
- By 1pm, need to have covered 40 points (a little less ok re reading time)
- By 1.15, need to have covered an additional 30 = 70 in total
- By 1.25, need to have covered an additional 20 = 90 in total

CONTENT

SOURCES OF INTERNATIONAL LAW

Article 38 of the ICJ statute

1. The Court, whose function is to decide in accordance with international law such disputes as a resubmitted to it, shall apply
    a. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states
    b. International custom, as evidence of a general practice accepted as law
    c. The general principles of law recognised by civilised nations
        i. Duty to provide reparation for an injury (Chorzow Factory case, AMCO v Republic of
        ii. Indonesia case)
        iii. Use of circumstantial evidence (Corfu Channel case)
        iv. Doctrine of estoppel (Eastern Greenland case, Temple case)
        v. Doctrine of equity (North Sea Continental Shelf cases, Frontier Dispute (Burkina Faso/Mali))
    d. Subject to art 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law
        i. Judgments of ICJ only considered to be binding on the parties to the dispute (art 59 of ICJ Statute), they are often considered to be authoritative statements of international law. Attempt to ensure consistency with international law
    e. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono if the parties agree thereto (denotes equitable jurisdiction but has never been used)

Shaw says these are treated as authoritative and complete, but there could be other possible sources.

Other Possible Sources

- Resolutions of international bodies (e.g. if a state votes in favour, that can be seen as state practice)
    - But these are not per se a source of international law
    - Can sometimes be evidence that a norm has crystallised into custom
    - Some resolutions declare rules to be customary
- UNSC Resolutions
    - Perhaps not law and just a source of obligations
    - Where the UNSC deals with a threat to peace and security, they do impose obligations that others must follow through being party to a treaty, they could be considered a source
- Soft law instruments (guidance, principles)
    - Environmental law beginnings
    - But also might develop into practice or custom
- Scholarly writers who enunciate what the law should be or what they think it is
- Unilateral statements by states, e.g. what states think is happening
- Argument that ICJ now slightly outdated
    - Distinction between **formal and material** sources
    - Formal = confer rules of an obligatory character
    - Material = give substance to the rules

Hierarchy of Sources

1. **Jus Cogens**
    a. **Superior to both customary law and treaty** (*Application on the Prevention and Punishment of Genocide*)

b. The most important principles that the entirety of the international community has an interest in upholding (in fiction). Substantive rules that can be imposed against other states and that all states have an interest in protecting. All states have a legal interest / procedural right in their protection.
c. Torture, slavery, prohibition on use of force (since 1945)
d. Seen in arts 53 and 64 of VCLT
e. **A rule of jus cogens can only be modified by a subsequent rule of the same character**

Lotus case

- French and Turkish ship collided
- Negligent French officer arrested in Turkey and tried for manslaughter
- France argues there is nothing in international law saying it can do this but Turkey says nothing that prohibits it either
- PCIJ said all things that are not prohibited are permitted

CUSTOMARY INTERNATIONAL LAW

- Customary international law is unwritten rules and patterns of behaviour that emerge over time. They are established by a pattern of claim, absence of protests by states particularly interest in the matter at hand an acquiescence by other states (Shaw)
- Art 38(1)(b) ICJ statute – evidence of a general practice accepted as law. Two elements:
    - State practice ("general practice")
    - And belief ("accepted as law")
- Evidence can be in voting on a resolution, domestic legislation, acts and omissions
- The burden of proving the custom is on the state seeking to rely upon it (*Lotus, Asylum*)

STATE PRACTICE

This is the objective element. Found in statements by competent officials, diplomatic correspondence and exchanges, opinions of govt legal advisers, treaties, domestic legislation, international and national court decisions, statements and voting patterns in international organisations, etc. Consider the weight of all of this

1 Density of the practice

1. **Uniformity and consistency**
    a. Extensive but not universal (*Asylum*)
    b. Absolute uniformity not essential (*Nicaragua*)
    c. Care particularly about the practice of especially affected states (*North Sea Continental Shelf*)
2. **Must the practice be of general application, or can it be specific?**
    a. *North Sea Continental Shelf*
    b. Practice to be applied by a sufficient number of states
    c. Regional and local custom is possible (*Asylum* and *Right of Passage*)
        i. **PRESUMPTION:** CIL binds all nations but some may be regional
        ii. *Asylum:* claimed a specific practice where someone hiding in your embassy in a foreign state, there may be a custom that allowed persons hiding there to have free passage ouside the country. Said unique to the region. **Court thought that was possible** but had not in fact happened in this instance
        iii. *Near unanimous practice would be required*

iv. *Right of Passage:* ICJ said inhabitants of Portuguese enclave in India had right of pasae over Indian territory
v. Must be consistent w just cogens

3. **Duration – least important element**
    a. This is flexible if uniformity and generality are present (*North Sea Contintental Shelf*)
    b. Instant custom is possible, e.g. airspace after WWII, conduct in outer space

OPINIO JURIS

- The State must act in a particular way **because it feels bound to do so**
- Not mere usage or habit
- Essential step (*North Sea Continental Shelf*
- *Nicaragua:* emphasis that belief is considered obligatory by states participating

PROTEST, ACQUIESENCE AND CHANGE

- Can affect opinion juris
- A failure to protest is usually considered to be acquiescence to custom
    - Based on principles of good faith and equity (*Gulf of Maine*). Acquiescence is "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent"
    - You will be estopped from making a claim that you do not have to follow the rule
- **Dissent or change in consensus**
    - May bring about new rule or revised norm
    - If state subsequently refused to follow rule, then in breach
    - States trying to establish contrary norms may be in breach of international norms but may believe other states will begin to act like them
- Will be a struggle between competing rules as more states start to breach, e.g. EEZ

Rule of the Persistent Objector

To be a persistent objector you must

1. Object at the time of the formation of the custom
2. Have a continuous objection
3. And adopt a contrary practice

If they have always opposed the rule they will not be bound. Will not work for emerging states because you have to signal displeasure before the norm crystallises.

