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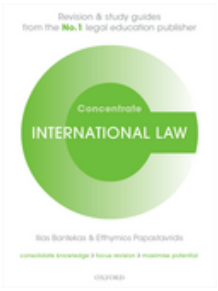

International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

Publisher: Oxford University Press
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Dedication

Ilias Bantekas wishes to dedicate this book to Στέφανος and μπέμπα for the immense joy they bring to his life.

Efthymios Papastavridis wishes to dedicate this book to his mother, Vassileia, for her immeasurable love.

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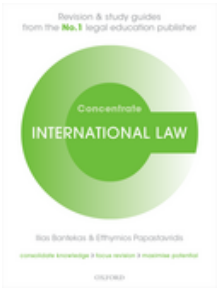

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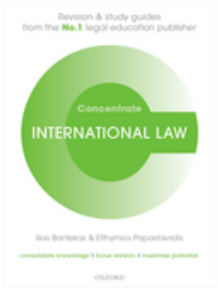

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1. The nature of international law and the international legal system

Chapter: (p. 1) 1. The nature of international law and the international legal system
Author(s): Ilias Bantekas and Efthymios Papastavridis
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The examination

Exam questions in this field will most likely involve international legal theory and the relationship between the various approaches towards international law. In addition, questions concerning the nature of legal obligations, including peremptory norms of international law (***jus cogens***), are frequent. Moreover, there may be questions regarding the conflict of international norms and its fragmentation.

(p. 2) Key facts

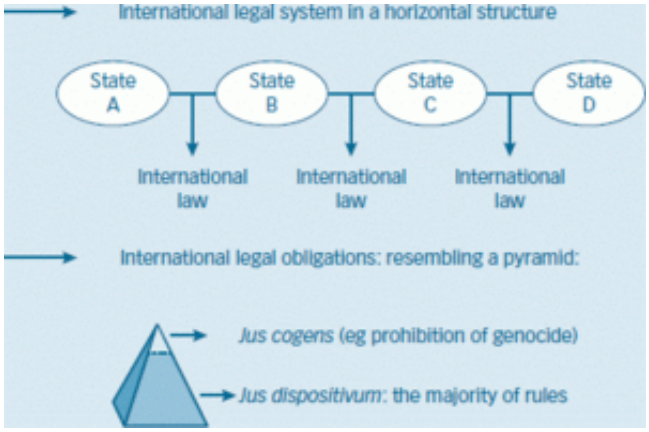
- International law sets out the rules that govern the relations between the members of international society, including sovereign States, **international organizations**, and individuals. These rules were mainly created by and for States, but nowadays they encompass more users and address far more issues.
- The structure of the international legal order is fundamentally different from that of national legal systems. Besides the absence of a central legislative organ—that is, equivalent of a national parliament—there is no international police or international judge as conceived in the domestic setting, but both enforcement and

adjudication of international rules depend heavily on the consent of the States concerned.

• International legal theory has long struggled with contemplating the nature of the international legal system. Theories such as formalism, positivism, or naturalism, which concern every category of law, have been complemented by schools that focus explicitly on international law, such as realism or policy-oriented approach, etc.

• There are different categories of norms in the international legal system; a common distinction could be between obligations of a contractual nature and obligation *erga omnes*. In addition, although there is no formal hierarchy among the sources of international law, there is a certain hierarchy of international norms: *jus cogens* (norms from which there can be no **derogation**) and *jus dispositivum* (norms that are susceptible to derogation).

(p. 3) Chapter overview



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The nature of the international legal system

Introduction

International law does exist and it does matter. International law concerns the invasion of Iraq or the killing of Osama bin Laden, news that makes the headlines of newspapers worldwide. International law also concerns day-to-day matters, such as the checking of passports at Heathrow airport. International law lays down rules governing the relations of sovereign States, but also grants rights to individuals, from the citizens of a State to asylum-seekers traversing the ocean to find a safe home. International law deals with international crimes, like genocide, but also regulates the simple **extradition** of a common criminal to his State of nationality.

As law in any given era and society is the product of its time, so too international law is the product of international society, evolving as the latter develops. For example, in the nineteenth century there were enough rules, especially of customary origin, to address the needs of its then State-centred international society. Today, the needs of international society have significantly increased by reason of its transformation and expansion. In the twenty-first century, international law is called to address the needs of the 193 member States of the United Nations, numerous international organizations, an indefinite number of **non-State entities** (eg multinational enterprises), and individuals.

(p. 4) At the same time, the international legal system remains fundamentally different from national legal orders. In the domestic setting, rules spring from a centralized legislative authority on the basis of a well-defined constitutional framework. These rules are enforced by a central authority, the executive branch of government, and when a dispute arises regarding their application concerned parties have recourse to the judiciary. This vertical system is not reflected on the international plane. There is no international parliament or central legislative body. There exists no

central administration to enforce international rules, nor an international court with mandatory jurisdiction that is open to both State and non-state entities.

International society consists of a constellation of sovereign States and other international organizations, which are dispersed in a rather horizontal order of authority. International law is the chain that holds them together, providing the rules that govern their coexistence in this anarchical yet interdependent universe. In this horizontal international legal order, the central figure is none other than the State, being able to create **custom** through its practice, adopt treaties, or establish other subjects of international law, ie international organizations.

This does not mean that States are free to choose not to be bound by any rules whatsoever. Rather, they consent to be bound because of the mutual benefits generated as a result. Theorists have long struggled with the question as to why international law is, or should be, binding, as well as with the nature of the international legal system. International legal theory has long been puzzled, apparently drawing analogies with the domestic legal systems with the hierarchy of norms. Should all international rules possess the same nature, being open to derogation and eternal change? The answer was given fairly recently with the acknowledgement of a set of norms that have, in principle, a superior position in the normative pyramid. These are so-called peremptory norms of international law that trump, or at least should trump, every other conflicting rule and from which there is no derogation. Peremptory norms include the prohibition of aggression, genocide, and torture, among others.

The structure of the international legal system

It is true that the international community seems more 'anarchical', than any other known legal community. This is due to historic grounds but also explained by the simple fact that there is no real 'hegemon' (ie leader), as Machiavelli would envisage, or a Hobbesian 'Leviathan', to hold sway. The international legal system is horizontally structured and this has consequences both in relation to its perception and its function. All States are considered equal as sovereign States (the principle of sovereign equality, enshrined in **Art 2, para 1 UN Charter**) and are not subject to the power of any supranational authority without their consent. Thus, sovereign equality and the need for State consent become extremely important in the international legal order. Indeed, there is no central legislature but all States may adopt agreements or engage in practice generating customary law on a bilateral, regional, or universal level. No State is subjected to third party dispute settlement, let alone to the International Court of Justice, if it has not offered its prior consent.

(p. 5) What are the reasons for this? Primarily, international society was never conceived in the same terms as its national counterparts. States could not accept their subjection to a higher authority that could enact and enforce rules or settle disputes without their permission. The question, however, as to how States could coexist, remained. The answer was to accept the need for some international regulation on the basis of common agreement in order to maintain a minimum public order and stability in international society.

This image of the international community has gradually changed. States have increased, new actors have come to the fore, particularly international organizations, transnational corporations, and international civil society. Even so, State consent remains paramount in the making and enforcement of rules. This was unequivocally illustrated in one of the first cases before the Permanent Court of Justice, the celebrated *Lotus* case:

The Case of the SS 'Lotus', PCIJ, Series A, No 10, Judgment of 7 September 1927

In this case the Court was looking for the existence of a customary law granting enforcement jurisdiction to **flag States** in respect of high-seas collisions. If such a rule was discovered Turkey would have been in breach of international law since it had prosecuted a French national on board a French vessel. Accordingly, the Court examined relevant State practice, but not necessarily to find a rule permitting the exercise of **jurisdiction** by a non-flag State. It was also content if it was unable to find a rule prohibiting the exercise of such jurisdiction. It is worth quoting the corresponding text: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their

> own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*' (p 18)

The last sentence, the so-called *Lotus principle*—namely, 'whatever is not prohibited is permitted in international law'—has underpinned the international legal system for a long time. However, it is true that due to the multiplication of States and international organizations, and the broadening of the subject matter of international law since the *Lotus* era, international law has gradually evolved and become more complex. For example, it no longer relies on custom as its predominant source, but rather on treaties. It has also come up with other non-binding agreements, eg Memoranda of Understanding, or other declarations or **soft law** instruments that reflect more flexible approaches. More importantly, it has placed the human being at the centre of its attention since the mid-twentieth century by virtue of the growth of human rights law.

Additionally, international society has established institutions that endeavour to play a rather constitutional role in international relations. Premised upon the domestic 'separation of powers' model, the UN General Assembly (GA) is a plenary organ where States can discuss international issues, complemented by the UN Security Council, an executive organ **(p. 6)** that may take forcible action in case of a threat to international peace and security. Finally, the International Court of Justice (ICJ) is an international court where States can settle their disputes. However, these institutions do not establish an order similar to a constitutional one, since the GA does not adopt binding rules and recourse to the ICJ is contingent upon the consent of the parties to a dispute. Finally, the police powers granted to the Security Council are subject to the veto of its five permanent members.

Thus it remains to be seen how the international community will evolve in the twenty-first century. Undoubtedly, new forms of cooperation and new international actors or participants may arise. Also, it is more than certain that the subject matter of international law will continue to increase and areas, such as the global commons (space, high seas, deep seabed), or fields, such as international economic law, will attract more attention.

Fragmentation

Brief mention should be made to the problem of fragmentation of international law. Due to its horizontal structure, it is possible for several legal regimes (ie foreign investment law and human rights law) to exist and develop in isolation of each other, ultimately culminating in the production of divergent rules of international law. This possibility is enhanced by the proliferation of international courts and tribunals that may produce divergent decisions on substantial matters. Moreover, as there is no *lis pendens* rule in the international legal order, there is the danger that one single case may end up in several courts and tribunals, all of which may decide the case differently. For example, different aspects of the same dispute between the UK and Ireland case concerning the ***Mox Plant*** case were submitted at the same time to arbitration under the **UN Convention on the Law of the Sea**, arbitration under the **OSPAR Convention**, finally ending up before the European Court of Justice (ECJ).

The International Law Commission decided to address this issue and established a Study Group under Professor Martii Koskenniemi on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'. In 2006, it published its report, which included various methods of obviating such diversification of international rules, such as the use of the interpretive tool of **Art 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT)** or the norms on the resolution of conflict, such as *lex specialis* or *lex posterior*.

Equally important is the knowledge of the case law of all international courts and tribunals as well as what has been designated as 'inter-judicial dialogue'. When international or national courts decide upon a case concerning a specific and delicate issue of international law, they should be aware of what other courts or tribunals have held on this issue and decide accordingly. This does not mean that they have to adopt the exact same position, albeit to enter into a line of argumentation, which would conduce to the unity and coherence of the international legal system. For example, when the ICJ ruled upon the degree of control required for certain acts of individuals to be attributed to a State (***Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia***

and Herzegovina v Serbia and Montenegro) (2007)), **(p. 7)** it disassociated that case from the one decided upon by the International Criminal Tribunal for the former Yugoslavia (ICTY) (***Prosecutor v Duško Tadić*** (1999)), and thus justified the adoption of the criterion of 'effective control' rather than of 'overall control'.

Revision tip

International law differs significantly from national legal systems. It reflects a rather more primitive international society, in which relations among its members are not in a structured and vertical order. Relations in international society are more loose and horizontal, while notions such as 'sovereign equality' or 'consent' have prominence. International law, however, is necessary in holding together the various parts of this constellation and has significantly progressed in the last century.

The nature of international law: theoretical approaches

The nature of the international legal system has been at the heart of the philosophy of international law. Theory has attempted since the seventeenth century to comprehend the nature of international law in various ways. Suffice it to refer succinctly to the following main streams:

Naturalism

Naturalism had been the prevailing approach in international law in the primary (prior to the sixteenth century) and classical period of international law (the seventeenth century until the nineteenth century). Premised upon canon (Church) law and the teachings of St Thomas Aquinas, naturalism addresses the question of the nature of international law by pointing to a set of rules that are of universal and objective scope. This approach was necessitated because these rules emanate from universal and superior values and principles that are eternal to mankind. Such values and principles dictate the limits of the legal system and the free will of the sovereign State. How are these principles of natural law to be found? They could be identified by recourse to canon law or to '*recta ratio*' (right reason) or to universally accepted moral values.

There have been many naturalist schools of thought, all of which share the idea that international legal argument is descending, in the sense that international obligations befall States, which are called to respect them as part of a universal code of truth. Among the proponents of naturalism one finds prominent international lawyers, such as Francisco de Vitoria (1480–1546), Hugo Grotius (1583–1645), Christian Wolff (1679–1754), Emerich de Vattel (1714–1767), and Georges Scelle (1878–1961).

It is true that naturalism, especially in its traditional form, is open to manifold criticism. Most importantly, it blurs the lines between law and morality and thus fails to distinguish international law from political theory or ideology. It is readily apparent how dangerous this **(p. 8)** can prove, especially as a common conception of morality or political ideology is extremely elusive. However, it must be noted that there are segments of naturalism even in the contemporary legal order, reflected principally through the notion of human rights. The idea that some fundamental rights, such as the prohibition of torture or slavery and the right to liberty and security are universal and cannot be derogated stems from a naturalist perception of international society.

Positivism

If naturalism lies at the one end of the jurisprudential spectrum, at the other end we undoubtedly find positivism. The latter is not based upon universal and moral principles, but on a structured and coherent legal system that is created by States in light of their interests and desires. In general, positivism rejects any extra-legal considerations, such as morality, politics etc. It perceives law as a scientific discipline, which is autonomous and self-standing and which can resolve its conflicts without recourse to external sources. According to positivists, law is a coherent system and its rules are derived from a logical and structured process.

Positivism blossomed at the end of the nineteenth century and was the dominant legal theory for many years. It significantly influenced international legal doctrine on account of its eminent proponents, principally Dionisio Anzilotti (1869–1950), Georg Jellinek (1851–1911), Heinrich Triepel (1848–1936), and Hans Kelsen (1881–1973). Jellinek advocated the extreme thesis that international law is based upon the self-restraint of States. Sovereign States enjoy the prerogative to comply with international law according to their own legal system and their own free will. International law is created because States choose to restrain themselves; however, in case of conflict between the law and the interest of the State the latter prevails.

