International Law

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2001

Oxford, Oxford University Press

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Part I: Origins and Foundations of the International Community

1 The Main Legal Features of the International Community

1.1 Introduction

- We jump too quickly to drawing parallels between domestic law and international law.
- The features of the world community are unique.
- Law doesn't necessarily address itself to individuals, and there are not necessarily central institutions responsible for making law, adjudicating disputes, and enforcing legal norms.

1.2 The nature of international legal subjects

- Most of rules of international law aim at regulating behaviour of states, not that of individuals.
- States are legal entities – aggregates of human beings, owning and controlling a separate territory, held together by political, economic, cultural (and often ethnic/religious) links.

- Within States: Individuals are principal legal subjects, Legal entities are secondary.
- In International community: States (legal entities) are primary subject, individuals are secondary.

- Although states dominate international community, they operate through actions of individuals (e.g. ministers, diplomats).
- But, individuals act not in their personal capacity, but on behalf of collectivities or multitudes of individuals – Hobbes, 'fictitious person'
- Powerful drive to submit all persons and all territory to exercise of state control.
- State serves to protect individuals from hardship and suffering (as church once did).

1.3 The lack of a central authority, and decentralisation of legal 'functions'

<u>National legal systems</u>
- have both substantive rules (about how to behave) and organisational rules.
- Organisational rules developed out of power of ruling classes to institutionalise their power and establish relationship between rulers and ruled (Law comes from power).
- All modern states:
- Use of force by members of community is forbidden (except emergencies) – state monopoly on use of violence
- Central organs of state responsible for law making, law determination, and law enforcement. Parliament/monarch makes law, court ascertained breaches of law, and police officers enforced.
- These functions derive from rule of law, not from interests of individuals.

<u>International legal system</u>
- very different because no state has managed to hold power long enough to be able to create a system of law (law comes from power).
- Relations between states remain horizontal, no vertical power structure describing laws
- Lack of centralised power even more obvious today as individuals and corporations have entangled allegiances, and sources of power are spread across the globe in arenas far beyond state.
- Relative anarchy at level of central management in international legal system.
- No central body responsible for three areas of law: making, interpreting, enforcing.
- States act in their own interests, not in the interests of community.
- Each state has power to auto-interpret rules – necessarily follows from lack of courts and compulsory jurisdiction → Legal order is what states will make of it.

- Traditional international law thus greatly favoured powerful states who could exert their interpretation of rules over others.

1.4 Collective responsibility

- Responsibility for violations of rules governing behaviour of states falls on group to which s/he belongs (not on individual transgressor) – v. different from national legal system which is based on individual, rather than collective, responsibility.
- International law works more along lines of tort vicarious liability (e.g. employers) – state becomes liable for actions of its citizens.
- Wronged State can take action against whole State which wrongdoer belongs to, not just against wrongdoer him/herself. Can claim payment of a sum of money or take counter-measures (e.g. expulsion of foreigners, trade sanctions, etc.)
- The whole State community is liable for any breach of international law committed by any State official and that the whole State community may suffer from the consequences of the wrongful act.
- e.g. Corfu incident, 1923 – Italian ambassadors killed on Greek territory, Italy demanded compensation, Greece refused, Italy sent in troops, League of Nations found Greece negligent in failing to protect diplomats, Italy awarded compensation.
- Some say that this form of collective responsibility is characteristic of primitive legal systems (e.g. family feuds, blood revenge).

New trends:
- New class of State responsibility for gross violations of fundamental rules enshrining essential values
- New class of individual responsibility has emerged (previously only pirates), like personal liability of war criminals.

1.5 The need for most international rules to be translated into national legislation

- International rules to be applied by states within their own legal systems generally have to be incorporated into national law, because doctrine of State sovereignty gives states control over what laws will apply in their territories.
- Therefore practice of international law depends on help, co-operation and support of national legal systems.
- International law like a field marshal who can only give order to generals – generals must give orders to troops.

1.6 The range of States' freedom of action

<u>National legal system</u>
- Individuals have broad freedoms of actions, but they are limited by legal restraints.
- Every community has a set of values which individuals are not allowed to deviate from without some legal or social effect.
- Limitations existing regarding the functioning of government (e.g. you can only vote when there are elections) and in terms of constitutional rules about liberties/freedoms.

<u>International legal system – Classical Approach:</u>
- Subjects of international law have huge freedom of action – nearly unlimited (classically).
- States were completely free to decide upon their own domestic matters, which some exceptions re treatment of foreign nationals, for example.

- States also had complete freedom re. conduct of their foreign policy and in economic policy. Classically, states could use force when they wanted to, intervene in affairs of other states → it was a free for all.
- The constraints on 'legal freedom' were political, economic, social and cultural – but not legal.
- International law was thus about negative regulation – what was not prohibited was allowed. This favoured states with powers to carry out their wildest dreams.

International Legal System – Modern developments:
- Network of international treaties limits freedom of state action.
- Increasing restriction on right to use force.
    - *Covenant of League of Nations* (1919) included restraints; *UN Charter* requires members to refrain from using or threatening the use of any sort of military force.
- Customary rule that certain general principles have greater legal force than other rules. Peremptory norms called *jus cogens*, result is that states must refrain from entering into agreements that violate peremptory norms.

1.7 The overriding role of effectiveness

- International law based on principle of effectiveness: only those claims and situations which are effective can produce legal consequences.
- Legal fictions have no place on international scene – international law attaches itself to what is real, to what works, not to what is legally, theoretically attractive. (e.g. new situations were not legally valid unless they could be seen to rest on a firm and durable display of authority).
- Therefore, force has played an overriding role – as effectiveness most easily obtained from the barrel of a gun.

1.8 Traditional individualistic trends and emerging obligations and rights

1.8.1 Reciprocity as the Basis of International Rights and Obligations

- International community's horizontal structure and lack of strong political, economic and ideological links among members has resulted in tendency for states to be self-seeking and self-interested.
- The substantive rules governing behaviour of States reflect this self-interestedness.
- International rules confer obligations on pairs of States only: each State has a right or obligation in relation to one other State only.

Customary rules:
- confer on each member of int'l community rights towards all other States.
- However, concrete application boils down to standards applying to pairs of States. Violation of customary norms creates legal relationship only between the aggrieved State and offending party.
- Consequence is that procedural right of enforcement in violation of a customary norm is earned only by the aggrieved party, not by the int'l community – no other state can intervene on victim's behalf.

Multilateral treaties:
- Treaty creates rights for each contracting party to demand fulfilment of obligations agreed to under treaty.
- However, breach of that obligation results in effect on one party, and only that party can protest.
- This is far from domestic legal systems – where breach of obligations (e.g. criminal) can result in intervention of non-party, e.g. Prosecutor.

- The result is that reaction to a breach of int'l obligation ultimately depends on whether the victim is stronger than or at least as strong as the culpable state → respect for law depends on power.

Exceptions to this rule:
Piracy
- Authorised every state to seize and capture pirates on the high seas, whatever their nationality and whether or not they had attacked.
- Thus, the right to intervene and maintain legal order conferred not just on injured parties, but on everyone.
- But this was not the advent on a new world community; rather states were reacting to safeguard a joint interest.

Rights of riparian states re navigation on international rivers
- Every riparian state has a right to free navigation and equality of treatment
- If one of those states performs an act preventing another State's free navigation, it infringes upon the right of any other riparian state, whether or not it actually causes damage, and that State can intervene (*Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, 1929)

1.8.2 Community Obligations and Community Rights

Present day:
- traditional rules based on reciprocity are still bulk of int'l law. But there are a number of treaties which provide for obligations on State towards all other parties and are not reciprocal. This emerged due to new values in int'l community.

Features of Community Rights:
- Obligations to protect fundamental values (peace, human rights, self-determination of peoples, environmental protection)
- Obligations towards all members states of int'l community (*erga omnes)*
- Coupled with a correlative right that belongs to any state (or any other contracting state if the rights arise through treaty)
- Right may be exercised by any other (contracting) state, whether or not it has been materially or morally injured by action of other state
- The right is exercised on behalf of int'l community to safeguard values of int'l community, not individual state self-interest

Exercise of 'community rights'
- Weak mechanisms, by in large, for exercise of these rights
- Traditional diplomatic means – diplomatic pressure, peaceful counter-measures, verbal expressions of disapproval, economic measures
- Some treaties simply proclaim rights without specifying any means by which they could be put into effect

- Development of community rights should be not be over-stated, as there is a huge gap between normative level and implementation. Often states end up exercising their 'community rights' only when their own political, economic, military interests are at stake.
- BUT there are some int'l procedures which can be set in motion not by states but by other aggrieved parties or by international bodies → creates pressure for fulfilment of int'l obligations from parties other than states.

1.9 Coexistence of the old and new patterns

- Traditional Grotian model: international community based on 'statist' vision of IR, characterised by co-operation and regulated interaction between sovereign states, each pursuing own interests
- Modern Kantian model: universalist or cosmopolitan outlook, sees world as international community of mankind, not just states, stresses trans-national solidarity.
- Two co-exist as international legal system develops and changes.

2 The historical evolution of the international community

2.1 Introduction

- Evolution of international community can be divided into four stages (see headings below).

2.2 The emergence of the present international community before the Peace of Westphalia
2.3 Stage 1: From the peace of Westphalia to the end of the First World War
2.4 Stage 2: From the First to the Second World War
2.5 Stage 3: From the UN Charter to the end of the Cold War
2.6 Stage 4: From the end of the Cold War to the present

3 States as the primary subjects of international law

3.1 Traditional and New Subjects

States are fundamental, paramount, and primary subject of international community because:
- They control territory in a stable and permanent way
- They exercise principal lawmaking and executive functions
- They posses full legal capacity – ability to be vested with rights, powers and obligations.

Other international entities either exercise control over territory for a short time or not at all.

Insurgents emerge through struggle against State to which they formerly belonged:
- International community is very unwilling to recognise them.
- Their existence is by definition provisional – they either win and become fully-fledged States or are defeated and re-assimilated into an existing State.

States and insurgents are traditional 'subjects' of the international community.

New players in international community in 20th century are:
- International organisations
- Individuals
- National liberation movements

All these have limited legal capacity (to have rights and obligations, to act).

3.2 Commencement of the Existence of States

There are lots of states and they all have different rules and ways of doing things.

Municipal law usually lays down rules for the birth of juridical subjects – how is it that an entity becomes legal holders and rights and duties (e.g. persons at birth, corporations).

BUT International community has no legislation laying down rules for creation of states – it's all based on Customary Law.

Characteristics of States which come to have State personality in international system:
1. Central structure capable of *exercising effective control over a human community* living in a given territory
   - Bodies endowed with powers of authority and control over human community must be original, not derived from another legal order (state) – but there were exceptions to this in times of protectorates.
2. *Territory* cannot belong to any other sovereign State, and Community there can no longer owe an *allegiance* to outside authorities
   - International law requires effective (not just asserted) possession and control over territory.
   - There have been limited exceptions to this principle – e.g. 'Governments in exile' in times of war – a political motivated move based on hopes of return of control over territory. If this prospect vanishes, then other States discard their recognition of the 'government in exile'.

3.3 The Role of Recognition

These are vague criteria for determining existence of State, and probably most important factor is the recognition or not of a new legal entity.

Act of recognition has no legal effect in itself – it does not create rights or obligations. This is opposed to view of some scholars in past (19th century) who thought that states were created by recognition, which is wrong because:

- who created the first state?
- It would mean even effective entities (w/ control over territory and population) would not be states if not recognised.
- It goes against principle of equality of states, because other states would have authority just by virtue of being born first of acknowledging existence of others.

Present - Recognition has following significance:

1. Political importance, as it testifies to the will of recognizing states to initiate int'l interaction w/ new state
2. Legal relevance, proves that the recognizing states consider that the new entity has all factual conditions to become an international subject (this is not binding on other states, but it helps pave the way).
3. Legal relevance, as it bars recognizing State from altering its position and claiming new entity now lacks Statehood (can't go back once you've been recognized)

If recognition is granted too soon – before factual conditions of statehood are met, like they're in a civil war – it may amount to unlawful interference in internal affairs of State (e.g. Recognition of Croatia in 1992 by EC, Austria and Switzerland when Croatia only controlled one-third of its territory).

Factual conditions required for state recognition:

- Effective control over human community and territory
- New conditions added in 1930s about following fundamental standards (such as ban on wars).
- 1990s – concerns about respect for human rights & minorities and respect for existing international frontiers
  (e.g. 1991 – EC Declaration on Guidelines on the Recognition of new States in eastern Europe and in the Soviet Union, & Decision of Arbitration Commission in 1992 re Bosnia).

State recognition happens over a period of time, rather than at once by all members of international community. Recognition by some States helps lead the way for others.

BUT without recognition by all States, these new entities are still under some obligations towards non-recognizing nations – e.g. on high seas, respect for territorial and political sovereignty, creates duties on the non-recognizing States not to invade or occupy the new State, jeopardize its political independence, subvert its domestic political system, or impede its rights to sail on high seas.

There can be situations where a State meets all the conditions (of effective control of territory and people) but is still deprived of statehood – e.g Southern Rhodesia (which states refused to recognise for its racist policies), Taiwan. There can also be cases where statehood is granted but rules clearly have been broken (e.g. Northern Turkey, recognised by Turkey only).

3.4 Continuity and Termination of Existence of States

Revolutionary or extra-constitutional change in government of a state does not alter its basic legal personality, so States are bound by international acts performed by previous governments.

Tinoco Concessions (GB v. Costa Rica) 1923

F: Tinoco, political leader, overthrew government in Costa Rica and declared new constitution. 1919 Tinoco government toppled, new leadership claimed that all rights granted to British companies under Tinoco government were quashed.
H: Arbitrator held that contracts were binding on Costa Rica, because Tinoco was in "actual and peaceable administration without resistance or conflict or contest"

- Changes in territory of a State may affect its legal personality – like merger, break-up, or incorporation.
- In secession, the State continues to exist as a legal subject, and the seceded part may acquire international recognition of statehood.

Issues of state succession arises if one State replaces another in jurisdiction over a territory – do the rights and obligations of former State get transferred to other international subject/s? This is dealt mainly by customary rules, to some extent codified in *1978 Vienna Convention on Succession of States in respect of Treaties* and *1983 Vienna Convention on Succession of States in respect of State property, archives and debts.*

Succession to Treaties:

Localized treaties – impose obligations and confer rights with regard to specific territories
- Because these treaties attach to a specific territory, they are not affected by fact of State succession, so they are binding on new entity (*1978 Vienna Convention, Art. 12*)

Non-localized treaties – do not concern specific territories
Two-tier system:
- Newly independent states – 'clean slate' – new states are not bound by treaties in force at date of succession, to take into account specific needs of decolonization process
- Other states – due to desire for int'l stability, continuity preferred, and States are bound by previously negotiated treaties (1978 *Vienna Convention, Art. 34 and 35*).

Treaties re Human Rights:
- General rule has evolved that the successor State must respect them.

Assets & State Archives
- Definition of what belongs to a State must be drawn from the relevant national law applicable at the moment of succession (*1983 Vienna Convention, Art. 8*)
- If assets are indeed public, then State that wields control over territory where assets are located succeeds ownership held by previous territorial State

Debts
- When a state breaks up and new entities are formed, the State debt of the predecessor passes to the successor States in an equitable proportion (*1983 Vienna Convention, Art. 40*)

Membership of international organizations
- If two states merge, the new state does not necessarily have to apply for new membership (to UN) (e.g when Egypt & Syria merged to form the United Arab Republic, Merger of N. & S. Yemen)
- If a member State breaks up, all must apply for membership on their own, except for bit that may successfully claim to be continuation of old State (e.g. Russia after break-up of Soviet Union).
- If a new State emerges after secession, it must apply for membership.

3.5 Spatial Dimensions of State Activities

3.5.1 General

Traditional int'l law:

Physical dimension of state activity → earth, portions of the sea (territorial waters – small portion of sea around each area of land), and the air (up to the stars, *usque ad sidera*)

Rules
- Whoever possessed a territory and exercised actual control over it acquired legal title
- For areas subject to no one (terrae nullius) mere discovery was insufficient to assert sovereignty; State needed to display sovereignty and intend to wield it

As a result, eventually whole globe became subject to one State's jurisdiction or another. This system heavily favoured bigger states and promoted individualism in int'l community.

Exception – High Seas
- Since 17th Century, there were seen as a thing belonging to everyone (res communis omnium).
- Every state could sail it ships or use the high seas as it pleased so long as it did not hamper anyone else's enjoyment.
- This was not a regime about community, it was one to allow each state to pursue its own purposes and its own interests.

After WWII – 1950s:
- Discovery that seabed off the coast of some States contained important resources
- Technology allowed greater exploitation of fishing resources on the high seas
- Int'l community preferred a regime to organize access to these resources on the basis of individualistic free choice and competition, which favoured larger, developed states
- Whole development of law of the sea was dictated by sovereignty, nationalism, and laissez-faire attitude
- Developing countries convinced int'l community to adopt community-oriented principles for the common sharing and exploitation of resources only for the seabed and ocean floor/subsoil. This was seen as the common heritage of mankind, but this has proved to be quite useless because technology is too expensive to develop these resources

3.5.2 Territory

Territory – that portion of land that is subject to the sovereign authority of a state.
- Today, there is no territory that is not subject to a sovereign power.
- States can exercise all their sovereign powers over their territories.

Exception → Antarctic – claims to territorial sovereignty by adjacent and discovering states are suspended by treaty

Island of Palmas, 1928 – "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular case."

a) *Acquisition of Territory*

Principal modes of acquiring territory:
1. Occupation of land belonging to no one
2. Cession by treaty, followed by effective peaceful transfer of territory

3. Conquest (no longer admissible, due to Declaration on Friendly Relations 1970, codifying a new principle of int'l law)
4. Accretion – physical process whereby new land is formed closed to existing land (e.g. new island at a river mouth)

b) *Delimitation of boundaries: the uti possidetis doctrine*

3.5.3 Sea

Sea has gradually been divided up into sections or areas, each with different legal status and creating different rights and obligations upon States.

1982 *Convention on the Law of Sea*, entered into force 1994 – largely replaces various codification conferences conventions of 1958.

Territorial Sea of States

- the waters surrounding a State's territory and including its bays, gulfs, & straits

Where do you measure the width of the territorial sea from – how do you define baselines?

- Lots of disputes about its width
- Rule used to be that width was three nautical miles – the effective range of shore artillery
- 1982 Convention, Art. 3 – States have a right to establish a breadth of their territorial sea up to limit not exceeding 12 nautical miles from the baselines
- Art. 5 of 1982 Law of Sea Convention – reflects a customary rules – "normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts official recognized by the coastal state"
- General principle of 'low-water line' derogated from in case of States whose coast is deeply indented and cut into or states which have fringe of islands off coast
  - Article 7.1 – for such states, method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured

Criteria for drawing straight baselines

- Must not depart to any appreciable extent from the general direction of coast
- Sea areas lying within the lines must be sufficiently closed linked to the land domain to be subject to the regime of internal waters
- Account must be taken of … economic interests peculiar to the region concerned
- The system in question may not be applied by a state in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.

States with Bays

- Art. 10.2 - Bay defined
- Art. 10.4 & 10.5
  - If the distance between the low-water marks of the natural entrance points of the bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the marks enclosed thereby shall be considered internal waters
  - If bay's entrance exceeds 24 nautical miles, a straight baseline of 24 nautical miles will be drawn so as to enclose maximum area of water possible with a line of such length
- Within the territorial sea, state enjoys full sovereignty, subject to right of innocent passage of foreign merchant ships and warships.
- Foreign ships can pass without prior notification or authorization, provided they do not act prejudicially to coastal state.
- Coastal state many not exercise criminal jurisdiction over offences committed on board ships within territorial waters, except under conditions in art. 27.1

Internal waters

- subject to full and exclusive sovereignty of State, no right of innocent passage to other states

Contiguous zones

  - Goes beyond the territorial sea and extend up to 24 nautical miles from baseline
- In this zone, state may prevent and punish infringement of its customs, fiscal, immigration or sanitary requirements within its territory or its territorial sea (Art. 33).

Exclusive economic zones

  - Area beyond and adjacent to territorial sea, extends 200 miles.
- Has been gradually established due to discovery of important fishing and mineral resources off coast
- Coastal state enjoys sovereignty in some specific matters – only for purpose of exploring, exploiting, conserving, and managing natural resources.
- It has jurisdiction over artificial islands, installations and infrastructures, marine scientific research, and the protection and preservation of marine environment.

Continental Shelf

  - Part of underwater land - natural prolongation of State's land territory into sea, before it falls away into ocean depths. Shelf normally covered with relatively shallow water, Length varies depending on geography
- Art. 76.1 sets outer limit of continental shelf up to 200 nautical miles from the baselines from which the breadth of territorial sea is measured
- Coastal state has sovereign rights to specific activities – exploration and exploitation of natural resources of shelf (oil and fishing resources)
- *North Sea Continental Shelf* case, ICJ – rights in continental shelf are an inherent right of state sovereignty over land
- Art. 80 – coastal state may construct and maintain installations for exploitation of shelf and establish safety zones around these installations up to 500 meters.

Delimitation of continental shelf between opposite or adjacent states has given rise to many disputes:

- Principle of equidistance (measure equal distance from nearest points of baselines from which breadth of territorial sea is measured) has been found to lead to inequitable solutions → *North Sea Continental Shelf* case (Germany v. NL & DK)

High Seas

  - Beyond contiguous zones and excepting the *exclusive economic zones*, waters belong to high seas. They are *res communis omnium*, free for every state to use.
- Each state has exclusive jurisdiction over its ships.
- A state may exercise jurisdiction over foreign ships, using its warships, in some circumstances:
  - It may approach and board merchant ships to ascertain their nationality, or to establish whether they engage in piracy, slaving, unauthorized broadcasting, etc.
  - It may arrest and seize any ship engaging in piracy or slave trading and bring those individuals to trial
  - It may pursue and seize a ship suspected of infringing its laws in its waters – right of hot pursuit must be initiated in its waters and ship pursued into high seas. Pursuit must be un-interrupted and cease as soon as pursued ship is out of high seas and into territorial waters of another state.

3.5.4 The International Seabed and the Concept of the Common Heritage of Mankind

International seabed

- Soil and subsoil under high seas

- Has been estimated to be rich in minerals, today seems that those were probably over-estimates, and it's also not economically feasible to exploit these resources
- At the time developing countries advocated for a new community-oriented principle to govern the exploitation of undersea wealth
- 1967 Maltese Ambassador – Arvid Pardo – launched notion of "common heritage of mankind", world community faced a choice between rampant individualism and community management of global resources
- Common heritage of mankind concept:
  - Absence of right of appropriation
  - Duty to exploit resources in the interest of mankind in such a way as to benefit all, including developing countries
  - Obligation to explore and exploit for peaceful purposes only
  - Duty to pay due regard to scientific research
  - Duty duly to protect the environment
- Art. 136 of Law of Sea Convention reflects this principle
- International Sea-bed Authority was provided for in Convention as organ to administer resources collectively
- Industrialized countries firmly opposed to new concepts, because
  - It did not ensure access to seabed minerals
  - Majority voting did not enable industrialized states which have to bear brunt of costly research and exploitation to have a proportionate role in decision-making
  - The legal regime of transfer of technology by industrialized countries to the Enterprise and developing countries would be contrary to free play of market forces and penalize developed countries
- 1994 – states reached an agreement on this impasse:
  - The Authority shall be set up gradually, and its cost for member states kept at a minimum
  - There is no longer obligation for States to finance the Enterprise
  - The Enterprise is now subject to market forces – both its funding and operations are subordinate to the cost-effectiveness criteria
  - In conformity with new voting system, the Authority's Council can no longer impose its decision on matters that States deem contrary to their interests
  - There is no longer obligation to transfer technology from developed countries to Enterprise or developing countries
- Although notion of common heritage of mankind has not been rejected, in practice the major benefits that would have accrued to developing countries have been severely watered down, and is thus not such a radical concept anymore.