Anglo-Norwegian Fisheries case: If the event had been a CIL (which it was not), it would not have applied to Norway since they had always opposed its application to the Norwegian coast

NORTH SEA CONTINENTAL SHELF CASES

GENERAL LAW TO APPLY

- In a situation where there has been a short time frame and just a few countries have signed, state practice needs to be virtually uniform
- Must be a rule of norm-creating character. Needs to be a significant rule and probably not subject to reservations

FACTS

- Between Germany and Denmark + the Netherlands
- Dispute over the continental shelf, i.e. their sea borders
- Court was asked to decide the applicable principles and rules of international law that the parties should apply when deciding how to determine the delimitation of the boundaries

Position of Denmark/Netherlands

- Area is governed by the mandatory **equidistance-special circumstances rule**
- Says Germany is binding even though they have not signed up to th e Convention
- Now part of the **corpus of international law** and is therefore automatically binding independently of any specific assent, direct or indirect, given by states
- Two bases for this:
    - **Positivist view of international law:** based on the work done by international legal bodies, on state practice and on the influence attributed to the Geneva Convention itself (claiming that these show it has become a rule of customary international law)
    - **Fundamentalist aspect:** natural law of the continental shelf – equidistance principle seen as a necessary expression in the realm of delimitation of accepted doctrine
- If it is fundamental, then it must also be positivist, but if not fundamental, it could still be positivist.

Position of Germany

- Denies that the equidistance-special circumstances rule is obligatory for States not party to the relevant Geneva Convention
- The appropriate rule is for states to have a "just and equitable share" of the available shelf
- Claimed the just and equitable share rule was a recognised general principle of law, which, under art 38 of the ICJ Statute, the Court was entitled to apply

FUNDEMENTAL NATURE OF THE RULE

- Here, the Court examines how the equidistant rule came into existence
- The essential finding is that the manner in which it came into being does not suggest the rule was considered fundamental or as the only option, which means this claim fails
- Reasoning for why that is true:
    - Records of International Law Commission, who considered the rule from 1950-1956, there is no indication that any of the members supposed it was incumbent on the Commission to adopt the rule of equidistant because it was based on an inherent principle of the continental shelf (in fact, it does not seem to have been considered)
    - Historically, the rule was given neither prominence nor priority, e.g. Commission discussed various other possibilities and seriously considered adopting one of them
    - Before referring to the experts, Commission had felt unable to formulate any definite rule at all – previous trend was for delimitation by agreement or arbitration
    - Doubts about the principle still being expressed later
    - Some scenarios not considered, e.g. not merely two adjacent states but three or more on the same coast (which is the context here)
- **Conclusion:** in the light of this history, and of the record generally, it is clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking.
- Instead, remained governed by two beliefs
    - (1) No one single method of delimitation was likely to prove satisfactory in all circumstances and should therefore be carried out by agreement
    - (2) Should be effected on equitable principles

POSITIVIST ELEMENTS

Argument 1: Convention not declaratory of existing rules but the process of definition and consolidation of the emerging customary law took place through the work of the ILC, reaction of govts to that work and the proceedings of the Genera Conference and this emerging customary law become crystallised in the adoption of the Continental Shelf Convention by this conference

- This is not the sort of foundation on which art 6 of the Convention could be said to have crystallised such a rule
- This is because the rule was eventually proposed with significant hesitation and concern and on an experimental basis
- Additional support for this view is found in the fact that art 6 of the Convention is one where states can make unilateral reservations even if they sign or ratify
    - This could not be the case of general or customary law rules and obligation which by their very nature must have equal force for all members of the international community and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in their own favour
- If the provision is one which is meant to enunciate a customary law rule, it should be a provision where a unilateral reservation right is not preserved
- Normal inference is that articles that do not figure among those excluded from reservation were not regarded as declaratory of previously existing or emergent rules of law (but would not prevent them from eventually becoming law)

Argument 2: Such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent state practice

- This involves treating art 6 as a **norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law** and has therefore become binding on parties not party to the Convention
- **No doubt that this process is possible and sometimes occurs – constitutes one of the recognised methods by which new rules of customary international law may be formed**
- Not lightly regarded to have been attained
- Two steps before this happens
    - (1) Necessary that the provision should be of a fundamentally norm-creating character as could be regarded as forming the basis of a general rule of law
        - Not the case here: it is secondary to another primary provision
        - Exception re special circumstances and uncertain scope of the provision raise doubts of its potential to be norm-creating
        - Ability to make reservations to art 6 also calls into question whether it can be norm-creating
- The Court notes that even without a lot of time passing for creating the rule, a widespread and representative participation in the convention may itself be sufficient, provided it included states whose interests were specially affected
    - True, but in this case the number of ratifications is not sufficient
    - This may not be because they dislike the principle but that is merely speculative
- Re time
    - 10 years since the Convention was signed
    - But only 5 since it came into force
    - Less than 3 years when the present proceedings were bought

    - Passage of short period of time is not necessarily itself a bar to the formation of a new rule of customary international law on the basis of what was initially a conventional rule, an indispensable requirement would be that within the period in question, 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 and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved
    - Not met in this case
        - 15 parties had followed the rule
        - But many of them were party to the convention so were following the convention rule rather than a customary rule
        - Also a small number of total possible states
        - Purely speculative why other states have not signed up
- Even if more numerous, the Court says not sufficient because **two conditions must be satisfied:**
    - (1) The acts concerned must amount to a settled practice
    - (2) Carried out in such a way as to evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it
- *Lotus* case: abstention from taking action only sufficient to show a customary rule of law where such abstention is based on their being conscious of having a duty to abstain

Agency

- Law comes from *Nicaragua* – consider whether Contras are agents of the US
- Received money and training but still not under the **effective control** of the US
- US did not create Contras, did not follow all the advice of the US in the manuals and did some operations on their own
- Emphasises the high level of control needed to attribute liability
- Cannot look at act of Contras and must look at act of States

Nicaragua: Applicable Law

- Court cannot use UN Charter – US reservation
- But could still apply CIL
- US argued that Charter subsumed customary international law re prohibition on the use of force – art 2(4)
    - Court: just because treaty has a provision mirroring CIL does not mean it replaces the CIL
    - Charter does not cover everything about the prohibition on use of force
    - Discusses the “inherent right” of self-defence, not present in Charter
    - Some issues not explained, e.g. no definition of armed attack or of necessity and proportionality and non-intervention not defined in Charter – have to use norm to understand
- Even if they were identical, there are no grounds for holding that when CIL is comprised of rules identical to those of treaty law, the latter supervenes the former, so that CIL has no existence of its own”

Use of Force for Neighbouring States

- This is in Nicaragua but I do not have notes yet
    - She has noted here re what is an armed attack and self-defence – **get this for use of force art**

Blood test next week

LAW OF TREATIES

VCLT represents CIL – *Danube Dam*

ICJ, art 38(1) requires ICJ to apply international conventions (which means treaties) when resolving a dispute

Treaties are important:

1. Modern international relations because conventions are the product of conflicting interests and result in compromises between states
2. Treaties are the main source of stability and certainty in international law
    a. Ensure stability because adopted through negotiations and consent
    b. Clarity because the rights and obligations are written down
3. Novel source
4. Used to redefine the structure of the international legal order because they are based on consent
    a. Can overcome points of difficulties, work together and helps strengthen the legal order

When a treaty is created, there is an intention to make an agreement that is legally binding under international law

Danube Dam: VCLT is CIL

TREATIES ENTERING INTO FORCE

- Treaty is a binding agreement governed by international law. Must be performed in good faith (art 26)
    - See art 18 if looking for good faith **before** in force
- Treaties come into force in such a manner / on the date that the parties agree (VCLT art 24)
- Treaties should be **registered**
    - This is to prevent secret treaties
    - Art 102: Treaties that are not registered cannot be invoked in front of an **organ of the UN BUT remain no less binding on the parties** (*Qatar/Bahrain*)

Signing vs Ratifying

- Not bound once signed but not ratified **BUT** there is an obligation to **act in good faith** between signing and ratifying (art 18).
- A state is never obliged to ratify a treaty
- Only has to abstain from actions that would defeat the purpose and object of the Treaty until it has made its intention not to enter into the Treaty clear

On whom is a Treaty binding?

- Treaties cannot make rights or obligations for third parties without their consent (art 34)
- Art 36: if rights are created, it will be assumed that third parties accept them
- Art 38: could also be binding through a CIL
- Companies cannot enter treaties (*Anglo-American* oil) but commercial agreements between states and legal persons may refer to and be governed by international law (*Texaco v Libya*)
- Unilateral statements made by State representatives can also be binding, depending on the intent of the State (*Nuclear Tests, Frontier Disputes*)
- Art 28: Treaties do not create retrospective rights and obligations unless contrary intention

Does UN Charter bind non-UN members?

- Art 2(6) of Charter gives this impression – organisation shall ensure states who are not members act in accordance with the Charter
- But ICJ Advisory Opinion on South Africa said no
    - But still bound by CIL (and SA apartheid regime was still unlawful)

Priority of Treaties

- Charter of UN takes priority in the event of an inconsistency (art 103)
- If SC adopts resolution that is contrary to a treaty, SC resolution will govern (*Lockerbie* case)

INTERPRETATION

- Three general approaches
    - Founding Fathers – intent at the time of entering into Treaty
    - Contextual
    - Words of 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).
- Example: Lagrand (regarding whether provisional measures are binding – art 41 ICJ Statute).
    - English and French versions of Treaty suggested differences in whether provisional measures were binding
    - Court said the French interpretation (that they were binding) best fit the object and purpose

FAILURE TO PERFORM A TREATY

Domestic law is no justification for failing to perform a Treaty (art 27)

- *Unless art 47 applies:* consent is invalidated because consent as 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

REPEALING A TREATY

Similar to doctrine of implied repeal

- When State becomes party to a treaty that is either wholly or partially inconsistent with an earlier Treaty:
    - The earlier treaty prevails if the later Treaty claims to be subject to it or not incompatible (art 20(2))
    - If all the same parties are signed up to both, then the earlier Treaty prevails to the extent it is not incompatible with the latter (art 30(3))

- If there are different parties who are signatories to the two treaties:
  - The earlier Treaty applies to those who are party to both to the extent not incompatible
  - The Treaty to which both parties are subject to governs their rights and obligations (art 30(4))
- 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).

AMENDING / MODIFYING A TREATY

Distinction between modification and amendment

- Treaties may be amended by agreement between the parties (art 39), depending on what the Treaty itself says
- **Amendment (art 40):** This is a proposal to change an instrument **among all parties** and entitles a new party to be party to the new instrument
- **Modification (art 41):** Side agreement among two or more parties to the treaty but most not have a negative effect on the other members of the treaty

RESERVATIONS TO A TREATY

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).

Special Reservation Rules:

- Art 19: reservations are permitted unless expressly prohibited by the Treaty, e.g. Rome Statute, or if they are incompatible with object and purpose of Treaty (UN Charter)
- No acceptance is needed if reservation is expressly authorised by Treaty (art 20(1))
- 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.

Otherwise, turn to art 20(4):

- 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 does not preclude entry into force of the treaty as between the objecting and reserving states unless a contrary intention is definitively expressed by the objecting state
- An act expressing on state's intent to be bound by a treaty and expressing a reservation is effective as soon as at least one other state has accepted the reservation
- If no objections have been made within 12 months, then acceptance is presumed (art 20(5)).
- Acceptance and objection modify treaty relationship between those states per arts 20 and 21. A reservation will have reciprocal effect

- May be able to make late reservations which was not previously accepted per ILC Guidelines, but now just depends on the reactions of states
- If a treaty is invalid because of reservations, general principles of law and custom will still be used (*English Channel Arbitration*)
- Reservations not permitted if "incompatible with the object and purpose" of treaty – art 19(c)
    - Also note the Treaty remains in force between the two states to the extent not covered by the reservation – art 21(3)

Interpretative Declarations – Distinguished from Reservations

- States can make declarations re how they believe a Treaty should be interpreted
- These must not purport to modify or exclude the legal effects of the Treaty (*Belilos*)
- Whether it is a declaration depends on what it seeks to achieve, which will be done by interpreting the text of the declaration and its effects (*Belilos*)

Reservations to the Genocide Convention case: ICJ said use of reservations permissible so long as consistent with **object and purpose of Convention** (rather than the need for all parties to agree)

INVALIDITY OF TREATY

Voidable:

1. Manifest violation of internal law re competence to conclude treaties that concern a rule of internal law of fundamental importance (art 46)
    a. Manifest means objectively apparent to any state conducting itself in good faith
2. Negotiator failed to follow instructions and other state knew (art 47)
3. Treaty was based on error re fact / situation which was assumed by the State to exist at the time the treaty was concluded and formed an **essential basis of consent to be bound** (art 48)
4. Fraudulent conduct of another negotiating state (art 49)
5. Corruption or bribery of the state's negotiating representative (art 50)

Void:

1. Negotiator lacks authority (art 51)
    a. Article 7
        i. Negotiator will be bound if:
            1. They produce appropriate full powers (art 7(1)(a))
            2. Either practice or circumstances suggests that person was to have full powers 7(1)(b)
        ii. In virtue of functions, following are considered to represent state without having to produce full powers: 7(2)
            1. Heads of State/Governments and Ministers of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty 7(2)(a)
            2. Heads of Diplomatic Missions for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited 7(2)(b)
            3. Representatives accredited by states to an international conference or to an international organisation or one of its organs, for the purpose of adopting the text of a treaty in that conference, organisation or organ 7(2)(c)
    b. Article 8 allows a state to **subsequently confirm** an act performed without authorisation

        i. Any act relation to the conclusion of a treaty performed by someone who does not meet the art 7 criteria is **without legal effect unless afterwards confirmed by that state**
    c. **Note also 46:** state may not invoke consent given in violation of domestic law re competence to conclude treaties unless that violation was manifest and concerned a rule of its internal law of fundamental importance
        i. **46(2):** A violation is manifest if it would be objectively evident to a state acting in good faith and conducting itself in accordance with normal practice
2. Consent by representative procured by coercion or threats of violence made against them (art 51)
3. State was coerced through threat or use of force (art 52)
4. There is a conflict with rule of jus cogens (arts 53 and 54)

Outcome:

- 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;
    - 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.
- Art 71: If Treaty in conflict w rule of jus cogens, there must be an elimination of any act performed in reliance on any provision conflicting with the jus cogens rule and must bring actions into conformity

DENUNCIATION / TERMINATION OF TREATY

- Termination or withdrawal may only take place under operation of treaty or by consent of all parties (art 54)
- **The Treaty remains in force even if so many parties withdraw that it is under the number that was originally needed to enter into force (art 55)**
- If the Treaty does not say anything about termination, denunciation or withdrawal, then it is presumed that this cannot happen unless it is established the parties intended to allow that possibility to occur or a right to do so is implied by the nature of the treaty (art 56)
- If a party is relying on art 56, it must give 12 months' notice
- Termination is usually of the agreement as a whole and requires agreement of all parties (art 56)
- Suspension is effectively a temporary termination (art 57)
- Termination by new treaty relating to same subject matter (art 59)

Exceptional breaches

1. **Material breach** (art 60): means not performing a fundamental element of the treaty, thereby depriving it of any real purpose. (Possibly in *Danube Dam* but occurred later than the termination)
    a. Has there been a material breach? 60(3)
    b. Whether that entitled the parties to termination by unanimous agreement? 60(2)(a)
    c. OR whether it could be terminated by a party specially affected by the breach? 60(2)(b)
    d. **BUT:** those provisions will not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character" – art 60(5)
2. **Supervening impossibility of performance** resulting from permanent destruction of an object indispensable to the performance of a treaty
    a. *Danube Dam* did not determine whether a particular regime could be an object
    b. *DD:* not impossible for parties to have taken steps to ensure that the object did not disappear through their treaty – could have made the necessary adjustment

3. **Fundamental change of circumstances:** art 62, existence of particular circumstances must have constituted an essential basis of the consent of the parties to be bound, **and** the effect of the change must be to radically transform their remaining obligations.
    a. Can only apply in exceptional circumstances
    b. Cannot be invoked where the treaty establishes a boundary
    c. Cannot be invoked where the fundamental change is as a result of a breach of an obligation, as for Hungary / Slovaka (*Danube Dam*)
    d. ***DD*** *In* the Court's view, the prevalent political conditions were not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed.
    e. DD The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty.
    f. DD Nor did the Court consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen.
4. **State Responsibility:** party can argue that there is a *state of necessity*
    a. Involves them basically saying they have breached the obligation but that it was necessary to do so
    b. Will suspend the obligation for the period of the necessity (Danube Dam)
    c. Two steps:
        i. Essential interests of states are engaged
        ii. Grave **and imminent** peril (DD)
    d. DD: protection of environment could meet the first step but there was no imminent peril in the case – could have taken other steps to protect self
    e. *DD:* NOT grounds for termination of a treaty but exonerates a state from its responsibility if it fails to implement a treaty

Consequences of Termination

- Valid termination only has prospective effect
    - Parties are released from further performance
    - No requirement to return to status quo ante (art 70)
- A valid suspension means the parties are released from obligation during the suspension, but during the suspension the parties cannot obstruct resumption of the treaty (art 72)

WITHDRAWAL

If there is a clause that sets out the withdrawal conditions, then that is followed.

Art 56 governs if there is no clause for withdrawal. It says withdrawal will only be possible if:

- It is established that the parties wished to permit withdrawal or denunciation; OR
- A right of denunciation or withdrawal can be implied by the treaty

But also note in reality it seems hard to imagine a state not being able to withdraw since entering into treaties depends on sovereignty.

USE OF FORCE

Definition of "use of force"

- Economic coercion or force not included at the time the Charter was written
- But today, interpreted more loosely and broadly

    - *Corfu Channel*: UK sending minesweepers into the channel to capture one and prove its existence was considered a use of force – self-action to help own interests not accepted
- Two ways of considering force not done by state, e.g. Afghanistan post-9/11
    - Traditional view is that the state actor supported the non-state actor, e.g. Taliban allowing AQ to train on their territory
    - Other view is that new rules are needed and perhaps have been developed by the SC resolutions post 9/11 that seem to suggest force could be used against non-state actor (1368 and 1373)
- Use of force also relates to idea of non-interference e.g. *Nicaragua*, problem that US was trying to intervene to change the political system

Developments Post-UN Charter

- Is all use of force always prohibited? Or just for certain prohibited purposes?
    - Except self-defence or collective security, all other grounds for intervention are subject to scrutiny
- Also the prohibition on use of force could be jus cogens
    - Rule of jus cogens can only be replaced by another rule of the same status, i.e. jus cogens
- Note that the Charter is not the only instrument to deal with use of force
    - Wording of Charter itself is limited; *Nicaragua* says so
- But in some situations we see states breaching this or engaging in humanitarian intervention
    - Bowett – broad interpretation
    - Brownlie – narrow re what use of force requires

Sliding Scale of Force

1. Self-defence: state may use force in self-defence: *Nicaragua*
2. Retorsion: when a state takes some measures to show their unhappiness at the conduct of another state. These may be completely legal, e.g. State A decides to stop providing aid to State B, e.g. US-Nicargua
3. Countermeasures – on other notes
4. Reprisals – lost some meaning with the Charter
    a. *Corfu Channel* tried to argue it was legitimate for them to send in minesweepers but court did no accept that self-help was acceptable
5. Acts of aggression, e.g. invasion of Iraq – no mandate from UN and no imminent threat