On the other hand, Kelsen was the most towering figure of legal positivism in the twentieth century, as he tried to conceptualize law as a 'pure' social science. In his seminal work, *Pure Theory of Law*, he illustrates the legal system as a pyramid: according to him, law is valid only as a positive law. A norm becomes law only because it has been constituted in a particular fashion, born of a definite procedure and a definite rule. The coherence of the legal system is ensured by tracing back its validity to the basic norm, the so-called '*Grundnorm*'. The validity of this norm is axiomatic, as a prerequisite for the validity of the entire edifice. In his theory, international law has a primary place, since all the constitutional and domestic norms derive their validity from the existence of the States as such; in turn, the existence of the State derives its validity from international law, which sets out the requirements for its creation.

Positivism has equally encountered criticism, especially the strict 'self-restraint theory' for the allegiance to the sovereign will of the State. Moreover, it is hard to accept the absence of factors such as morality in a discipline that is called to govern the relations of (international) society.

(p. 9) **Realism**

Neither naturalism nor positivism averted the calamities of World War II. Thus, many international jurists turned their backs in the post-Charter era to these theories, holding that international law reflects a reality, paradoxical in many respects, but still a reality and it is futile to try to comprehend it in absolute terms. International law does exist and it is not merely a composition of moral values nor sterilized logical structures. Rather, it is the offspring of international society and there is no need to search for the source of legal obligations or why States comply with these. Prominent lawyers such as Ian Brownlie and James Brierly espoused realism.

Formalism

Closely linked with the idea of legal realism is the theory of formalism, which is particularly popular in Europe. It describes the process of discovering international rules. Law is whatever meets the requirements of a broadly accepted definition of law, regardless if this definition derives from naturalistic or positivist considerations. It thus resembles realism, albeit infused with positivist features. A good example is the relation of formalism to the sources of international law. For formalism, a certain rule becomes international law only when it takes the form of the three formal sources under **Art 38 ICJ Statute** namely: treaty, custom, or general principle of law.

Policy-oriented approach

The policy-oriented school starts from the premise that law operates against a social background. Its purpose is the prescription and application of policy in ways that maintain order in international community while simultaneously achieving the community's social goals. This approach has been associated with the New Haven School (University of Yale) of the 1960s and particularly professors Myres McDougal, Harold Lasswell, and more recently Michael Reisman. It stands on the opposite footing of formalism and represents a very liberal and political perspective of international law. Emphasis is placed on the law-making process and whether this reflects shared community values, such as wealth, enlightenment, skill, well-being, affection, respect, etc. The policy-oriented approach has been criticized by States formerly belonging to the 'Eastern bloc' as a very 'Western and capitalist' approach towards international society and it has not had a great influence in other continents.

Looking for extra marks?

There have also been various modern theories or so-called 'new approaches' to international law. These

approaches are premised particularly on the work of the critical legal studies ('CLS') schools that emerged as a legal theory in the USA, namely schools of thought that are engaged in heavy criticism of the aforementioned theories. Such schools suggest that the nature of international law is (p. 10) limited because it is determined by language, which is biased and trapped in the conventional structures of politics and power. Critical legal studies scholars, amongst them David Kennedy and Martii Koskenniemi, try to capture the fact that international lawyers try to use arguments both about what States do and what they ought to do and that there is a constant tension between those arguments. Critical legal studies pushed forward other approaches to international law, such as cultural relativism or critical race theory. The latter provides a critical analysis of race and racism from a legal point of view.

Is there any hierarchy in international law?

The international legal system operates upon a horizontal structure of authority, in which the subjects of international law are equal and bound by legal rules only if they express their consent. Hence, the adoption of treaties is dependent upon State consent, whereas custom requires consistent practice by some States and the explicit or tacit consent of others. It is not surprising, therefore, that the formal sources of international law (treaties, custom and general principles) are not set out in hierarchical order. This, however, does not mean that there is no hierarchy of norms in international law.

Jus cogens norms

In 1960 the International Law Commission (ILC) fuelled the discussion on the distinction of norms. In drafting the **VCLT**, the members of the ILC put forward the idea that not all rules of international law have the same juridical value, there being certain norms from which no derogation should be allowed. These peremptory norms of international law (*jus cogens*) reflect the most fundamental values of international society and thus stand at the apex of the normative pyramid of the international legal system. This theoretical construction was laid down in **Art 53 VCLT**, stipulating that 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, 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'.

Nonetheless, the ILC was careful not to lay down an exhaustive list of such *jus cogens* norms, as its purpose was to produce an open-ended list of such norms that would change depending on the exigencies of international society. Thus, *jus cogens* norms differ from all other international legal rules, conveniently called *jus dispositivum*, in the fact that *jus cogens* can never be altered even by consent.

What are these *jus cogens* norms? Having in mind their fundamental significance for the international legal order, such norms should include the prohibition of aggression, (p. 11) the prohibition of genocide, the protection of fundamental provisions of international human rights and humanitarian law, the prohibition of slave trade, apartheid etc. Even so, the ICJ has been extremely reticent in enunciating the existence of such norms. First, it insinuated that the prohibition of the **use of force** may be a *jus cogens* norm in ***Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*** (1986)). It was after many years that the Court did officially acknowledge a norm as *jus cogens*: in ***Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*** (2006), the Court intimated that the *prohibition of genocide* was part of *jus cogens*. It made a similar finding in ***Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*** (2012) in respect of the *prohibition of torture*.

Erga omnes obligations

Closely related but not identical to *jus cogens* is the notion of obligations *erga omnes*, ie international obligations that are not contractual in nature, but are owed to the international community as a whole. For example, the Court in ***East Timor (Portugal v Australia)*** (1995), recognized the principle of **self-determination** as an obligation *erga omnes*. On the one hand, it is logical that all *jus cogens* norms set out obligations *erga omnes*. Therefore, the

prohibition of genocide has to be respected by all States and if a State breaches this obligation, all States are entitled to raise this issue before political organs and invoke the responsibility of the wrongdoing State. More specifically, the **ILC Articles on State Responsibility** (2001) provide for such invocation of responsibility by non-injured States in case of a breach of an obligation *erga omnes* (**Art 48**).

On the other hand, obligations *erga omnes* do not spring exclusively from *jus cogens* norms. For example, certain boundary treaties or treaties setting forth an objective regime (eg the 1888 Treaty of Constantinople regulating navigation through the Suez Canal), must be respected by all States. In addition, in ***Nuclear Tests (New Zealand v France)*** (1974), the statement of the French President that France would not engage in any atmospheric nuclear tests conducted in the South Pacific region was found to bind France vis-à-vis all States.

Article 103 UN Charter

Another facet of hierarchy in the international legal system is **Art 103 UN Charter**. This provision is the key mechanism for enforcing sanctions adopted by the Security Council under **Art 41 UN Charter**. It sets forth that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. In other words, when the Council adopts a binding resolution ordering the imposition of sanctions against a State, including the freezing of any assets, UN member States would not be in **(p. 12)** breach of their international obligations under other bilateral or multilateral agreements in implementing this resolution. This does not mean that conflicting obligations are terminated; rather, they are simply suspended as long as the sanctions are in force. As a result, States implementing their obligations under the **UN Charter** are not considered in breach of other conflicting obligations (particularly non-performance) contained in other treaties to which they are parties.

Article 103 has served as the legal basis for the implementation of numerous sanctions regimes imposed by the UN since the 1990s. Nonetheless, it was recently held by the ECJ that **Art 103** cannot trump *jus cogens* norms. In ***Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*** (2008), the ECJ ruled that the EC regulation embodying the sanctions against Al-Qaeda imposed by SC Res 1267 was in breach of the right to be heard and the right to an effective remedy. According to the ECJ, these rights constitute fundamental principles of international law which not even the Security Council can ignore.

Looking for extra marks?

When there is a conflict between a *jus cogens* and a *jus dispositivum* norm, the former should, in principle, prevail. However, there have been cases before the European Court of Human Rights (***Al-Adsani v UK*** (2001)) and the ICJ (***Jurisdictional Immunities of the State, Germany v Italy: Greece intervening*** (2012)), in which this has not been obvious. Both cases concerned the ostensible conflict between *jus cogens* norms, eg war crimes or torture, and the principle of **State immunity**. The latter was considered essentially of a procedural character and hence in no direct conflict with the substantive *jus cogens* rules. In case now of a conflict between two *jus dispositivum* norms, one may resort to classic Latin maxims that are also applicable in the international system: (a) *lex specialis derogat legi generali*, ie a special legal regime has priority over a general law and; (b) *lex posterior derogat legi priori*, namely, the more recent law overrides an older law.

Revision tip

International law sets out obligations that may differ in nature and legal consequences. The most significant difference is between peremptory norms of international law (*jus cogens*) that are not susceptible of derogation and other norms of international law (*jus dispositivum). Jus cogens* norms encompass fundamental principles of the international legal order, such as the prohibition of aggression, torture, and genocide. Such norms impose obligations *erga omnes* upon States or international organizations, namely obligations owed to the international community as a whole. *Erga omnes* obligations are not contractual.

(p. 13) Key cases

Case	Facts	Principles
Barcelona Traction, Light and Power Company Ltd, Judgment, ICJ Rep (1970), p 3	The case related to a claim brought on behalf of natural and legal persons alleged to be share-holders in a foreign limited liability company. It was claimed that unlawful measures were taken against the company. This decision of the Court has principally been cited because of an *obiter dictum* on *obligations erga omnes*. The Court was under severe criticism during that period for failing to uphold the entitlement of Ethiopia and Liberia to invoke the responsibility of South Africa for the apartheid regime in Namibia in 1966. To address this criticism, the Court decided to include a paragraph in the decision postulating the idea of obligations owed to the international community as a whole.	The Court held that: 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as well as from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination…' (paras 33–4).
Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Rep (2010), p 403	The Court was asked to assess the **legality** of the unilateral declaration of independence made by the representatives of the people of Kosovo on 17 February 2008. Absent a treaty, the Court had to assess whether this declaration was legitimate under general international law and whether it was in breach of UN Security Council Resolution 1244.	The Court construed the question narrowly and sought to address only whether there is a rule prohibiting such a unilateral declaration under customary law and not whether there was a rule permitting it. In analysing relevant State practice, it concluded that 'the practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases' (para 79). This stance was criticized by Judge Simma in his Declaration that is reminiscent of the *Lotus* principle. He held that: 'The Court's reading of the General Assembly's question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called *Lotus* principle. By reverting to it, the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not

Under this approach, everything which is not expressly prohibited carries with it the same color of legality; it ignores the possible degrees of non-prohibition, ranging from “tolerated” to “permissible” to “desirable”.’

(p. 14) Key debates

Topic	**Formalism and the sources of international law**
Author/Academic	J D’Aspremont
Viewpoint	The theory of ascertainment which the book puts forward attempts to dispel some of the illusions of formalism that accompany the delimitation of customary international law. It also sheds light on the tendency of scholars, theorists, and advocates to de-formalize the identification of international legal rules with a view to expanding international law. The book seeks to revitalize and refresh the formal identification of rules by engaging with the postmodern critique of formalism.
Source	*Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011)
Topic	**Fragmentation**
Author/Academic	B Simma
Viewpoint	In his view, irrespective of whether we are in the presence of an emerging system or an uncoordinated mess of diverse mechanisms, the fact is that the present state of affairs, characterized as an ‘explosion of international litigation and arbitration’, has not led to any significant contradictory jurisprudence of international courts; such cases remain the exception, and actually courts have gone to great lengths to avoid contradicting each other.
Source	‘Fragmentation in a Positive Light’, 25 *Michigan Journal of International Law* (2003–4) 845

Exam questions

Problem question

State A is under the dictatorship of General X who heavily oppresses its population. This oppression fuels resistance movements along the whole country, leading to serious disturbances and riots in the major cities of State A. General X responds with military force and very soon there are hundreds of dead and seriously injured people.

State B decides to intervene in State A in order to 'avert a humanitarian catastrophe', as it declares. The intervention is successful and General X is ousted from power.

You are arguing with a friend whether the intervention in State A was lawful; you support that it was lawful because it was justified by a *jus cogens* norm—that is, the prohibition of flagrant violations of human rights. Your friend counter-argues that there is another *jus cogens norm*, called the prohibition of the use of force in international law.

(p. 15) How can you resolve this conflict of between two *jus cogens* norms? State the arguments of both sides.

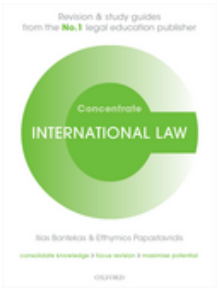
An outline answer is included at the back of the book.

Essay question

Is there a threat of fragmentation in international law and how can we address it by using the existing principles and mechanisms of international law?

Discuss.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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2. Sources of international law

Chapter: (p. 16) 2. Sources of international law
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The examination

Exam questions in this field will definitely involve the relationship between the sources of international law. In addition, questions concerning the two elements of custom and when the latter is established are frequent. It will be less probable to find questions on general principles of the law or on subsidiary sources. Moreover, there may be questions regarding additional sources of international law, such as the UN General Assembly resolutions.