3.5.5 Air

- At present, each state enjoys exclusive sovereignty over airspace above its territory and territorial sea

- Traditionally, states have claimed sovereignty over whole of airspace
- No foreign state may fly through without permission or authorization
- Over-flight by foreign aircraft allowed due to bilateral and multilateral agreements
- 1944 Chicago Convention on International Civil Aviation – specific rules for civil over-flight

3.5.6 Outer Space

- Outer space – starts between 90 and 100 miles above earth

- Theoretically, until rockets and satellites were first launched, each state had sovereign rights over its own portion of outer space
- However, once rockets and satellites possible, consensus emerged that states (US & USSR) were not required to ask for the authorization of the States above whose territory the satellites were orbiting
- As a consequence, outer space immediately considered open to everybody for exploration and use
- Through UN Resolutions, Declarations, Treaties, basic legal principles re space law established:
  - It is not subject to national appropriation by claim of sovereignty, but means of use or occupation, or by another means
  - Its exploration and use must be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development and shall be the province of mankind (Art. 1 of 1967 Treaty and Article 4 of 1979 Treaty)
  - It must not be used to put into orbit around the earth, or station in any other manner, objects carrying nuclear weapons or other weapons of mass destruction
- Space was subject to regime akin to high seas, except for provision on no nuclear weapons
- This is not a legal regime for common interests of mankind, it's still a state-interest driven model. Major powers use their space exploration powers primarily for their own good.
- *1979 Treaty on Moon and other Celestial Bodies* (to a large extent become customary law)
  - provides that all substances originating from the moon and other celestial bodies are to be regarded as natural resources belonging to the common heritage of mankind
  - Question of how to share benefits from exploitation of resources in outer space was left unresolved

3.6 The Legal Regulation of Space, Between Sovereignty and Community Interests

The int'l legal regulation of territory and other space shows most clearly the conflict between traditional, state sovereignty approach and modern, community-oriented outlook.

In this area, state sovereignty and self-interest / individualism has dominated (even in the legal realm). The legal regulation of space has been governed by 'each for himself' principle.

The 'common heritage of mankind' concept was advocated by developing countries, but at the same time they were trying to gain control over exclusive economic zones on their coast-lines, and furthermore, they were unlikely to develop technology to exploit ocean bed resources, whereas developed states were.
→ Could infer that developing countries were themselves acting out self-interest, rather than out of 'common humanity.'

BUT, 1982 Convention on the Law of the Sea and 1979 Treaty on the Moon still contain the concept of 'common heritage of mankind,' so it may not have lost all relevance at international level.

4 Other International Legal Subjects

4.1 Insurgents

- Political and military dissidence within a sovereign state results in large-scale armed conflict, with rebels succeeding in controlling some territory and setting up an operational structure capable of wielding authority over individuals who live there (minimum characteristics of states).
- When this happens, insurrectional party normally gains some measure of recognition as an int'l legal subject.

- Insurgents either fail and get crushed by state or succeed and become states themselves with international legal personality. There is a grey area between when they are trying not to get crushed.

- States have traditionally been very hostile to insurgents, because insurgents want to topple them.
- States thus tend to regard insurgents as common criminals.
- They also resist any interference from int'l community.
- Reasons for even greater reluctance to recognise insurgents in modern times:
  - Spread of tribal feuds or other conflicts in developing states, due to arbitrary borders drawn by colonial powers
  - Growing influence of nationalist or religious groups, particularly in states born from collapse or break up of bigger state.
- Therefore, growing tendency to deny int'l legal standings to rebels.

<u>Evidence of this:</u>
- Current regulation of conditions for insurgents to acquire int'l legal personality is confused and rudimentary
  - Rebels should prove they have effective control over territory
  - Civil commotion should reach a certain degree of intensity and duration.
- States (both attacked state and third parties) can decide whether these conditions have been met.
- Rebels are automatically upgraded to international subjects engaged in war if:
  - State they are rebelling against recognizes them and admits it is an int'l armed conflict
  - Third states recognise them

  Few examples of this – US Civil War, naval blockade of South, recognition of belligerency

- Therefore, existence of rebels as int'l legal persons may depend on attitudes of other subjects – in theory, world community could deny int'l legal personality to any rebel group, no matter how effective its control of territory, government, and population.

- Things in practice not as bleak for rebels wanting int'l standing:
  - Int'l community has various political and ideological alignments – someone is bound to recognize the rebels
  - Even other states may find it useful to recognize rebels as independent legal subject, for example, in order to address claims for protection of foreign nationals to authority that has effective control over territory and population

- Rebels also have a hard time because third state are authorized to provide assistance of any kind to the lawful government (including sending military reinforcements), but they are duty bound to refrain from providing any assistance other than humanitarian to rebels.

→ this is different if rebels qualify as a national liberation movement

Furthermore, int'l rules don't generally address themselves equally to rebels and states

- Same Obligations:
  - Rebels are empowered to enter into agreements with those states that are willing to establish rapport with them
  - Rebels are to grant foreigners the treatment provided for under international law
- BUT Different rights
  - can't claim respect for the lives and property of their 'nationals' (ppl who owe them allegiance)
  - If a national from insurgent territory lives in another state, other state's duty to protect exists only in relation to 'lawful government' that individual is a citizen of, not to rebels
  - Persons acting as state officials for rebels are treated as individuals, can only be granted international protection by states which grant them recognition
  - Do not possess any right of sovereignty over territory they control → they cannot cede the territory or part of it to another state, they merely have de facto not de jure authority

- Insurgents are state-like subjects, but they are transient and have limited international capacity.
- They have only a few international rights and duties.
- They are associated with a limited number of existing states that grant them recognition.

4.2 The reasons behind the emergence of new international subjects

International organizations:

- States have been motivated by *expediency* and *practicality* in granting international legal status to them.
- This began in 19th Century, but expanded after WWII. Bodies set up after WWII were granted autonomous powers with rights and duties distinct from each member State.
- Motivated by belief that a web of international instruments would impose barriers on states and help avoid another world war.

Individuals

- Western liberal-democratic theory based on legal entitlements of individuals at root of this emergence of new int'l legal subjects
- Human rights doctrine – logical corollary was that individuals should have opportunity to call states to account before int'l bodies if they felt their rights had been violated
- Emergence of certain core values of int'l community (peace, humanitarian law)
- States perceived need to hold individuals to certain int'l obligations and be able to punish them for breach.

National liberation movements

- Doctrine of self-determination of peoples key here
- Freedom from racist regimes of colonial domination – Lenin (anti-colonialist version, 1917); Wilson (moderate version, 1918).

4.3 International organizations

- States increasingly find it convenient to set up international machinery for carrying out tasks of mutual interest.
- International organizations - object is "to create new subjects of law endowed with a certain autonomy, to which parties entrust the task of realizing common goals."
  - ICJ, *Legality of the Use by a state of nuclear weapons in armed conflict*
- They are but instruments in hands of states.

- They have limited competence and field of action – states invest them with special powers, inherently limited by state interests and desires for function of particular int'l organization.
  - ICJ, *Legality of the Use by a state of nuclear weapons in armed conflict*

First created in late 19th century and early 20th century – v. rudimentary and concerned with technical matters:
- Universal Postal Union, 1875
- Union for protection of industrial property, 1883
- International Institute for Agriculture, 1905
- Various river commissions (Danube, Rhine, etc.)

League of Nations & ILO
- of greater importance, but they too had hardly any real independence or existence of their own.
- But did they have international legal personality?
  - Many scholars said no.
  - But some courts said yes → 1931, Italian Court of Cassation, *Istitute Internazionale di Agricoltura v. Profili* – held that organization had int'l legal personality because states had intended organization to be autonomous

Issue became more pressing after WWII, when lots of international organizations were established on various issues.
- Political relations – UN, OAS, Council of Europe, OAU, League of Arab States
- Military relations – NATO, former Warsaw Pact
- Economic co-operation – IMF, World Bank, WTO, EU
- Cultural relations – UNESCO
- Social co-operation – ILO, FAO

Test for determining whether an organization is an international legal subject
1. Show that member states, in setting up organization and entrusting certain functions to it, intended to clothe it "with the competence required to enable these functions to be effectively discharged"
   → prove that founding fathers intended to create an autonomous body capable of being detached from members
   Intention can be inferred from various elements:
   - Deduced from fact that decisions of principal organs of organization must not be taken unanimously but can adopted by a majority vote
   - May be spelt out in statute of organization
     e.g. *ICC Statute*, Art. 4.1 – ICC has international legal personality.
2. Necessary for the organization in actual fact to enjoy autonomy from member states and effective capacity necessary for it to act as an international subject
   - 1949, ICJ *Reparations for Injuries suffered in service of the UN*

- Organizations that do not meet this test are said to be acting on behalf of member states and do not have international legal personality. This means states are collectively responsible for any wrongful act committed by official acting for that organization.

Rights and duties of international organizations with int'l legal personality
- depends on whatever the states creating it have decided.
- But there are some rights which have emerged as generally being held by international bodies:
  - Right to enter into int'l agreements with non-member states on matters within the organization's province (like treaties)

- Right to immunity from jurisdiction of state courts for acts and activities performed by the organization
  - Has come up re employment law
- Right to protection for all the organization's agents acting in territory of a third state in their official capacity as international civil servants
  - 1949, ICJ *Reparations for Injuries suffered in service of the UN* - authoritatively upheld this right
- Right to bring an int'l claim with a view to obtaining reparation for any damage caused by a member state or third state to the assets of organization or to its officials acting on its behalf (even when victim is national of offending state, functional rather than national bond respected). Some saw this as dangerous attack on national allegiance, Socialist countries didn't like this.
  - 1949, ICJ *Reparations for Injuries suffered in service of the UN*

- BUT int'l organizations do not always have capacity to enforce these rules if they are breached, because they can often do little more than suspend delinquent member state from participating or voting, or expel it altogether.
- With regard to non-member states, int'l organizations may be able to invoke rules on state responsibility.

4.4 National liberation movements

Liberation movements – organized groups fighting against colonial, racist or alien powers
- Africa (mainly), Asia, Latin America, to some extent in Europe
- Prevalent from 1960s-1980s

- Many groups which led national liberation movements eventually acquired statehood (e.g. ANC in South Africa).]
- Others have gone half-way (PLO), still others have been unsuccessful (POLISARIO front in Western Sahara).
- Some of these groups managed to controlled territory, but not all. They were usually hosted in a friendly third country.

- This distinguishes them from regular insurgents – because they were given international status not through their effective control of a territory and its population, but based on international values of self-determination.
- No ban is imposed on states to refrain from providing them with assistance (short of sending troops)
- States are duty-bound to refrain from assisting the state which is seeking to squash a struggle for self-determination.
- Territory is not insignificant though, because national liberation movements to at least aspire or intend to eventually control over some territory.

- To be holders of int'l rights and obligations, national liberation movements need to have a representative organization or apparatus than can be in contact with the international community.
- If it has such an apparatus, it can claim to have international status – Geneva Protocol I 1977, Art. 96.3
  e.g. PLO has been recognized to have limited international personality

<u>Rights and obligations of national liberation movements:</u>
- Right to self-determination – a community right

- Rights and obligations deriving from general principles on conduct of hostilities
- Rights and obligations deriving from rules on treaty-making – because their representatives can enter into some treaties, for example, agreements on borders
- Right to claim respect for, and protection of, persons acting in their official capacity as organs of the people's representative structure & their immunity from states' courts for acts performed in that capacity
- Cannot dispose of the territory or its natural resources under dispute
- BUT colonial or dominant power is barred from entering into international treaties concerning the territory of the people concerned
  - *Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal* (1989)

4.5 Individuals

Many contend that individuals may not be regarded as having the legal status of international subjects. They see individual right to petition before international bodies as an exception, and nothing more than a procedural right because it is cannot be enforced. Cassese thinks it is much more complicated than this.

4.5.1 Traditional law

- From 17th to 20th Century, during development of int'l community, human beings were under exclusive control of states.
- If they did acquire some legal relevance internationally, it was beneficiaries of treaties (on navigation, on treatment of foreigners) or as reference points or terrains for state power (diplomatic immunities).

- A treaty, being an international agreement, cannot as such create direct rights and obligations for individuals. But object of international agreement may be that the contracting parties adopt some definite rules at national level that create individual rights and obligations.
  - 1928, PCIJ, Advisory Opinion in *Danzig Railway Officials*

- Traditional int'l law did not include general rules conferring rights on individuals, regardless of their nationality.

<u>Exception – piracy:</u>
- Some scholars said rules on piracy imposed direct obligations on individuals while at the same time exceptionally authorizing states to seize pirates on the high seas and punish them irrespective of their nationality.
- Others said that the int'l rules merely obliged states to pass legislation prohibiting piracy and authorized all states to allow their national authorities to arrest, prosecute and punish pirates
- Controversial question because at the time, individuals were under full control of states, and it was odd to say that certain individuals had obligations imposed by international rules but did not gain any international rights and powers.

4.5.2 Modern law

- Today, states have lost their exclusive monopoly over individuals, gradually yielding some powers to international organizations.
- Individuals have been granted some legal rights that can operate at an international level and have also been conferred with obligations (like respect for fundamental values).

a) Customary rules imposing obligations on individuals

In armed conflict, international rules that impose obligations on individuals have come into being:
- should individuals engaged in international war break rules of warfare, they would be criminally liable for such breaches, regardless of their status as state agents
  - Has evolved to include crimes against humanity – genocide, aggression and terrorism, torture).
- These obligations are incumbent on all individuals, regardless of the rules within their national legal system.
- This puts the international legal system into direct contact with individuals, without having to go through the national legal system for implementation.
- Individuals have these obligations both when they act as state officials and when they act in private capacity.
- Individuals in breach are criminally liable and can be brought before the courts of any country in the world or before an international criminal tribunal.

b) Holders of the corresponding rights

Who is entitled to enforce these obligations? Two possible views:

1 It is not possible to consider that individuals are entitled to seek enforcement of those obligations. Only states could make such a claim and have the power to enforce it.

2 Individuals have rights to seek enforcement of obligations on other individuals. For the time being, this international right is not met with specific means of enforcement that belong to individuals. They can only institute criminal proceedings against alleged culprits before national courts possessing, territorial, personal, or universal jurisdiction, or they can bring claim to attention of ICC Prosecutor.

- There is nothing to prevent states from changing the current situation and granting individuals rights to enforce these international obligations – all depends on will of states.

c) Treaty provisions conferring rights on individuals

- States have increasingly concluded agreements granting human rights to individuals subject to their jurisdiction → these only be exercised by individuals within the domestic legal system of each contracting party.

- States have also provided individuals with right to petition international bodies alleging that a contracting state has breached a human right protected by treaty
  → the right to petition international bodies is conferred on individuals regardless of whether or not they are authorized by national implementing legislation of those treaties – this right is granted to individuals *directly* by individual rules.

Limitations on this right of petition:
- Individuals only have a procedural right (right to initiate international proceedings before an int'l body).
- Right is usually limited to forwarding a complaint, because cannot participate an int'l proceedings
  - Exception – European Convention on Human Rights, which allows to take part in hearings
- Normally individual has no right to enforce or promote enforcement of decision favourable to her. Individual is left in hands of accused state, and cessation or reparation will depend on good will of states.
  - Exception – European Convention on Human Rights – state under the obligation to comply and Council of Europe Committee of Ministers can monitor compliance
- Right is only granted by treaties – therefore only exists with respect to certain matters

    - e.g. labour relations – art. 24 of ILO Constitution grants associations of workers or employers the right to submit complaints.
    - e.g. human rights – Optional Protocol to Int'l Covenant on Civil and Political Rights and CERD grants individuals rights to submit communications to human rights bodies. ECHR and Inter-American Convention on human rights grant individuals right to lodge complaints against member states.
- Not all states that are parties to above treaties are made accountable to individuals, because states do not have to accept clauses that confer individual rights of petition in order to ratify the treaty.
- Procedures individuals can initiate are very different from those existing in domestic law.
    - They are not judicial, although they tend to follow judicial rules
    - Int'l proceedings may be quite rudimentary, particularly in rules on taking of evidence.
    - Outcome of procedure is not a judgement proper, but more of a report or recommendation, with not legally binding decision.
- Individual right of petition ultimately rests on will of states, and could vanish if states terminate treaty or repeal clauses on communications procedures.

But significance of int'l right of petition should not be under-estimated:
- It indicates state willingness to deprive themselves of some of their sovereign rights over individuals.
- Right is being granted to persons as human beings, as nationality doesn't affect your right to bring a petition against a state.
- Many states in the end respect the decisions taken by the international complaints reviewing mechanism, despite lack of enforcement.

4.5.3 Legal status of individuals in international law

Individuals do posses international legal personality, but it is limited:
- They have a few obligations, deriving from customary international law.
- They have procedural rights (rights of petition) which benefits individuals, but only if state has signed the treaty and clause conferring that right.
- All states are willing to demand individuals' respect for fundamental values, but they are less prepared to grant them power to sue states before int'l bodies.

5 The fundamental principles governing international relations

5.1 Introduction

No state was powerful enough during period of crystallization of international community to impose its own legal system or values or set a standard of behaviour at international level.

Values which emerged by consensus of state practice as paramount:
- Freedom – grant wide sphere of legitimate action to states
- Equality – start from assumption of legal equality of states
- Effectiveness – tend to legitimize situations which have acquired de facto force

→ laissez-faire approach of classical international law

UN Charter's principle values a big departure from this
1. Sovereign equality of states
2. Peaceful settlement of disputes
3. Prohibition of threat or use of force

However, by 1960s clear that these Charter values did not go far enough. Developing and socialist countries wanted a revision to expand and update the Charter's core values, because
- They wanted their own basic demands in international law
- They wanted to discuss, negotiate, and agree upon basic standards of conduct with traditional members of world community

So: *UN 1970 Declaration on Friendly Relations* (resolution 2626 – XXV, adopted by consensus, but not legally binding) – added to Charter's three first values:
4. Ban on intervention in internal or external affairs of other States
5. Duty of co-operation
6. Good faith
7. Principle of equal rights and self-determination of peoples

However, fact that these were agreed in a resolution does not make them principles of international law. Have to look at state practice to determine whether they in fact have universal scope and legally binding force.

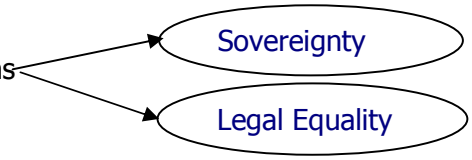
→ These principles make up the overriding legal standards that form the constitutional principles of the international community. They help diverse community with often conflicting interests get along somewhat (really?).

5.2 The sovereign equality of States

5.2.1 General

The sovereign equality of states, of all the fundamental principles regulating IR, is the only one that everyone agrees on. It has the support of all groups of States, irrespective of ideologies, political leanings, and circumstances. Whole body of international law rests on idea of sovereign equality of states.

Principle has two distinct notions



5.2.2 Sovereignty

Sovereignty confers these powers and rights:

1. Power to wield authority over all the individuals living in a territory
2. Power to freely use and dispose of territory under the State's jurisdiction and perform all activities deemed necessary or beneficial to the population living there.
3. Right that no other state may intrude on another state's territory (right to exclude others, jus *excludendi alios*)
   e.g. Cases of bounty hunters seizing criminals and tacking them back to face trial, violation of country's sovereignty that criminal was hiding out in. BUT US Supreme Court trampled on this in *Alvarez-Machain* (1992), holding that capture of a Mexican man wanted to face charges in US court was legitimate and not a violation of extradition treaty.
4. Right to immunity for state representatives acting in their official capacity. Acts performed by State officials in international relations are not seen as individual acting on behalf of state, but as state itself acting. As a result, individuals cannot be brought to trial if such actions are contrary to international law. However, there are exceptions in the case of crime and in the case of individual actions in which person would be immune from both foreign jurisdiction and domestic arrest.
5. Right to immunity from jurisdiction of foreign courts for acts or actions performed by the State in its sovereign capacity and immunity for execution measures taken against the use or planned use of public property or assets for the discharge of public functions
6. Right to respect for life and property of State's nationals and State officials abroad

5.2.3 Legal Equality

- Formally speaking, no member of the international community can be placed at a disadvantage; all must be treated on same footing.
- This means that states which are factually weaker remain in that position and don't get a handicap or special treatment to compensate for structural inequality.
- It also means that legal constrains are only valid or legitimate if accepted in full freedom by the State concerned.

5.3 Immunity and other limitations on sovereignty

State sovereignty is not unfettered – it is restricted by:
- Treaties – restraints states put on themselves
- Customary rules – restrains that the international community puts on all states, arising from obligation to respect sovereignty of other states

5.3.1 Rights and Immunities of Foreign States

A State may not exercise its sovereign power over, or otherwise interfere, with actions legally performed by foreign States on its territory.

<u>A State may not:</u>
1. Call to account on its own territory a foreign State official for acts performed in the exercise of his functions, except in the case of international crimes (e.g. ICTY)
2. Interfere with foreign armed forces lawfully stationed on its territory (unless authorized by treaty rules or ad hoc consent)
3. Perform coercive acts on board a foreign military or public ship or aircraft (like enforcing its law on foreign plane)

4. Submit to the jurisdiction of their courts foreign States for acts performed in their sovereign capacity
   Why?
   - B/c states should not interfere with public acts of sovereign states out of respect for their independence
   - B/c judiciary should not interfere with the conduct of foreign policy, by either national or foreign governmental authorities, on the principle of separation of powers – this role should be left to responsible international agency

   BUT exception for acts performed by a State in a private capacity, as a legal person under private law (i.e. government owning electricity plants) – when state is engaged in commercial transaction for sale of goods or supply of services (*Il Congreso del Partido, Alcom Ltd. V. Republic of Colombia,* UK).
5. Seize foreign State property or take any other measure of execution or preventive measures against the property of a foreign State intended for use or discharge of public functions.
   BUT, can take such measures against property destined for private/commercial functions (i.e. Not the ambassador's briefcase, but yes his textile samples for his father's company).
   - Execution measures can normally be taken against bank accounts of foreign States, but some courts don't think that bank accounts opened by foreign diplomatic missions should be vulnerable to seizure because they exist to perform public function of foreign State

5.3.2 Immunities of Diplomatic Agents

International **customary** law grants a host of privileges and immunities to diplomatic agents – in *Vienna Convention on Diplomatic Relations,* 1961.

Most of this Convention declared existing principles of customary law, or have since turned into general law.