SELF-DEFENCE

- Predates Charter and is an inherent right
- **Must the act be temporary, i.e. once SC is seized of the matter you have to stop?**
    - No, as seen in *Falklands/Argentina* dispute
    - Argentina went and seized the islands
- **NECESSITY AND PROPORTIONALITY**
    - *Caroline* case letters – enunciate necessity and proportionality
    - US decision not to go all the way to Baghdad – to do so would be to do more harm than was necessary to achieve their aims
    - AC noted that there is a fine line between what is a legit use of force but can turn aggressive
- Possibility of collective self-defence?
    - Yes, it exists
    - BUT criteria to follow (*Nicaragua*)
        - (1) Armed attack of scale and effect
            - Does not need to be armed force between states, e.g. Contras

            - But then need to be able to link that attack of a group with the state
        - (2) Declaration by victim state
        - (3) Request for assistance
        - (4) Report to the SC
- Nicaragua: **First US self-defence argument:** US can use self-defence on behalf of neighbouring states (i.e. they can exercise self-defence for others)
    - Collective self-defence is accepted
    - BUT this requires a **request by the state that has in fact been the victim of an armed attack AND a timely report to the SC**
    - That condition has not happened here
- **Second argument:** US has taken counter-measures on behalf of El Salvador
    - Counter measures can ONLY be taken by the state that is affected
    - Unlike self-defence where collective self-defence can be accepted

Use of force against non-state groups

- 9/11 the key example
- Resolution 1368 – seen as a recognition that a state can use force against non-state actors
- Recognises the inherent right to self-defence and terrorist attack allows this
- But possibly the resolution is not that clear – resolution does not say this, but just that if a state is a victim of an attack, it has the right to defend itself
- 9/11 potentially amounted to an armed attack
- Best way is to link events to a state
    - US said exercising right of self-defence because Taliban allowed AQ to train in Afghanistan
    - Suggests we do not need new norms to deal with force against non-state groups. We can use the norms we currently have
    - Some with states that are unable to control part of its territory and airstrikes in places like Syria – seems like a violation of territorial integrity at first sight by Syria is not in control of territory that was in the hands of ISIS
- So to remember
    - Scale and effect
    - Link group to state
    - See whether this is a valid expression of self-defence by considering the capacity of the state from where the terrorists operate. If it has no capacity to defend itself, then it may be more acceptable that other states act
    - Danger is that as soon as you move away from a strict interpretation of use of force, some states may take advantage of that

Jus Cogens Prohibition on Use of Force

- Exceptions include invitation or consent
- States can accept another state using force within its borders, e.g. Sri Lanka called in Indian armed forces when civil conflict erupted
- But what happens when there is a dispute over who is the legitimate government, e.g. Venezuela?
- Peacekeeping operations – require the consent of the govt of the country, could be sent on mandate of SC or GA

Claimed Exceptions

- Intervention by superpowers to impose friendly regimes – now obsolete post-Cold War
- Protection of nationals abroad and other rescue missions

    - E.g. US and Panama, but because could not dispute what US did
    - Accepted in old days that it had to be done simply to protect and limited to what is necessary to save nationals, e.g. could not extend to seizing territory
    - Brownlie: since this is not in the Charter means it no longer exists post-1945, but states have used it and said not a violation of 2(4) – not violating territorial integrity, but just to protect nationals – Entebbe raid
- Intervention to defend the right of democratic governance, e.g. Grenada or Haiti
- Preemptive use of force against terrorists, e.g. post-9/11 operations
- Targeted killings, e.g. US and Israel practice
- Humanitarian intervention and R2P – Kosovo, Libya, Syria

ANTICIPATORY USE OF FORCE IN SELF-DEFENCE

- Christine Gray chapter
- Six day war, 1960s, troops amassed on Israel border, but Israel attacked the countries first
    - Israel said imminent threat meant it could use self-defence
    - This was accepted
- Compare to 1981 when Iran building a nuclear facility and Israel attacked first
    - Not imminent, so not appropriate
- Anticipatory therefore clearly requires it to be imminent
- US has tried to make this a thing – greater the threat, greater the risk of inaction, then the more compelling case for taking anticipatory action even if uncertainty remains at the time
    - But other states do not accept to change the law (2006 and 2010)
    - Preemptive goes too far – must be imminent

HUMANITARIAN INTERVENTION

Was NATO's intervention in Kosovo legal?

- **Definition:** operation where one or more states intervene on the territory of another state (a) to prevent or put an end to gross violations of human rights or (b) to set free hostages or to protect nationals abroad
- Brownlie would say not continued in Charter to not allowed; Bowett would say not extinguished
- Necessary until the Security Council can act efficiently (Lillich)
- Brings us to doctrine of R2P

RESPONSIBILITY TO PROTECT

- State sovereignty involved state responsibility
- If states do not or cannot live up to their responsibilities, other states can step in with the right to protect
- Changes stem from a change in away from a pure focus on the state and towards a focus on the individual – human rights, greater emphasis on role of individuals rather than states
- Sovereignty still exists but no longer based solely on entitlements – responsibilities now a part

PROCESS

1. Must be sure the state is unwilling or unable to protect the population itself
2. Goes to SC
    a. If blocked, could use the Uniting for Peace Resolution

b. Commission did not limit the use of this to atrocities like genocide and crimes against humanity. Report envisages intervention as a result of a natural disaster, but watered down in 2005 GA
c. Requires large scale loss of life or ethnic cleansing

MAIN REQUIREMENTS

1. Preventative responsibility – we ought to prevent situations that lead to the suffering of populations
2. If prevention does not work, there is a responsibility **to react which could lead to intervention of forces under the auspice of SC**
3. **New step: responsibility to rebuild:** states that intervene should remain to help rebuild the society

In addition

1. Measure of last resort – other options exhausted
2. Must not be done to change a regime
3. Must use less intrusive measures possible before more coercive ones use

Other elements needed

1. Just cause – actual or apprehended large scale loss of life or ethnic cleansing (large scale)
2. Right intention – to halt or avoid human suffering
3. Last resort – after other diplomatic and military options fail
4. Proportional means
5. Reasonable prospects of success
6. Right authority – SC must authorise following verification of facts
   a. No P5 veto where their vital state interests not involved
   b. In case of inaction, use Uniting for Peace
7. AC also thinks we should have clear and unambiguous objectives and parameters of what can be done

Is R2P accepted?

- Most states feel unsure about it
- It is emerging, but does not yet seem to be a legal norm – see the difference between Libya and Syria
- As practice, sometimes we do not act, e.g. Rwanda

Remember that R2P involves the huge of force, so we need to consider whether there is a basis for this use of force – brings up issues of **sovereignty and territorial integrity.** These both involve the use of force without the consent or invitation of the state where it is happening. **Therefore do not confuse with humanitarian assistance – no obligation and requires invitation from local authorities.** Also distinguish from peacekeeping operations, where their goal is to maintain peace and stability.