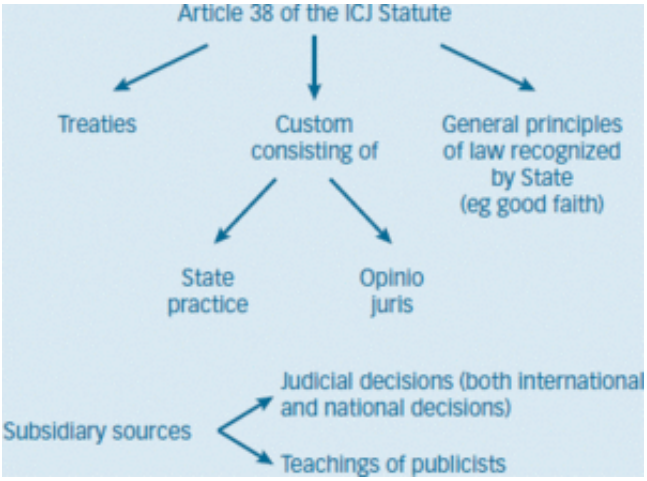
(p. 17) Key facts

- A rule (norm) of international law must be derived from one of its recognized sources. Given the absence of a central legislative organ in international law, States have determined in advance those sources from which a binding international norm may emerge.
- The formal sources of international law are enumerated in **Art 38 of the International Court of Justice (ICJ) Statute**. They include treaties, international custom, and general principles of law. In addition, **Art 38**

enumerates two subsidiary sources, namely judicial decisions and scholarly writings. There is no hierarchy among the formal sources, especially between custom and treaty; it is accepted that they may coexist alongside each other.

• Besides these formal sources, practice also recognizes so-called soft law. This is not binding as such but is considered as having persuasive value which may through consistent practice and usage transform into customary law. Examples of soft law include key resolutions of the UN General Assembly.

(p. 18) Chapter overview



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Sources of international law

Introduction

Sources of public international law address the question 'where do we find the rules of international law?' Municipal rules are derived from legislation enacted by Parliament, other legislative bodies, or the common law as expressed by judicial precedent. The law of the land, thus created, embodies a set of rules, whose validity we accept because they come from these sources.

(p. 19) The sources of international law are different from their municipal counterparts. There is no parliament to enact legislation or a constitution setting out a legislative process; moreover, judicial decisions do not create binding precedent. In this horizontal, as opposed to vertical, structure of the international legal order, the role of sources gains increased importance. At the international level, recourse will be made to what States usually do in their international relations with a legal conviction (custom) and to what States agree in written form between themselves (treaties). In addition, general principles of law common to many nations may prove of assistance in cases where there is no treaty or custom. These are known as the 'formal sources of international law'. As evidence of what custom is, we look to judicial decisions or the writings of renowned publicists (theory). These are called 'subsidiary sources'.

The sources of international law are traditionally found in **Art 38 ICJ Statute**, which stems from its predecessor, the **Permanent Court of International Justice (PCIJ) Statute**. **Article 38** states that the 'Court…shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

It is common to distinguish between *formal sources*, ie treaty, custom and general principles, and what are known

as *material sources* of international law. The latter denotes the type of document in which the rule in question is found. Material sources in this sense may be treaties, resolutions of the UN General Assembly (GA), judicial decisions, or draft texts prepared by the International Law Commission (ILC). The rule, however, laid down in these documents, will be international law if and only if a formal source says so; namely only if the rule in question has been accepted as custom or part of a treaty that has entered into force. Custom and treaties are in practice the basic sources of international law, with the general principles of law complementing them, especially in situations where a particular issue is not regulated by treaty or custom.

No hierarchy between the formal sources exists, especially with regard to treaty and custom. They are considered equal. Thus, both the treaty law and custom possess equal legal value. More importantly, they can coexist and complement each other. They are not exclusive. In practical terms, however, several differences exist not only between treaty and custom, but also between the treaties themselves; on the one hand, there are treaties that can be quick to draw up, or they can be extremely (frustratingly) slow (eg **United Nations Convention on the Law of the Sea**). On the other hand, custom tends to be slow, but it's flexible because no global or multilateral agreement is required. The more controversial a topic is, the less likely States are to agree a treaty on it (eg use of force). Therefore, it must be always questioned whether creating treaty or custom is the most satisfactorily way to proceed with a particular issue.

The traditional reading of sources in the **ICJ Statute** is under criticism given that international law has evolved significantly since its introduction in the 1922 **PCIJ Statute**. It is claimed that emphasis, instead, should be placed on the emergence of additional sources, such as the conduct of international organizations. International organizations represent forums for multilateral diplomacy, with the UN GA attracting the participation of all UN member States. Hence, it is reasonable to accept GA resolutions as sources of international law. Whatever the merits of these views or criticisms, the fact is that allegiance to the traditional sources of international law has served the international community well. At the present time it seems unlikely that any other system will be able to replace the traditional approach.

(p. 20) Looking for extra marks?

There does exist a class of agreements that are not intended to be strictly binding (eg memoranda of understanding), as well as other instruments, such as resolutions and declarations made by international organizations. These instruments are known as 'soft law'. The term 'soft law' is simply a convenient description for a variety of non-legally binding instruments used in contemporary international relations by States and international organizations.

Treaties in force

Article 38 ICJ Statute sets forth that the Court shall apply: 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting States'. Accordingly, the first source of international law is treaties or 'international conventions' under **Art 38**—that is, international agreements between States in written form and governed by international law. States habitually conclude multilateral or bilateral treaties by which they are bound to particular conduct. Treaties are analogous to contracts in domestic law and the commitments enumerated in treaties constitute international law.

Why should States comply with their treaty obligations? **Article 26 of the 1969 Vienna Convention on the Law of Treaties** (**VCLT**) enunciates the fundamental principle of *pacta sunt servanda*, ie 'what has been agreed to must be respected'. It is this principle that renders treaties a formal source of international law.

It is obvious that not all treaties constitute 'law' for all States. In the same manner that a party to a treaty is committed to the obligations therein, a State which is not a party to a treaty is under no such commitment. A 'treaty does not create either obligations or rights for a third State without its consent' (**Art 34 VCLT**).

Article 38 ICJ Statute refers to 'treaties and conventions in force', thus excluding treaties which have not, or not yet, come into force, or which have ceased to be binding on the parties. The question whether a particular treaty is in force between certain States is to be answered simply by checking whether it has been ratified.

Custom

Introduction

Article 38 ICJ Statute acknowledges as the second source of international law 'international custom, as evidence of a general practice accepted as law'. There is no other category of law in which custom has such a pivotal role as in international law. This is due to the nature of the international legal system and the lack of a central legislative body. Indeed, until the mid-twentieth century, the majority of the rules and principles governing the relations between nations were customary. The inception of the ILC in 1949 brought about the gradual codification of customary law into treaties (eg **UNCLOS**, **VCLT**); however, customary law retains its relevance even today: first, it complements treaty law and addresses many of its **(p. 21)** shortcomings; secondly, it is the most convenient process for change in international law. Indeed, treaties have a cumbersome system of amendment and modification and this makes custom a very useful tool for addressing new challenges in international life.

What is custom?

The traditional doctrine is that the mere fact of consistent international practice is not enough, in itself, to create a rule of law; an additional element is required. Thus, classical international law sees customary rules as resulting from the combination of two elements: an 'objective' element—that is, established, widespread, and consistent practice on the part of the States (*usus*)—and a 'subjective' element known as the *opinio juris sive necessitatis* (opinion as to the law or to necessity). The classic case concerning the requirements for the formation of custom is the following:

North Sea Continental Shelf cases (Germany v Denmark/Netherlands), ICJ Rep (1969), p 3

The Court discussed the process by which a treaty provision, and more specifically the 1958 **Geneva Convention on the Continental Shelf**, could generate a rule of customary law. It held that 'not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*' (para 77).

The element of 'practice'

The first or the 'objective' element of custom is State practice. The question then beckons as to which practice is relevant. Since international law regulates the relationships between States, it is only the conduct (action or omission) of States in their relations with one another, or in relation to other subjects of international law, such as international organizations, that is relevant as practice. It follows that said conduct (which could be over acts or claims) should always be public and possess an international character. The ILC has recognized as relevant State practice, among others, State laws, parliamentary minutes, statements of foreign ministers; decisions of national courts and voting practices before the UN GA. Not only acts, but also omissions may qualify as State practice; eg in the ***Case of SS 'Lotus' (France v Turkey***) (1927), the PCIJ examined whether the abstention of non-flag States from exercising jurisdiction on the high seas in cases of vessel collisions gave rise to a customary rule. It found that there was no such practice.

The relevant practice (conduct) must be widespread, consistent, and uniform. The practice of States should be both internally (ie between different organs of a State) and externally (between different States) consistent. The conduct need not be undertaken by every State, so long as it is consistent. In certain fields of international law, however, the practice (p. 22) of some States possesses more value than that of others. It is the practice of these States, the 'specially affected States', which we look to see when there is 'practice'. For example, it is mostly the practice of the States bordering a river that is taken into consideration for the ascertainment of rules on international watercourses. On the other hand, it is equally significant how non-specially affected States respond to certain practice. For example, States without space technology may publicly protest against the space practice of technologically advanced nations, in which case the practice may not lead to the formation of custom. If they acquiesce, then the practice, if it is consistent enough, will generate custom.

The practice may even commence from only one State and then be adopted by other States and eventually lead to the emergence of customary law. A textbook example is the emergence of the continental shelf in international law: it all started with the 'Truman Proclamation' in 1945 which was followed by many coastal States, leading to its recognition as customary law by the ICJ in the ***North Sea Continental Shelf cases (Germany v Denmark/Netherlands)*** (1969).

The time factor

The establishment of custom certainly requires time; however, there might be cases when the subject matter is new and the formation of custom is instant. For example, when the first satellites were launched into space, it was questioned whether the satellite, in orbiting the earth, infringed the **sovereignty** of the States whose territory it overflew. The matter was resolved by an international convention; however, there have been scholarly opinions claiming the emergence of an 'instant custom' permitting such activity (eg B Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law', 5 *Indiana J Int'l Law* (1965) 23, p 36).

General versus special or local custom

It is common to consider international custom as general and applicable to all members of the international community, eg the prohibition of genocide should be respected in all corners of the world. This does not exclude the existence of customary rules that have a local or special scope of application. As regards *local or regional customary law*, the most well-known example is that relating to the practice of diplomatic asylum in Latin America, whereby the States of the region recognize the rights of the embassies in granting asylum to political fugitives. The ICJ considered the application of that rule in the ***Asylum case*** (1950), although ultimately in did not find it applicable to the merits of that case.

On the contrary, the ICJ has upheld that a special custom may exist between two States only:

> *Right of Passage over Indian Territory (Portugal v India)*, Merits, Judgment, ICJ Rep (1960), p 6
>
> In this case, Portugal relied on a special custom between itself and India concerning access to certain Portuguese enclaves on Indian territory. The Court held that 'it is difficult to see why a number (p. 23) of States between which local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States' (p 39).

Habitual character

As was manifested in the ***North Sea Continental Shelf cases (Germany v Denmark/Netherlands)*** (1969), State practice must be accompanied by a conviction of adherence to an existing rule of law. In the words of the Court, '[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitua1 character of the acts is not in itself enough. There are many international acts, eg in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty' (para 77).

Nevertheless, in stark contrast to the element of practice, which is easy to discern, *opinio juris* seems very vague. It is quite difficult to say with certainty when a State acts or abstains from acting on the basis of some legal conviction. Moreover, it is difficult to tell when both elements are present and when custom is definitely established. Such questions have led many writers to deny the two-element theory and thus emphasize the importance of practice alone. Others have accepted the need for both elements. To mention a selection of these very interesting theoretical approaches: at one end of the spectrum there are scholars such as Jenks, who accept only the element of practice, or Sir Hersch Lauterpacht, who takes *opinio juris* as granted and looks for *opinio non-juris*—when there is established practice, the presumption is in favour of the existence of customary law and we consider the existence of *opinio juris* as granted; at the other end of the spectrum, Kirgis illustrates the two elements as sliding scales—the more practice exists, the less *opinio juris* we need and vice versa. Finally, D'Amato stresses the significance of the legal articulation of State practice: that is, the manner that States justify a certain behaviour. If it includes a justification in legal terms, then we have the *opinio juris.*

Looking for extra marks?

What about a State that persistently objects to the creation of a customary rule? Is it possible to assert that it is not bound by it? The notion of 'persistent objector' has been accepted both in theory and jurisprudence. For example, in the ***Fisheries case (UK v Norway)*** (1951), the Court stated that the then ten-mile rule of the breadth of the **territorial sea** 'would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'. It is required that the State concerned persistently and publicly objects to the formation of the rule from its outset. However, it is improbable that a State will not eventually be bound by a rule of general application that is accepted by all States in the world.

(p. 24)

Revision tip

International customary law is the practice of States accompanied with the conviction of adherence to what is an obligation or right under international law. Accordingly, custom consists both of the 'physical' element of 'practice' and the 'psychological' element of *opinio juris*. On the one hand, State practice needs to be consistent, uniform, and widespread, but not necessarily global or without aberrations. It is true that the practice of States specially affected by the rule concerned will be more important. On the other hand, *opinio juris* will usually be found in legal declarations of States.

The general principles of continental law

Article 38 ICJ Statute includes also 'the general principles of law recognized by civilized nations' as a source of international law. When the corresponding provision of the **PCIJ Statute** was being elaborated, the drafters were concerned that in some cases the future Court might find that certain matters are not adequately, if at all, regulated by a treaty or custom. It was thus considered as inappropriate for the Court to be obliged to declare what is known as a *non liquet*, namely that a particular claim could neither be upheld nor rejected for the lack of any existing applicable rule of law. Thus, the Court could have recourse to the established principles of domestic law that are

commonly recognized among the 'civilized nations' in order to find the applicable law in such cases.

This provision remained unchanged in **Art 38 ICJ Statute**. According to the prevailing interpretation, the principles in question are those which can be derived from a comparison among the various systems of municipal law. The extracted principles must be shared by all, or the majority, of domestic legal systems. It goes without saying that the word 'civilized' is now outdated and echoes another era. The idea however, remains that such principles have to be common to all the major legal systems, eg both in common law and continental law, as well as Islamic law where pertinent.

Neither the PCIJ nor the ICJ has based a single decision on such principles, although there have been references to these in various cases, especially before the PCIJ. For example, in the ***Legal Status of the Eastern Greenland case*** (1933), reference was made to *estoppel*, while in the ***Free Zones of Upper Savoy and the District of Gex*** (1932) to the principle of *abuse of right*. Moreover, in the case of the ***Right of Passage over Indian Territory (Portugal v India)*** (1960), Portugal argued that general principles of law supported its right to passage and submitted a comparative study of provisions in various legal systems for what may be called 'rights of way of necessity'.