<u>Immunities enjoyed by diplomatic agents</u>
- Functional immunities - enjoyed as state officials for acts and transactions performed in their official capacity (they are the state, hence cannot be sued)
- Property immunities - attach to premises and assets used by foreign state official for accomplishing mission
- Personal immunities – cover the personal life of the official intended to shelter the foreign official from any interference with their private life that might jeopardize the accomplishment of their official function

<u>Personal immunities are different from other immunities in that they:</u>
- cover private acts and transactions (compare to functional, which only covers public acts of state)
- aren't exemptions from the law of the host state, but exemption from jurisdiction of their courts and enforcement agencies
- only apply in relations between sending and receiving state (whereas functional immunities can be invoked against any other state, *erga omnes*)
- cease with cessation of the function (whereas functional immunities are permanent)

<u>Property Immunity includes:</u>
- Premise of foreign diplomatic mission are inviolable. The mission is not foreign territory, it still belongs to host state, but the enforcement agencies of this state are not allowed to exercise their powers in that area, unless authorized by head of mission
- The property of foreign diplomatic mission is immune from search, requisition, attachment, or execution

- The diplomatic bag, and diplomatic courier and messages in code and cipher may not be violated

Personal immunities include
- Immunity from arrest and detention. If diplomat commits a crime, host state may tell sending state that the agent is a *persona non grata* and, under Art. 9 Vienna Convention, Host state may then recall the agent or cease her diplomatic function; if neither, the host state can cease to consider her a member of the diplomatic mission
- Immunity from criminal jurisdiction
- Immunity from civil and administrative jurisdiction of the receiving State
  except under Art. 31 with regard to
    - private immoveable property located in the receiving state, unless holding it on behalf of State for purposes of mission
    - succession
    - any professional or commercial activity exercised outside her official functions
    - if diplomat voluntarily submits to local jurisdiction (e.g. if you start proceedings in a local court, you can't suddenly back out and say you're immune from local jurisdiction since you accepted it in the first place).
- Inviolability of the diplomatic agent's private residence, papers, correspondence, and property
- Exemption from all dues and taxes, personal or real, national, regional, or municipal

- These immunities normally apply to members of his/her family forming part of the household, provided they are not nationals of the host state.
- BUT these immunities don't apply if diplomat has nationality of host state or is a permanent resident (Art 38.1 of Vienna Convention). Such a person only enjoys functional immunity privileges. (otherwise person could be exempt from any jurisdiction and be unaccountable)

5.3.3 Immunities of Consular Agents

Consular agents are not diplomatic envoys – there are not in charge of transactions between two States. Rather, their activities are meant to protect the commercial and other interests of the appointing State, provide assistance to nationals of that State, and perform notarial functions (registration of marriages, wills, etc.).

Vienna Convention (1963) – codified the customary rules on the legal status of consular agents:
- Consular agents do not enjoy personal immunities.
- They are only immune from criminal and civil jurisdiction for acts done in the official exercise of their consular duties (functional immunities).
- Art 41.1 – are not liable to arrest or detention pending trial
- Art 41.2 – cannot be imprisoned or have their freedom of movement restricted
- Consular premises are inviolable, Consular archives and documents cannot be searched / seized.
- Art. 49 – Consular agents exempt from taxation
- Art. 50 – Consular agents exempt from customs duties and inspection

5.3.4 Immunities of Heads of State and Members of Cabinet

Heads of States, foreign ministers, and other members of Cabinet on official mission abroad have:
- Immunity for official acts (functional immunity)
- Enjoy privileges and immunities with regard to their premises (home and business) and private acts

These immunities relate to property or person, and are intended to shelter the foreign State official from any undue interference by the host State in his or her private life, which would jeopardize exercise of her/his duties for State

They are only granted to senior State officials on an official visit, not on private visits. When not travelling officially, the host state must afford them special protection, and may grant them some privileges and immunities, but only out of politeness and good will (comity) rather than obligation.

5.3.5 Duration of Privileges and Immunities

- Functional immunity does not cease with the end of the functions vested in the State official.
- Personal privileges and immunities terminate at the end of the mission.

Laperdrix and Penquer v. Kouzouboff and Belin (Paris Court, 1925):
- personal immunities do not continue, because diplomatic immunity is set up in interests of government, not in interests of individuals.

If an ambassador commits an ordinary crime in host country, leaves at end of diplomatic mission, and then returns as a private citizen, he may be arrested and brought to trial.

- Cessation of immunity does not coincide with moment of termination of his/her diplomatic functions in the host State. Diplomat remains protected for a reasonable time after end of posting so that they may make arrangements to leave (even in case of armed conflict).
  → Codified in Vienna Convention on Diplomatic Relations, Art 39.2

5.3.6 Limitations upon a State's treatment of foreigners and individuals

Customary international rules on respect for human rights impose upon States certain fundamental obligations regarding treatment of individuals, whether national or non-national/stateless, on their territories. But these rules are not specific.

Customary rules – obligations with regard to foreigners:
- Protect them from unlawful attack
- Not subject them to military conscription
- Not to grossly and systematically infringe their human rights

5.4 Non-intervention in the internal or external affairs of other States

5.4.1 General

Principle of non-intervention in the affairs of other States is one of the most essential tenets of the 'Grotian' classical model of international community.

The principle has been enshrined in specific customary rules:
- Prohibition of a state from interfering in the internal organisation of the foreign State (i.e. deciding which ministry is best equipped to deal with a certain question)
- State is not allowed to bring pressure to bear on specific national bodies of other countries (e.g. legislature, judiciary, police)
- May not interfere in the relations between foreign government authorities and their own nationals

- State must refrain from instigating, organizing, or officially supporting the organization on their territory of activities prejudicial to foreign countries (but this does not cover subversive activities carried out by private persons without authorization of state).
- Whenever a civil war breaks out in a foreign country, States are duty-bound to refrain from assisting insurgents, unless they qualify for status of a national liberation movement

Pre-1945 – these rules were in force, but a state could choose not to follow them if they thought their interests over-rode the rules (e.g. a state could intervene in affairs of another state if it thought it was under threat from that state).

Post-1945 – these principles have renewed importance, particularly to some states, due to:
1. Introduction of far-reaching legal restraints on use or threat of force
2. Drive towards international co-operation, which entailed expansions of inter-governmental organizations which by definition meddle in internal affairs of states, and encourage states to determine exactly which areas of their affairs were immune from any intervention
3. Spread of human rights doctrines, with the ensuing possibility for states and others to press for compliance with human rights standards

Principle of non-intervention → bridge between traditional sovereignty-orientated structure of int'l community and new attitude of States, based on social intercourse and co-operation

5.4.2 New Forms of Intervention

Does the ban on interference in internal affairs include economic pressure or coercion, political destabilization, instigating, fomenting and financing unrest? What about more subtle forms of pressure, such as radio propaganda, economic boycott, influencing int'l monetary and financial institutions and stifling views of weaker states in those bodies?

<u>Economic pressure:</u>
- Decision to withhold economic assistance to developing countries or int'l aid agencies is not an infringement, if decision is motivated by difficulties in granting State or change in policy motivated by domestic jurisdictions
- However, economic measures "designed to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind" (principle III of UN Declaration of1970, para. 2) may be run counter to principle of non-interference.

These issues were subject of big debate during Cold War (1960s and 1970s).
- Socialist and developing countries argued that economic pressure violated rights to non-interference.
- Western States denied this, arguing that int'l law only prohibits intervention by force or by threat of force, and felt that states remained free to influence the policies and actions of other countries.

One area of agreement between West and Socialist and developing countries:
- ➢ Prohibition of toleration by State A of subversive activities against other states organized in territory of state A.

[5.6 – 5.10]

Part II: Creation and Enforcement of International Legal Standards

6 International law-making: Customs and Treaties

6.1 Introductory remarks

6.1.1 Traditional Law

- Treaties and Custom are main methods for creating legally binding rules, both responded to need of not imposing obligations on States that did not wish to be bound by them.
- Treaties, being applicable only to contracting parties, reflected the individualism prevailing in international community.
- Custom, although binding on all members of the community, also rests on consent – customary rules resulted from the convergence of will of all States (see *Lotus*). It was felt that any member could object to the applicability of a customary rule.

- Both treaties and custom possessed equal rank of status - reflects unfettered freedom of states.
  - Therefore, a later law repealed an earlier one; a later law, general in character, does not derogate from an earlier one, which is special in character; a special law prevails over a general law.

- Both treaties and norms could regulate any subject matter, and in any manner the parties chose.
- Thus, two or more states could elect to derogate from customary international law, and a new custom supplant an existing treaty.
- International rules did not define in detail the processes by which a treaty came into being, because states wished to be as free as possible in their dealings.

6.1.2 New Trends

1. Because of emergence of a huge number of states in 20th century with very different values, it was necessary to establish some rules for regulating treaties (establishment, interpretation, etc.)
   → *Vienna Convention on the Law of Treaties*, 1969
   → *Vienna Convention on the Law of Treaties between States and International Organizations*, 1989

2. A set of fundamental values has emerged, that all states agree to in terms of their content and crucial importance.
   - A new category of general international rules has come into being – *jus cogens*. They place restraints on the otherwise unfettered freedom of States.
   - They establish a *hierarchy* within body of international law – States may not derogate from these peremptory norms through treaties or customary rules.
   - Therefore, *jus cogens* superior to all other rules of international law.

3. Now questionable whether states object to the formation of customary rule and thus remain outside it. Rise in community pressure on individual states.

6.2 Custom

6.2.1 General

Statute of the ICJ, Art. 38.1 – lists among the sources of law upon which the Court can draw: "International custom, as evidence of a general practice accepted as law."

Custom made up two elements –
1) General practice (*usus, diuturnitas)*
2) Conviction that such practice reflects, or amounts to, law (*opinio juris*) or is required by social, economic, or political exigencies (*opinio necessitatis*)

Custom vs. Treaties
- not normally a deliberate law-making process. When states participate in norm-setting process, they do not act for primary purpose of laying down international rules. Their primary concern is to safeguard their economic, social or political interests. Unconscious and unintentional law-making (Kelsen)
- rules are binding on all members of world community, whereas treaties only bind those that adhere to them

6.2.2 Elements of Custom

State practice (*usus, diuturnitas)*
- Epitomized in ICJ, *North Sea Continental Shelf* cases: "State practice should be both extensive and virtually uniform."
- *Nicaragua* – instances of non-compliance with a rule do not mean that the rule has not come into being. State practice need not be absolutely uniform, individual deviations do not necessarily lead to conclusion that no rule has crystallized. Deviations can actually prove that there is a customary rule, because the State or others feel that there has been a breach of something

State conviction (*opinio juris* or *opinio necessitates):*
- Practice – evolves among certain States under the impulse of economic, political or military demands. May be regarded as being imposed by these external needs. (*opinio necessitatis*)
- If this practice does not encounter strong and consistent opposition from other States, but is increasingly accepted or acquiesced to, a customary rule gradually crystallizes
- At this later stage, it may be held that the practice is dictated by international law (*opinio juris*)
- Now states begin to believe that they must conform to the practice not because economic, political or military considerations demand it, but because an international rule requires them to.
- Thus, precise moment that a customary rule appears / is born is imprecise – it's a gradual process over time, culminating in a feeling that states have that they are conforming to a legal obligation.
    - Rules on continental shelf – an example of nascent customary rules based on *opinio necessitatis* that then turned into *opinio juris*.

- Where there are conflicting interests about the economic or political interests, the *usus* element may become most importance in the formation of the customary rule. (e.g. important in formation of rules on continental shelf, not so important on use of outer of space, as there wasn't much use!)
- In other instances, *opinio* is more important – because rule is based on evident and rational grounds (e.g. rules on prohibiting slavery, genocide, and racial discrimination).

6.2.3 The role of usus and opinio in international humanitarian law

Usus and *opinio* play a different role in humanitarian law of armed conflict, due to Martens Clause, adopted in 1899 at Hague Peace Conference, listed 3 main elements of custom:

> "Until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."

Was taken up in 1949 *Geneva Conventions* and the First Additional Protocol 1977, and has been referred to by the ICJ in *Legality of the Threat or Use of Nuclear Weapons*.

Clause puts 'laws of humanity' and 'dictates of public conscience' on same footing as 'usage of states.' Therefore state practice may not need to apply to formation of a principle or rule based on laws of humanity or public conscience.
→ *usus* may be less important regarding international humanitarian law than *opinio juris/necessitates.*

- Expression of legal views by a number of states and other international players about a principle or rule may be enough to lead to formation of a customary rule.
- This makes sense, because otherwise customary rules on humanitarian issues could only be created after state practice of atrocity and global rejection of such practice – law here being used as an antidote to destructiveness of war, rather than clean-up tool.

6.2.4 Do customary rules need, at their birth, the support of all states?

- Traditional view was the express or tacit consent of all States was required for a rule to emerge in world community.
- No longer seen as necessary today.
- Once customary rules gradually crystallize, they do not need to be supported or consent to by all states.
- It is enough for a majority of states to engage in consistent practice corresponding with the rule, and for those states to be aware that the rule is needed.
- States shall be bound even if some of them have been indifferent, relatively indifferent, or have refrained from expressing either assent or opposition to it.

6.2.5 Objection by states to the formation of a customary rule

Can a state that objects to the formation of a customary rule dissociate itself from such a rule and thus remain free from the obligations it imposes once it has been consolidated as an international rule? Can states opt out?

- Custom at present no longer maintains its original 'consensual' features as in classical theory
- Current community-oriented configuration of international relations would make it hard for a state not to succumb to pressure of vast majority of world community
- There is no firm support in State practice and international case law for a rule that allows a persistent objector to opt out.

  - Therefore, a State is not entitled to claim that it is not bound by a new customary rule on the grounds that it has consistently objected to it.

- However, strong opposition by Major Powers can slow down development or formation of a new rule.
- Some sort of law imposing obligations on those who were not willing to be bound or prepared to be bound is gradually emerging.

6.2.6 The present role of custom

After WWII, custom increasingly lost ground:
- Existing customary rules were eroded more and more by fresh practice and resort to custom to regulate new matters became relatively rare
  → due to growing assertiveness of socialist and developing countries, who felt that custom was associated with West's power over international world order, and wanted legal change through treaty-making.
- Membership of the world community is much larger today than in heyday of customary law, and members of the world community are deeply divided. Makes it hard for general rules to gain support from such a diverse group of states

- Nevertheless, existence of international organizations facilitates and speed up custom-creating process, at least in areas where States do want those rules to come into being (e.g. UN).
- Consent is the common decision-making process, which helps lead states to common denominator principles. This evolves into normative core, which can then become basis for drafting of treaties or evolution of customary rules.

Custom is thus not on the wane everywhere. It remains significant in:
- *Areas of emerging economic interest* – e.g. those relating to law of sea, continental shelf, economic zone – because solutions to specific issues propounded by one or more states may eventually come to satisfy needs of other states
- *Areas of major political and institutional conflicts* – where new needs in international community give rise to strong disagreements between states, therefore may be very hard to regulate with treaties (e.g. rules on customary modification of art. 27.3 of UN Charter, SC decision can now be taken even when one or more permanent members is absent, contrary to text of article).
- *Updating and elaboration of customary law* – if newly independent States consider customary law to be more or less acceptable and in need revision or clarification. E.g. laws on warfare, law of treaties. Some customary rules have been updated or revised and consecrated in treaties, even though these are substantially customary laws.

6.3 Treaties

6.3.1 General

- Agreements – a merger of wills of two or more international subjects for purposes of regulating their interests, using international rules

- Treaties only bind parties to them, the states which have agreed to be bound by their provisions.
  - *Certain German Interests in Polish Upper Silesia*, ICJ, 1926 – a treaty only creates law as between the states which are party to it.
- For third states, treaties have no legal consequence.
- Third states may derive rights and obligations from a treaty only if they consent to assuming the obligations or exercising rights laid down in treaty (has been codified in Art. 35-36 of 1969 *Vienna Convention on Law of Treaties*) Rights can be presumed, obligations must be in writing
- Therefore, nothing can be done without or against will of a sovereign state.

6.3.2 The 'old' and the 'new' law

Traditional law rested on principle of utmost state freedom in making treaties. Due to pressure from socialist and developing countries, new rules were introduced and old ones codified in 1969 *Vienna Convention on Law of Treaties*, entered into force in 1980.

Formal aspects of law enacted through the Convention

- Most of its provisions either codify customary law or have given rise to rules belonging to the corpus of general law.
- Those provisions of treaty which do not belong to 'corpus of general law' retain status as merely treaty provisions, unless they turn into customary norms.
- Convention as a whole does not yet constitute general international law.
- But, Treaty probably does represent what will become 'new' law once 'old' law withers away – some of it is potential customary law

Political or ideological concepts underlying Convention

- Introduces restrictions on the previously unfettered freedom of states, each country must respect a central core of international values from which no country can deviate (Art. 53 and 64 on *jus cogens*).
- Democratization of international legal relations: Using coercion on a state to induce it to enter into an agreement is no longer allowed (Art. 52). All states can now participate in treaties without being hampered by fact that a few contracting parties exercise a right of veto (art. 19-23 on reservations)
- Convention enhances international values as opposed to national claims. Interpretation of treaties must now emphasize their potential rather than give pride to state sovereignty (art. 31 on interpretation)

New law does not completely take over 'old law'.

- Art. 4 – Treaty applies only to treaties which are concluded after the entry into force of Treaty
- Not all members of the world community have become parties to Convention, thus treaties between those countries which are not parties are only governed by those bits of the treaty which are declaratory of (or has turned into) customary law.

a) Making of treaties

- States enjoy full freedom in terms of modalities and form of agreement, no rules prescribing any definite procedure of formality.

Two classes of treaties in State practice – those in solemn form and those in simplified form

Solemn form:

- Diplomats negotiate treaties
- Agree and adopt a written text, signed by diplomats, then submitted to national authorities for ratification (usually require both Head of State and legislature to be involved in this)
- Ratification signals the state's express intent to be legally bound by the treaty.
- State is not bound by treaty until it has been ratified, signed, exchanged, and deposited with one of them or an int'l agency. Until such point, state must not act in a way that would derail object and purpose of treaty
- States that have signed a treaty are not obliged to ratify it

Simplified form (aka 'executive agreements')
- Negotiated by diplomats, senior civil servants, etc.
- Became legally binding as soon as either the negotiator or Foreign Ministers sign them
- Don't need ratification by head of state or legislature to make them binding
- This arrangement works well for issues that require a quick agreement or those issues which are seen as purely functional.

All this depends on state will. There have been cases about whether a state intended to enter into an internationally binding agreement, or instead only intended to undertake a political commitment.
- *Aegean Sea Continental Shelf*, ICJ, 1978 – press communiqué jointly issues by PMs of Greece and Turkey. ICJ held that government did not intend document to represent a commitment. ICJ considered nature of act or transaction, context in which it was drawn up, didn't regard form of document (a mere press release) as determinative of int'l obligation or not
- *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Boundary*, ICJ 1994 – minutes of a meeting between Foreign Ministers of Bahrain and Qatar did constitute an international agreement, because they enumerated the commitments the parties consented to, created rights and obligations in int'l law for the parties

b) Reservations

Old law
- When a state participating in negotiations for a multilateral treaty found some bits unpleasant, it could
  a) exclude application of one or more provisions
  b) stipulate its own interpretation of the provision
- Such reservations had to be accepted by all other contracting parties for the reserving state to become bound by treaty
- In practice this created a veto right to all other parties against the state holding the reservation
- Bilateral treaty – different, because a reservation from one party is essentially a proposal for a modification of text, therefore other must either accept or negotiate and create treaty or refuse and treaty dies

New law
- This old doctrine of 'unity of treaties' became much harder to apply as global community expanded and became more diverse
- 1969 Vienna Convention regime on reservations (first introduced by ICJ in *Reservations on Convention on Genocide*)
- States can append reservations at the time of ratification or accession, unless reservations
  a) are expressly prohibited by the treaty
  b) prove incompatible with the object or purpose of treaty
- The treaty comes into force between reserving state and other parties
- One of the latter states may object to the reservation within 12 months after its notification.
- Objections end up meaning that the provisions covered by reservation do not apply as between two states – they drop out of treaty
- Therefore, no difference between objecting to a reservation or accepting it – in either case, the 'reserved' bit drops out of treaty agreement between those 2 parties
- If state places a certain interpretation on a treaty provision, and a state objects, treaty applies without the provision that are covered by interpretative reservation. For all the states that don't object, the treaty applies with the interpretative reservation.

- Legal regime allows as many states as possible to take part in treaties with components that they don't agree with. But this may impair 'multi-lateralness' of agreements, if it all ends up being a hodge-podge of bilateral agreements, with different reservations.

➢ Human rights – if a state enters a reservation to a human rights that is inadmissible either because it is not allowed by the treaty itself or is contrary to object and purpose, it does not mean that the provision reserved does not operate with regard to the reserving state (contra regular rule). Reservation must be regarded as null and void. This means that human rights standards prevail over sovereignty of states. Opinion of European Court of Human Rights (*Belilos, Weber, Loizidou)* and UN HRs Committee (General comment, 1994 and *Rawle Kennedy).*

c) Grounds of invalidity

Old Law

- In the past, duress (economic, political, military coercion to induce one state to enter an agreement) was not considered to invalidate the treaty.
- Corruption of state officials negotiating treaty did not render it null and void.
- Only grounds of invalidity were minor
  - Using force or intimidation against the state official making the treaty
  - Inducing the other party through misrepresentation to enter into an agreement (i.e. false maps)
- All the grounds of invalidity were on same legal footing
- Only the party to a treaty allegedly damaged by a treaty's invalidity was legally entitled to claim that the treaty was not valid (privity of treaty)

New Law – Vienna Convention on Law of Treaties

- Art. 52 – Coercion (Threat or use of military force) exercised by one state against another makes a treaty null and void. Additional Declaration included economic and political coercion. Foundations laid for gradual emergence of customary rule
- Art. 53 – Treaties may be null and void if contrary to peremptory norms (*jus cogens*)
- Art. 50 – corruption of a state official of one of the negotiating parties can lead to invalidity
- Art. 48 – error
- Art. 49 – fraud
- Art. 51 – use of coercion against state representative negotiating treaty
- Art. 47 – if state's consent to a treaty manifestly violates an internal law of fundamental importance, treaty can be invalid

Important – distinction between 'absolute' and 'relative' grounds of invalidity

- Absolute (coercion, incompatibility with *jus cogens*) – implies that
  - Any state party to the treaty (not merely the state which has suffered) can invoke invalidity of treaty
  - A treaty cannot be divided into valid and invalid clauses, but stands or falls as a whole (Art. 44.5)
  - Possible acquiescence does not render the treaty valid (art. 45)
- Relative (error, fraud, corruption, manifest violation of internal law, etc.)
  - These grounds may only be invoked by state which has been victim
  - These grounds of invalidity may be cured by acquiescence or subsequent expressed consent of victim state.
  - These grounds may make only some provisions of the treaty null and void

If a treaty is tainted with absolute nullity, can a state not party to the treaty invoke?

- Art. 65 – only a party to the defective treaty may invoke its inconsistency with *jus cogens*, same rule seems to apply for other grounds of invalidity (Art. 52 and 54).
- BUT Customary rules – imply that any state concerned, whether or not party to the treaty, may invoke *jus cogens* or coercion as a grounds of absolute nullity, because these values are paramount at int'l level. Also allows a state to 'protect' itself against any assault on *jus cogens* rights (like planning a genocide on your territory) that was agreed by two state parties. Third state should be able to take this to an international court or tribunal or arbitration.

d) Interpretation

Old law
- There wasn't much in terms of specific rules about interpretation. People generally agreed should interpret according to intention of draftsmen. But, how do you figure that out?
- Some (CVL) countries placed great importance placed on "legislative history" – the *travaux preparatoires* – as indication of intent. Other (CML) countries preferred focus on text and construction of treaty.
- Absence of any rules proved to be to the advantage of the powerful states
- Criteria which did emerge – interpret in such a way that it places fewest curtailments on states; no treaty should be read to mean an infringement on sovereignty of state

New Law – Vienna Convention, Art. 31-3
- Emphasis on literal, systematic, and teleological interpretation (art. 31.1) – good faith, ordinary meaning, object and purpose
- Weight given to object and purpose of contracting parties
- Effectiveness principle – interpret provision based on what would be effective and useful (contra old principle of reading down to avoid any restraint on sovereignty).
- Preparatory work – can only be used as supplemental means of interpretation, to confirm (art. 32)
- Text equally authoritative in each language (art. 33). If there is a conflict between meanings in two languages, the meaning which best reconciles the texts in light of object and purpose of treaty must be given effect.

e) Termination

Old law
- Major powers released themselves from treaty obligations whenever they saw fit
- Sometimes resort to war necessary to do this
- Not clear under what circumstances a material breach resulted in other party being released from their obligation
- War – did that terminate all treaties or leave some intact?