Change to R2P shows the key tensions **between morality and legality of intervention**

- Effective? Is this an effective way of ending a crisis?
- Consequences of use – tensions, mishaps and further violations of human rights
- R2P tries to go beyond intervention and look at how to prevent and rebuild

EMERGING LEGAL NORM

Emerging legal norm

- AC says we can consider this in relation to Libya and Syria

- Libya: aimed to disestablish govt in Libya that treated people badly. Actions by SC and a number of measures in response. Included two measures by SC
    - The first one did not call for force but called on members to pressure regime, e.g. imposing economic and diplomatic sanctions to try to target people at the top
    - The second happened after first not considered enough, so this allowed the use of all necessary means – had responsibility to protect but did not do so, no-fly zones established and force could be used to enforce no-fly zones
    - Some abstentions because thought only if planes took off could there be force, but interpreted in a more robust way – led to full destruction of air defence system to help rebel groups
- What is the goal of R2P? Is there a change of regime or a chance it will be used in a way to displace a leader? If so, this is a bad use of R2P
- Is the norm open to abuse? NATO in Yugoslavia, Russia in Georgia, why there was no intervention in Syria post-Libya
- This raises questions about the future of R2P
    - Arguably rule is good but operationalisation of the rule is the problem
    - How to enforce in a way that is objective and actually helps those on the ground?
    - Machinery of UN meant to be neutral and impartial to be taken seriously. How does this work with R2P?

Peacekeeping

1. **Require consent of local authorities**
2. Traditionally had very limited use of force, e.g. protect peacekeepers themselves only, often observers
3. Conflicts have changed
    a. Inter-state to intro-state
    b. How can peacekeeping missions adapt?
    c. More able today to use force to ensure their mandate is fulfilled – so moved from force to protect peacekeepers to use force to ensure mandate fulfilled
    d. Some cases this even goes further under ch 7 mandate to create temporary administrations, e.g. East Timor, Kosovo
    e. Problems, e.g. peacekeepers accused of times

NICARAGUA v UNITED STATES

FACTS

- US began to feel as though Nicaraguan government interfering – was a strongly left government and they felt that was a threat to their agenda and to their allies
- Imposed economic sanctions and embargos
- Most importantly for these facts, they gave financial and physical support to the Contras, who were opposing the government, and seemed to help them militarily
- Nicaragua brings a claim to the ICJ claiming that the US is interfering within its sphere of influence and in its domestic affairs, which states are not meant to do under the Charter (article 2)

POLITICAL DISPUTE

- For the ICJ to be able to hear the dispute, it must be legal and not political
- This dispute seems to be political
- Court says ok to have some political elements so long as there is a legal question to consider, so says they can hear this case

WHEN ONE PARTY DOES NOT APPEAR BEFORE COURT ON MERITS

- The court still has to decide the issues on the merits
    - Must determine they have jurisdiction to hear the case

    - Must determine the case on its merits
- Use the arguments the US made in preliminary hearings to help, as well as public statements

JURISDICTIONAL ISSUE RE RESERVATION CLAUSE

- US has a reservation in place relating to the Charters of the UN or of Organised American States
- Court accepts this means it cannot rely on either of those charters
- But instead can rely on customary international law
- In practice, however, they do refer to those docs to find evidence of whether they contain customary international law

US ARGUMENT: UN CHARTER HAS SUBSUMED CIL

- US says the Charter of the UN has taken customary international law and put it into the Treaty. The Treaty has therefore **subsumed customary international law.** To the extent customary international law is in the Charter, it is now conventional law and not customary law
- Court disagrees
    - They live side-by-side
    - **Even when the conventional and customary law say the same thing, both laws exist**
    - Charter is economical in its terms
    - Art 51 on self-defence says that states **retain** their inherent right to use self-defence. Does not tell us the conditions for self-defence and suggests the right to use self-defence comes from elsewhere

ARE THE ACTIONS OF THE CONTRAS THE ACTIONS OF THE US?

- Why was this a possible argument?
    - Some level of control by the US over the Contras
    - Training, gave manuals on how to act, provided equipment and financing
- Court rejected this argument – this level of control is not enough
    - Need direct and effective control
    - Very high threshold
    - In some situations, Contras had not followed the manuals, etc. so there was not clear enough evidence that the US were controlling their actions
- Preservation of sovereignty, territorial authority and non-interference also engaged by the US flying planes in the airspace, and US armies and training to try to undermine the Nicaraguan regime

SELF-DEFENCE

- **First US self-defence argument:** US can use self-defence on behalf of neighbouring states (i.e. they can exercise self-defence for others)
    - Collective self-defence is accepted
    - BUT this requires a **request by the state that has in fact been the victim of an armed attack AND a timely report to the SC**
    - That condition has not happened here
- **Second argument:** US has taken counter-measures on behalf of El Salvador
    - Counter measures can ONLY be taken by the state that is affected
    - Unlike self-defence where collective self-defence can be accepted

Conclusion: US therefore cannot act in self-defence of neighbouring states here and are in breach of principle of non-interference

LEGAL PERSONALITY / CAPACITY

Traditional Approach

- State is the only subject with full legal personality (*Reparations for Injuries Advisory Opinion*)
- Statehood an important threshold in international law – arts 2 and 4 of UN Charter and art 34 ICJ Statute
- Indicia of legal personality
    - Capacity to enter into treaties
    - Bring claim for breaches of international law
    - Right to claim privileges and immunities at international law
- Individuals instead considered objects

States decide who has legal personality

- What is statehood?
    - Capacity to enter into relations with others
    - Capacity to bring cases to ICJ – **remember ONLY STATES can do this**
    - Diplomatic protection
    - But also brings obligations, e.g. protect diplomats within its borders
- Who else can be a subject of international law?
    - UN – look at the advisory opinions
    - IGOs
    - Based on state consent – remember to consider the instrument and practice
- A reminder of what it entails
    - Not all legal subjects have same capacity or rights
    - The fact you do not have legal personality does NOT mean you cannot influence international relations, e.g. multinational corporations and terrorist movements

STATEHOOD

Four criteria from Montevideo Convention:

1. Permanent population
    a. Population that lives there and develops its economy there
    b. Different when soldiers put on the ground or something like that
    c. Vatican possibly not a permanent population – e.g. Tuvalu with 11k
    d. Size of the population is not important
2. Defined territory
    a. Not completely defined – often there are border disputes e.g. US/Canada
3. Government
    a. Perhaps effective government needed
    b. But that does not mean they have to be totally independent and not in need of assistance, e.g. NZ assistance for courts in Pacific states, lots of financial aid, Leichtenstein relies on Switzerland to patrol its borders sometimes
    c. Guinea-Bisseau, where govt controls approx. 20-30% of territory
4. Capacity to enter into relations with other states
    a. Need to have someone willing to enter relations with you
    b. There could theoretically be a possibility that you cannot be a state without recognition – but AC said recognition is not part of this test and not something you need to consider

Originally, this was a treaty between American states but now CIL. Remember it is criteria for ***becoming a state, not retaining statehood.***

Extra: creation of state must be done without use of illegal armed force

Re disappearing states e.g. in the Pacific

- Recognition of other countries particularly important here and AC doubts there will be few states willing to say they do not think Pacific states should have statehood anymore
- Losing territory not always the end of the world, e.g governments in exile in WWII
- AC thinks there should be a presumption of continuing sovereignty

Impacts of statehood

- You are sovereign – can make law and enforce in your territory
- Can enter into treaties, which is an extension of sovereignty, not giving it up – *Wimbledon* case

Recognition

- We know the four criteria and states have to be set up through no violations of international law
- What about recognition? Is it necessary?
- Note from AC: Tino case deals with continuity
- In theory, recognition is a political act but it does have legal effects - idea of declaratory recognition
- If it wants to play a role at the international level, the state needs to be able to play with others
- This is where the fourth capacity re enter relations with others relates to recognition
- In your own corner or not considered a state, e.g. Taiwan
- Otherwise, Taiwan is well-defined, has permanent population and a govt in control and does enter into international relations with other states, e.g. US - but to truly be part of the international order, it needs to be recognised
- Was crucial for former republics of the Soviet Union etc. during Cold War
- Guidelines for Recognition - theses new states had to accept to become part of human rights treaties

- In practical terms, after Cold War, to become accepted as independent states, they had to accept some terms to be recognised
- Not a condition as such but in practical terms it is truly important

States in Free Association

- Independence of states can sometimes be questioned
    - E.g. Niue and Cook Islands could be considered to be in the realm of NZ, but AC does not like this term
    - Niue and Cook Islands are states in free association
    - Also have micro-states like Nauru and Monaco
    - Or failing states like Somalia used to be
    - State dissolution and succession
- Special types of territory
    - Territories under colonial rule
    - Territories under UN administration (they are not trying to create new states, but trying to rebuild or create the legal institutions to help the territories become independent)
    - International leases, e.g. Panama, Guantanamo Bay – part of Cuba
        - GB – US SC has now ruled that it is de facto part of US and US law applied there
    - Historical entities, e.g. Holy See, Sovereign Order of Malta
        - They are **NOT states but they have legal personality based on historical importance**

DETERMINING LEGAL PERSONALITY

UN

- Art 104: Shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and fulfilment of its purpose – so has legal capacity in member states
- Art 105 it has the right of mission and privileges and immunity
- But what about on the international plane?

REPARATIONS FOR INJURIES ADIVSORY OPINION

- UN worker killed when his hotel was bombed in Jerusalem while working as representative of the UN
- Does the UN have the right to bring a claim on his behalf? Does it have legal personality to bring a claim against Israel?

1 Israel treated as a member, since this is a novel case

2 Is the UN a legal person?

We get a two-step test for figuring out legal personality from this case:

1. Look at the constitutive Charter / legislation
2. Consider state practice

The Charter

- Not explicitly given legal personality
- But Charter does not just make the organisation a centre for harmonising the actions of nations in the attainment of these common ends (art 1(4))
- It has organs which have been equipped with special tasks, concluded treaties
- **Court wants to consider what characteristics were intended to be given to the UN**
    - Intended to exercise and enjoy, and was exercising, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on the international plane
    - It could not carry out the intentions of its founders if it was devoid of legal personality
    - It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged
- The rights and rules of an entity such as the organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice
- BUT IT IS NOT A STATE
    - Indeed, it is lower than a state, but just a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims
- Agent receives protection based on functional capacity
    - Agent better at performing their duty if they know they are protected
    - Ensures independence of the agent – if they have to count on their nationality, it could be risky
    - Requires a link between the person and the organisation
- Can bring a claim against a non-member
    - Fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognised by them alone, together with the capacity to bring international claims
- Subjects of international law not necessarily identical re nature and extent of their rights
- Inter-governmental organisations possess the necessary legal personality to carry out their functions
- Powers not limited to what is conferred by constituent instrument (express powers) but extend to what is necessary to perform functions effectively (implied powers)
- No claim before ICJ
- UN can bring international claim against a non-member state, e.g. negotiation, mediation, arbitration

CERTAIN EXPENSES OF THE UN ADVISORY OPINION

- Some states did not want to pay for increasing peacekeeping missions
- Challenged the ability of the UNGA to make certain decisions re expenses

The budget

1. Look at the statute
    a. Budget, no qualification of expenses – if it had been expected to be limited to administrative expenses, that would have been clear, and nothing suggests this
2. Practice
    a. Often included items that did not seem to be administrative
    b. Previous peacekeeping missions had been included

Function of the UNGA

- Does the SC have exclusive responsibility to deal with peace and security?

    - No, just primary
    - So GA can be concerned with this too
    - Some situations where SC has exclusive responsibility
        - Enforcement action under chapter 7

ANSWERING A PROBLEM QUESTION ON LEGAL PERSONALITY

- Inter-governmental organisations possess the necessary legal personality to carry out their functions (*Reparations for Injuries*)
- Powers not limited to what is conferred by constitutent instrument (express powers) but extend to what is necessary to perform functions effectively (implied powers)
- So, you therefore look to two elements:
    - (1) Constituent instrument
        - Does it say there is legal personality?
        - What rights / obligations does it confer upon the body? Does it need legal personality to fulfil those rights and purposes?
    - (2) Consider practice in the past and reaction to that practice
- Does not mean it is a state but that it has legal personality