Subsidiary sources: judicial decisions and teachings

Article 38(1)(d) ICJ Statute makes a clear distinction between the sources mentioned in the preceding sections and judicial decisions and teachings. This is clear from the fact that it **(p. 25)** refers to the latter as being merely 'subsidiary means for the determination of rules of law'. In other words, while the former sources are considered as 'formal', the latter are 'material' sources, having, nonetheless, a special degree of authority.

The judicial decisions referred to in **Article 38** include judgments by the ICJ as being of the highest authority. However, the Court has made it clear that its judgments do not have the form of binding precedent. In addition, decisions of other international courts and arbitral tribunals serve as subsidiary sources, but they are not alone. The Statute refers to judicial decisions, encompassing thus the judgments of municipal courts. Although such judgments may seem of lesser value, in fact decisions of respected national courts carry significant weight in global practice. For example, in the ***Arrest Warrant of 11 April 2000 (DR of Congo v Belgium)*** (2002), the parties relied heavily on the decision of the UK House of Lords in the ***Pinochet case*** (***R v Bow Street Metropolitan Stipendiary, ex parte Pinochet Ugarte*** (1999)).

As regards the writings of esteemed publicists, it is true that they had an increased importance in the era of the PCIJ. Today, courts and tribunals rely less on international legal doctrine; nevertheless, the opinions and resolutions of collective bodies of international jurists, such as the ILC or the *Institut de Droit International*, still hold relevance.

The relationship between the sources of international law

There is no hierarchy between the formal sources of international law. Nonetheless, in practice, general principles of national law are usually elicited in very specific fields, particularly international criminal law. As far as custom and treaty are concerned, it has been questioned whether they can coexist or whether a custom ceases following its codification. This was emphatically addressed in ***Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*** (1986). The Court held that where a customary law is replaced by a multilateral treaty, the customary rule continues to exist, not only in respect of non-parties to the treaty, but also against its parties. For example, the right of **self-defence** is governed by **Art 51 UN Charter** as well as the principles of necessity and **proportionality**, which are customary in nature.

The relationship between treaty and customary law is never static; reference should be made again to the following case:

> *North Sea Continental Shelf cases (Germany v Denmark/Netherlands)*, ICJ Rep (1969), p 3

The Court identified three situations in which the existence or creation of customary law might be related to treaty provisions: first, the treaty may embody already established rules of international law; secondly, it is possible that a multilateral treaty sets out rules and principles to which the treaty has a 'crystallizing effect': these would be rules which, even though State practice exists, are not considered as customary law prior to the adoption of the treaty—the latter thus crystallizes their (p. 26) birth in international law; thirdly, it may be that, after the convention has come into force, States other than the parties adopt its provisions in their mutual relations and this may constitute practice leading to the development of a customary rule. The Court noted that it is necessary that the provision in question 'should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law' (para 72).

Possible new or additional sources of international law

Besides the formal and secondary sources already discussed, there may be other new sources of international law which correspond to modern times and which reflect an international society more democratic and less formal. Such candidates are apparently the resolutions of the UN GA, **unilateral acts**, as well as principles such as equity.

The acts of international organizations in general give rise to various legal consequences. On the one hand, decisions of the UN Security Council are binding upon all UN member States. This does not mean that they constitute an independent source of international law, as their binding nature is derived from the **UN Charter** itself (**Art 25**). On the other hand, there are resolutions of the UN GA that are not binding upon member States per se; nonetheless, they may constitute convenient material sources, in the sense that they may include statements of international law. It is questionable whether resolutions embodying such statements constitute additional sources of international law. Even though it would be consistent with the democratic principle in international law to recognize such law-making authority to the GA, these resolutions do not amount to additional sources. Very often they simply enunciate a rule of customary international law or adopt a general principle of law. For example, the ICJ in ***Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*** (1986), looked at various resolutions, such as 3313/1974 on aggression and extrapolated the customary rules on the non-use force.

Equity has played a significant part in international legal discourse of recent years. The idea of 'equitable principles' or 'equitable result' is instrumental in the law of maritime delimitation. Nevertheless, it is difficult to accept 'equity' as an additional source of general international law.

On the contrary, unilateral acts have a distinct legal value, yet their regulation is far from clear. These acts are unilateral in the sense that although performed by a single State acting under its own volition, the consequences of the conduct are governed by international law, ie they create unilateral legal obligations on the State. Examples are the acts of recognition, protest, waiver etc. In the ***Nuclear Test case (Australia v France)*** (1974), the ICJ held that France had assumed legally binding obligations through unilateral declarations, made to the world at large, to the effect that it would not undertake any further atmospheric nuclear tests in the Pacific. However, this is different from accepting all unilateral acts as independent sources of international law. Rather, States proceed in adopting them in the belief that they are founded on a customary obligation.

(p. 27)

Revision tip

Article 38 enumerates treaty, custom, and general principles of law recognized by the majority of national legal systems as the formal sources of international law. This enumeration has been the subject of serious criticism, particularly as being inappropriate to address the contemporary law-making challenges of international society. Additional sources in the form of resolutions of the UN GA, the principle of equity, or even unilateral acts have

been suggested as such. It is true, however, that all these additional sources are binding or create international law, because they have been in keeping with a previous customary or treaty law. Hence, they operate more as a material source of international law rather than as an additional formal one.

It also held that the fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.

Key cases

Case	Facts	Principles
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Rep (1986), p 14	The case was initiated by Nicaragua and concerned the various activities of the US in and against Nicaragua in breach of various rules of international law, including the prohibition of the use of force and non-intervention. Due to the US **reservation** to the optional clause in the **ICJ Statute** the Court was forced to apply only customary international law. Although the use of force was regulated under customary law prior to the **UN Charter**, there was doubt whether the existence of conflicts and forcible interventions since 1945 gave rise to any sort of relevant and consistent practice.	The Court held that 'it is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule…If a State acts in a way prima facie inconsistent with a recognized rule, but *defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule*' (para 186) (emphasis added). **(p. 28)** It also held that the fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.
Legality of the Threat or Use of Nuclear Weapons, ICJ Rep (1996), p 226	The Court had to address the question posed by the GA as to the legality of the use or threat of use of nuclear weapons under international law, including the law of **armed conflict**, the prohibition of the use of force, and international environmental law. Absent a treaty, the Court had to assess the various declarations of the UN GA to find whether they were creative of customary international law.	The Court interpreted the numerous GA resolutions on the question of nuclear weapons as doing no more than revealing 'the desire of a very large section of the international community to take steps towards nuclear disarmament' (para 73). It did not recognize that the GA has authority to enact international law. More importantly, in assessing the resolutions it was unable to find a requisite *opinio juris* to this end, due to the inconsistent voting of the member States during their adoption—that is, in one instance State A voted in favour and in another against.

Key debates

Topic	**International custom**
Author/Academic	M Mendelson
Viewpoint	The author discusses the various theories for the creation of custom in international law. He takes the view that there is time for the abandonment of the concept of *opinio juris*, since it is not so necessary and is moreover difficult to identify.
Source	'The Subjective Element in Customary International Law', 66 *British Yearbook of International Law* (1995) 177
(p. 29) **Topic**	**General principles of law**
Author/Academic	R Kolb
Viewpoint	In his view, general principles of law play an important, albeit often invisible, role as catalysts of a law-in-movement. In particular, they offer a legal basis from which new legal doctrines or norms can be derived from case to case, in order to fit new social and legal needs. These functions are illustrated more concretely through the example of the powerful principle of good faith.
Source	'Principles as Sources of International Law (with special reference to good faith)', 53 *Netherlands International Law Review* (2006) 1

Exam questions

Problem question

State A has a bilateral agreement with State B, which provides for the reciprocal freedom of movement and financial transactions between their nationals in their respective territories. In application of this agreement, many nationals of State B have moved to State A, which is significantly more prosperous in natural and other resources. In addition, State A has granted access to the authorities of State B to use its territory for some military exercises. After several years, the relationship between the two States deteriorates and State A decides to denounce the above treaty and expel all the nationals of State B established on its territory. In response, State B initiates proceedings before the ICJ claiming that State A has violated their bilateral treaty and corresponding customary law, the general principles of good faith and *pacta sunt servanda*, and finally the right to use State A's territory for military exercises. The basis of jurisdiction is the respective declarations under the optional clause of **Art 36(2) ICJ Statute**. However, State A has made a reservation excluding the application of any bilateral treaty binding upon the parties to the dispute.

What will be the applicable law against which the Court will assess the claims of State B?

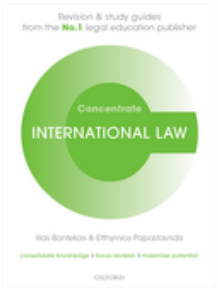
An outline answer is included at the back of the book.

Essay Question

Is the enumeration of sources in **Art 38 ICJ Statute** exhaustive and adequate in the twenty-first century?

Discuss.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



International Law Concentrate: Law Revision and Study Guide

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3. The law of treaties

Chapter: (p. 30) 3. The law of treaties
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The examination

Typically, exam questions in this field concern the validity and application of treaties. They usually avoid technical issues such as the negotiation of treaties or the role of the entity that acts as the depositary of treaties. Common questions involve the difference between treaties and memoranda of understanding (MoU) or the interpretation of treaties as well as reservation to these. Equally, questions about third States or the grounds for termination and suspension of the operation of treaties, such as material breach, are frequent.

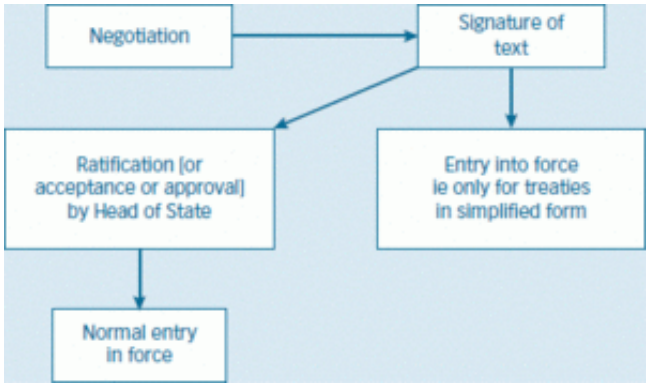
(p. 31) Key facts

- The **Vienna Convention on the Law of Treaties** (**VCLT**, 1969) is the key point of reference. **VCLT** reflects, to a very large degree, customary international law.
- **VCLT** regulates treaties concluded between States. It was followed by the 1986 **Vienna Convention on the Law of Treaties between States and International Organizations or between Organizations**, which is not yet in force.

• Treaties are one of the means through which States regulate their international relations. They constitute also one of the formal sources of international law according to **Art 38(1) of the International Court of Justice (ICJ) Statute**.

• The cornerstone of the law of treaties is the principle *pacta sunt servanda*, namely what has been agreed to must be respected.

(p. 32) Chapter overview



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Treaty making process

Conceptualizing and defining a treaty

'Treaty' is one of the qualifications used to designate binding international agreements. A treaty is defined by **VCLT** as:

Article 2(2) VCLT

> [a]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

It is true that a treaty may de described in a multitude of ways. In addition to 'treaty' or 'convention', the same concept is also designated as 'declaration', 'charter', 'covenant', 'pact', 'act', 'agreement', 'exchange of letters', etc.

From the above definition, it is apparent that **VCLT** regulates: (i) treaties concluded between States, (ii) treaties in written form, (iii) treaties 'governed by international law'. It follows that agreements between States and international organizations or agreements between States and non-State entities are excluded from the scope of **VCLT**. Agreements between States and organizations are governed by customary international law until the 1986 Convention enters into force. In addition, oral agreements are excluded from the **VCLT**. This does not mean that there are no oral agreements, which are subject to customary international law.

(p. 33) The key requirement for the existence of the treaty is that it must be 'governed by international law'. This means that since treaties create obligations there must be an intention therein to establish binding relations. If such

intention is not manifest, then the agreement in question will not be a treaty. Indeed, several inter-State undertakings may assume the form of international agreements without encompassing an intention to give rise to obligations (eg 1975 **Helsinki Final Act**). Such undertakings are often times called 'soft law' or assume the legal form of so-called MoU, which expressly stipulate their non-binding character. Finally, sometimes, agreements between States will be governed by national law, eg the local law for the sale of property.

Looking for extra marks?

The **VCLT** does not require that a treaty assume any particular form. If a dispute arises as to the status of a particular agreement, an objective test determines whether its terms are binding on the parties. This is accomplished by taking into account the agreement's actual terms and the particular circumstances under which it was drafted. As a result, the minutes of a meeting may amount to a treaty.

Maritime Delimitation and Territorial Questions (Qatar v Bahrain), Jurisdiction and Admissibility, ICJ Rep (1994), p 112

The two ministers signed a text recording several commitments accepted by their governments, some of which were to be immediately enforced. Having signed such a text, the foreign minister of Bahrain is not subsequently entitled to claim that he intended to subscribe only to a 'statement recording a political understanding' and not to an 'international agreement'.

The 'birth' of treaties in international law

Treaties may be concluded between two (bilateral) or more States (multilateral), between States and international organizations and between international organizations themselves. Every treaty is initially negotiated by the competent representatives of States or international organizations, either on a bilateral or multilateral level. The treaty, however, is considered concluded when the parties thereto express their consent to be bound by its terms.

Who has the authority to conclude treaties?

Treaties are negotiated and concluded by the competent representatives of States. The general rule expressed in the **VCLT** (**Art 7, para 1**) is that 'a person in considered as representing a State for the purpose of expressing the consent of the State to be bound by it if he or she **(p. 34)** produces appropriate full powers'. Accordingly, the holder of 'full powers' is authorized to adopt and authenticate the text of the treaty and to express the consent of the State to be bound by it.

There is, however, a group of persons who, by virtue of their functions and without having to produce full powers, are presumed to have such authority. These are the 'Big Three': heads of State, heads of government, ministers of foreign affairs, as well as heads of diplomatic missions. They may adopt the text of a treaty between the accrediting State and the State to which they are accredited (**Art 7, para 2**).