New law
- Clarified concept of 'material breach' – art. 60.3 –
- Material breach consists of
  - Repudiation of the treaty not sanctioned
  - Violation of a provision essential to accomplishment of object or purpose of treaty
- Clarified what 'changed circumstances' had to be to end obligation (art. 62 (a) (b))
  - Existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty
  - Effect of the change is radically to transform the extent of the obligations still to be performed
- Exceptions to 'changed circumstances' release from obligation (art. 62.2)
  - If the treaty establishes a boundary

- If the fundamental change is the result of a breach by the party invoking the clause
- Art. 64 – if a new peremptory norm (*jus cogens)* emerges, any existing treaty which is in conflict with that norm becomes void and terminates (!!)
- Denunciation – treaty not subject to termination or withdrawal unless
  - Parties had intention of allowing for denunciation as a means of termination/withdrawal
  - A right of denunciation or withdrawal may be implied by nature of the treaty
    e.g UN Covenant on Civil and Political Rights is not subject to denunciation or withdrawal (UN HRs Committee)
- Except for art. 64 stipulation, various causes of termination do not make treaties come to an end automatically but can only be invoked by one of the parties as a grounds for discontinuing treaty.

6.4 Codification

- Most members of int'l community prefer treaties to custom (more certain, arise from negotiations).
- 1960s to 80s – states thought it would be a good idea to codify the law by a treaty-making process

- Traditional and classical areas of codification – Draft Treaties done by UN Int'l Law Commission and then discussed by the Sixth Committee of GA
  - law of the sea, diplomatic and consular immunities, law of treaties, state succession, state responsibility

- Areas where existing law in need of radical change, technical approach of going through ILC abandoned in favour of direct state-to-state negotiation and discussion (e.g. law of sea)
  - Special Committee set up to report to GA
  - If matter too controversial, adopt a declaration instead

Possible effects of codification treaties:
- Declaratory effect – simply codify or restate an existing customary rule
  - *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ – Art. 60 of Vienna Convention on law of treaties was merely declaratory of existing law
- Crystallizing effect – bring to maturity an emerging customary rule, a rule still in its formative stages
  - *North Continental Shelf* Cases, ICJ – with regard to Art. 1 and 3 on the Convention on the Continental Shelf
- Generating effect – treaty provision creating new law sets in motion a process whereby it gradually brings about or contributes to formation of a corresponding customary rule
  - *North Continental Shelf* Cases, ICJ – Ct said it was legally admissible for a treaty provision, only conventional or contractual in origin, to become part of corpus of int'l law and be accepted by such as *opinio juris*

All this of may also happen re texts other than treaties (e.g. resolutions or Declarations of UN GA).

6.5 The introduction of *jus cogens* in the 1960s

6.5.1 The emergence of jus cogens

- 1960s – upgrading of certain fundamental rules produced by traditional sources of law
- Socialist and developing countries claimed that certain norms governing relations between states should be given a higher status and rank than ordinary rules deriving from treaties and custom → *jus cogens*.

- Examples – self-determination of peoples, prohibition of aggression, genocide, slavery, racial discrimination, racial segregation, apartheid.

Why advocate *jus cogens*?
- Developing countries: it was another way of fighting colonial powers.
- Socialist countries: such peremptory rules presented the hard core of those int'l principles which, by proclaiming peaceful existence of states, permitted and safeguarded smooth relations between states having different economic and social structures. It was a political means of setting in stone the rules of the game between East and West.
- Western countries: didn't like this at all. In the end they acquiesced, having ensured that there was some mechanism for judicial determination of peremptory norms.

Introduction of this concept translated some of the positive law concepts from 17th and 18th century (one of the three bodies of law these scholars described was natural law, regulating life of mankind, laws derived from reason and humanity, necessary, prevailed over treaties).

6.5.2 Establishment and content of peremptory norms

Jus cogens was accepted but on condition that any state invoking it be prepared to submit its determination to ICJ.

Vienna Convention on Law of Treaties 1969 & 1986, Art. 53 – Defn of Peremptory Norm:
- "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

(and fact that a treaty which violates a peremptory norm is void)

Jimenez de Arechaga says this is backwards:
- This description of *jus cogens* fails to apprehend its real essence, since the definition is based on the legal effects of a rule and not on its intrinsic nature; it is not that certain rules are rules of *jus cogens* because no derogation from them is permitted; rather no derogation is allowed because they possess the nature of rules of *jus cogens.*

Art. 66(a) allows for resort to the Court in the event of disputes on the actual content of *jus cogens.*

- A peremptory norm can only take shape if the most important and representative states from various areas of world consent to it. Ultimately rests on the consent or acquiescence of majority of members of world community.
- BUT it is difficult for a state to oppose the formation of a peremptory norm – due to political, diplomatic, psychological factors which dissuade states from criticizing values that most other states hold dear.

Impact of *jus cogens* concept should not be over-stated.

- Nevertheless, clear agreement has emerged that certain rules indisputably belong to *jus cogens.*
- Norms "so essential for the protection of fundamental interests of international community that their breach was recognized as a crime by that community as a whole" – in draft ILC State Responsibility articles.
  - e.g. colonialism, slavery, genocide, apartheid, massive pollution of atmosphere or seas, prohibition of threat or use of force, fundamental human rights, racial discrimination, torture,

self-determination, fundamental principles of humanitarian law (ICTY in *Kupreskic* agreed with this last one)

→ All these *jus cogens* norms impose community obligations and by the same token confer community rights.

6.5.3 Limitations of jus cogens as envisaged in the Vienna Convention

- Major limitation – they may only be invoked by a state that is both a party to the Vienna Convention and party to the bilateral or multilateral treaty it intended to have declared contrary to *jus cogens*.
- An outsider to treaty in question (or not party to Treaty Convention) cannot invoke art. 53 and 64.
- Therefore *jus cogens* has limited practical application – a potential rather than actual rule.

6.5.4 Partial remedies to those limitations, provided by customary international law

However, this defect (6.5.3) mitigated by:
- Customary rules on invalidity of treaties
- Gradual emergence of a customary rule on peremptory law

- Customary rules on invalidity: Any state directly affected by a treaty contrary to a peremptory norm of int'l law, whether or not party to the treaty, may invoke the invalidity of the treaty.
- Customary rule on *jus cogens* operates with regard to states that are not party to Vienna Convention
- A customary norm has evolved to the effect that certain rules of int'l law (created either by custom or by multilateral treaties) possess special legal force – capacity to prohibit any contrary norms and squash those made in spite of this prohibition.

6.5.5 The effects of jus cogens

Typical effect of peremptory norm is that, as States cannot derogate from them through treaties or customary rules, the treaty or customary rules contrary to *jus cogens* are null and void.

But you don't have to go as far as invalidity.
- A court may simply disregard or declare null and void a single treaty provision that is contrary to *jus cogens*, if the remaining provisions are not tainted with the same legal invalidity.
- A court could also read a treaty provision in such a way that it is consistent with *jus cogens*, rather than against it.

Other effects of peremptory norms / *jus cogens*
- can be a deterrent – they can signal to all states and individuals that there absolute values which no one can deviate from.
- may affect recognition of states – whenever an entity with all the hallmarks of statehood comes into being through aggression, denial of rights of minorities, apartheid, etc., other states are legally bound to withhold recognition.
- a state may be unable to enter a reservation to a treaty that is contrary to peremptory norms (according to UN Human Rights Committee, 1994).
- Possible violation of a peremptory norm (torture, racial persecution, e.g.) could prevent a state from complying with an extradition treaty, if it is known they would be extraditing an individual to that fate (according to Swiss Courts).

- may strip state immunity from jurisdiction of foreign states – a state is not entitled to immunity from any act that contravenes a *jus cogens* norm, regardless of where or against whom the act was perpetrated.
- may de-legitimize any legislative or administrative act which authorizes conduct against *jus cogens* at international level. National measures may not be accorded legal recognition by other states (according to Spanish Courts and ICTY).
- States may acquire universal criminal jurisdiction over the alleged authors of acts which violate peremptory norms (according to ICTY, Belgium, House of Lords in *Pinochet).*

6.5.6 Deficiencies and merits of jus cogens

- *Jus cogens* has only been invoked in states' pronouncements, in *obiter dicta* in int'l arbitral or judicial bodies, and in declarations of UN bodies.
- It has not been relied upon in legal disagreements between states, or by int'l courts in settling int'l disputes.
- It has not yet been used to invalidate a treaty provision.
- ICJ has carefully avoided pronouncing on *jus cogens* in anything more than elusive language.
- [They have been invoked by some states at a domestic level.]

Why? B/c peremptory norms primarily have a deterrent effect.

At an international level, they remain a potential legal tool rather than an actual one.
- Why? B/c states act out of self-interest, they are prepared to challenge a treaty on basis of *jus cogens* only to the extent that it serves their interests. They are not interests in 'public interests' of global community.

- BUT peremptory norms probably do play a role in guiding and channelling conduct of states.
- *Jus cogens* may be less about policing state behaviour than about setting standards and norms which states then internalize, helping to prevent violations of those norms.

[7]

8 Implementation of international rules within national systems

8.1 Relationship between international and national law

8.1.1 Three different conceptions of the interplay between the international order and municipal legal systems

Do international rules make up a body of law not only different but autonomous and distinct from municipal/national legal system → question of much controversy.

Three different theories

1 Monistic view 1 – supremacy of municipal (national) law

- Developed by German scholars – 18th and 19th centuries – Moser, Hegel, Bergbohm, Zorn, Wenzel
- Believed that national law subsumed and prevailed over international legal rules
- Therefore international law proper does not exist on its own, it's just the 'external law' of national legal systems
- Reflected the extreme nationalism and authoritarianism of a few great powers

2 Dualistic doctrine – existence of two distinct sets of legal orders (int'l & municipal)

- Developed by German Triepel and Italian Anzilotti
- Britain and US favoured this theory in their case law and in US constitution
- Recognized the authority of int'l customary rules and ratified treaties approved by competent constitutional authorities
- International rules only considered binding to the extent that they had been approved or accepted by the country's foreign policy-makers
- Starts from the assumption that int'l law and municipal legal systems are two distinct and formally separate categories of legal orders
- These two systems differ as to their
  - Subjects (domestic – individuals and groups, international – states)
  - Sources (domestic – parliamentary systems & courts, international – treaties and custom)
  - Content of rules (domestic – regulating internal functioning of the state, rel. between state and individual, international – relations between states).
- Therefore this theory holds that int'l law cannot directly address itself to individuals; it must be transformed from int'l to nat'l law in order to have any effect on individuals.
- Inspired by a moderate nationalism, but also states to 'exit' from int'l law by not turning it into national law.

3 Monistic view 2 - unity of various legal systems and primacy of int'l law

German, Kaufmann, 1899

- Theory born from assumption of states self-interest clashing against common interests
- Int'l rights and obligations accrue to and are imposed on not only States but individuals
- Superiority of international rules over national legal systems
- Immediate applicability of international rules within national legal systems of states, without need for transformation of those rules from int'l to national
- Fact that international rules, taking precedence over national legislation, automatically repeal any national laws contrary to them

- This theory got squashed by the more sophisticated and realistic theory of Triepel. It looked more like aspiration than a description of reality.

Nonetheless, it became a popular idea after WWI – Austrian Kelsen, Austrian Verdoss, and French Scelle – Their theory:
- There exists a unitary legal system, embracing all the various legal orders at all levels
- Int'l law is at the top of the pyramid and validates or invalidates all legal acts of any other legal system. Therefore, municipal law must conform to int'l law
- Transformation of int'l law into domestic law is not necessary because they are part of one normative system
- Subjects of int'l law are not radically different from those of national law – individuals are seen as principal subjects, in int'l law taken into account in their roles as state officials.
- Because int'l law is superior to domestic law, it can be applied as such by domestic courts, without any need for transformation. BUT, if Constitution forbids this, they allowed some need for national application – but this was a question of national law, not affecting the legitimacy of int'l law
- National courts can be made to apply national laws that are contrary to int'l rules, but they would incur international state responsibility for doing so
- Therefore international legal system controls, imperfectly, all national systems.
- Ideological underpinnings of this theory – internationalism and pacifism.

8.1.2 Modern changes in the relation between the international and municipal law

- Monistic Theory 1 – devoid of scientific value and intended to underpin ideological and political positions
- Dualistic Theory – did reflect legal reality of 19th and 20th century, but couldn't explain some things, like the fact that some int'l rules do impose obligations on individuals (e.g. piracy)
- Monistic Theory 2 – nice in theory, but really utopian and did not reflect reality. But it had important psychological impact and helped to introduce idea of responsibility of state officials as individuals

Today
- International law no longer constitutes a sphere of law tightly separate and distinct from the sphere of law of national legal systems
- It isn't a different legal realm from national law, it has had a huge daily direct impact on national law
- Many international rules now address themselves directly to individuals, without intermediary of national systems (e.g. international crimes) or grant individuals rights before international bodies (e.g. right to petition).
- Int'l law is no longer *jus inter potestates* (law between states), it also embraces individuals.
- Int'l law gradually headed towards a *civitas maxima* (human commonwealth encompassing individuals, states, and other aggregates cutting across state boundaries).
- Increasingly becoming a *jus inter partes* (a body of law governing relations among subjects in a horizontal manner), rather than a *jus super partes* (law governing from above).

8.2 International rules on implementing international law in domestic legal systems

- Most int'l rules to become operative need to be applied by state officials or individuals within domestic legal systems. National implementation is crucial, but there is huge diversity in one different legal systems actually implement.

- Int'l law says that states cannot invoke the legal procedures of the municipal system as a justification for not complying with international rules.
  - PCIJ, *Polish Nationals in Danzig, Free Zones*
  - 1969 *Vienna Convention on Law of Treaties*, Art. 27 – establishes this rule re treaties

- In addition, some say that there exists a general duty for states to bring national law into conformity with obligations under int'l law. If such a duty existed, each time a state breached an int'l obligation, it would breach both the obligation itself and the general duty to conform state law with int'l law
  - PCIJ – *Exchange of Greek and Turkish Populations, 1925*

- However, state practice shows that there is no general duty to conform national law to int'l law.
- If a state breaches an int'l obligation, other states can demand cessation or reparation for wrongdoing, but they are not entitled to ask why the state breached (e.g. what the problems are in national law).
- Int'l law concerns itself with results, not with process or explanations → individualistic structure of int'l community

Current regulation of int'l community shows some developments from this traditional view of int'l law:
- A number of treaties explicitly impose upon contracting states the duty to enact legislation to implement some/all of provisions of the treaty.
  - 1949 *Geneva Conventions on the victims of war*, treaties on human rights, Statutes of *ICTY, ICTR,* and *ICC*
- Some general rules that have acquired the rank and status of peremptory norms (*jus cogens*) require that states adopt implementing legislation
  - *ICTY*, *Furundzija* – one consequence of peremptory nature of prohibition of torture is that states must enact legislation prohibiting this practice at national level

- Why? B/c states regard some treaties and general rules as so important that all states must comply and enact in national law. Common goal is to prevent even potential breaches of these int'l rules.
- In these treaty and *jus cogens* obligations, a state can be called to account for having breached the specific obligation AND for having breached the general duty to apply int'l law in domestic law.

- Apart from these specific cases (some treaties and *jus cogens)*, there is no int'l regulation of implementation – leaves states complete freedom with regard to how they fulfil nationally their int'l obligations.
- As a result, huge lack of uniformity among states – States consider it a right of sovereignty to do as they please in terms of implementation.

8.3 Trends emerging among the legal system of States

8.3.1 Modalities of implementation

Two basic modalities of implementing national rules prevail

1 Automatic standing incorporation of international rules

- Such incorporation occurs if national constitution / law says that all state officials as well as national and other individuals living in the territory of the state are bound to apply certain present or future international law.

- An internal rule provides in a permanent way for the automatic incorporation into national law of any relevant rule of int'l (customary or treaty) law, without a need for a specific national law to incorporate.
- Therefore, any time a country signs a treaty, or a new customary rule evolves, states must comply with it, without any further action.
- Enables national system to adjust itself continuously and automatically to international rules.

2 Legislative ad hoc incorporation of international rules

- Int'l rules become applicable within the State legal system only if and when the relevant parliamentary authorities pass specific implementing legislation
- Such legislation can be:
  a) Act of parliament translating treaty provisions into national law (*statutory incorporation).* Sets out in detail the various obligations, powers, and rights stemming from the international provisions.
  b) Act of parliament which simply enjoins the automatic application of the international rule within the national legal system, without reformulating the int'l rule being incorporated (*automatic incorporation)*
     - In substance, this works similar to #1, except it is on a case by case basis. Legislation would say something like Treaty X must be complied with, here is the text of Treaty X annexed. Requires courts, state officials to interpret the text of treaty.

- Cassese thinks preference should be giving to legislative ad hoc incorporation (#2) to ensure effective implementation.
- However, if int'l rule is self-executing, it is better to have the automatic (either permanent #1 or ad hoc #2(b)) incorporation of int'l rules. Better safeguards correct application of int'l rules, allows national legal system to adjust itself to int'l rules more easily.

8.3.2 The rank of international rules within domestic legal orders

- Some states tend to put int'l rules incorporated into national legal systems (whether automatically or ad hoc through legislative action) on the same footing as national legislation of domestic origin.
- This means that any national rule passed after the int'l law has been incorporated can amend or repeal incorporated int'l law. Int'l law can be set aside by an act of parliament.
- Other states give int'l rules a higher rank and status than nat'l legislation. This is linked to the nature of the national constitution.
  - Where the constitution is flexible (can be amended by act of parliament), the only way of giving int'l rules overriding importance would be to entrench them in constitution, so that it is not possible for simple majority in parliament to over-turn them.
  - Where the constitution is 'rigid' (lays down special requirements for constitutional amendments and sets up a court to review legislation so that legislature does not over-step its powers), if the constitution provides for the incorporation of int'l rules, then those enjoy higher status than normal law. This means that legislature can't pass a law contrary to international rule, unless this law is enacted through a special procedure required for constitutional legislation. This system upholds the supremacy of int'l obligations.

8.3.3 Exigencies motivating states in their choice of the incorporation system

States regulate national incorporation of int'l rules on the basis of two different requirements:

1 Choose between a statist and internationalist approach

- States choosing a statist or nationalist approach tend to:
  - Adopt legislative ad hoc incorporation (#2)
  - Put int'l rules on the same footing as national legislation of domestic origin
- States taking an internationalist approach tend to:
  - Opt for the automatic incorporation (whether standing (1) of ad hoc (2(b)) of int'l rules
  - Accord int'l rules a higher status and rank than national legislation

2 Consider the relationship between the executive and legislative branches of government
- If government (foreign ministry) makes treaties without any parliamentary participation, problems may arise if:
  - Treaty covers areas which come within purview of legislature
  - This would allow government to bypass parliament – hence these countries do not like automatic standing incorporation (#1), but prefer ad hoc incorporation (#2).
- If Parliament does not play a role, or only a limited one, in decision to be bound by treaty:
  - May be necessary for Parliament to given their consent to incorporation of treaty for it to take effect.
  - In this case, states prefer ad hoc incorporation (#2) over automatic incorporation (#1).

8.4 Techniques of implementation

8.4.1 Customary international law

- All national systems adopt automatic standing incorporation to incorporate customary law.
- National constitutions, statutes, and judicial decisions of most states stipulate that customary international rules become domestically binding by the mere fact of their evolution in int'l community.
- Why? B/c how else would states incorporate a rule that everyone agrees to and it's not clear when it first emerged and what exactly it is. Better to leave this interpretation job to judges and state officials rather than parliamentary debate.

- However, there can be customary rules that need to supplemented by national legislation in order to become operative at a national level.
  - Example of such non-self-executing customary rules – rule providing that the maximum outer limit of the territorial sea should be 12 miles. But each state can determine by specific legislation the exact width of its territorial sea, within that 12 mile limit.

Rank of customary int'l law in national systems:
- In states with rigid constitutions, int'l customary law overrides any inconsistent 'ordinary' national legislation. In some of these states, there is a constitutional court entrusted with judicial review of legislative acts, consequently responsible for ensuring that no law is passed which violates constitution
  - Italy, Germany, Japan, Greece, Uzbekistan, Turkmenistan, Belarus
- Other States do not lay down provisions that put customary int'l law higher than ordinary legislation. If parliament passes a law which conflicts with customary law, the national law, being later in time, would prevail
  - USA, China, France, UK (in UK, this is due to lack of written constitution), Belgium, South Africa (despite it having a rigid constitution)

8.4.2 Treaty Law

a) Modalities of implementation

- Custom – standing automatic incorporation
- Treaties – combination of standing automatic (1), statutory ad hoc (2a) and automatic ad hoc incorporation (2b)

Some examples
- Domestic authorities are to comply with treaties upon their publication in Official Bulletin (France, many African countries)
- Treaties ratified by the president after Senate approval (US)
- Treaties do not bind national authorities unless they are translated into detailed national legislation (UK, Russian Federation)
- Frequent resort to automatic ad hoc incorporation (Germany, Italy)

b) Non-self-executing treaties

- Particular problem re treaties with non-self-executing provisions – provisions that cannot be directly applied within the national legal system because they must be supplemented by additional national legislation.

- National courts often to broaden the notion of non-self-executing treaty provisions with a view to shielding national legal systems from legal change.
  - e.g. French Courts spent forever trying to define whether Art. 8 of European Convention on Human Rights was self-executing or not (Everyone has the right to respect for his private and family life, his home and his correspondence).

c) Status of international treaties and possible conflict with later legislation

- Legal standing of treaties within domestic legal orders and the possibility of conflict between int'l treaties and subsequent national legislation vary greatly in different countries.

- In countries where a constitutional provision provides for the incorporation of treaties, duly ratified treaties override national legislation.
  - France – treaties acquire a status higher than ordinary legislation, thus treaties prevail in case of conflict. But treaties may not override constitutional provisions. This is why France had to pass a constitutional law in order to ratify statute of ICC
  - Similar system in Greece, French-speaking African countries, Spain (but without reciprocity clause), Russian Federation, Bulgaria, Moldova, Estonia, Armenia, Azerbaijan, Kazakhstan, Georgia, Tadzhikistan, Netherlands (where treaties are even higher than constitutional law in some cases)

- In contrast, in other countries, constitutions or national laws provide (explicitly or implicitly) that treaties possess the same rank and status as laws enacted by parliament. This grants parliament the power to change legislation implementing a treaty whenever national interests are regarded as paramount.
  - Italy, US (treaties have the status of federal law, prevail over state law, but can be superseded by later federal law)
- Conflicts frequently arise, so Courts tend to use interpretation principle that in case of doubt a national statute should be construed so as not to conflict with int'l treaty ratified by state.
  - Scholars have criticized this approach, saying that legislatures rarely set out to expressly contradict treaty obligations, it happens through lack of co-ordination or oversight.

- Other scholars advance a different principle of interpretation: that when interpreting and applying international treaties that might be inconsistent with national legislation, one ought to proceed on the basis that the legislation implementing the treaty is a special law, because it originates from attempt by legislature to conform to int'l treaty. This 'specialness' should justify treaty implementation laws overriding national laws in cases of conflict.