WHO HAS LEGAL PERSONALITY

- Legal capacity is the capacity to bring claims, to have missions, representations, privileges, immunities and capacity to enter into treaties
- **IGOs** can enter into treaties, depending on their instrument and practice
- **NGOs:** no
    - Can have procedural capacity in some human rights treaties
    - (1) They bring together individuals and businesses who have particular interests **and expertise. Their expertise is crucial where states have limited resources. They are part of this civil society because of their expertise.**
    - (2) No formal classification, but UN Charter refers to the possibility some may have observer status
    - (3) Presence in international law – may not have voting rights but actively participate in the preparatory works leading to a negotiation of a treaty, e.g. get rid of nuclear weapons. Active voice behind the scenes / observer status
    - (4) How they are organised – some have recognition of treaties e.g. ICRC in Geneva Convention
    - (5) Civil society
- **Individuals:** many treaties provide substantive rights to individuals, e.g. human rights treaties. But you also need to consider whether they have procedural rights to bring the claim, e.g. whether they have standing
- **Duties:** individuals also have duties
    - Responsibility for crimes under international law, e.g. piracy on high seas, genocide, etc.
    - International prosecution, e.g. ICC/Rome Statute, ICTY/ICTR
    - Hybrid and internationalised tribunals
- **Multinational corporations:** cannot enter into treaties, but they can enter into agreements with states, and those agreements may be internationalised, i.e. governed in part by international law
    - *Texaco v Libya* – makes it clear Texaco did not enter into a treaty
    - But this is the perfect example of the kind of body who will nevertheless have an impact on international relations despite not having the ability to enter into treaties
    - Should also have duties, e.g. human rights
    - Consider them political actors

- **Terrorists or national liberation movements**
    - They do not have capacity as groups
    - But they do have political influence
    - Sometimes hard to draw the line between legitimate and non-legitimate movements
- **Indigenous or aboriginal people**
    - Have received heightened importance over time
    - UN Declaration on the Rights of Indigenous Peoples – not a treaty but a declaration of GA

[Notes not here for self-determination because AC said not in test, but print notes in case]

Answering Alberto's Practice Question

1. **Seva passes a statute not adhering to the Convention due to poor econ conditions in their country**
    a. Must perform a treaty in good faith (art 26)
    b. Domestic law not a reason not to enforce treaties (art 27)
    c. Essentially they are admitting they breached the Convention but have good reason for doing so. This is like the notion of state responsibility, where parties can avoid a Convention out of necessity (DD)
        i. But unclear that either of the requirements engaged
        ii. Central interests of the state: potentially, depending on the gravity of the econ crisis
        iii. Imminent threat: unlikely that this is such a grave and imminent threat. In *DD* case, the Court noted there were other steps the nations could have taken other than not adhering to the treaty. Here, it is likely that Seva can do the same
    d. **Supervening impossibility of performance? Art 61**
        i. The object here would have to be the economic conditions of the country?
    e. **Fundamental change of circumstances? Art 62**
        i. Only done in exceptional cases (Danube Dam) and an econ downturn or recession, which is unfortunate but happens often, could not be considered a fundamental change of circs
2. **Wagia has not ratified and advises companies to pay between 10-20NZD per hour**
    a. Since Wagia has only signed and not ratified (unless agreement says otherwise), it is not yet bound by the agreement (cite). However, in the period between signing and ratifying, it is expected to act in good faith (art 18)
    b. This only means it must not do things that defeat the object and purpose of Treaty (art 18)
        i. Has good faith obligation when a) it has signed the treaty **until makes intention clear not to become a party** and b) expressed consent, pending entry into force provided not unduly delayed
    c. Arguably a Treaty that aims to give workers rights is being defeated by a company suggesting that workers are paid under the min wage, particularly if as much as half of the agreed wage is permitted. Although this is arguable, it is possibly met here.
    d. Alberto also says possibility of regional custom re the minimum wage in the area (I suppose because the min wage was around $20 anyway so bound by that, but unlikely to meet the high threshold for regional CIL)
3. **Surcia's withdrawal from the agreement**
    a. Surcia withdrew after others seemed to be acting badly
    b. Unsure if there is a provision in the Treaty that allows withdrawal. If so, Surcia would be allowed to withdraw following whatever procedure/limits are in the clause (art 56)
    c. If no provision, then art 56 says withdrawal is not possible unless it is established that parties wished to permit the possibility of withdrawal or denunciation or a right of denunciation or withdrawal can be implied by the treaty
    d. Nothing on the facts regarding this. Could just note it seems unlikely in reality that a party could be stopped from refusing to adhere to a treaty
    e. OR art 56(2) – give 12 months' notice
4. **Volga's reservation to the agreement**
    a. Nothing in treaty (that we know of) that says reservation not allowed or definitely allowed, so arts 19 and 20(1) do not apply
    b. Possible acceptance if more than 12 months has passed (art 20(5))
    c. But also breaches 19(c) – the reservation is incompatible with object and purpose of the treaty since it fundamentally violates workers' rights, which the treaty aims to protect

    d. Could also be a material breach of a provision essential to the accomplishment of the object and purpose of the Act under art 60 for similar reasons
    e. Also note the Treaty remains in force between the two states to the extent not covered by the reservation – art 21(3)
5. **Interpretative clause is a reservation against the object and purpose of the Act**
    a. Declarations re how a treaty should be interpreted are allowed, but *Belilos* says they may not purport to modify or exclude the legal effects of the treaty
    b. Whether a statement is a declaration depends on what it seeks to achieve, which will be done by interpreting the text of the declaration and effects (*Belilos*)
    c. I would argue yes – this goes further than interpreting a vague section and tries to change the legal effect of the workers' protection by providing them far less protection than what workers' protection treaties would usually seek
    d. Then need to go on to say whether inconsistent under art 19(c) – yes for other reasons explained
6. **Volga has committed a material breach of the treaty and it should therefore be terminated**
    a. Has there been a material breach? 60(3)
    b. Whether that entitled the parties to termination by unanimous agreement? 60(2)(a)
    c. OR whether it could be terminated by a party specially affected by the breach? 60(2)(b)
    d. Whether termination is not possible here because it deals with the protection of human persons contained in treaties of a humanitarian character – 60(5)
7. **One of the old states to the agreements has now split into two. Have they been coerced and can they rely on the old reservation?**
    a. Coercion is one of the grounds for invalidation of a treaty (art 51 / 52) but it does not seem like there has been any use of force here, so probably not
    b. Entitlement to rely on old reservation: art 34 – treaty applies to each successor state
    c. Automatic succession has sometimes been accepted, e.g. *Application of the Genocide Convention*
    d. But even if the new states need to give notice that they accept the treaty, they would still be entitled to make reservations to it
8. **Agreement no longer in force**
    a. Art 55: Just because states withdraw from the treaty so there are now fewer signatories than what was initially required for the treaty to come into force does not mean that it is not in force now