Consent to be bound

According to **Art 11 VCLT**, the 'consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'. This is a matter for the parties themselves.

Signature

Ordinarily, appending one's signature to a treaty signifies mere agreement as to the finalized version of the text, not that the State in question intends to be bound by the terms of the treaty. It is common nowadays, however, for several treaties, particularly bilateral ones, to be concluded simply by the signature of a State's authorized representative, eg minister of finance. These are known as 'treaties in simplified form', or, according to the US practice, 'executive agreements'.

Should the parties intend that a treaty be subject to subsequent ratification, acceptance or approval, their signature constitutes only an intermediary stage. It solely denotes that the delegates have agreed upon the text and they are willing to consider ratifying it. In such cases a signature does not entail an obligation to ratify. It does constitute, however, a juridical act, in the sense that by its signature each State accepts certain legal consequences. Such a legal consequence is the obligation to refrain from acts which would defeat the object and purpose of the treaty in question prior to the ratification or the expression of the consent not to be bound by it (**Art 18 VCLT**). It was with this provision in mind that the US decided to 'unsign' the 1998 **Rome Statute of the International Criminal Court** in 2002, in view of their policy to sign bilateral agreements with State parties to the ICC prohibiting them from transferring US citizens to the ICC. Such policy would definitely defeat the object and purpose of the **Rome Statute**, thus the US preferred to get out of the **Art 18** obligation.

Ratification

Ratification means that the ratifying State agrees to be committed by the terms of the treaty at the inter-State level. It emphasizes therefore the State's consent to be bound, as opposed to merely signing the treaty.

(p. 35) Entry into force

Consent to be bound by a treaty, in whatever form (ie approval, acceptance, accession, ratification), will not always entail that the treaty has necessarily entered into force. Bilateral treaties usually enter into force following the exchange of so-called instruments of ratification (essentially an official declaration to be bound that is sent to the depository), while the entry into force of multilateral treaties depends on the intention of the parties. The parties often include a provision stipulating that the treaty shall enter into force only after the deposit of a minimum number of ratifications. For example, the **UN Convention on the Law of the Sea** which was signed in 1982 required 60 ratifications for its entry into force; it thus took 12 years to enter into force (16 November 1994).

The 'life' of treaties in international law

The principle *pacta sunt servanda*

The principle *pacta sunt servanda*, enshrined in **Art 26 VCLT**, stipulates that parties must not only adhere to their treaty obligations, but they must do so in *good faith*. Good faith is an autonomous legal principle that permeates the entire law of treaties. Its significance was underscored by the ICJ in the ***Gabčíkovo–Nagymaros*** case:

Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Rep (1997), p 7

> The case concerned the implementation of a 1977 treaty providing for the construction of a hydro-electric dam along the stretches of the Danube in Hungary and Slovakia. Hungary claimed that the conduct of both parties demonstrated their repudiation of the treaty, which had thus come to an end. Nonetheless, the Court was of a different opinion, namely that the reciprocal wrongful conduct of both parties 'did not bring the treaty to an end nor justified its termination'. More importantly, it stressed that 'what is required in the present case by the rule *pacta sunt servanda*…is that the parties find solution within the cooperative context of the treaty' (para 142).

Treaties and third States

The principle of *pacta sunt servanda* applies only to States that have expressed their consent to be bound by a treaty. In other words, only the State parties to a treaty shall abide by its provisions. In respect of non-State parties (otherwise known as third States or parties) a treaty is a *res inter alios acta*, ie it does not create obligations or rights without their consent. The **VCLT** deals with the issue of treaties and non-State parties in **Arts 34–8** and distinguishes between obligations and rights.

(p. 36) Exceptionally, **Art 35 VCLT** provides that a non-party may be bound by the terms of a treaty it has not ratified if it expressly accepts to be bound and the parties themselves agree to extend the application of the treaty to third parties. The same rule applies in respect of rights conferred by a treaty upon third parties (**Art 36 VCLT**).

Treaties that encompass rights and obligations for third States are those that create so-called *objective regimes*, namely legal regimes that are considered valid against the entire international community. Examples include those treaties governing international waterways, such as the Suez Canal, that establish freedom of navigation for all States.

Interpretation of treaties

Interpretation, it is claimed, is a term of art rather than law. The purpose of interpretation is to establish the meaning of the text intended by the parties. In general, there are three main schools of interpretation: (a) the *subjective*, which looks at the intention of the parties; (b) the *objective* or *grammatical*, which is premised on the text of the treaty, and (c) the *teleological*, which underscores the 'object and purpose' of the treaty.

For the International Law Commission (ILC), however, and the **VCLT**, the starting point has been the text rather than the intention of the parties. The idea is that interpretation must start with a careful consideration of the text. This is so because the text is the expression of the will and intention of the parties. This textual interpretation, however, may be qualified in the light of the following considerations: (a) the context of the treaty, (b) its object and purpose, (c) the subsequent agreements concluded between the parties, (d) the subsequent practice of the parties, and (e) the relevant rules of international law, namely international customary law.

Article 31(1) VCLT provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The rule in **Art 31(1)** is that treaty interpretation must be premised upon three elements: the text, the context, and the object and purpose; the underlying principle, however, is that a treaty will be construed in good faith.

The ICJ has consistently upheld the primacy of textual interpretation, while it has downplayed the relevance of the intention of the parties and the preparatory works of the treaty (*travaux préparatoires*). **Article 32** provides for the recourse to the preparatory works or to the circumstances of the conclusion of the treaty, in order to confirm the meaning resulting from the application of **Art 31**, or, more significantly, to determine the meaning when the interpretation according to **Art 31** leaves the meaning ambiguous or obscure.

Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Rep (1994), p 6

> Interpretation must be based above all upon the text of a treaty. As a supplementary means to interpret a treaty, recourse can be made to other methods of interpretation, such as the preparatory work of a treaty (para 41).

(p. 37) **Article 31(2) VCLT** defines the context of the treaty as encompassing any instrument of relevance to the

conclusion of the treaty as well as the treaty's preamble and annexes. As regards the 'object and purpose' of the treaty, which is, by definition, a vague term, it is often conflated with the *principle of effectiveness*. This principle may operate as an element within the 'object and purpose' approach, but it is not limited to this function. In fact, it has two meanings: the first is the presumption that all treaty provisions were intended as possessing legal significance and thus any interpretation that renders a text ineffective is erroneous. The second concerns the object and purpose test, emphasizing that the treaty as a whole and each of its provisions were intended to achieve some result; an interpretation that inhibits the fulfillment of the text's object and purpose is thus incorrect and another interpretation should be sought (*ut res magis valeat quam pereat*).

A practical illustration of treaty interpretation is provided in the following ICJ case which dealt with the construction of the term '*comercio*' (commerce):

Dispute Regarding Navigational and Related Rights between Costa Rica and Nicaragua, Judgment, ICJ Rep (2009), p 213

The Court held that even when the meaning of a term is no longer the same as it was at the time of the conclusion, this original meaning may have significance. It is true that under **Art 31 (3)(b) VCLT** the subsequent practice of the parties can result in a departure from the original intent on the basis of a tacit agreement between the parties. This, however, can be the result of the parties' intent upon conclusion of the treaty. The intent was, or may be presumed to have been, to give the terms used a meaning or content capable of evolving, like the term '*comercio*' (see para 64).

The significance of **Art 31(3)(c) VLCT**, namely the 'relevant rules of international law' as a means of interpretation, was highlighted by the ICJ in the ***Oil Platforms*** case:

Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Merits, Judgment, ICJ Rep (2003), p 803

In this case the Court had to decide whether the destruction of the Iranian oil platforms was a measure essential for the security of the US, as provided in Art XX para 1(d) of the 1955 Treaty between the US and Iran. If had been so, the other provisions of the said treaty would not be applicable and thus no breach on the part of the US would have occurred. The Court interpreted the above provision taking explicitly into account 'any relevant rules of international law applicable in the relations between the parties' (Art 31, para 3(c)), namely the rules of international law on the use of force. In interpreting the said provision in the light of these rules, it came to the conclusion that the destruction of the oil platforms could have been a lawful measure only as self-defence, which was not the case here.

Revision tip

The starting point for the interpretation process is always the text of the treaty. This is explicitly stipulated in **Art**

31(1) VCLT and it has been endorsed by the ICJ. However, the text is not the end point, as many factors such as the context, the object and purpose of the treaty, the subsequent practice of the parties, or the relevant customary law may be taken into account.

Reservations

Reservations to treaties are one of the most controversial issues in the law of treaties. A reservation is a unilateral statement made by a State, when signing, ratifying, or acceding to a treaty, the effect of which is to exclude or modify the legal effect of certain provisions of the treaty in their application to that State (**Art 2(d) VCLT**). The most important case concerning reservations was the 1951 ICJ ***Genocide Convention Advisory Opinion***; the Court had to select between the rigid approach of the League of Nations, which only permitted those reservations accepted by all signatory parties to a treaty and the more flexible approach of the Pan-American Union, which did not exclude reservations banned by some but not all parties. The Court opted for the latter approach and found that even if not all States accept the reservation, the reserving State can still be a party to the treaty.

The Court's approach is now reflected in **Art 19 VCLT**, which strikes a balance between the integrity of the treaty and the need for flexibility in order to encourage wide participation. The starting point is that parties to a treaty are free to prohibit reservations or to permit only specific reservations. Examples of treaties prohibiting all reservations include the 1982 **UN Convention on the Law of the Sea**, and the 1998 **International Criminal Court Statute**. In all other cases, the default rule is that reservations are permitted, unless the reservation is incompatible with the object and purpose of the treaty.

Article 20(4) VCLT stipulates that where a party objects to another State's reservation the reserving State may still be considered bound by the treaty, albeit not in relation to the objecting party.

A rather acute issue concerns the distinction between those reservations that are incompatible with the object and purpose of a treaty from those which are not. Two schools of thought have addressed this issue:

- The permissibility school suggests a two-stage approach whereby the compatibility of the reservation with the treaty's object and purpose is examined objectively. If found incompatible, the approval of other parties is irrelevant, whereas in the event of compatibility the parties may decide whether to accept or reject it, on whatever grounds they wish.
- The opposability school considers the validity of a reservation as a matter of intention (of other parties) alone and views the compatibility test solely as a guiding principle.

(p. 39) Finally, a distinction is often made between reservations and *interpretative declarations*. The latter are appended to treaties by governments at the moment of signature, ratification, or acceptance with the purpose of setting out how the State in question understands particular provisions in the treaty. While these declarations do not constitute reservations, to the degree that the pertinent interpretation serves to modify or alter the legal effects of the treaty against that State, it constitutes a disguised reservation. Thus, such declarations must be subject to careful scrutiny.

The question of the law and practice of reservations to treaties was included since 1993 in the agenda of the ILC. The premise was that the **VCLT** set out the general principles governing reservations, but it did so in terms that were too general to act as a guide for State practice and left a number of important matters in the dark, including the scope of declarations of interpretation, the validity of reservations (the conditions for the lawfulness of reservations and their applicability to another State) and the regime of objections to reservations etc. After many years of deliberation, in 2011, the ILC adopted a Guide to Practice to Reservation to Treaties, which tried to give practical answers to the majority of the problems that had arisen in the practice of States and international organizations.

What happens with reservations to human rights treaties? In the ***Belilos v Switzerland case*** (1988), the European Court of Human Rights (ECtHR) decided that a declaration made by Switzerland when ratifying the **European Convention on Human Rights** (**ECHR**) was in fact a reservation of a general character and therefore impermissible under the terms of **Art 64 ECHR**. The Court severed the reservation and held that Switzerland was bound by the convention in its entirety. Moreover, the **International Covenant on Civil and Political Rights** (**ICCPR**) Human Rights Committee, in its controversial General Comment No 24(52), took the view that the **VCLT** provisions were inappropriate in the context of human rights treaties. It is the committee itself and not the State parties, which should determine the compatibility of a reservation to the **ICCPR**. More recently, human rights treaty bodies commenced a 'reservation dialogue' with reserving States in order to withdraw offending reservations. This was also the recommendation of the ILC in its Conclusions on the Reservation Dialogue annexed to the Guide adopted in 2011.

The 'death' of a treaty in international law

Invalidity of treaties

The first set of rules that may lead to the termination of a treaty concern the invalidity of treaties. These rules may be divided into two groups: relative grounds in **Arts 46–50** and absolute grounds in **Arts 51–3 VCLT**. The main difference is that the former render a treaty voidable at the insistence of an affected State, whereas the latter do not require any legal (p. 40) effects to have taken place. In respect of bilateral treaties this difference is not insignificant given that both grounds lead to the invalidation of the treaty. However, in the context of multilateral treaties, the existence of a relative ground vitiates the treaty with regard to the particular State concerned and may not affect the other remaining parties (**Art 69, para 4 VCLT**).

Relative grounds

These are as follows:

1. *provisions of internal law regarding competence to conclude treaties*—under **Art 46(1) VCLT**, a State may not justifiably claim that its consent to be bound by a treaty was done in violation of its domestic law, unless the violation was manifest and concerned a rule of its internal law of fundamental importance;
2. *specific restrictions on authority to express the consent of a State* (**Art 47**);
3. *error*—according to **Art 48 VCLT**, 'a State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty';

Temple of Preah Vihear (Thailand v Cambodia), Merits, Judgment ICJ Rep (1962), p 17

Thailand had claimed that the boundary line indicated on a map was in error since it did not follow the watershed line that was provided in the relevant treaty. The Court rejected this claim by arguing that: 'it is an established rule of law that the plea of error cannot be allowed as vitiating consent if the party advancing it contributed by its conduct or error, or could have avoided it, or the circumstances were such as to put the party in notice of a possible error' (p 26).

4. *fraud* (**Art 49**);
5. *corruption* (**Art 50**).

Absolute grounds

These are as follows:

1. *coercion of a representative of a State (**Art 51**)*;
2. *coercion of a State by the threat or use of force (**Art 52**)*;
3. jus cogens.

Available practice in relation to these grounds is extremely limited.