- But there are many states that have not made any provision in their constitution or national legislation for the implementation of treaties. In these countries, treaties are incorporated by means of ad hoc mechanisms. The rank and status of the treaty in the national legal system depends on the rank and status of its ad hoc implementing legislation.
  - China, Italy, Ghana, Uganda, Nigeria, Tanzania

8.4.3 Rights of individuals v. discretionary power of states in treaty implementation

- When a state party to an int'l treaty fails to implement some of its provisions within its domestic legal order, this may mean that individuals lack the fundamental rights which the treaty intends to confer on them.
- This often happens when a foreign state violates international rules granting rights to nationals of a contracting party. If the injured state does not respond to breach of treaty, the individuals' rights may end up being jeopardized. Thus, individuals' right remain unfulfilled at national level, due to discretion of states.
- Tension between respect for fundamental rights of individuals at national level and political discretion of states in international affairs.

8.4.4 Implementation of binding decisions of international organizations

- Some inter-governmental organizations are empowered to adopt binding decisions (some producing outside effects, some consisting of administrative acts) that require implementation at national level.
  - e.g. UN Security Council resolutions on economic and diplomatic sanctions – only work if the member states comply with the resolutions and apply them in domestic law

- Normally, national legal systems do not contain any special provisions on the automatic or ad hoc incorporation of decisions of international organizations.
  - Exceptions – Netherlands, Greece, Spain, France → provide that internationally binding resolutions and decisions of inter-governmental organizations become binding with the internal legal system simply upon their publication in the Official Journal
- For most countries, however, specific legislative enactments are necessary to turn the decisions of international organizations into binding national law.
  - e.g. Laws passed at national level re ICTY and ICTR
- Special case – organs of the European Communities – Treaties establishing EC provide that *regulations* are directly applicable in national legal order of member states. *Directives* are directly applicable in some specific cases, but not all. This works because the EC needs immediate harmony across legal systems for the EC to work, and because European Court of Justice has a judicial review role.

8.5 Statist versus international outlook: emerging trends

- Choice of mechanism for applying int'l rules is the acid test for finding out how states feel about international values.

- States sensitive to international demands – opt for automatic standing incorporation mechanisms of customary law, treaty rules, and decisions of int'l organizations
- Very few countries adopt such an overall internationalist outlook.
  - Greece, Netherlands and Spain stand out as countries which do.

- Most states still take a nationalist approach to the implementation of int'l law. They do not make international values prevail over domestic interest and concerns. Put int'l law on same footing as domestic law.
  - UK – most extreme respect of parliament supremacy over int'l law.
  - France and Russian Federation – more moderate, partially internationalist approach – customary law prevails over domestic law, but not treaty law.

- Most states do not accord primacy to int'l rules in their national legal systems. This shows that they do not want to tie their hands formally with international rules, but does not necessarily mean that they don't usually follow int'l rules.

- Courts may play a crucial role in ensuring compliance at national level with international legal standards. They can use two interpretive tools – presumption of in favour of international treaties and presumption that treaty-implementing national law is "special". This can advance int'l law over domestic law.

- Furthermore, there are more international rules that address themselves directly to individuals, either by imposing obligations or granting rights. These international rules reach individuals directly, not via domestic law. Passing of domestic law re this body of individual international law bolsters this body of law, but does not create these rights and obligations – Individuals acquire them automatically, bypassing state.

9 State Responsibility

9.1 General

- Int'l community is so primitive that archaic concept of collective responsibility still prevails → whole collectivity to which the harmed individual belongs can respond
- Whole state incurs responsibility, whole state has to take remedial measures.

- Two different stages of development of law on state responsibility – Traditional and New law.

State responsibility:
  - the legal consequences of the international wrongful act of a state, namely the obligations of the wrongdoer (on the one hand) and the rights and powers of any state affected by the wrong (on the other).
- Preconditions exist for this to be invoked.
- Have to define what 'international wrongful act' means.

9.2 Traditional law

- Old law of state responsibility consisted of customary rules evolved out of practice of states and cases brought before arbitral tribunals. Very little treaty law on the subject.

Customary rules:
- If a state violated an obligation imposed by an international rule, it bore international responsibility for such violation.
- It had to make reparation for the breach
- OR the injured state was entitled to resort to self-help - forcible action (armed reprisals) or non-forcible measures (economic sanctions, diplomatic sanctions) – designed to impel the delinquent state to repair the wrong or penalize it.

Features of traditional rules on state responsibility:
- Rules were rudimentary.
  - They did not specify what counted as international delinquency or what the consequences were.
  - It was not specified whether one form of reparation was to be preferred over another, and if so why.
  - Choice of class of reparation was left to the injured party.
  - It was not clear whether intent or malice was required, or whether a state could be held responsible for the un-intentional and non-malicious acts committed by its state officials that violated international law (culpable negligence, no-Fault regime?).
- State responsibility amounted to a bilateral relation between the delinquent state and the injured state. Only if the two parties entered into negotiations could they establish a dispute settlement mechanism.
- Accountability for international wrongs hinged on collective responsibility. This meant states were held accountable for actions of individuals, and individuals were not responsible at international level.
  - Exceptions to this absence of individual responsibility
    - Piracy - seen as international crime committed by individuals in their private capacity)
    - War crimes – offences committed in inter-state wars, normally by individuals acting as State officials. But liability applied only to soldiers and lower officers, not military leaders and commanders.

- Customary rules on legal consequences of wrongful acts were normally lumped together, both by states and publicists, with the substantive rules governing state behaviour (i.e. rules about treatment of foreigners).
  - Because customary rules about state responsibility typically crystallized through disputes about treatment of foreigners.
  - Tendency to confuse rules on state responsibility with breaches of int'l rules on rights of foreign nationals and their property.

9.3 The current regulation of State responsibility: an overview

The modern day regulation of state responsibility has been very much influenced by work of *UN International Law Commission.* They have drafted, a number of times, *Draft Law on State Responsibility*.

Salient traits of new law (as of 2001 publication of this book):

1. Law of state responsibility separated from set of substantive rules on treatment of foreigners.
   Distinction between:
   - primary rules of international law – customary or treaty rules laying down substantive obligations for states (treatment of foreigners, state immunities, etc)
   - secondary rules of international law – establishing
     - conditions on which a breach of a primary rule may be held to have occurred
     - legal consequences of this breach

     → This is law on state responsibility.

2. Current rules have clarified and given precision to some controversial issues
   - Whether fault is necessary
   - Nature of damage required for state to be considered 'injured'
   - Circumstances which exempt actor from wrongfulness

3. Agreement on distinction between two forms / categories of state responsibility
   - *Responsibility for ordinary breaches of international law*
     - Breaches of bilateral or multilateral treaties, which create state-to-state obligations. Breach of obligation remains a private matter between two states, victim and wrongdoer.
   - *Aggravated responsibility for breaches of fundamental general rules that enshrine essential values*
     - Arises when a state violates a general rule laying down a community obligation – a customary obligation *erga omnes* protecting fundamental values (peace, human rights, self-determination of peoples) OR
     - When a state violates an obligation on all parties laid down in a multilateral treaty safeguarding those fundamental values and entitling any state, or any other party to the treaty, to demand cessation of a violation
     - Material or moral damage is not absolutely necessary to invoke the state's responsibility
     - What matters is that the breach – it infringes a state's right to compliance by any other state with the obligation (breach not fault produces injury)
     - This creates a public (as opposed to private) relation of obligation between the wrongdoer and the whole community, which allows any contracting member of the community to invoke the responsibility of the wrongdoer, even if it is has not been injured itself.
     - Means that states that invoke aggravated responsibility are not invoking a personal or individual interest but a community interest.

- All states entitled to demand compliance with the obligation can take remedial actions to make state stop its actions and make reparations.

4. Article 33 of Charter requires states to *settle disputes by peaceful means* before resorting to possible counter-measures.
   - Injured state is no longer allowed to decide immediately to take forcible action or enforce its right using military or economic force.
   - Successive steps required:
     1. Request reparation
     2. If no reparation is made or reparation is unsatisfactory, endeavour to settle peacefully, through negotiations, conciliation, arbitration or other means of settling disputes.
     3. If all these steps fail, a state may take peaceful counter-measures.

5. *Individual criminal liability* has enormously expanded. Individuals (whether state officials or private actors) are accountable for serious breaches of int'l law.
   - Now includes military leaders as well as senior politicians.
   - Body of int'l criminal law has developed as a separate branch from int'l law on state responsibility.

6. It is possible for states to be held *accountable for lawful actions*.
   - e.g. under Law of Sea Convention (art. 110), a warship of a state can stop and search a foreign merchant vessel on the high seas if there is reasonable doubt to suspect ship is engaged in piracy, slave trade, etc.
     - BUT if the doubts prove unfounded, state has obligation to repay vessel for any harm caused.
   - e.g. Nuclear energy exploitation – states may be liable to states or persons injured by their lawful but ultra-dangerous activities.

9.4 'Ordinary' State responsibility

9.4.1 Preconditions of State Responsibility

Basic condition of state responsibility – commission of a wrongful act.

Determination of a wrongful act includes:
- Subjective elements
  1. Conduct of individual contrary to int'l obligation can be ascribed / imputed to a state
  2. In some instances, the fault of the state official performing the wrongful act
- Objective elements
  1. The inconsistency of the particular conduct with an international obligation
  2. Material or moral damage to another international subject
  3. Absence of any of the circumstances which exempt state from charge of wrongfulness

(a) Subjective elements of international delinquency

1. Can conduct of individual contrary to int'l obligation be ascribed / imputed to a state?

- For a state to be responsible it is necessary to establish whether the conduct of an individual may be imputed (attributed) to it.
- Was the individual who committed the breach a State official under the national legal system of a particular state?

- Doesn't matter whether s/he is an official of the central government or of a territorial unit
  - "The conduct of any organ of a State must be regarded as an act of that State." ICJ, *Immunity from Legal Process of Special Rapporteur of the Commission on Human Rights*

- Individual must be acting in his official capacity, not as a private individual.

- Even if the state official committed the act outside his instructions or outside his remit, his actions are still imputed to the state.
  - ➢ [ILC Draft Articles, 2000, Article 9]
  - *Youmans*
    - F - American nationals threatened by a mob of Mexican nationals. Mexican troops were sent to quell riot, but instead of protecting Americans they opened fire on the house and killed two Americans.
    - H – Mexico-US General Claims Commission – Mexico found responsible
    - "We do not consider that the participation of the soldiers in the murder can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer."

- Int'l rules also cover case where individuals who do not fulfil state functions in fact play an important role in exercise of governmental authority, in that they actually wield control over senior state officials.

- Actions of *de facto state organs* may also be attributed to state.
  - These individuals do not have status of state officials but they act on behalf of state (through state's instructions, under state's overall control, or in fact behave as state officials)
  - for example, secretary-general of a political party in a one-party state or a person that the world regards as leader of his state, regardless of lack of constitutionally authority (like Qaddafi in Libya).
  - Rule to some extent codified in Article 5 of ILC Draft (2000) – concerning public entities that are not state organs under national law.
    - ➢ GET RECENT TEXT HERE.
  - ICJ, *Nicaragua*
    - In the Nicaraguan civil war, were the actions of the contras (rebels) against central authorities attributable to US authorities?

    Three classes of individuals:
    - Members of the US government administration (CIA) and US armed forces → attributable to US
    - Latin American operatives, paid by US, given instructions by US agents or officials, and acted under their supervision → attributable to US
    - *Contras* – had to show that they had been under "effective control" of US, that US had issued them specific instructions concerning perpetration of unlawful acts

    Two tests for attribution of wrongful acts
    1. Whether or not individuals were state officials
    2. If they were not, whether or not they were under state's "effective control"
       - They were paid or financed by state
       - Their action had been coordinated or supervised by that state
       - The state had issued specific instructions concerning their unlawful actions
    - ➢ ILC (2000) upheld this decision, in Art. 6 (GET NEW TEXT).
  - ICTY, *Tadic (Merits)*

- Were some individuals (Bosnian Serbs) fighting in a prima facie civil war (between Bosnian Serbs and authorities in Bosnia & Herzegovina) acting on behalf of a foreign country (Federal Republic of Yugoslavia), which would turn civil conflict into an international one?

Three tests (departure from *Nicaragua*) on whether an individual acts as a de facto state organ:

1. Whether single individuals or militarily unorganized groups act under specific instructions or subsequent public approval of a state
2. In case of armed groups of militarily organized groups, whether they are under the overall control of the state (without requirement that state issues specific instructions)
3. Whether individuals actually behave as state officials within the structure of a state

- Unlawful acts committed by individuals not acting as de facto state organs (attacks on foreigners or foreign authorities)
  - state on whose territory the acts were committed incurs int'l responsibility only if it did not act with due diligence - it omitted to take necessary measures to prevent attacks on foreigners or their property OR after perpetration, it failed to search for and punish wrong-doers
  - State is not responsible for acts of individuals, only responsible for its own conduct by omission
  - ICJ, *US Diplomatic and Consular Staff in Tehran case*
    - First stage of attack on US embassy – by militants who had no official status as state actors. BUT Iran held responsible for failure to protect the US premises
    - Second state – Iranian government legally bound to end the occupation and pay reparation. Instead, it approved and endorsed occupation. This turned militants into agents of Iranian state, therefore Iran responsible as a state for their actions. Acknowledgement and approval by a state can have a retroactive effect.

2. Is fault of State official required for state responsibility to arise?

- Fault = psychological attitude of wrongdoer, consists of intention or recklessness
- Int'l courts do not normally ask whether state officials who have allegedly committed an int'l wrong have acted intentionally. Do not look at subjective intent of wrongdoer.
- Only consider the question of Fault if the state claims it did not act willingly, invoking *force majeure*
  - ILC Draft 2000 – endorses this approach – of stating that there are some special circumstances in which state can plead absence of fault (art. 40) GET TEXT

b) Objective elements of international delinquency

1. Inconsistency of the particular conduct with an international obligation

- For conduct of a state to be inconsistent with an international obligation, it must be contrary to an obligation stemming from an applicable rule or principle of int'l law.
- For state responsibility to arise, the obligation must have been in force when it was breached.
- Wrongful conduct can be an act or an omission, can be instantaneous or continuing wrongs.

2. *Material or moral damage to another international subject*

- State that has a right corresponding to an obligation breached is legally entitled to call the wrongdoer to account
- Some say in addition to Breach as Injury, you need Material or Moral Injury
  - Material damage – any prejudice caused by economic or patrimonial interests of a state or its nationals

- Moral damage – breach of state's honour or dignity

- One school of thought – an int'l wrongful act may only be committed when in addition to breach of an obligation (legal injury) there is a material or moral injury

OR

- Legal injury is necessarily inherent in any breach of int'l rights of a state. It's enough to invoke state responsibility just for breach of the int'l obligation itself, even absent any moral or material damage to the state. The material or moral damage can be considered when assessing damages.
  - View taken in ILC Draft 2000

- BUT, in practice, moral or material damage is usually present in cases of ordinary state responsibility, because why else would states invoke a right of action against another bilateral party (one-to-one relation) unless there had been some injury.
- It is only in cases of aggravated state responsibility (breach of human rights norms, e.g.) that you see cases of injury defined as breach pure, because these are community, as opposed to one-to-one, rights and obligations.

- This regime applies for customary law. States can establish different rules through treaty. (e.g. WTO).

3. Circumstances which exempt state from charge of wrongfulness

Principal circumstances which preclude state wrongfulness

- Codified in ILC Draft Articles 2000

a) Consent of the state injured
   - Consent to carry out activities that would otherwise be prohibited by int'l law renders those activities lawful (like agreeing to station foreign troops on your territory).
   - However, consent is not valid if it permits activities contrary to *jus cogens* (genocide on your territory)

b) Compliance with peremptory norms
   - Breach of an obligation imposed by need to comply with peremptory rules does not give rise to a wrongful act
   - If state refuses to abide by a bilateral treaty imposing mutual military assistance at the request of another state, because the other state is acting with purpose of carrying out crimes against humanity

c) Self-defence - See chapter 14

d) Counter-measures in respect of an international wrong - See chapter 11

e) Force majeure
   - Article 24(1) 2000 – definition
   - Very hard to invoke
   - *Rainbow Warrior*, Arbitral Tribunal
     - France claimed that urgent medical reasons required repatriation of a French agent to France, without consent of New Zealand. France argued these medical reasons were force majeure.
     - No – this is not force majeure – it must be invoked to justify involuntary, or at least unintentional conduct, relating to an irresistible force or unforeseen event
   - Test – absolute and material impossibility

f) Distress
   - ➢ Article 25(1) definition
   - o Illustrations of distress – unauthorized entry of aircraft into foreign territory to save life of passengers
   - o *Rainbow Warrior* – France's actions were justified by distress (but not *force majeure*). BUT France responsible because it did not return agent to France once medical reasons had terminated

g) State of necessity
   - ➢ Article 26(1) – definition
   - o *Case Concerning the Gabcikovo-Nagymaros Project (Hungary Slovakia)*, ICJ 1997
     - Hungary contended that in 1989 it had suspended a treaty obligation with Czechoslovakia to build a dam on Danube on account of "state of ecological necessity."

     Court dismissed Hungarian submissions:
     - State of necessity, as reflected in ILC articles, is grounded in customary law.
     - Perils invoked by Hungary were not sufficiently established or imminent
     - Hungary had other means to resolve crisis it identified – like negotiations, rather than suspension or abandonment of its treaty obligations
   - o Distress - the wrongful act is justified by the urgent necessity to save the life of the person (performing the wrongful act) or the lives of other individuals entrusted to state.
   - o Necessity – aims at warranting a breach of international law imposed by the need to avert a serious danger to whole state or the population of a state.

- State may nevertheless have to pay compensation for any material harm or loss caused, even in circumstances where no responsibility is incurred.
  - ➢ Article 27(b) of ILC Draft

- But compensation does not always have to be paid:
  - o Self-defence or counter-measures – actions are only taken to react to wrongful act of another state. Wouldn't make sense to have injured (and self-defending) state compensate wrongdoer state for injuries caused by its counter-measures.
  - o Compensation should also be excluded for some other circumstances which nullify wrongfulness
    - If a state has consented to an action by another state that would otherwise be unlawful, it should not be able to turn around and claim for compensation afterwards (because consenting state knew or should have known about foreseeable harm).

9.4.2 Consequences of the wrongful act

<u>Obligations of the responsible state</u>
- To cease the wrongdoing
- Offer appropriate assurances and guarantees of non-repetition (art. 30)
- Make full reparation for injury caused (art. 31)
- If it refuses to make reparation or pay compensation, it must accede to any bona fide attempt to peacefully settle the dispute made by the injured state

Reparation – hierarchy has been established
- Material damage – responsible state must provide restitution in kind (put injured state back to position it was before harm caused by wrongdoer) to the extent that restitution
  - o Is not materially impossible

    - Would not involve a burden out of all proportion to benefit
    - (ICL art. 36)
- If restitution is not possible or only provides partial recovery, state must make compensation
    - Compensate for any financially assessable damage caused, including loss of profits in so far as it is established
- Moral damage – may be addressed by satisfaction (art 38(2)) - may consist of acknowledgement of breach, expression of regret, formal apology, punishment by national authorities, formal assurance of non-repetition
    - But it cannot be out of proportion to the injury or take a form that is humiliating to responsible state. Can include symbolic payment of modest sums.

Rights, powers, and obligations of the injured state
- the right to claim cessation of wrongful act, assurances, and guarantees of non-repetition
- right to claim full reparation for material or moral damage caused

If it decides to invoke state responsibility, injured state must take following steps:
1. It must give notice of its claim to that state, specifying conduct that the responsible state should take and what form reparation should take (art. 44)
2. If responsible state does not comply, the injured state must try to settle the dispute by peaceful means (art. 53(2).
3. If the responsible state refuses to make reparations or enter into peaceful dispute settlement or acts in bad faith in response to offers of dispute settlement, injured state is entitled to resort to counter-measures (art. 53(2) and 52(4)).

9.5 'Aggravated' State responsibility

This concept has come into being because:
- Rules exist that envisage reaction to international delinquencies, above and beyond the usual response
- Practice concerning response to large-scale violations of human rights shows that responses to breaches are permissible outside the ordinary rules
- Emergence of a world community based on values of peace, human rights, etc. that states cannot opt out of → hence states should allow a stronger reaction for breach of these values than an ordinary state responsibility situation
- This reaction should be 'public and collective' as opposed to the private and bilateral response of ordinary state responsibility.

First reading in ILC of Article 19 – proposal for "international crimes of states" – led to extensive debate; was eventually removed from draft articles due to state reluctance to be accused of crimes.

9.5.1 Subjective and objective elements of the wrongful act

Both ordinary and aggravated responsibility involve the legal regulation of subjective and objective elements of responsibility.

What differentiates aggravated responsibility from ordinary responsibility?
- *Obligation breached must be a community obligation to give rise to state responsibility*
    - Community obligation:
        - Concerning a fundamental value (peace, human rights, self-determination of peoples, environment)

        - Owed to all the other members of the int'l community, or to the state bound by a multi-lateral treaty
    - Comes with a community right – a right belonging to any other state (or any other contracting party if it's a multi-lateral treaty)
    - Community right may be exercised by any other state or contracting party, whether or not injured by breach
    - The right is exercised on behalf of the international community, not in injured party's self-interest.
- *Fault:*
    - Breach of the obligation must be gross or systematic – not sporadic, isolated, or minor contravention.
    - Due to gravity of breach and the fact that the obligation violated is of such fundamental importance, fault (serious negligence) is always an issue in aggravated responsibility. Psychological element is thus always present.
- *Damage:*
    - In aggravated responsibility, a state is responsible towards all other states simply for breaching an international obligation even if the other state has not been materially or morally damaged.
    - Legal injury, not factual injury, leads to state responsibility.

- *Interdependent or integral obligations* – more complicated*:*
    - e.g. those in treaties on disarmament or environmental treaties
    - these are obligations necessarily dependent on corresponding performance by all other parties
    - So a breach of these obligations would clearly legally injure each of the contracting parties
    - However, only some of the treaties give rise, in case of violation, to aggravated responsibility – like disarmament treaties, which do not entitle the other parties to suspend the treaty or withdraw in cases of violation, but solely to take collective or authorized sanctions.

9.5.2 The consequences of the wrongful act in cases of aggravated responsibility

Legal regime
- Under customary law, the offending state has obligations towards all other states.
- All other states have rights, power and obligations vis-à-vis delinquent state.
- (In contrast to ordinary state responsibility - one-to-one obligation between victim and wrongdoer)

Obligations incumbent on delinquent state
- Wrongdoer under all the obligations incumbent upon any author of int'l wrong under regime of ordinary state responsibility.
- However, these obligations are not owed only to injured state but to all other members of int'l community.
- Legal consequences move from bilateral to a community relation.
- Restitution, compensation, or satisfaction may be relevant when wrongful act has caused material or moral damage to a particular state (e.g. aggression, violations of Human rights of nationals of that state).
- In most cases of breach of community obligations, reparation may be inconsequential – how do you pay damages for genocide?

Rights, powers and obligations of other states
- Legal position of other states - any member of int'l community, whether or not damaged by wrong, provided it has the legal entitlement or right corresponding to obligation breached by responsible state.

- ILC has taken a minimalist approach and suggests that the response is based on actions of individual states, rather than a collective and public action.
- As a result, perpetration of these wrongs affronts community values, but response contemplated remains bilateralist and private in nature.
  - Art 54

Obligations of states other than delinquent one:
- Not to recognize as lawful the situation created by the breach
- Not to render aid or assistance to the responsible state in maintaining the unlawful situation
- To co-operate as possible to bring breach to an end.
  - Art. 42(2)

All states other than wrongdoer have these powers, rights, and claims:
- To invoke the aggravated responsibility of the delinquent state, by bringing their claim to the notice of that state
- To demand cessation of the wrong and request assurances and guarantees of non-repetition
- To claim reparation in a form consistent with nature of wrong.
- If the responsible state has not taken immediate action to discontinue the wrongful act or has not complied with the reparation sought by states, the right to bring the matter to the attention of competent international bodies (e.g. UN, OAS, OAU, Council of Europe).
  - States must first steps within international organizations – showing response to wrongdoing as necessarily public and collective.
- If those bodies take no action or their actions do not bring about cessation or reparation, all states are empowered to take peaceful counter-measures on an individual basis.
- When states opt for individual counter-measures, these must be subject to same conditions as under ordinary responsibility.
- In particular state must
  - Offer to negotiate or propose other means of peaceful settlement (mediation, conciliation, arbitration or judicial settlement)
  - Duly notify responsible state of their intention to resort to counter-measures
  - In case of armed aggression, states are entitled to resort to collective self-defence (subject to request or consent of victim of aggression).