(p. 41) Termination or suspension of a treaty's operation

Article 54 VCLT sets out the general rule that a treaty may be terminated, or a party may withdraw therefrom, in accordance with the relevant provisions of the treaty itself or by consent of all parties. Similarly, the operation of a treaty may be suspended if this is expressly provided for. Many multilateral treaties stipulate that a party may withdraw following a period of notice to the other parties.

Where a treaty is silent on its termination or suspension and no consent has been provided by other parties, the following grounds may be relied upon:

Material breach

A 'material breach' encompasses the repudiation of a treaty or the violation of any provision therein essential to the accomplishment of its object or purpose (**Art 60, para 3**). **Article 60 VCLT** regulates the consequences of a breach of treaty. The ILC has taken a very cautious approach and emphasized that a breach of a treaty obligation, however serious, does not automatically bring the treaty to an end. It merely entitles a party to invoke the breach as a ground for terminating or suspending its operation. This entitlement, however, is subject to certain procedural safeguards set forth in **Arts 65–8 VCLT**. Obviously, the principle of the sanctity of treaties, namely *pacta sunt servanda*, is instrumental in this regard.

Supervening impossibility of performance

Article 61 limits the grounds of non-performance to the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty'. If so, a party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it. This ground is unavailable to a party that was itself instrumental in causing these circumstances.

Fundamental change of circumstances

The underpinning idea for justifying this claim of non-performance is that it would be unfair to insist that a party perform an obligation that is no longer feasible on account of the radical change of circumstances since the adoption of the treaty in question. Apparently, this idea runs counter to the principle of *pacta sunt servanda*. **Article 62 VCLT**, very cautiously, accepts that a termination on such grounds is possible, but limited.

Article 62 sets out that 'a fundamental change of circumstances which has occurred with regard to those [circumstances] existing at the time of the conclusion of a treaty, and which (p. 42) was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'. **Article 62** provides also that claims of fundamental change of circumstances are inapplicable in respect of treaties establishing boundaries, especially where the claimant has contributed to this radical change.

The *locus classicus* for all these grounds of termination is the ICJ ***Gabčíkovo–Nagymaros*** case:

> *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Rep (1997) p 7

First, with regard to material breach, the Court found that Hungary's notification of terminating the 1977 treaty was premature, as no breach had yet occurred. In any case, Hungary had not acted in good faith and therefore had by its own conduct prejudiced its right to terminate the 1977 treaty. In relation to **Art 61 VCLT**, the Court held that the impossibility of performing the treaty's obligations was attributable to Hungary's failure to perform most of its own projects. Finally, in addressing the claim of Hungary that the political and economic situation had radically transformed the extent of the obligations still to be performed, the Court took a very restrictive view and rejected the claim of fundamental change of circumstances under **Art 62 VCLT**.

Looking for extra marks?

The rules on the termination or suspension of the operation of treaties are closely linked, yet distinct from the law of State responsibility, particularly counter-measures. As the ILC Special Rapporteur on State responsibility explained:

> …the law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of State responsibility takes as given the existence of primary rules and is concerned with the question whether the conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are.

Revision tip

The principle *pacta sunt servanda* is so fundamental that every claim for the termination of a treaty should be very restrictively assessed. The rebuttable presumption is that treaties remain in force unless the parties consent to their denunciation or their overall termination.

(p. 43) Key cases

Case	Facts	Principles
Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion ICJ Rep (1951)	The Advisory Opinion of the Court was requested by the UN General Assembly in the following terms: 'In so far as concerns the Genocide Convention, in the event of a State ratifying or acceding to the Convention subject to a reservation made…can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others…?'	The Court determined that if a party to the convention objects to a reservation which it considers to be incompatible with the object and purpose of the convention, it can in fact consider that the reserving State is not a party to the convention; if, however, one party accepts the reservation, then the reserving State is considered a party to the convention.
Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening), Judgment, ICJ Rep (2002), p 303	In its judgment on the case concerning the land and maritime boundary between Cameroon and Nigeria, the Court fixed the course of those land and maritime boundaries. The maritime delimitation should, according to Cameroon, have been based on valid international agreements, such as the 1975 **Maroua Declaration**, which Nigeria disputed. The reason was that it was signed by the Nigerian head of State of the time but never ratified.	The Court found that the **Maroua Declaration** constituted an international agreement concluded between States in written form and tracing a boundary; it was thus governed by international law and constituted a treaty in the sense of the **VCLT** (see **Art 2, para I**), which reflects customary international law in this respect. The Court further considered that it could accept the argument that the agreement was invalid. It observed that, while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. In the Court's opinion, the **Maroua Declaration** entered into force immediately upon its signature.

 Key debates

Topic	**Treaty interpretation**
Author/Academic	R Gardiner
Viewpoint	Gardiner provides a close analysis of the rules on treaty interpretation as framed by the **VCLT** and as applied by both international and national courts for 30 years now. It analyses the general history, background, and development of the current rules on treaty interpretation; more importantly, it reads well, is informative, and rich in useful material.
Source	*Treaty Interpretation* (Oxford: Oxford University Press, 2008)
Topic	**The law of treaties and other categories of international law**
Author/Academic	E Cannizzaro (ed.)
Viewpoint	The book first explores the influence exerted by the **VCLT** on pre-existing customary law. Certain rules of the **VCLT** which, at the time of its adoption, appeared to fall within the realm of progressive development, can now be regarded as customary international rules. Conversely, a number of its provisions, in particular those which have been the subject of subsequent codification work by the ILC, have become obsolete.
Source	*The Law of Treaties beyond the Vienna Convention* (Oxford: Oxford University Press, 2011)

Exam questions

Problem question

State A ratifies a regional agreement on disarmament from conventional weapons and appends an interpretative declaration. This stipulates that it will reconsider the application of the agreement should the political circumstances radically change. In 2012, it starts again to acquire such weapons on the ground that the political tension in the region necessitates it to do so. Following a severe reaction by other parties it decides to denunciate the treaty on the basis of fundamental change of circumstances.

1. Does State A have a right to claim that the acquisition of conventional weapons under such political circumstances was justified pursuant to its interpretative declaration?
2. Does State A have a right to denounce the treaty under **Art 62 VCLT** ?

Discuss.

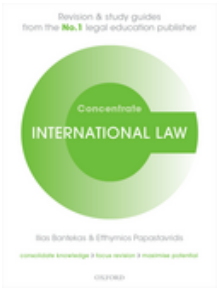
(p. 45) **An outline answer is included at the back of the book**.

Essay question

'There is no part of the law of treaties which the text writer approaches with more trepidation than the question of interpretation' (McNair, 1961).

Discuss.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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4. The relationship between international and domestic law

Chapter: (p. 46) 4. The relationship between international and domestic law
Author(s): Ilias Bantekas and Efthymios Papastavridis
DOI: 10.1093/he/9780199676538.003.0004

The examination

Questions tend to focus generally on the application of the principles of transformation and incorporation of international law into domestic legal orders. The key is not simply to restate the fundamental bases of these principles but to back them up with cases that demonstrate how they are applied in practice. Other than these principles, other issues are unlikely to occupy a single exam question, but readers are advised to have a good understanding of the uses of domestic laws before international courts and tribunals. A basic knowledge of English constitutional law is essential, especially since questions are likely to focus on the reception of international law by English courts. The laws of jurisdictions other than England with respect to the reception of international law are highly improbable, so it is worth concentrating on the relevant English judicial and constitutional practice.

(p. 47) Key facts

• The international legal system and domestic legal systems are separate entities, despite their frequent interaction. The relationship between the two focuses on: (a) the reception of international law (treaties and

custom) into domestic legal orders and (b) the hierarchy between domestic and international rules.

• It is one thing for States to be bound by treaties at the inter-State level (ie between themselves) and it is another for treaties to produce effects in the States' domestic legal orders. The production of such effects in domestic legal orders depends on the constitutional arrangements of each country. In the UK this relationship has chiefly been interpreted by the courts.

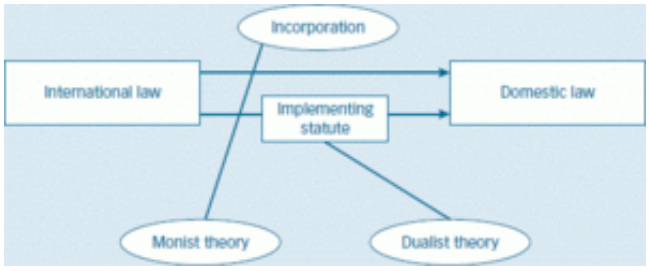
• English law requires that generally in order for treaties adopted by the government to produce effects at the domestic level they must first be implemented by Parliament through an Act or other legislative action.

• **Self-executing treaties** are those treaties that are clear and precise enough so as not to require further implementing legislation. Not all countries accept the doctrine of self-executing treaties and even those that do (eg the USA) restrict the range of treaties that may be considered self-executing.

• There are two main constitutional theories for importing treaties and custom into domestic legal orders, namely incorporation and transformation.

• Resolutions of the UN Security Council override all other conflicting legislation in the domestic order of States, save if said resolutions are contrary to human rights. Nonetheless, it is up to each country to decide the method by which such resolutions are to become domestic law.

(p. 48) Chapter overview



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Applying international law in the domestic sphere

Does international law prevail over domestic law?

Imagine a theoretical situation whereby the laws of country X permit the interrogation of terrorist suspects through the use of torture. This would be in conflict with the 1984 **Torture Convention**, to which X is a party, as well as customary international law which prohibits all forms of torture (and which is equally binding on country X). What we have here is a clash between a domestic and an international rule and we are asked to determine which one should prevail over the other. Most situations will not be as clear-cut. They will involve a conflict between a provision found in a constitution, which is the highest law in the land, and a treaty or custom which came in to effect after the constitution was adopted. By way of illustration, the constitutions of civil law countries had traditionally prohibited the extradition of nationals to other nations. With the adoption of the European arrest warrant all signatory countries were obliged to surrender their nationals, thus giving rising to questions of unconstitutionality. In such cases, it is assumed that States are willing to amend the relevant provisions in their constitutions or otherwise treat them as being compatible with their international obligations.

Moreover, it is important to know how States treat in their domestic legal orders that part of international law to which they have not given their express consent (as is otherwise the case with treaties), such as certain rules of custom.

(p. 49) Besides the general rule that countries cannot rely on their domestic law as an excuse to violate their international obligations, under A**rt 27 Vienna Convention on the Law of Treaties** (**VCLT**) (***Polish Nationals in Danzig*** (1931)), the precise relationship between domestic and international law is determined by-and-large by each

State's constitution. These constitutional arrangements explain how the international obligations of States are received in the domestic sphere. Once an obligation is found to exist it binds the State in its external relations, irrespective of how it decides to ultimately import it in its domestic sphere. Two theories are generally put forward to justify these constitutional arrangements, namely **monism** and **dualism**.

Certain German Interests in Polish Upper Silesia, PCIJ, Series A, No 7 (1926)

Domestic law is relevant for assessing a State's compliance with international law. In this case the Permanent Court of International Justice (PCIJ) held that although it was not empowered to interpret Polish law, there was nothing to prevent it from 'giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention'.

Looking for extra marks?

In ***Germany v USA*** (***LaGrand case***) (2001), the International Court of Justice (ICJ) accepted that the separation of powers and competencies between federal and state courts and authorities in the USA was a matter of domestic law. However, it emphasized that the effect of said separation on a country's international obligations was a matter of international law alone.

Monism

Monist theory suggests that international and domestic law do not constitute different legal orders, but are part of the same order, in the same manner that contract law and criminal law are distinct disciplines albeit they are both part of the English legal system. Monism does not deny, however, that there may well occur clashes between international and domestic law. In such cases, just as domestic laws are subject to a hierarchy with the constitutions trumping all other conflicting laws, international law is considered superior to domestic legislation and always prevails.

Dualism

Unlike monism, dualism rejects the notion that international and domestic law are part of the same legal order. For dualists, the two are wholly separate and distinct orders. When a conflict arises between them, the national judge asks whether domestic law (ie regular laws or the constitution) allows the application of a particular international rule. This may happen, **(p. 50)** for example, because the rule in question is part of a treaty which the country has ratified. Thus, dualism undertakes a selective process, based on a State's international obligations, in order to determine which international rules are enforceable in a domestic legal system.

Revision tip

Countries adhering to the monist theory generally follow the *method of incorporation* for bringing international rules into their domestic legal orders. Dualist countries use the *method of transformation*, both of which are explained below. It should be noted that even monist countries follow a mixed system. The UK follows a mixed system whereby it *incorporates* custom but *transforms* treaties in general.

The reception of international law by municipal law and institutions

This is a very practical matter that concerns how a treaty, a custom, and UN Security Council resolutions may be enforced, if at all, before domestic courts and authorities. A treaty or a custom may well establish rights and duties for individuals, such as human rights treaties. These rights holders will want to claim these rights domestically and therefore it is crucial to know how and when these treaties become available to individuals in the domestic legal order (ie when they are justiciable). States follow two general methods for the reception of international law into their domestic orders, namely incorporation and transformation.

Incorporation of treaties

The doctrine of incorporation holds that rules of international law automatically become part of domestic law without any further legislative, administrative or judicial action. This doctrine is straightforward in the case of treaties because their existence is known to the countries that signed and ratified them. Countries adhering to the doctrine of incorporation render all their treaties part of their domestic law automatically upon ratification.

There is one major practical problem with the incorporation of treaties, namely that they may require further refinement or elaboration at the domestic level. For example, a treaty that confers the right to adequate housing necessitates legislation and financial action in terms of resources, **justiciability**, determination of needs etc. Thus, most countries adhering to the doctrine of incorporation distinguish between self-executing and non-self executing treaties. Self-executing treaties are those whose provisions are clear and elaborate enough to be applied automatically in the domestic legal order without the need for further domestic legislation. Alternatively, some self-executing treaties may contain provisions that are considered as non-self executing and national parliaments may demand the passing of implementing legislation for these non-self executing provisions.

(p. 51) Looking for extra marks?