*** The above measures do not affect or prejudice the possible operation of the UN security system. UN Security Council, faced with a gross violation of community obligations that amounts to a threat to peace, breach of peace, or act of aggression, may recommend measures that states are entitled to take (not use of force), under art. 41, or may authorize states to take forcible action.
  - In other words, if SC thinks the international wrongful act is covered by Art. 39 of UN Charter, the Security Council takes over, and individual states may only take action to extent allowed by Charter.

- State which has been specifically damaged by wrongdoer's actions (e.g. because state killed some of its nationals) may claim for reparation for those specific injuries.
- Other states may invoke state responsibility without need to show connection to nationality of victims, but wouldn't be able to claim under that specific head of damages.

9.5.3 Trends in state practice

- The most frequent case of implementing aggravated state responsibility can be seen in cases where states resort to self-defence.

- States prefer to act through international bodies such as the UN Security Council or GA, rather than acting alone (e.g. South Africa, Iraq, Yugoslavia, Libya, Liberia, Haiti).
- This is good – it shows state confidence in international institutions.

- In a few instances states have resorted to counter-measures even in absence of a specific decision or recommendation of SC.
  - Poland – when EC reduced import of Soviet products; Falklands/Malvinas, when EC suspended import of goods from Argentina
  - Yugoslavia – NATO member states reacted using military force against massacres perpetrated on Yugoslavia's own territory, in clear breach of UN Charter *jus cogens* principle banning use of force.

- But, states and international organizations have not yet fully used the enormous legal potential provided by rules on aggravated state responsibility.
- States remain unwilling to interference in matters of no direct interest or concern to them; states don't want to follow community interests.
  - ICTY, *Furundzija* – noted in obiter great importance of aggravated state responsibility as a tool in international law re torture.

9.6 The special regime of responsibility in case of contravention of community obligations provided for in multilateral treaties

- Multilateral treaties that protect fundamental values sometimes contain rules on aggravated responsibility.
- These treaties also include complex mechanisms for ensuring compliance and set up institutionalized responses to breaches of those provisions (replace customary law rules on response).
- The collective response to violations not only covers gross or systematic breaches, but any contravention of the treaty.
- However, except for European Convention on Human Rights and Inter-American Convention on Human Rights, this sweeping mechanism weakened by weakness of supervisory and sanctioning mechanism

9.6.1 Treaty regulation

- All the contracting obligations are under the general obligations arising in cases of aggravated responsibility as laid down in customary law.
- Provisions of each treaty specify the legal rights, powers, or claims of contracting states (other than wrongdoer). Some examples of such regimes follow.

<u>1949 Geneva Conventions</u>
- These lay down community obligations – Confirmed by ICTY in Kupreskic

Two mechanisms to enforce state responsibility
- Art. 1 (common to all four conventions) – any contracting party must respect and ensure respect for the Convention in all circumstances
  - ICJ, *Nicaragua* – this principle has become part of "general principles of humanitarian law."
  - Empowers and obligates any state party to demand of another state party that it comply with obligations under Convention
  - Entitles each state party to demand cessation of serious violation of Conventions
  - Special regime for grave breaches
  - If a belligerent commits such a grave breach, any other state party may react at two levels:

    - At inter-state level – any state has the right to invoke the international responsibility of another contracting party for grave breach perpetrated by member of its armed forces or other individuals acting on its behalf (Arts. 51, 52, 131, 148).
- At level of internal criminal punishment at national level. Each state under obligation to
    - Enact penal legislation to punish grave breaches
    - To search for persons alleged to have committed such breaches
    - To bring them before its own courts, unless it decides to hand them over to another concerned contracting state (art. 49, 50, 129, 146).
    - These obligations at an internal level are a way of implementing the aggravated responsibility of the state.
- Conventions have no provisions ruling out invocation of ordinary responsibility.

1966 UN Covenant on Civil and Political Rights
- Extends notion of aggravated responsibility to any breach of the Covenant
- Any state party is legally entitled to demand cessation of violation of Covenant, even if this violation is not gross and large scale.
- Obligation – to fully respect the covenant
- However, this obligation is not bilaterally monitored.
- Instead, a body responsible for handling allegations by states or individuals of violations of the Covenant – the UN Human Rights Committee
- A state may invoke the responsibility of another contracting party by asking the Committee to declare that the state complained of has indeed breached the covenant.
- Both individuals and states have a right to submit 'communications' against other states for violations of the Covenant.

1993 The Statute of ICTY
ICTY, *Blaskic*
- Art. 29 of ICTY Statute imposes on all states obligations to comply with orders and decisions of the tribunal.
- Every member of UN has a legal interest in the fulfilment of the obligation laid down in art. 29
- Legal interest can be exercised after a judicial finding of the Tribunal that a state has violated art. 29

9.6.2 State practice

Geneva Conventions
- Regime provided for has not been consistently used.
- In less recent years, in most cases, resort to art. 1 has been made privately rather than publicly.
- In more recent times, more states have gone public, or made public their actions subsequently.
    - e.g. Jordan has protested against violations of international humanitarian law in the Arab territories occupied by Israel; Germany has reminded Russia of its Protocol II obligations in Chechnya
- International organizations have also called on state parties to honour Geneva conventions
    - e.g. Committee of Ministers of Council of Europe re massive rape of women and children in former Yugoslavia
- Provisions on national prosecution of grave breaches were not applied until 1994, when national courts of some European states began to prosecute persons allegedly guilty of serious breaches in former Yugoslavia.

UNCCPR

- Central supervisory mechanism have been consistently used and become more effective (particularly re communications by individuals)
- This is probably due to a lack of sanctioning action by individual states based on HRC ruling.

ICTY
- States have also made scant use of this legal regime, deferring to Security Council in face of breaches of art. 29.

9.6.3 Treaty regimes and resort to international customary law measures

- Relationship between remedial action provided for in a multilateral treaty imposing community obligations and the right to resort to measures envisaged in customary int'l law on aggravated responsibility?
- In case of breach of a treaty on human rights:
  - Only if institutional remedies can the aggrieved or any other state activate the legal means under customary law, including resort to uni-lateral counter measures. Need to exhaust institutional or collective mechanisms first (shows public interest and community values which underpin aggravated responsibility).
  - Same would hold true for other treaties, e.g. those on nuclear tests
- When faced with a failure of institutional treaty-made mechanisms to react effectively against a gross violation, the fall-back solutions are those under customary international law. BUT these are available to everyone, not just parties to the treaty. Treaty collectivity is replaced by whole international community.

9.7 The current minor role of aggravated responsibility

- Scant invocation of aggravated responsibility due to fact that states cling to idea that they should take action at international level primarily to protect their own interests.
- As a result, states are inclined to invoke state responsibility only when they are materially or morally injured by another state.
- State responsibility remains a primarily private matter, arising in a bilateral context. They don't want to meddle in other state's affairs so that others wont meddle in theirs (principle of reciprocity).

- Thus, aggravated responsibility may be more of a tool for use in the future, if and when states actually start to practice those fundamental values they preach.

10 Mechanisms for promoting compliance with international rules and pursuing the prevention or peaceful settlement of disputes

10.1 Introduction

National systems
- various sophisticated systems for adjudicating disputes between members of community

International system
- dispute settlement mechanisms much more rudimentary
- Until adoption of UN Charter, states could resort to force to impose settlement on their own terms, without third-party ascertainment of possible breaches of law
- Things changed with UN Charter and ban on use of force – created need for more sophisticated rules re dispute resolution.

10.2 Traditional mechanisms for promoting agreement

Two classes of mean of settling international disputes:
- Those which aim at inducing the contesting parties to reach agreement (Negotiation)
- Those which are designed to confer on a third party the *power to settle the dispute* by a legally binding decision (Inquiry, Good offices, Mediation, Conciliation).

Negotiation
- Most elementary method of settling int'l disputes
- Third party totally absent from this method
- Advantages
  - Solution left to parties concerned, without any outside pressure → they own outcome
  - There will be no loser or winner, because parties should be happy with outcome
- Disadvantages
  - Negotiation seldom leads to an in-depth determination of facts or identification of legal rules applicable to a situation
  - Stronger state may easily subdue the other party by resorting to means associated with its de facto superiority
  - May turn out as a way for stronger states to bend will of lesser states

Inquiry
- Method envisaged in 1899 at Hague Conference
- It is a scheme in which contending parties agree to set up an int'l body consisting of independent and impartial individuals who find out facts underlying dispute
- Parties can then choose what legal consequence to draw from these facts
- Often attached to more complex dispute resolution mechanism, as precursor to judicial decision
  - e.g. Art 50 of ICJ statute – confers power on court to entrust someone with this inquiry role

Good Offices
- Third state or int'l body is asked, or offers, to induce the contending parties to negotiate an amicable settlement

Mediation
- Third party takes a more active role in dispute settlement, by participating in negotiations between the two disputants and informally promoting ways of settling the dispute

- Most effective when mediator is a dignitary of a powerful state or a senior civil servant of int'l organisation

Conciliation
- Even more active role for third party, who considers the various factual and legal elements of dispute and formally proposes terms of settlement (they still aren't legally binding on disputants).

10.3 Traditional mechanisms for settling disputes by a binding decision

Arbitration
- Qualitative leap from other mechanisms
- Dispute no longer settled for purpose of safeguarding peaceful relations and accommodating interests of conflict parties
- Additional goal – patching up differences on basis of international legal standards
- Court makes thorough examination of facts and the law governing them
- Court's finding is legally binding on both parties

- Numerous treaty rules provide for resort to arbitral courts – since late 19th century
- Process began in 1899 with First Hague Convention on Peaceful Settlement on Int'l Disputes, set up the Permanent Court of Arbitration

Permanent Court of Arbitration
- PCA (still exists today) consists of standing panel of arbitrators, states could pick which ones they wanted for settling a specific dispute, also had administrative infrastructure
- PCA came and went as states required it to settle disputes
- Since 1900, PCA has only heard 23 cases, 20 of which were between 1900 and 1932.
- Methods of conferring jurisdiction
  - Agreement to submit a certain dispute to the Court (compromis)
  - Making of a treaty containing a clause whereby each contracting party could submit to the court any dispute relating to another contracting party (arbitral clause)

- Heyday of arbitration – two World Wars – when Western states were still relatively homogeneous. Arbitration was a useful way of relaxing dangerous tensions among relatively similar conflicting parties.

Permanent Court of International Justice (PCIJ) – set up in 1921
Replaced by International Court of Justice (ICJ) – 1946

Why ICJ is better than PCA
- It consists of a group of sitting judges – parties no longer had choice of which judges
- As it was made up of judges permanently associated with court, ICJ could develop a continuous tradition and assure logical development of int'l law.
- Law became more authoritative rather than politically motivated (because judges were sitting).
- Court comprised of judges, not politicians and arbitrators.

Arbitration – rests on consent of states – set up by treaties and jurisdiction accepted through contractual obligations.

10.4 The new law: an overview

Law since WWII and UN Charter has a few important features:

- A general obligation to settle legal or political disputes peacefully (with general ban on use of force).
  - As a result, states have increasingly resorted to and sometimes strengthened traditional dispute settlement mechanisms.
  - Principal bodies of UN (SC and GA) have handled disputes likely to jeopardize peace.
- In some areas (particularly int'l trade), states have crafted compulsory mechanisms, similar to adjudication.
- States have realized that in many areas dispute settlement should be replaced by mechanisms designed to monitor compliance with int'l legal standards, thus preventing or deterring deviation from those standards.

10.5 The general obligation to settle disputes peacefully

- Art 2(3) – broad in scope, generally about peaceful settlement of disputes
- Art. 33 – imposes only obligation of peaceful settlement with regard to disputes that endanger int'l peace and security
- Any vagueness about extent of this obligation clarified in *UN Declaration on Friendly Relations* – laying down principle that all states must seek a peaceful settlement for any dispute that may arise between them. Declaration arguably codified a customary rule.

- States must thus endeavour to resolve their disputes peacefully, before taking any enforcement action.
- Despite this general obligation, still no specificity about how disagreements should be resolved.
- No general rules about states needing to submit to authority of bodies empowered to dictate terms of settlement, no adjudicating organ with general and compulsory jurisdiction.
- States mandated to try to settle their differences by means other than force, by have complete freedom as the choice of means of settlement.

- Why? Because states don't want their freedom fettered, and because they feel that some types of dispute settlement are more appropriate to some problems than others.

10.6 Resort to traditional means

States have increasingly resorted to traditional means to settle disputes.

<u>Inquiry (fact-finding)</u>
- Has increasingly acquired importance as a means of establishing facts employed by int'l organizations
  - ILO, UN SC, Council of Int'l Civil Aviation Organization – all organizations which are empowered to and have frequently resorted to inquiry

<u>Mediation</u>
- Has been resorted to also.
  - e.g. Chile and Argentina asked Pope John Paul II to mediate dispute between them over the Beagle Channel, they made an agreement after Pope's proposals, suggestions and advice (1979)
  - e.g. Carter and Camp David Agreement
  - e.g. Group of Contact mediated between conflicting states of former Yugoslavia to reach Dayton Accord / Paris agreement (1995)

- e.g. President of Finland and former Russian Prime Minister had task of finding a political settlement in Kosovo Crisis (1999)

Arbitration and Adjudication

- Increasing number of states (particularly socialist and developing countries) have submitted disputes to ICJ. Western states, have tended to shun the court.
- As a result, ICJ has pronounced on a number of politically sensitive issues such as self-defence, indirect armed aggression, self-determination of peoples, the legality of the threat or use of nuclear weapons, genocide, etc.
- Methods of Acquiring Jurisdiction
- Optional clause of Statute of ICJ – every state can declare that it accepts ipso facto and without special agreement the compulsory jurisdiction of the court in relation to any other state accepting the same obligation (Art. 36.2)
  - Consent method (forum prorogatum) – state institutes proceedings before court against another state that has not previously accepted Court's jurisdiction. If by some acts, like appearing in Court to argue case, the respondent state shows that it accepts the court's jurisdiction, the Court is empowered to pronounce on merits of case
    - First set up by PCIJ in 1925 in *Mavrommatis Palestine Concessions case (Greece v. Great Britain)*, confirmed by ICJ in 1951 in *Haya de la Torre Case (Colombia v. Peru)*
- Proliferation of permanent or semi-permanent international courts and tribunals
  - e.g. European Court on Human Rights and Inter-American on Human Rights, Int'l Tribunal on Law of the Seas, ICTY and ICTR (ad hoc criminal tribunals), Special Court for Sierra Leone, Iran-US Claims Tribunal

- Some consider multiplication of international arbitral or judicial bodies as likely to lead do discrepancies, fragmentation and incoherencies in int'l law.
- Has been suggested that ICJ should have the final word on int'l legal issues.

10.7 Strengthening and institutionalizing of traditional means

- Obligation to settle disputes peacefully has meant states have tried to strengthen traditional mechanisms and establish them on a more permanent basis.
  - particularly for conciliation or adjudication functions, some bodies have been set up specifically with those functions
  - for negotiation, still most widespread means of settling disputes, some treaties make recourse to it compulsory (e.g. *UN Convention on Law of Sea*, art. 238; Article VIII(2) of 1959 *Antarctic Treaty*).

10.7.1 Resort to compulsory conciliation or adjudication

- Traditional system providing for unilateral resort to conciliation or arbitration has been strengthened:
  - Compulsory conciliation or adjudication procedures are laid down in multilateral treaties
  - They rest on basic consent of the overwhelming majority of member states of int'l community

Conciliation

- conclusions and proposals of conciliator (third party) are not binding on the parties.
- But there have been steps forward:
  - Providing for a right to initiate, or obligation to submit to conciliation
  - Establishing a procedure to be followed in conciliation
  - Setting up a body responsible for seeking to induce contending parties to reach an amicable

Compulsory conciliation

- Some countries argue that int'l rules only make sense if there is a compulsory means of settling disputes
- Vast majority of states do not want to tie their hands to one form of settlement vs. another – strongly oppose obligation for settlement procedures which lead to win/lose conclusions

→ Compulsory conciliation mid-way position between two extremes

Compulsory conciliation – Example - Vienna Convention on Law of Treaties, 1969:

- disputes concerning any provision on the invalidity of treaties other than on *jus cogens* can be submitted to conciliation within 12 months of their beginning (art. 66(b))
- Any party to dispute can set in motion conciliation procedure by writing to UN SG
- Conciliation Commission appointed by SG – hears facts, examines claims and objections, and makes proposals to parties
- Has quasi-judicial powers, but its findings and proposals are not binding on parties
- But weight of report probably has more importance than that of a legally binding judgement
- In practice, this mechanism has never been utilized

Compulsory Adjudication

- advocated by developing countries, resisted by West
- 1969 *Vienna Convention on Law of Treaties*, Art. 66(a) – disputes relating to *jus cogens* may be submitted to ICJ at request of one party only, after 12 months have elapsed since start of dispute without any settlement being reached
- 1982 *Convention on Law of Sea*, Art. 279 – imposes duty on states to exchange their views as to mode of settlement; if no method agreed on, each contending party has right to resort to conciliation. If offer not accepted or unsuccessful, any party to the dispute can initiate judicial proceedings before one of 4 courts (Int'l Tribunal on Law of Sea, ICJ, Arbitral Tribunals)
  - Developing countries have used this mechanism a number of times, Australia & NZ used Arbitral Tribunal against Japan in *Southern Bluefin Tuna*

- Mechanisms are designed to settle disputes relating to the interpretation or application of specific multilateral treaties – provided fro in compromissory clauses or clauses on compulsory conciliation.

- Other mechanisms not associated with treaties, like International Centre for Settlement of Investment Disputes:
  - set up under aegis of World Bank to try to set up legal regime that protected interests of both investors and developing states
  - No permanent tribunal, but an Administrative Council with panels of conciliators and arbitrators
  - has been very successful, primarily in arbitration.

10.7.2 The increasing dispute-settlement role of UN organs

- Another important development - handling of disputes likely to threaten or endanger peace of security by Security Council or General Assembly
  - Central political body of int'l organized community now monopolizes (or should) those disputes that threaten int'l peace and security.
  - Body empowered to call parties concerned to explain their position and try to narrow differences, reconcile views, recommend equitable solutions – central organs of Conciliation
  - Any party to the dispute or any third party can bring a dispute to attention of SC or GA

- SC has further contributed to settlement of disputes by setting up bodies with special judicial functions – e.g. UN Compensation Commission, charged with considering claims for damages after Iraq invasion of Kuwait; ICTR and ICTY.

10.8 The establishment of more flexible mechanisms for either preventing or settling disputes

10.8.1 Quasi-judicial compulsory settlement of trade disputes

GATT & WTO – both examples of innovative methods of int'l settlement of disputes

WTO system – Dispute Settlement Understanding:

1. Each contracting party must notify the WTO and other parties of its adoption of trade measures affecting the operation of substantive provisions of a trade agreement. Notification followed by consultation. If consultation fails, can resort to good offices or conciliation by WTO.
2. If no settlement reached, a contracting party may submit a complaint to a panel of independent experts. Complaint is not about breach of WTO provisions, it is about nullification or impairment of benefits accruing to it.
3. Complaint may emanate from a single state or more states.
4. Panel hears submission from each complainant as well as the state complained of. 3rd states may also be heard. In making their findings on the facts and law, panel first issues Interim Report with findings and conclusions, which parties can comment on. Then Final report issued.
5. Panel's report is adapted unless consensus not to adopt it OR party to dispute appeals against report.
6. If an appeal is made, Appellate Body hears appeal, solely on questions of law.
7. Reports of the Appellate Body are automatically adopted, unless consensus not to adopt (no further right of appeal).
8. There is monitoring of compliance with Panel/Appellate Body's report. If no compliance, state injured may ask for suspension of concessions or other obligations laid down in agreement.
9. If the state disputes the suspension, the matter must be referred to Arbitration and findings of Arbitral Court are final.

→ Inventive mixture of conciliation, negotiation, and adjudication, with some follow-up.

- Strength of procedure to do with importance states place on economic interests.
- Has proved to be one of best and most useful means of settling disputes in world community.

10.8.2 International supervision

Another system established to scrutinize behaviour of state parties to specific treaties as a way of inducing compliance.

Different from int'l adjudication in these ways:

- Composition of organ responsible for scrutiny may include representatives of states acting in official capacity, not just individuals.
- Overseeing functions are often entrusted to more than one body.
- Initiative of supervisory procedure not left to aggrieved state, but can be taken by other beneficiaries of the int'l rules (e.g. individuals, NGOs, the supervisory organ itself.)
- Supervision carried out with aim of deterring states from breaking rules.
- Normally hearings of supervisory bodies are private, so as not to embarrass states
- Outcome of procedure is not binding, but more a report

Why create such a system?

- After WWI, States started to resort to int'l treaties to regulate matters which until then had been within domestic jurisdiction (like minorities, workers' rights, narcotic drugs) – issues which related to protecting interests of those other than states
- In these new areas it was difficult to establish mechanisms to ensure observance with international rules, because these were new and challenging obligations, states did not want to be monitored on performance before judicial bodies. Furthermore, int'l community couldn't grant standing to individuals who were beneficiaries of these rights and the most natural claimants for their breach.

- Imagine monitoring systems established – all designed to limit impact on State sovereignty
- Have been relatively successful at impelling states to live up to their int'l obligations, because it relies not on punishment or judgement but moral and diplomatic persuasion

Field in which supervision is most widespread:

- International labour conventions
- Treaties and other int'l standards on human rights
- Peaceful use of atomic energy
- Environment
- Antarctic and Outer Space
- Int'l and internal armed conflict
- International economic law

Modalities through which supervision carried out:

- *Reporting* - Examination of periodic reports submitted at pre-determined intervals
  - ILO (art. 22), CERD (art. 9), Covenant on Human Rights (art. 16 and 40), Slavery Convention (art. 8), Convention against Torture (art. 19)
- *Inspection* – more penetrating than reports, which rely on state's own account of situation, can be on the spot
  - International Agency for Atomic Energy (art 12.6), Antarctic Treaty (art. 7), Treaty on Peaceful Use of Outer Space (art. 12)
- *Contentious Procedure* – parties to a dispute and supervisory body engage in contentious examination of case
  - Covenant on Civil and Political Rights (art. 41), Optional Protocol to Covenant, Torture Convention (art. 21)
- *Preventive supervision* – adoption of measures designed to forestall commission of international delinquency by a state
  - Peaceful use of atomic energy and protection of environment

[11]

Part III: Contemporary Issues in International Law

[13]

14 Collective Security and the Prohibition of Force

14.1 Maintenance of Peace and Security by Central Organs or with their Authorization

The collective security system envisaged in the UN Charter was never established, but a number of mechanisms have been established which try to achieve collective security.

14.1.1 Resort to Force by States

On a few occasions the SC (Security Council) has authorized states to use force against another State that had threatened peace, committed a breach of the peace, or engaged in aggression.

- 1950 – taking advantage of absence of Soviet delegate, SC authorized member states (led by US) to assist South Korea in repelling aggression of North Korea, use of UN flag during military operations allowed (Resolutions 82-84/1950)
- 1990 – SC authorized member states to use all necessary means – force on a large scale – to repel Iraqi aggression against Kuwait (Resolution 678/1990)

SC has also authorized force to enforce economic, not just political, objectives.

- 1966 – SC called upon UK to halt by use of force if necessary the passage of ships carrying oil to Southern Rhodesia, against oil embargo
- 1990 – SC said member states could inspect and verify the cargo and destination of every ship crossing Gulf to ensure it was not violating embargo in Iraq.

States to halt all inward and outward shipping to ensure implementation of economic measures:

- 1993 – Yugoslavia – 787/1992, 820/1993
- Somalia – 794/1992
- Haiti – 875/1993 and 917/1994
- Liberia – 1083/1997
- Sierra Leone – 1132/1997

SC gradually established a direct link between humanitarian crises and threats to the peace – one of the three possible conditions that could trigger SC action under Chapter VII. This enlarged the concept of threat to the peace laid down in Art. 39 (Chapter VII) of UN Charter, to include humanitarian crises, once considered sovereign to domestic jurisdiction.

Authorization of use of force to establish secure environment for humanitarian relief operations:

- 1993 – to create safe havens in Bosnia and Herzegovina by authorizing air attacks (Resolutions 836 and 844/1993)
- 1992 – Somalia (Resolution 794/1992) and 1994 - Rwanda (929/1994) – large military operations conducted by 'coalitions of willing' to achieve humanitarian objectives (distribution of relief supplies, protecting displaced persons, refugees and civilians at risk

BUT using humanitarian intervention grounds as a reason for use of force can be a slippery slope, and SC is reluctant to invoke and vague about the reasons / conditions.

SC has also authorized states to use force in order to restore democracy or public order

- 1994 - Haiti – States could set up an international force and use all necessary means to facilitate departure of military leaders and allow return of democratically-elected President Aristide (Res. 940/1994)
- 1997 - Albania – after request from Albania, SC authorized intervention (Res 1101/1997)
- 1999 – East Timor – authorized intervention to prevent internal disorders from turning into combat situations

History shows that although SC bears overall political responsibility for authorized operations, member States retain command and control over their armed forces, and thus they carry out operations, with only obligation to report to the SC on a regular basis.

This authorization system has become standing practice and is recognized as consistent with Chapter VII.

14.2.1 Maintenance or Restoration of Peace by Regional or Other Organizations

SC has implicitly authorized regional or other organizations to use force.
- Yugoslavia – SC authorized both maritime and air operations, referring to a possible implementation through the Western European Union and NATO. After war, it authorized NATO to establish a multi-national force in Bosnia-Herzegovina (1031/1995 and 1088/1996).
- Kosovo – SC authorized NATO to deploy an international security presence in Kosovo (1244/1999).

BUT Kosovo put UN authorization system at risk, because NATO attacked the Federal Republic of Yugoslavia without SC authorization, in light of the gross human rights violations perpetrated against Kosovar population. NATO's actions are considered a breach of the UN Charter, but in Resolution 1244/1999, the SC endorsed its actions after the fact.

This may have created start of a customary rule legitimizing forcible intervention for humanitarian purposes without the need for formal SC authorization.

14.1.3 Maintenance or Restoration of Peace upon Authorization of the GA

"Uniting for Peace" resolution – empowers the General Assembly to recommend that member States adopt forcible measures against a state held responsible by the Organization for a breach of the ban on the threat or use of force
- pushed by the US in 1950 as a counter-weight to Soviet power
- became irrelevant once Soviet Union returned to SC, and once GA became less keen on the West following decolonization.

14.2 Peacekeeping Operations

1956 – first time that peace-keeping forces were used, during Suez Crisis, through the Uniting for Peace Resolution. GA entrusted Secretary-General with creation of military force to secure end of hostilities and withdrawal of British, French, and Israeli forces from Egyptian territory and act as a buffer

Characteristics of traditional peace-keeping operations
1. Composed of military personnel offered to UN by member States and deployed in an area with consent of territorial state
2. Under the exclusive authority, command and control of the SC, but sometimes the GA. SC bears responsibility for their overall political direction.

3. No power of military coercion, but can resort to arms in self-defence.
4. Requested to act in neutral and impartial way
5. Financed through regular budget of UN (ICJ – (Advisory Opinion on *Certain Expenses of the UN)*

Main objective of peace-keeping operations
- separate contending parties
- forestall armed hostilities between them
- maintain order

There have been exceptions to these general characteristics, particularly re only firing in self-defence:
- Congo – SC authorized ONUC to use force to prevent occurrence of civil war in Congo (Res 161/1961), and to arrest and bring to detention fighters (Res 169/1961).
- Somalia – peacekeeping force there had enforcement powers under Chapter VII (Res. 814/1993)
- Bosnia Herzegovina – authorized UNPROFOR to act in self-defence and to reply to bombardments against safe areas by any of the parties (836/1993)

→ all three were countries were there was no peace to keep

Vast majority of UN forces have responded to intra-State conflicts or have intervened in internal disorder or immediate post-conflict situations:

Forces deployed after peace agreements, to help ensure they were respected and implemented
- Angola, Mozambique, Rwanda, El Salvador, Cambodia. These forces included civilian as well as military personnel to help in humanitarian assistance, reconciliation, elections, etc.

Forces entrusted with administration of a regime for a transitional period
- Kosovo (1244/1999) – UN force to perform basic civilian administrative functions, set up political institutions, organise humanitarian relief, keep law and order
- Timor (1272/1999) – UN force to provide security and maintain law and order, to assist in establishing administration, support capacity-building, ensure delivery of humanitarian assistance, etc.

Most complex operations run into problems because of traditional PK requirement of consent of territorial state and impartiality. Sometimes they have gone ahead without consent of one or more of parties involved, which in turn jeopardized impartiality.

The current operation of the peace-keeping system is at odds with what was envisaged in Chapter VII of the Charter, but it is recognized as consistent with it.

Peace-keeping operations have proved to be useful because they stop the fighting and can be helpful in completing a complex peace process. But they can also be damaging because they freeze the situation without providing solutions to basic root problems of conflict. (e.g. Cyprus, Kashmir).

14.3 Collective Measures not Involving the Use of Force

Chapter VII, Art. 41 – Sanctions not involving use of force, not necessarily as a substitute for military action.

Sanctions mechanism has proved hugely important for UN system – both to respond to serious violations of int'l law that amount to threat or breach of peace AND to react to situations which imperil peace and security (although aren't quite breaches of int'l law).

Often, the less coercive the sanctions are, the more frequently and effectively they are used. Sanctions help to express collective condemnation of State mis-behaviour.

Their effectiveness depends on:
- level of support they actually enjoy (if member states don't comply, they don't work)
- quality of targeting

14.3.1 Economic and Other 'Sanctions"

Sometimes SC has decided that member States should take certain economic or commercial measures against a delinquent state.
Southern Rhodesia (1966-1979) and South Africa (1977-1994) – under Art. 41 of Charter, SC imposed an embargo on import and export of certain goods, specifically military in South Africa

SC imposed Economic sanctions and military embargoes:
- Iraq (661/1990), Somalia (733/1992), Libya (748/1992), Yugoslavia (757/1992), Liberia (788/1992), Haiti (841/1993), Angola's UNITA group (864/1993), Sierra Leone (1132/1997), Taleban in Afghanistan (1267/1999).

SC recommended the adoption of measures, like breaking off diplomatic relations:
South Africa (from 1962), Portugal (1963-1975, due to its colonial policy).

Due to lack of substantial and unanimous support by international community, many of these resolutions have not been heeded.

14.3.2 Non-Recognition of Illegal Situations

UN has sometimes fallen back of non-recognition of situations which it deems illegal.
Israel, South Africa, Southern Rhodesia, Cyprus, Iraq's invasion of Kuwait

Politically, UN pronouncements of non-recognition aim to isolate delinquent state and compel it to change the situation that has been condemned. They are often used as a last resort when UN can't find any stronger solution – if you can't fix it, at least don't acknowledge it.

Legally, States who support the UN resolution pledge themselves to avoid any international or internal act capable of turning the factual situation into an internationally legal one (like domestic courts treating acts and transactions with the unlawful authority as null and void. BUT states that don't support the resolution cannot be forced to take the view that the situation is contrary to international law.

14.3.4 Condemnation by the SC

SC also has tool of condemning serious violations of Article 2.4, by defining them as acts of aggression
- condemnation of Israeli attack on PLO headquarters in Tunisia (573/1985)

Can also condemn use of force without calling it aggression
- War between Ethiopia and Eritrea condemned (1177/1998 and 1227/1990)

14.3.4 Public Exposure, by the GA, of Gross Violations

Another 'sanction' the UN uses, for lack of anything better, is public exposure, normally through GA resolutions that condemn unlawful conduct and calling for end to behaviour. Have been used in response to violations of human rights and disregard for basic principles of Organization.

This isn't a mechanism with lots of teeth, but as states appear to be more and more worried about public opinion and try to avoid moral chastisement.

14.3.5 The Establishment of International Criminal Tribunals

Acting under Chapter VII, Art. 41 (measures not involving use of force, classification confirmed by ICTY in *Tadic (Interlocutory Appeal)*), the SC has set up international criminal tribunals to prosecute and punish authors of atrocities perpetrated during armed conflict (ICTYugoslavia, 1993 and ICTRwanda, 1994)

14.4 Exceptionally Permitted Resort to Force by States

14.4.1 Self-Defence

a) General

Art. 51: Resorting to self-defence is a legal enforcement, but limited to rejecting the armed attack.

ICJ, *Nicaragua*: self-defence only warrants 'measures which are proportionate to the armed attack and necessary to respond to it.'

Conditions of Self-defence:
1. Victim of aggression must not occupy aggressor's State territory, unless strictly required to stop aggressor
2. Self-defence must come to end as soon as SC steps in, takes over and takes effective action to stop aggression – until that point, legal right of self-defence may continue
3. Self-defence must cease as soon as its purpose (to repel armed attack) has been achieved

→ prohibition of prolonged military occupation, annexation of territory, anything that over-steps mere rejection of aggression

Because SC never developed its own collective security system, states have resorted to self-defence, often for things not strictly seen as self-defence
e.g. US involvement in Vietnam, Israeli attack on Egypt, USSR intervention in Afghanistan, UK military action in Falklands

States, particularly Great Powers, have tended to abuse this right – for both punitive and deterrent purposes

Examples of punitive purpose justified under Art. 51
- US – Libya, Missile attacks on Baghdad, Afghanistan, Khartoum/Sudan
  Logic of US argument on Self-Defence revealed
  "The US acted in exercise of our inherent right of self-defence consistent with Article 51 of the UN Charter. These strikes were a necessary and proportionate response to the imminent threat of future terrorist attacks against US personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat. The targets were selected because they served to facilitate directly the efforts of terrorists specifically identified with attacks on US personnel and facilities and posed a continuing threat to US lives."

b) Question of ascertaining facts

How are facts established amounting to circumstances required for a state lawfully to resort to force in response to an armed attack?

Often States have tended to adjust the facts to what suits the justification they are trying to make. Factual circumstances may prove as complex and important as legal issues. Problem exacerbated by fact that at time of attack, States usually monopolize control over facts or possess a distinct advantage in establishing them. This makes it hard for international community to judge whether action really was taken in self-defence on proper legal grounds.

c) Is anticipatory self-defence admissible?

Does Art. 51 allow a pre-emptive strike on a State is certain, or believes, that another state is about to attack it military?

People who support anticipatory self-defence say that if you know a state is about to attack you (due to intelligence, it would be naïve and self-defeating to contend that a state should sit and wait before being legally allowed to defend itself. Making states act as sitting ducks makes a mockery of the Charter's main purpose of minimizing unauthorized coercion and violence across State lines (Israel likes this argument).

Legal argument supports this by contending that UN Charter did not suppress or replace pre-existing rules of international law, which allowed anticipatory self-defence.

However, others say that
1) alleged customary rule of self-defence did not envisage a right of anticipatory self-defence, just one of self-defence/preservation &
2) Art. 51 wiped out all pre-existing laws on the subject.

BUT, re (2), *Nicaragua* ICJ decision suggested that customary international law continues to exist alongside treaty and Charter, meaning that whatever existed on self-defence prior to Art. 51 could be used. But court not specific about content of customary international law on self-defence, to see whether it is beyond what is allowed by Art. 51

Another scholar says there should be a distinction between anticipatory self-defence (where an armed attack is merely foreseeable) and interceptive self-defence (where you know armed attack is imminent and practically unavoidable), in which case resort to self-defence should be allowed. But this view has been criticized, because there is no basis in Art. 51, is not supported by State practice, and would be just as hard to categorize as current distinctions.

Some states have favoured a broad interpretation of self-defence:
- Israel, USA, Japan, Canada, Iraq

In interpreting and applying Art. 51, must resort to *object and scope* of Art. 51 and more generally Chapter VII of UN Charter.
- Purpose of Art. 51 and Chapter VII is to safeguard peace and to establish a collective and public mechanism designed to prevent or stop armed violence.
- The exception is the private right that states have to act in self-defence.

- Since peace is paramount, whatever jeopardizes peace should be banned, including pre-emptive strikes – particularly since this power can be so easily abused by states.

This may be unrealistic in practice – but states still have to stop and consider that they risk abusing Art. 51 before they act, and they may be enough in itself.

Anticipatory self-defence – best to think of it as legally prohibited, while acknowledging that there are cases where breaches of prohibition may be justified on moral and political grounds.

d) Self-defence against armed infiltration and indirect aggression

Art. 51 is built on out-dated understanding of military aggression. International practice shows that military aggression involves a gradual infiltration of armed forces / volunteers supported by a foreign government into the territory of another state.

Does international law extends self-defence to include reaction to invasion through *infiltration of troops* and to *indirect armed aggression*?

Infiltration of Troops:
- US argued it was defending itself against "infiltration of troops" from North Vietnamese and Vietcong in Vietnam war.
- States view (Resolution 3314-XXIX/1974, Definition of Aggression, UN General Assembly) and Legal view (ICJ in *Nicaragua*):
  - Armed attacks that justify self-defence are those that are made by armed bands, groups, irregulars or mercenaries *sent by or on behalf* of another State, and of such gravity as to amount to an armed attack conducted by regular forces. Anything less does not warrant self-defense.

Indirect armed aggression:
- Various states have claimed that this justifies action in self-defence (US, Israel, South Africa)
- International community has never fully agreed with this view. Most states were opposed to this interpretation of Art. 51 and regarded the resort to force by these states, invoking this justification, as illegal.
- Same view was held in debates in UN Special Committee on Friendly Relations in 1966-1970 – Northern states wanted to expand possible justifications for acting in self-defence, many of Socialist/Third World countries argued for a stricter interpretation of existing Art. 51
- ICJ, *Nicaragua*: training or providing economic, military, logistical or other support to rebels fighting against central authorities in another country may be regarded as a threat, use of force, intervention in the affairs of another sates. BUT it does not amount to an armed attack, and thus does not entitle the target State to respond in self-defense.

Art. 51 thus does not appear to authorize self-defence against indirect armed aggression, and there is no general rule of state practice that allows this justification.

Entitlement to right of self-defense against a state supporting an insurgency depends on:
- Level of such support
- Evidence of that support
- Evaluation of that evidence by ICJ or another competent UN organ
- Proportionality of the response
- Legality of means used to respond

e) Collective self-defence

Art. 51 grants any member state of the UN the right to use force in support of another State which has suffered another attack.

Right has been interpreted to the effect that the intervening State must not be itself a victim of the armed attack by the aggressor (in which case it would be acting under individual self-defence).

But before a state can assist, there must either be a prior bond (like a treaty authorizing this type of assistance, e.g. NATO) or an express request by the victim of attack.

The victim of attack must ask for help and must be the one to determine whether it has been a victim of an armed attack → ICJ in *Nicaragua*.

'Collective' self-defence has been invoked in very few occasions:
- USA – Vietnam, in support of South Vietnam; Nicaragua
- Britain – attack on Yemen to assist Federation of Southern Arabia
- Iraq attack on Kuwait

States don't tend to get involved in collective security directly, preferring to send arms and military equipment rather than soldiers.

14.4.2 Protection of citizens abroad

States have used force for the purpose of protecting their nationals whose lives were in danger in a foreign territory.
- Sometimes without the consent of the territorial state
  e.g. Belgium in the Congo in 1960, USA in Dominican Republic, 1965; USA in Iran, 1980; USA bombings in Libya, 1986, Baghdad, 1993, Afghanistan & Sudan, 1999 in response to terrorist attacks on US nationals
  - Difference: territorial state was not responsible for the threat to life of foreign nationals, because public order had collapsed vs. local government was answerable as it did not protect foreign nationals (or tolerated / abetted those who sought to harm them).
- Sometimes with the consent of the territorial state
  e.g. USA sending troops to Lebanon, 1958, USA sending troops to Panama, 1989, Belgium sending troops to Congo
  - All cases where some claim to threat to country's nationals (no always substantiated) and invitation or permission granted by host state

Larnaca Incident, 1978 – strange case about Egyptian nationals held hostage by terrorists in Cyprus. Egypt got permission to send an aircraft to Cyprus, but once it landed Cypriots realized it held armed commandos, and Cypriots refused to grant permission to intervene. Egyptian commandos opened fire nonetheless, and then Cypriots opened fire. In the shoot-out, several were killed, but the terrorists were arrested. Big dispute afterward – Egypt said Cyprus had not authorized the use of force but claimed it had not violated Cypriot sovereignty and had acted to fight terrorism, Cyprus said its sovereignty had been violated.

- In most cases of use of force to protect nationals, the intervening State is a Western power intervening in territory of a developing country → lens on current world power order
- It's mostly Western countries who argue that armed intervention for the protection of nationals is lawful, either because it's under Art. 51 or under a customary rule unaffected by Charter

- Other countries have consistently opposed the legality of use of force to protect foreign nationals

But these smaller states' objections have not obliterated the general rule that allows resort to force to protect nationals (possibly subsumed under Art. 51 under general notion of self-defence).

Strict conditions for use of armed force to protect nationals to be lawful:
- Threat or danger to life of nationals (due to terrorist attacks or collapse of public order) is serious
- No peaceful means of saving their lives are open, either because they have already been exhausted or because it would be totally unrealistic to resort to them
- Armed force is used for the exclusive purpose of saving or rescuing nationals
- The force employed is proportionate to the danger or threat.
- As soon as nationals have been saved, force is discontinued.
- The state which has used such armed force immediately reports to the Security council, explaining in detail the grounds for its attack.
  - Based on these conditions, the US bombing of Libya, 1986, Baghdad, 1993, and Afghanistan & Sudan, 1998, were contrary to UN Charter

14.4.3 Armed intervention with the consent of the territorial state

Is the principle that an illegal act is no longer illegal if the party whose rights have been infringed previously consented to it (*volenti no fit injuria)* applicable at an international level?

Traditionally – each state was free to allow another to use force in any form on its own territory → state could sanction its own invasion, extinction, etc.

Does the UN Charter's ban on use of force prevent consent to use of force on one's own territory?
- Yes – by explicit consent a State may authorize the use of force on its territory whenever, being the object of an armed attack, it resorts to individual self-defence and in addition authorizes a third State to assist in 'collective self-defence.'

But what about if the state is not being attacked from outside but by insurrection within territory?

- State practice makes extensive use of the 'consent exception' even though this does not conform to int'l law.
- A number of States believe that consent legitimizes the use of force, because it precludes violation of Art. 2.4 of Charter (territorial integrity and political independence of state).
- States often claim that their military intervention into another state's territory was valid because the other state consented.
  e.g. Panama Canal – US government interpreted Panama Canal Treaty to allow US to unilaterally intervene if Panama Canal was closed or its operation was impeded. Panama signed treaty with that condition, then president said Panama would never accept US intervention unless explicitly authorized by Panamanian government, US ignored and said that they would follow what was in the treaty. US invasion and occupation of Panama in 1989 was not lawful, either on grounds of consent from Panama (they didn't), to safeguard lives of US citizens, to help restore democracy, or to bring Noriega to justice.

Different scenarios:
- Consent to the use of force was given by a State on whose territory an organized movement was not fighting the government
  → use of force is legitimate

- Substantial body of population supported the insurrection, and the insurgents have not been aided externally, then use of force by third states could be against principle of self-determination and non-interference
  → use of force illegitimate
- If rebels receive military aid from third States, then use of force (by another third party) at request of state
  → legitimate

State of the Law on Consent to Armed Intervention today

1. Consent must be freely given (not through duress, coercion, etc.)
2. Consent must be real, not just apparent
3. Consent must be given by the lawful government or its representative
4. Consent may not be given to a blanket authorization for the future, must be related to specific event
5. Consent may not legitimize the use of force against the territorial integrity or political independence of consenting state (would be contrary to UNCHTR art. 2.4)
   i.e. you can't consent to another state using force to establish control over a population within your territory or appropriating a part of your territory
6. Consent cannot run counter to other principles of *jus cogens*
   i.e. if force were authorized in order to deny/limit right of peoples to self-determination or if force used atrocities to put down rebellion or prevent secession

14.4.4 Armed reprisals against unlawful small-scale use of force

Some states think that military action short of war in response to a single and small-scale armed action by another State are legally authorized, either by Art. 51 or a general rule.

Legality of general category of armed reprisals in modern international law?
e.g. 1968 Israeli 'reprisals' against Egyptian installations and a raid against Beirut

- No customary rule has evolved on the legality of armed reprisals
- They are also not authorized under Art. 51 and have been condemned by various SC resolutions.

Some have drawn a distinction between

- retaliatory armed force – a delayed response to the unlawful but small-scale use of force by another state → armed response not lawful
- immediate armed reaction to a minor use of force → armed response should be lawful, otherwise all states would be at mercy of aggressive states
  e.g. border patrols, other side launches attack against border control guards, they should be allowed to fire back

Legal justification

- The unlawful action involving force, undertaken by the other state, is not an armed attack under art. 51 (*Nicaragua* – a border skirmish does not amount to an armed attack).
- There was no other means of avoiding an immediate peril to the life of persons belonging to the victim state

Conditions for lawful use of force against small-scale use of force:

- Necessity and proportionality
- Immediacy (on-the-spot-reaction to attack)

14.4.5 Is resort to force to stop atrocities legally admissible?

Charter does not authorize individual States to use force against other States with a view to stopping atrocities, because the Charter places utmost importance on peace and security, rather than protection of individual rights.

Such a resort to force is only possible in very exceptional circumstances and if actions are justified and authorized by the Security Council.

From state practice, backed up by decision of ICJ in *Nicaragua*, it is clear that an international customary rule has not crystallized that would entitle individual States to take forcible measures to induce a state engaging in gross and large-scale violations of human rights to stop such violations.

- Because *usus* is extremely limited and *opinion necessitates*, though widespread, does not fulfil conditions of generality and non-opposition.

14.5 Use of force when self-determination is denied

In contrast to illegality of intervention on humanitarian grounds, gradually a customary rule has evolved providing for an exception for peoples subjected to colonial domination or foreign occupation, as well as racial groups not represented by their governments.

If such groups are forcibly denied their right to self-determination, they are legally entitled to resort to armed force to realize this right.

Evidence of acceptance of this rule

- 1970 Declaration on Friendly Relations
- subsequent GA resolutions (e.g. on definition of aggression)
- 1977 First Additional Protocol to 1949 Geneva Convention (Art. 1.4).