The Netherlands is cited as the prime example of a nation whose constitution favours the incorporation of treaties, as long as they are deemed self-executing. Under the US Constitution, treaties are considered ‘supreme law of the land’. However, the US Senate has ratified very few treaties brought before it by the federal government.

Incorporation of custom

Unlike treaties, the existence of custom is not self-evident but has to be verified. In practice, this means that when a customary rule is invoked before a court the judges must verify its existence. The next step is to determine whether the verified custom, in accordance with the country’s constitution, can be incorporated automatically or whether its importation requires an additional Act of Parliament. In common law nations if a custom is found to exist it will in principle be incorporated into the domestic legal system (***Buvot v Barbuit*** (1736)), except:

- if the customary rule in question has been consistently repudiated by the authorities of the country (known as the persistent objector rule)
- if it is inconsistent with an existing Act of Parliament (***Chung Chi Cheung v The King*** (1939)).

In England it has traditionally been held that customary international law forms part of its law and therefore once the existence of a custom has been verified it is automatically incorporated into the domestic legal order (***Trendtex Trading Corporation v Central Bank of Nigeria*** (1977)). The *incorporation* of custom into the UK legal order, therefore, is in contrast to the *transformation* required in respect of treaties.

Not all customary rules may be incorporated

The courts of countries that adhere to the doctrine of incorporation in respect of customary rules tend to limit the

application of this doctrine in certain circumstances. This is true especially where the content of the custom in question is unclear or where it is deemed by the courts as being contrary to domestic law and practice. This position is supported particularly by the courts of common law nations. In the UK, for example, a customary rule would not normally be incorporated if it is contrary to precedent (case law) and statute. As a result, some scholars have suggested that the courts of these countries have abandoned incorporation in favour of the **doctrine of transformation**. This scholarly position is not generally accepted.

Re Keyn [1876] 2 Ex D 63

A German ship collided with and sank a British ship on the high seas. As a result, the passengers of the British ship were killed. The German captain was prosecuted for manslaughter in England and the question was whether British courts could exercise extraterritorial jurisdiction over collisions taking place on the high seas as a matter of customary law. Cockburn CJ held that even if the **(p. 52)** majority of nations authorized the use of such jurisdiction he would still deny it because it would mean changing the relevant English jurisdictional rules altogether. This wholesale change of the law, in his opinion, could only come about by an Act of Parliament and not by the courts' recognition of a new customary rule.

Re Keyn should not be read as requiring an Act of Parliament in order to bring a customary rule in the British domestic legal order. Rather, it is a cautious judgment in respect of a customary rule which, if automatically incorporated, would have changed British jurisdiction on the high seas altogether. The court was not willing to do this on its own accord.

Incorporation of crimes under customary law

It is undeniable that certain serious international offences, particularly genocide, torture, crimes against humanity, and war crimes are recognized as such under customary international law. Their automatic importation, therefore, in the domestic legal order of countries adhering to the **incorporation doctrine** should not cause any constitutional problems. However, many countries have not adopted specific criminal legislation in respect of customary crimes, especially if such crimes are not encompassed in an international treaty. As a result, if new customary crimes were to be incorporated in a legal system for the first time their application against an accused may violate the rule against the prohibition of applying retroactive criminal legislation (***Nulyarimma v Thompson*** (2000)).

R v Jones (Margaret) [2007] 1 AC 136

A number of people broke into a military base with intent to destroy facilities and equipment. They argued that the base was used by the USA and the UK in order to commit the crime of aggression against other nations. It was for the Court to decide whether the crime of aggression, which did not exist in common law or statute in Britain, could be incorporated by the mere fact that it existed under customary international law. Lord Bingham held that customary crimes were not automatically incorporated. He went on to note, however, that this was not because unincorporated customary crimes lacked definitional certainty.

Incorporation of Security Council resolutions

Under **Art 25 UN Charter** all member States are obliged to carry out and implement resolutions adopted by the Security Council (SC). Although the charter does not set out any particular procedure it does not render incorporation conditional upon the adoption of necessary domestic legislation. Therefore, it is assumed that resolutions of the SC apply immediately and without the need for further action on the part of member States. In practice, and in order to avoid constitutional problems, most States usually adopt implementing legislation following the adoption of resolutions by the SC that require some form of positive action—although **(p. 53)** as pointed out, such legislation is not necessary. At the domestic level, implementing legislation will be necessary in cases where the resolution clashes with existing laws.

Kadi and Al Barakaat International Foundation v Council of the European Union [2008] ECR I-6351

Following the 9/11 attacks the SC imposed individual sanctions (freezing orders) against the assets of persons suspected of terrorism. Naturally, UN member States ordered their banks to freeze the assets of the targeted suspects, some of whom claimed that the uncritical enforcement of the SC's resolutions deprived them of their right to effective judicial protection. The European Court of Justice (ECJ) agreed that the lack of judicial review against the SC's resolution did indeed deprive the applicants of their right to judicial remedies. Therefore, SC resolutions need to be interpreted in accordance with fundamental rights.

Looking for extra marks?

In ***HMT v Mohammed Jabar Ahmed and ors*** (2010) the UK Supreme Court was called to assess an order adopted by the Treasury pursuant to the **UN Act 1946** which gave it power to freeze the assets of suspected terrorists listed by subsidiary bodies of the UN SC. The Supreme Court held that because orders implementing the 1946 Act did not require parliamentary approval the courts needed to be extra careful to guarantee that orders did not breach fundamental human rights. The fact that freezing of assets under the order failed to provide judicial recourse meant that the order itself was ***ultra vires***. Again, therefore, it is stressed that all international obligations assumed by the UK, including SC resolutions, must be interpreted in consonance with fundamental rights.

The doctrine of transformation

Unlike the doctrine of incorporation, whereby all treaties and customs adopted by a State are considered automatically part of its domestic legal order, the doctrine of transformation is based on a wholly different rationale. Countries adhering to transformation require that in order for a treaty ratified by the constituent organs of the State to become law of the land it must be followed by an implementing Act of Parliament—that is, the adoption of domestic legislation, as is the case with the UK. In practice, implementing legislation need not necessarily be extensive and cover in detail all the provisions of the treaty. It may simply be a verbatim reproduction of the treaty itself. Alternatively, Parliament may deem that most, if not all, the provisions of the treaty may be found in existing legislation. The significance of implementing legislation is not so much in its elaboration of the treaty in the internal domestic order. Rather, it serves to confer rights and duties on persons and legal entities at the domestic level. If it were not for this implementing legislation the effects of the treaty would be valid and enforceable only at the inter-State level.

This observation is important when considering Britain's treaty-making powers. There, treaties are ratified by the Queen upon advice of the prime minister, albeit after the treaty is **(p. 54)** laid before Parliament for consideration for

a period of twenty-one days (the **Ponsonby rule**). Parliament plays no other direct involvement. Nonetheless, without implementing legislation adopted by Parliament, treaties ratified by the Queen remain effective only at the inter-State level (ie between States themselves) and produce no effects whatsoever in the British domestic legal order. In the UK legal order, treaties possess an *interpretative* dimension, whereby the courts may infer in their construction of a particular treaty that Parliament did, or did not, intend for it to conflict with existing legislation.

Revision tip

Although a minor point, one may distinguish *transformation* (ie the use of a domestic statute to turn an international obligation into a domestic one) from *implementation*, which generally refers to the taking of practical measures to give effect to an international obligation. An example of implementation is the establishment and policing of a quarantine adopted under the terms of a treaty as opposed to the statute that sets up the quarantine. Sometimes, however, the use of the term *implementation* is used in scholarly work to denote the legislative act adopted in the process of *transformation*.

The Parlement Belge (1880) 5 PD 197

Two ships, one British and one Belgian, collided near Dover. When legal action was brought against the Belgian ship, the *Parlement Belge*, before British courts, its owners argued that it was covered by immunity on account of a treaty between the two countries to that effect. The problem was that said treaty had not been transformed into British law by an Act of Parliament. The Court of Appeal held that absent an Act of Parliament the treaty had not become part of English law. The rationale was that because treaties can deprive British subjects of their private rights, only Parliament is competent to alter the status of private rights. See also the *International Tin Council* cases.

Medellín v Texas 552 US 491 (2008)

The case concerned the application of the **Vienna Convention on Consular Relations** to death-row inmates. The convention had been ratified by the USA but Congress had not enacted implementing legislation. In the same case the ICJ had issued an injunction upon the USA to halt the executions. The US Supreme Court held that the convention was binding on the USA at the inter-State level, but absent domestic legislation it produced no effects in the US legal order. The result would have been different had the convention been self-executing. Moreover, judgments and decisions of the ICJ were found by the Supreme Court not to be binding domestically in the absence of an act of Congress or other constitutional authority.

(p. 55)

Revision tip

The UK was one of the first signatories to the **European Convention on Human Rights** (**ECHR**) and British

nationals have long brought cases against the UK before the European Court of Human Rights (ECtHR). Nonetheless, the rights in the **ECHR** became part of English law only in 1998 when the **Human Rights Act** was adopted by Parliament as a means of implementing the **ECHR**.

Recognition of foreign judgments

States usually adopt bilateral and multilateral treaties when agreeing to enforce foreign judgments in their domestic legal spheres. These judgments are implicitly part of international law because the duty to recognize them and incorporate them is based on the aforementioned treaties. In this manner, courts may recognize the validity of foreign private laws on the ground that the parties to a contract agreed to apply these rules to their contractual arrangements. In some instances, however, national courts may refuse to recognize a foreign judgment on the basis that the foreign court lacked jurisdiction in the particular case (***Grosvenor Casinos Ltd v Ghassan Halaoui*** (2009)).

Key cases

Case	Facts	Principles
JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry (***Tin Council cases***) [1990] 2 AC 418	The International Tin Council (ITC) was an international organization established by treaty between various countries, including the UK. The treaty in question was never implemented by Parliament, but this did not prevent the ITC from having its headquarters in London and enjoying international legal **personality**, as well as privileges and immunities in the UK as a result of a statutory order. When the ITC went bankrupt its creditors brought legal proceedings in the UK. The problem was that the ITC's founding treaty had not been transformed into English law and there was uncertainty as to whether a claim based on an untransformed treaty was possible.	It was held that: 'the Crown's power to conclude treaties with other sovereign states was an exercise of the royal prerogative…[but this] did not extend to altering domestic law or rights of individuals without the intervention of Parliament and a treaty was not part of English law unless and until it had been incorporated into it by legislation'. Lord Oliver went on to emphasize that individuals do not derive any rights under, nor are they deprived of obligations by, untransformed treaties. As a result, the claims against the ITC were non-justiciable and were therefore rejected.
(p. 56) ***Liechtenstein v Guatemala*** *(Second Phase)* (***Nottebohm case***), ICJ Rep (1955), p 4	Nottebohm was a German national who had lived in Guatemala continuously for almost forty years, but had not obtained that country's nationality. At the end of that forty-year spell he successfully applied for naturalization in Liechtenstein, which he had visited often. At some point Guatemala nationalized Nottebohm's business assets and Liechtenstein proceeded to bring a claim on his behalf as a result of his nationality link with that country. At issue before the ICJ was whether the granting of nationality by States despite their weak links with the person upon	States are free under international law to confer their nationality upon whomsoever they wish. However, 'a State cannot claim that the rules it has laid down are entitled to recognition by another State unless it has acted in conformity with the general aim of making the nationality granted in accord with an effective link between the State and the individual'. In essence, the ICJ held that international law recognized as valid the granting of nationality that was based on an 'effective link' between the person and the country. States were still free to confer nationality upon whomsoever they wished on any other ground. However, despite the

	their weak links with the person upon whom nationality was conferred was valid under international law, or whether it simply produced effects in the domestic order of the conferring nation only.	on any other ground. However, despite the fact that all other grounds were valid under domestic law, only the 'effective link' ground was binding upon all nations under international law.
R (on the Application of Al-Jedda) v Secretary of State for Defence (2008) 47 ILM 611	An individual had been detained by British forces operating in Iraq on grounds of security. His detention remained indefinite and he was not charged with an offence. Although the conditions of the detention violated **Art 5(1) ECHR**, the British government claimed that it was nonetheless justified in detaining him in this manner because SC resolution 1546 granted to all nations a broad authorization to detain suspected terrorists. The question was whether obligations stemming from the SC (on the basis of the **UN Charter**) superseded the UK's human rights legislation.	Lord Bingham noted that actions taken pursuant to Security Council resolutions override the UK's human rights obligations, irrespective of whether these are derived from domestic legislation or other international treaties (ie the **ECHR**). This conclusion was the result of **Art 103 UN Charter**. Nonetheless, the UK was under an obligation to reconcile as best as possible its two competing obligations. In the case at hand this entailed ensuring that the detainee's rights under **Art 5 ECHR** were not infringed 'to any greater extent than is inherent in such detention'.