14.6 The old and the new law contrasted

Old law rested on these fundamental tenets:

1. unfettered freedom of states to use force
2. consequent lack of a clear-cut distinction between enforcement (resort to coercive action to compel observance of law) and use of force of law for realizing one's own interests
3. license to use force without previously getting international authority to establish whether a subjective right of the state resorting to force had in fact been violated
4. international wrongs remained a private occurrence between injured and aggressor states, no one else could intervene in solidarity
5. lack of international agency capable of co-ordinating resort to force by individual States
6. traditional law favoured great powers at expense of small states

1945 – major shift: maintenance of peace should become a 'public concern'

New Law

1. Any use of force except in self-defence is totally banned. New international law has not changed the norms concerning the modalities of use of force – state bound to respect certain principles placing restraints on military action
2. UN is in theory endowed with collective responsibility both for enforcing law in extreme cases (jeopardy to peaceful relations) and more generally for safeguarding peace
3. Theoretically, the UN has a monopoly on use of force, in that only it should intervene militarily in extreme cases that jeopardize global peace and security

4. Whenever international rules are disregarded without the breach amounting to an 'armed attack', states are not authorized to react by force → only peaceful reaction is lawful
5. Even peaceful sanctions must be preceded by resort to other peaceful means of conflict resolution (but does not have to be judicial adjudication)
6. Non-coercive measures of enforcement are lawful, use or threat of military force are unlawful.

- All this theory is great but does not apply in practice due to weakness of international enforcement machinery
- Today the law consecrates the might of Great Powers, because they hold veto power over any decision that would define their actions as transgressions of Chapter VII of the Charter.
- BUT, system probably does slow down the acceleration of use of force in resolving conflicts
- Should remember the role of public opinion in dissuading states from breaching international law

15 Legal Restraints on Violence in Armed Conflict

15.1 Introduction

Law of war is at vanishing point of int'l law (and international law is at vanishing point of law).

Law of war
- directly and transparently reflects power relations
- only partially restrains States' behaviour
- law relinquishes its control and power politics takes over
- int'l rules hold Armageddon only partially at bay
- legal restrains are often checkmated by sheer power

Law of war can only be expected to mitigate most harmful consequences of war.

15.2 Classes of War

1648 – 1789
- wars were contests between professionals, conducted as a sort of game between politicians with little direct involvement of civilian population
- due to development of costly well-trained armies whose deaths in war were expensive to states, military participation as a sign of honour and class, lack of national allegiance of military men and reluctance to fight to bitter end, aristocratic principles of chivalry

French Revolution changed all this and helped to create total war.
- Universal conscription – soldiers no longer professionals, citizenship carried with it obligation to fight for country.
- War became a relationship between man and man, a life or death struggle involving whole population of contending states.

Absolute war (von Clausewitz, Prussian general) – had merits in that:
- Decision to engage in armed conflict no longer taken by handful of leaders with little regard for their populations
- Savagery of modern war would prompt modern leaders to think twice before going to war (really?)

15.3 Traditional law in a nutshell

Bulk of traditional law on war was restated, codified or developed at *Brussels Conference 1874* and *Hague Conferences of 1899 and 1907*.

- This law was based on assumption that wars are clashes between states' armies, making it important to distinguish between combatants and civilians.
- It reflected tensions between Great powers and lesser states, interests of naval powers, and interests of countries wishing to remain aloof in war and those who were war-seeking.

Basics of traditional law of war:
- Only inter-state armed conflicts were regulated, no rules for civil wars.
- Only applied to parties to armed conflicts if both were contracting parties.
- Only customary law (most general and loosest body of law) would indisputably apply in any war between any parties.

- Lawful combatants were members of regular armies, as well as militias and volunteer corps.
- Civilians could also be lawful combatants if they were taking up arms on approach of the enemy.
- Means of warfare – few prohibitions; parties only had to be sure that means could only be targeted at belligerents, but little enforcement or protection of civilians in practice.
- Law favoured strong & middle-sized powers, in means of combat, method of combat, and compliance.

Rules of Neutrality:
- Neutral states must refrain from giving any direct or indirect assistance to either belligerent, in particular states must not allow belligerents to use their territories in interesting one/other party.
- Belligerents must refrain from using the neutral territory for any warlike action, and if its troops retreat there, they must consent to being interned in neutral state
- Belligerents have the right to search and visit and to seize neutral vessels carrying contraband (goods which may assist enemy in conduct of war, very hard to determine what exactly those goods were, therefore neutral states commercial interests at risk).
- They are entitled to blockade the enemy coast, thus preventing access to it by any vessel, including neutral states.

15.4 New developments in modern armed conflict

Hague Codification process rendered defective and inadequate for a number of reasons.

- New classes of combatants emerged.
  - WWII – partisans and resistance movements were key in many countries, but law did not recognize them as lawful combatants. Allies felt that resistance movements should be granted some legitimacy, as they had acted for politically sound reasons.
  - Decolonization – people also felt that guerrillas should be upgraded to status of lawful combatants.
- Wars of rich (with sophisticated weapons) and wars of poor (struggles for national liberation) – both produced staggering civilian losses, non-combatants suffered most.
- New agencies of destruction became popular – planes, atomic bomb, bigger missiles, chemical weapons etc.
- Civil wars become more widespread – sometimes with Great Powers fighting each other by proxy, or as part of decolonization process and aftermath
- Institution of neutrality gradually crumbled – as rules on neutrality put those states wishing to remain aloof in a situation no less hazardous than that of belligerents; UN which rested on collective security; development of ideological and regional voting blocs which meant states usually took sides.

15.5 The new law: an overview

Due to these developments, impetus for a new codification of law of war. New law has not supplanted old law; has supplemented it and added greater clarity and precision.

- 1949 – Conventions on war victims (on wounded and sick in field, on wounded, sick and shipwrecked at sea, on prisoners of war, on civilians) → largely turned into customary law
- 1977 – Diplomatic conference adopted two Protocols (int'l & internal armed conflicts), revised and updated 1907 Hague Regulations and 1949 Geneva Conventions

- New law still based on fundamental distinction between combatants and civilians (who do not take part in hostilities).

- But humanitarian law has become less geared to military necessity and more influenced by human rights values.
  - ICTY, *Tadic* - emphasized this trend
- Furthermore, much of treaty-based law of war (e.g. Geneva Conventions) now applies to all belligerents, even if they are not contracting parties.

15.6 Current regulation of international armed conflict

15.6.1 Lawful combatants

a) Traditional Law

Big powers
- it was in their interests to exclude any one other than members of the regular army from the class of lawful combatants, to restrict the numbers of people who were legally entitled to fight back in case of invasion
- it was also in their interests to limit the rights of civilian populations under occupation

Small and middle-sized states
- Succeeded in extracting concessions for militias and volunteer corps and for civilian populations
- Also excluded possibility that occupying power could acquire ipso facto sovereign rights over territory it invaded

Big and small states reached a compromise.

Lawful combatants

Regular armies	**Militias and volunteer corps**	**Inhabitants of territory who spontaneously take up arms to resist invading troops**
	Conditions • Were commanded by a person responsible for his subordinates • Wear a fixed distinctive sign recognizable at a distance • Carry arms openly • Conduct their operations in accordance with laws and customs of war	Conditions • Carry arms openly • Respect laws and customs of war

In practice, between 1907-1939, war fought mainly by regular armies, only on a few occasions did other lawful combatants take up arms.

b) New Law

New categories of lawful combatants (added through post WWII codification processes)

Partisans	**Guerrillas**	**Mercenaries**
1949, Third Geneva Convention, Art. 4.A.2	1974-7, Art. 44 (compromise formula after much debate)	Geneva Conference, art. 47
New category of • "organized resistance movements, belong to a party to the conflict and operating in or outside their own territory, even if territory occupied"	Requirements - unchanged • Being linked to party to conflict • Were commanded by a person responsible for his subordinates • Wear a fixed distinctive sign recognizable at a distance • Carry arms openly • Conduct their operations in accordance with laws and customs of war	• a mercenary shall not have the right to be combatant or prisoner of war
• They had to fill same conditions as militias and volunteer corps, and had to be linked to a party to the conflict.	Reduced requirements: • Obliged to distinguish themselves from civilian population when they are engaged in an attack or are preparing for an attack • Do not openly have to carry arms • If captured by adversary having not fulfilled these conditions, do not forfeit status as lawful combatant and are treated as prisoners of war, although liable for breach of art. 44.3	• 1960-70 – lots of mercenaries helping to fight wars in Africa, by ruling elites and foreign powers to either topple or uphold regimes. • African states claimed that mercenaries should be treated as unlawful combatants, West said that they should be treated as lawful provided they met requirements
	Furthermore, in wars of national liberation and military occupation, further relaxations of rules: • Only have to carry arms openly during each military engagement and long enough before launching attack so it is visible to adversary (art. 44.3) • But if they do not satisfy this requirement, they lose their status as lawful combatant	Mercenary = any person who: • is specially recruited locally or abroad to fight in armed conflict • in fact takes a direct part in hostilities • is motivated by desire to make money and is promised payment by party to the conflict that substantially exceeds what a lawful combatant would get • is neither a national or a party to the conflict nor resident of territory controlled by party to conflict • is not a member of the armed forces of a party to conflict • has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces

15.6.2 Conduct of hostilities: means of warfare

a) Traditional law

Only weapons which were ineffective or might imperil life of their users were proscribed:
- Explosive projectiles weighing under 400 grams (ineffective)
- Poisonous weapons, asphyxiating gases, automatic submarine contact mines (dangerous to users)

Really important or effective weapons were not banned, like aircraft & hot air balloons.

General principle (1899 and 1907 codifications) against weapons calculated to cause unnecessary suffering:
- Minor arms like lances with barbed heads
- Irregularly shaped bullets
- Projectiles filled with broken glass

Also, could not use indiscriminate weapons (that could not distinguish between civilian and combatant) or use weapons indiscriminately.

b) New law

General rules have proved unworkable because too loose.

Specific bans on specific bans have been more helpful:
- use of chemical and bacteriological weapons (1925 – Geneva Protocol)
- manufacturing and stockpiling of bacteriological weapons (1972 – specific Convention)
- any weapon whose primary effect is to injure with fragments non-detectable in human body by x-ray (1980 – Convention with three protocols) [these weapons don't actually exist, ppl thought US had them]
- use of land mines, booby traps and other devices if employed indiscriminately and against civilians (1980 – Convention with three protocols, amended in 1996 to be stronger re land mines)
- incendiary weapons used to attack civilian or civilian objects, or military targets located within civilian concentration (1980 – Convention with three protocols)
- blinding laser weapons (1995 - Fourth Protocol)
- hostile use of environmental modification techniques (1976 – Convention)
- use, production, stockpiling and transfer of antipersonnel mines (1997 – Ottawa Convention)

Advantages to specific bans:
- Since relevant int'l convention actually describes weapon, high degree of certainty created about what kinds of weapons are outlawed.
- Provides normative guidance in spite of lack of enforcement mechanisms – states have by in large followed these bans

Disadvantages to specific bans
- Bans tend to be about weapons that have minor military effectiveness or would hurt person using them
- Has not been extended to weapons which are really effective, like aerial bombardment or atomic weapons
- Bans on minor weapons can be bypassed by new and sophisticated weapons which do not fall under prohibitions

c) Nuclear weapons

Theoretical use of nuclear weapons:
1. Aggressive first strike – to launch an attack against another state, initiating war
2. Pre-emptive first strike – to make a pre-emptive attack on another state, when attacking first state believes the other state is about to launch a nuclear attack
3. Second use in self-defence – to respond in kind to a nuclear attack (or other weapon of mass destruction) by another state
4. First use in conventional war – to inflict devastating losses on enemy in the course of a conventional war
5. Retaliatory use in conventional war - To retaliate against enemy's first use of nuclear weapons, weapon of mass destruction, chemical or biological weapons, in the course of conventional war

→ Nuclear powers justify uses under 2, 3, and 5

Law's response:
- No treaties or customary law (thank god!) on use of nuclear weapons
- Analogies to be drawn from customary rules of int'l humanitarian law

1. Aggressive first strike – would be contrary to Art. 2.4, prohibition of attack not in self-defence
   - ICJ, *Legality of the threat or use of nuclear weapons*
2. Pre-emptive first strike – would again seem contrary to Art. 2.4, because art. 51 of UN Charter does not authorize such strikes, whatever arms concerned.
   - ICJ, *Legality of the threat or use of nuclear weapons* – failed to comment on this question.
3. Second use in self-defence – lawful if it meets requirements:
   - necessity and proportionality – ICJ re-iterated this in *Nicaragua*
   - protection of civilians & unnecessary suffering to combatants
   - neutrality and inviolability of third powers
   - ICJ mentioned all these in *Legality of the threat or use of nuclear weapons* but made a very ambiguous ruling.
     - Doubtful that nuclear weapons can be used in such a manner that meets all these requirements. But some nuclear states insist that tactical nuclear weapons could be used in ways that respect int'l law.
4. First use in conventional war – would be contrary to requirements above and be absolutely illegal
5. Retaliatory use in conventional war – could be lawful if clearly met requirements above

15.6.3 Conduct of hostilities: methods of combat

a) Traditional Law

Two sets of rules:

Those meeting needs of belligerents, regardless of power
- Prohibiting treachery (article 23(b) of Hague Regulations)
- The killing or wounding of enemies who have laid down their arms or have no means of defence and have surrendered (art. 23(c))
- Declaration that defeated enemies who surrender will not be killed (art. 23(d))
- Improper use of flags of truce or military insignia
- Pillage
- Permissions on spying

Those which were calculated to (or did in fact) favour the stronger states

- Belligerents must not attack either from land or from sea undefended towns, villages, dwellings or buildings (art. 25); but there was no definition about 'undefended' or a mechanism to determine, hence an invading power could simply refuse to recognise it as un-defended
- Officer in command of an attacking force must do all in his power to warn authorities before commencing a bombardment, except in cases of assault (art. 26)
- All necessary steps must be taken to spare, as far as possible, churches, works of art, hospital and historic monuments (art 27)

b) New Law

Modern int'l regulation of methods of combat has become even more uncertain and ineffective than it was under traditional regime.

Principles
- Can't attack civilian objects alone or hit military and civilian objects indiscriminately
- When launching an attack, precautions must be taken to spare civilian objects
- In case an attack on military objective cannot but cause incidental civilian loss of life or destruction of property, precautions must be taken to ensure losses are not out of proportion to military advantage obtained.

These are very vague and have been very loosely interpreted. They do, however, provide some mitigation of the carnage of war.

These principles were clarified and given legal precision (as much as possible) in *Protocol I*, 1977.
- General definition of military objectives – but so sweeping it can cover almost anything (art 52.2)
- Definitions of indiscriminate attacks (art. 51.4 and 51.5)
- Definitions of precautionary measures when launching an attack (art. 57 and 58)
- Various provisions on civilian objects (art. 52-6)
- Provisions on non-defended localities (art. 59) and de-militarized zones (art. 60)

- Most strong military powers objected to these rules, and only Britain ratified the Protocol with numerous reservations.
- Therefore, although these build upon, expand, and give precision to customary law, these provisions have not become generally binding (in fact custom) and are binding only on signatories to protocol.

- Except – Art. 57 and 58 on precautions on collateral civilian casualties, because they specify pre-existing norms and do not appear to be contested by any state, including those which have not ratified
  - ICTY, *Kupreskic*

- BUT – prohibition of use of methods intended to cause long-term damage to natural environment and prejudice health and survival of population (art. 55)
  - Response to Vietnam war
  - Supported by practically all states → reflects a general consensus of states and is thus binding on all members of int'l community
  - but ICJ in *Nuclear weapons* case not sure that general consensus makes it binding on everyone, said only binding on state parties

15.6.4 Protection of war victims

a) Traditional Law

- Laws protecting war victims (those who do not take part in hostilities or are now no longer able to due to wounds, sickness, shipwreck) was much stronger than other areas of law of war.
- Because it is in the interests of military powers to safeguard members of their war victims (principle of reciprocity)

b) New Law

- Four Geneva Conventions of 1949 and Protocol I of 1977 set out extensive and detailed int'l laws protecting war victims.

- Creates status of prisoner of war - those who fall into hands of enemy, either through surrender, wounded, shipwreck
  - o may be interned in POW camps far from combat zone
  - o must be held in good health and treated humanely
  - o have rights to freedom from violence and intimidation

- Civilians are protected if they are in hands of adversary either from outset of hostilities or after occupation.
- But those who happen to be in combat zones only protected by Protocol I.

15.6.5 Means of ensuring compliance with law

a) Traditional Law

- Lack of compliance mechanisms was major weak point of traditional laws of warfare.

Three devices were used for compliance:
- Belligerent reprisals – maltreatment of prisoners, bombing of undefended localities (a v. bad idea)
- Criminal punishment of enemy combatants or civilians guilty of war crimes – usually victor's justice
- Payment of compensation for any violation perpetrated – victor's justice

b) New Law

Reprisals
- Most rudimentary and widespread means of inducing compliance with law
- 1949 *Geneva Conventions* banned reprisals against 'protected persons' (POWs & civilians in hands of enemy)
- Bans have now turned into customary law
- BUT Reprisals against civilians in combat zones were implicitly permitted
- 1974-77 Conference – extended the ban to civilian persons or civilians finding themselves in combat zones (art. 51.6, 53(c), 54.4, 55.2, 56.4 of *Protocol I*)
  - o Due to strong opposition of many states to their provisions, they remain treaty law, and bind only states which ratify or accede to protocol without reservations.
  - o BUT ICTY, *Kupreskic* – advanced view that demands of humanity and dictates of conscience *(opinio necessitatis*) created a customary rule also binding on states who are not signatories, because all states now have means other than reprisals to induce compliance with int'l laws of war

Penal repression of breaches

- Serious violations of int'l humanitarian law may be prosecuted and repressed by national courts and at int'l level through special courts, tribunals, and now ICC.
- This is a good development.

Protecting Powers

- 1949 *Geneva Conventions* codified and improved on int'l practice by providing that each belligerent could appoint a third state as a "protecting party", but this required consent of both parties
- Each state would have a protecting power (or they could both have same one), they would act as referees, scrutinizing implementation of Conventions
- 1949 Convention advanced this by creating "substitutes for protecting powers"
  - Detaining power (state detaining enemy wounded, POWs, etc.) was duty bound to accept the offer of services of a humanitarian organization, such International Committee of Red Cross to assume functions performed by Protecting Powers
- In practice, protecting power systems resorted to in only five cases
- Furthermore, states have often refused to accept offer of ICRC to act as substitute; and ICRC has sometimes been reluctant to step in
- System further institutionalized and specified in Article 5 of *First Protocol, 1977*

15.7 Current regulation of internal armed conflict

15.7.1 General features of the legal regulation of civil strife

- Approach of int'l law to civil strife rests on inherent clash of interests between the lawful government on one side (who wish to regard insurgents as criminals) and rebels (eager to be internationally legitimized).
- Third states may and do side with either side, which further complicates matters.

- All rules governing struggle between lawful government and insurgents do not grants rebels status of lawful belligerents.
- For both governments and third parties, rebels are common criminals breaking domestic penal law.
- If captured, they are not prisoners of war but can tried for having taken up arms against central government.

- Insurgents can become lawful combatants only if the incumbent government decides to grant them status of belligerency – very rare, it would mean admitting there was a civil war going on.
- Thus most insurgents have no international legal standing.
- BUT if insurrectional government gains international rights and obligations, it might entail acquisition of status of lawful combatants for its armed forces.

- Most rules on internal armed conflict aim at protecting non-combatants only.
- Methods of combat are not regulated, except to extent that it must spare civilians.
- This becoming more problematic as third states help insurgents, often in military ways.

15.7.2 Customary law

- Traditional dichotomy between inter-state conflicts and civil strife has becoming increasingly blurred since 1930s (Spanish Civil War, v. bloody).

- As a result, internal armed conflicts are governed less by state sovereignty and more by international rules.
- Why?
  - Growing frequency of these conflicts
  - Conflicts becoming more cruel and protracted
  - Difficulty for third states to remain aloof
  - Propagation in int'l community of human rights doctrine
  - ICTY, 1995, *Tadic*

- Rules developed after Spanish Civil War about conduct in internal armed conflict:
  - Ban on deliberate bombing of civilians
  - Prohibition on attacking non-military objectives
  - Rule concerning precautions which must be taken when attacking military objects
  - Rule authorizing reprisals against enemy civilians and consequently submitting them to general conditions exacted for reprisals

  → v. similar to rules for international armed conflict

- These rules apply to any internal armed conflict in which insurgents:
  - Have an organized administration effectively controlling portion of territory of state
  - Have organized armed forces capable of abiding by international law
- Minor rebellions, uprisings, and other internal strife which aren't full civil war are not covered by these rules.

- Formation of general norms on civilians – born out by unanimous adoption of UN GA Resolution 2444 (XXIII, 1968) and Resolution No. 2675 (XXV, 1970).

Practice does not live up to law.
- Neither government nor insurgents protect non-combatants.
  e.g. Nicaragua, El Salvador, former Yugoslavia, Colombia, Chechnya
- Why?
  - b/c civilians often take sides and contribute at various levels to struggle
  - b/c in many states, population is split into conflicting ethnic, cultural or religious groups which do not feel that they belong to same country

<u>Elementary consideration of humanity</u>
- Customary rule has evolved out of 1949 Geneva Convention, Art. 3 (stressed by ICJ in *Nicaragua)*
- Applies to any internal armed conflict, not just civil wars
- Means to protect only victims of hostilities
- Provisions:
  - Non-combatants must not be attacked
  - Contending parties must not resort to measures intended to intimidate or terrorize civilian populations (like My Lai massacre)
  - Taking of hostages is prohibited
  - Prohibition of all reprisals involving violence to the life and persons of non-combatants, or outrages upon their personal dignity
  - If members of the armed forces of the adversary or civilians belong the opposing party are arrested and detained or put in interment camps, they must be treated humanely
  - No discriminatory treatment, no torture, cruel humiliating or degrading treatment
  - Wounded and sick, including those of adversary, must be collected and cared for
- State practice after 1949 – Art. 3 invoked, reaffirmed and relied upon in a number of occasions.
- Even when disregarded in practice, no state admitted to violating art. 3.

- However, it more honoured in breach – but this lack of state practice has not been enough to erode the customary rule.

- Some rules on conduct of hostilities have also seeped into internal armed conflicts – for example, prohibition of use of chemical weapons, on grounds that what is inhumane at int'l level would surely be inhumane at national level.
  - ICTY, Tadic

- Trend further strengthened by idea that war crimes can only be committed in inter-state wars. Serious violations of customary or treaty rules governing internal conflicts may also amount to war crimes in certain conditions.
  - ICTY, *Tadic*; ICTR, Art. 4, ICC Statute, Art. 8.2

15.7.3 Treaty law

- A number of treaties agreed upon since 1949 also regulate internal armed conflicts.
- BUT they have not turned into customary law (unlike rules on elementary considerations of humanity). Therefore, they are only binding on contracting parties.

Some treaties on internal armed conflicts:
- Second Additional Protocol, 1977
- 1954 Hague Convention on Cultural Property (art. 19), updated by second convention in 1999 (art. 22)
- 1996 Amended Protocol II to 1980 UN Convention on conventional weapons (prohibition on land mines, booby traps, etc)
- 1997 Ottawa Convention on Prohibition of Use, Stockpiling, Production and transfer of anti-personnel mines (art. 1)
- 1995 Protocol IV to UN 1980 Convention on laser weapons

Second Additional Protocol 1977
- Much weaker than originally proposed due to objections from some Third World countries
- Covers only large-scale armed conflicts, not smaller internal uprisings
- Despite this weakness, it does represent maximum which states participating in 1977 conference were willing to agree.

15.8 The role of law in restraining armed violence

- Int'l legal control of warfare has kept pace with developments in organized armed violence only to a limited extent.
- Body of law is beset with deficiencies, loopholes and ambiguities.
- However, it is a good thing that there are at least some norms that restrain state conduct.
- Legal standards serve as a moral and political yardstick that public and NGOs can use to evaluate state behaviour, and states can check themselves against.