(p. 57) Key debates

Topic	**The incorporation of customary crimes in English law**
Author/Academic	Roger O'Keefe
Viewpoint	Traces the debate in ***R v Jones*** where Lord Bingham held that a customary crime 'may, but need not, become part of the domestic law of England without the need for any domestic statute or judicial decision'. This incorporation of customary crimes was subject to two limitations: (a) the *Knuller* rule, whereby the courts cannot introduce new crimes, and (b) that Parliament typically enacts statutes in respect of treaty and customary crimes and that if it refuses to do so with regard to a particular offence this is the end of the matter. In the present instance, the **International Criminal Court Act 2001** intentionally excluded aggression from its ambit, thus leading to the conclusion that it should not be treated as a domestic crime in England.
Source	'Customary International Crimes in English Courts', 72 *British Yearbook of International Law* (2002) 293
Topic	**The permissibility of judicial review in respect of Security Council resolutions**
Author/Academic	Jean D'Aspremont, Frédéric Dopagne
Viewpoint	Following the ECJ's decision in ***Kadi*** it is no longer taken for granted that SC resolutions are automatically applicable in the domestic spheres of UN member States. Rather, their implementation has to be consistent with international human rights and although States are under a duty to enforce the resolutions of the SC they must do so in a manner that does not violate human rights as well as their duties under the law of the European Union.
Source	'Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders', 5 *International Organisations Law Review* (2009) 371

Exam questions

Problem question

Antonio is a Somali national who is accused of having committed the crime of nuclear terrorism. He is captured by a British warship in international waters and is sent to the UK to stand trial. The UK has ratified the convention against nuclear terrorism but has not passed implementing legislation. In any event, the crime itself is considered a serious offence under customary international law and most States in the world have adopted relevant provisions in their criminal statutes. To further **(p. 58)** compound the situation, the UN SC issues a list of names suspected of terrorism and demands that all UN member States arrest these persons (if found on their territory) and freeze their personal assets and those of close family members. Antonio is on this list. His wife receives a housing and child care benefit in the UK because she is disabled. The UK government suspends these payments to his wife and children and offers them no judicial recourse to challenge the measures against them. Critically discuss whether:

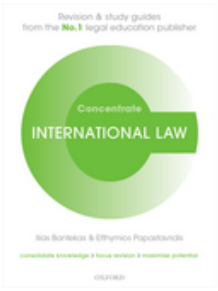
1. Antonio may be tried in the UK on the basis of the nuclear terrorism convention and whether the terms of the convention are enforceable in the UK's domestic legal order.
2. Antonio may alternatively be tried in the UK on the basis of the customary nature of the crime of nuclear terrorism (your response should take into consideration the legal complexities of incorporating customary law into the UK legal order).
3. A UN SC resolution overrides any domestic legislation to the contrary and whether under such circumstances a UN member State is nonetheless obliged to carry out the terms of the resolution, AND
4. the absence of judicial remedies and the freezing of assets that constitute the basis of a family's survival are legitimate under the case law of the ECJ. Are human rights considerations relevant to the reception of SC resolutions in the domestic order of UN member States?

An outline answer is included at the back of the book.

Essay question

Critically discuss the various limitations imposed on the doctrine of incorporation in respect of customary rules. Why have English courts taken a cautious approach to the incorporation of custom?

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



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5. Personality, statehood, and recognition

Chapter: (p. 59) 5. Personality, statehood, and recognition
Author(s): Ilias Bantekas and Efthymios Papastavridis
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The examination

General questions on the nature of legal personality are rare and so they are mostly focused on the particular subjects of international law. Among these one should certainly pay particular attention to the classical and contemporary elements of **statehood**, as well as the legal personality of international organizations. Students should also be aware of the way that **recognition** of States and governments works because this is also a topic that students can critically develop in an exam. Recognition of governments is a likely topic, although the old case law is now pretty much obsolete. Readers should focus on post-1980s case law.

(p. 60) Key facts

- The concept of 'subjects of international law' refers to the same concept as the term 'international legal personality'. The classical distinction between subjects and objects of international law is now pretty much out of use, if not obsolete.
- International legal personality means having rights and duties directly under international law and a

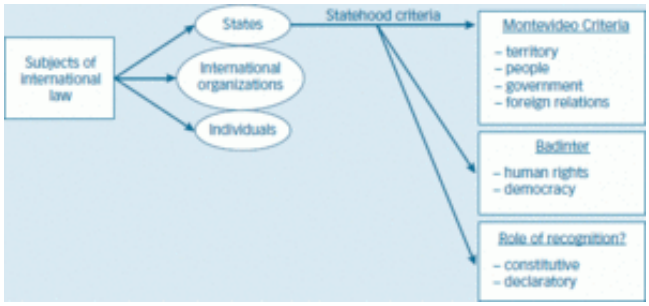
capacity to enforce these rights. Therefore, any entity satisfying these criteria possesses international legal personality.

• Although numerous entities (ie States, individuals, international organizations etc) may possess international legal personality, they do not all enjoy rights and duties in the same degree. For example, States can make treaties and use armed force to defend themselves, whereas individuals cannot. Therefore, international legal personality should be viewed from the point of view of capacity in each and every case.

• The primary subjects of international law are States, because they make the law and it is they that confer rights and duties on other actors. Some degree of international legal personality is enjoyed by international organizations, individuals, non-governmental organizations, such as multinational corporations, national liberation movements, and others. It all depends on the conferral of rights and duties by States in each particular case.

• Recognition of States rests on two competing theories. The first contends that recognition is irrelevant to statehood (**declaratory**), whereas the second argues that it is a solid criterion of statehood (**constitutive**). Besides recognition of States, the recognition of governments also exists as a practice, although it is less frequent in the contemporary era.

(p. 61) Chapter overview



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Subjects of international law

Subjects of international law

We have already said that international legal personality entails having rights and duties under international law and a capacity to enforce these. It is taken for granted that States possess unlimited legal personality. Through treaties and custom they are also able to confer international legal personality to other actors, such as individuals and international organizations. The rights and duties of the latter are not unlimited and are instead dependent on the wishes of States. An example of a 'right' is the entitlement of States to defend themselves against external aggression. The criminalization of war crimes, on the other hand, is an example of an obligation placed upon individuals. Rights and obligations would be meaningless if they were not enforceable. Rights and duties under international law can be enforced before international courts with limited jurisdiction such as the International Court of Justice (ICJ), the International Criminal Court (ICC), ad hoc criminal tribunals such as those for Yugoslavia and Rwanda, quasi-tribunals such as human rights treaty bodies (eg Committee against Torture), as well as before national courts. Indeed, national courts entertain most legal actions concerning rights and obligations under international law. Moreover, enforcement need not necessarily be judicial in nature. An obligation may well be enforceable by the resolution of an organ of an international organization (eg UN Security Council) or through inter-State negotiations which may lead to an agreement for damages or reparation.

(p. 62) **States and the criteria for statehood**

Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which has crystallized into customary law, is typically taken as the starting point for assessing whether an entity satisfies the criteria to be a State (ie to have statehood). These are: (a) the existence of a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States. These criteria are not exhaustive and, as will be analysed later on, new entities wishing to acquire statehood must generally in practice secure a sufficient degree of recognition by other States. Such recognition will be accompanied by guarantees that the newly emerging State shall respect human rights, its existing territorial boundaries, and general international law.

Permanent population

Population size is not a criterion for statehood, given that certain small-island States, such as Nauru, had a population of less than 10,000 upon independence. What is required is a core stable population that has a firm allegiance to the State on the basis of a shared nationality. This does not mean that said population must share the same ethnic, religious, or other composition, given that the conferral of nationality is generally independent of such common characteristics. It is immaterial if a foreign migrant population working there has surpassed the local population in number. It is also irrelevant if a large number of nationals of the State are nomads and move around the territory of their country or across neighbouring countries in order to graze their cattle, as long as their transit to the neighbouring nations is temporary (***Case Concerning Western Sahara, ICJ Advisory Opinion*** (1975)).

A defined territory

It would be absurd for an entity to claim statehood without the possession of certain territory. What this criterion excludes, therefore, are situations where a rebel group merely occupies certain territory but is still battling to hold on to it against other States. As a result, it excludes all self-proclaimed States that have acquired territory by unlawful armed force and annexation, as is the case with the so-called Turkish Republic of Northern Cyprus (TRNC). Statehood, on the other hand, is not denied simply because certain borders of a country are disputed or not fully recognized by the international community. The territory of Israel is still contested by most of its neighbours, but it is no less a State than its detractors. The ICJ has made it clear that there is no rule of international law whereby the land frontiers of a State must be fully delimited (***Germany v Denmark and the Netherlands*** (***North Sea Continental Shelf cases***) (1969)).

> (p. 63) Looking for extra marks?
>
> Provinces/States within federal entities (as is the case with the USA) do not possess the same degree of international legal personality as that enjoyed by regular States and they do not possess statehood. Nonetheless, federal constitutions, such as that of Germany, allow provinces to enter into treaties or other relations with foreign States and international organizations.

Government

All that is required is that the entity in question possesses a sovereign government that is free from external domination. Given that many countries in the world are governed by dictatorial and undemocratic regimes, there is no requirement that governments be democratic. The TRNC has not been recognized by any country other than Turkey, because its government is universally considered an emanation of Turkey.

A country may be described as ‘failed’ because of its inability to provide physical security, legitimate political institutions, economic management, and social welfare to its people, as is the case with Somalia, and yet retain its statehood.

Capacity to enter into foreign relations

It is not obvious in what way this requirement is different from the criterion of government. In practice, this means that

an entity is able to enter into treaties, conduct business, exchange diplomats, and undertake other activities with other countries. In large part, although most scholars and judgments are silent on this matter, an entity's capacity to enter into foreign relations is dependent on its recognition and legitimization by other countries. An entity whose statehood is not accepted by other countries will be unable to enter into foreign relations with them even if it is fully capable of doing so.

Revision tip

The four criteria of statehood in the **Montevideo Convention** have long been recognized as being part of customary law. The criteria of government and foreign relations capacity should be distinguished even though the latter seems like a natural extension of the former.

The relevance of human rights in the determination of statehood

It should be remembered that the discussion on statehood concerns new entrants in the community of States, because the statehood of existing countries cannot be denied unless of course they disappear or disintegrate.

Following the disintegration of the former Yugoslavia in the early 1990s, the federal provinces that comprised it sought their independence. A committee appointed by the EU, known **(p. 64)** as the Badinter Committee, stipulated that in order for the EU to recognize the statehood of these new entities they would have to satisfy respect for the **UN Charter**, fundamental human rights and democracy, as well as guarantee the rights of all minority groups within their territories. Moreover, they were obliged to respect the inviolability of all existing borders and settle all disputes amicably.

The principle of self-determination, which is analysed in chapter 12 'Human rights', is significant in the creation of new States. The external dimension of the principle dictates that majorities can decide to secede and create new States. However, the practice of nations under international law is to discourage secessions (***Badinter Committee, Opinion No 2*** and principle 5 of the UN General Assembly Resolution 2625 (1970), known as the **Friendly Relations Declaration**). Moreover, minorities, although they enjoy a great number of rights under international law, do not possess the right to external **self-determination** (ie to secede). This was why a number of countries opposed Kosovo's unilateral declaration of independence from Yugoslavia, particularly countries with politically active minority populations. The ICJ's Advisory Opinion on this unilateral declaration simply said that unilateral declarations are not unlawful under international law (***Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*** (***Kosovo Declaration case)*** (2010)).

The basic rule is that for a **secession** to be universally approved it must be done by lawful means (ie a referendum or plebiscite and in conformity with the local constitution) and with the agreement of the central government.

Reference re Secession of Quebec [1998] 2 SCR 217

The Canadian government asked its Supreme Court to rule whether a unilateral secession brought about by a referendum—which the French-speaking Quebecois had recently lost—would have been lawful under Canadian and international law. The court held that international law did not favour disintegration as long as the State in question 'represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination and respects the principles of self-determination in its own internal arrangements'. As a result, even if the plebiscite had been in favour of secession, this could not be done unilaterally, but on the basis of an agreement among all of Canada's provinces and in accordance with the rights of other Canadians and minorities.

The legal personality of international organizations

International organizations are established by States and it is the founding States of each organization that determine their powers and functions. Powers and functions are written into the organizations' founding (or constitutive) instrument. An example of this is the **UN Charter**. Some organizations are set up for a variety of purposes, such as the UN, whereas others are set up for a very specific purpose, as is the case with the International Sugar Organization. There is considerable debate as to the legal personality of international (p. 65) organizations and two theories are usually put forward, namely the *inductive* and the *objective* approach. According to the inductive approach the rights and duties of organizations under international law are derived from their constitutive instrument. This includes not only those rights and duties that are expressly stated therein, but also those that may be implied on the basis of the object and purpose of the organization. The objective approach suggests that the international legal personality of organizations is not dependent on their constitutive treaty, but on whether or not they fulfil certain conditions under general international law. This theory is particularly important because the constitutive instruments of many organizations, including the **UN Charter**, do not specifically state whether the organization enjoys international legal personality. The conditions required under the objective approach are the establishment of the organization by treaty and independence from the member States that established it. In practice, a combination of the two approaches is where the truth lies.

Implied powers

The charter of an organization may only spell out certain powers. Yet, during the lifetime of the organization it may be required to exercise further powers if it is to fulfil the functions and tasks assigned to it. These are known as **implied powers**.

Reparation for Injuries Suffered in the Service of the United Nations (***Reparations case***), ICJ Rep (1949), p 174

The ICJ held that the UN could not possibly carry out the intentions of its founders if it was not endowed with some degree of international legal personality. Moreover, the UN was found to possess implied powers (ie powers not expressly included in the **UN Charter**) if these were essential for carrying out tasks specifically assigned to it. The same view was later iterated by the ICJ in its ***Certain Expenses of the UN*** Advisory Opinion (1962), where it held that irregular peacekeeping expenses authorized by the General Assembly (GA) were expenses of the UN because the action contemplated fell within the GA's mandate under the **UN Charter**.

Looking for extra marks?

International organizations may delegate powers and functions to other entities, particularly new organs founded by them for a specific purpose (known as subsidiary bodies or organs). However, they cannot delegate to these organs the original powers conferred upon them in the organization's constitutive instrument.

Consequences from the international legal personality of international organizations

International organizations possess a legal personality that is wholly distinct from the personality of each and every State that established them. This means that any claim which the (p. 66) organization might have against any State or other entity belongs to the organization itself and is brought in its own name. Equally, any liabilities attributable to the organization are incurred by it alone and not by its member States (***AOI and ors v Westland Helicopters Ltd***

(1988)). Equally, organizations and their staff enjoy immunities and tax exemptions in the countries where they operate. This usually comes about as a result of: (a) domestic laws that confer said immunity and tax exemption; (b) a headquarters agreement; (c) a multilateral agreement, such as the 1947 **Convention on the Privileges and Immunities of the United Nations**; (d) it is stated in the organization's constitutive treaty and hence is binding on member States; or (e) in the absence of any of these, a one-off (ad hoc) arrangement may be agreed with a particular nation.

MacLaine Watson & Co Ltd v International Tin Council (***Tin Council cases***), 81 ILR 670

The International Tin Council, an international organization, went bankrupt and its creditors pursued legal action in London not only against the Tin Council itself but also against its member States. The House of Lords held that since international organizations possess a distinct personality from that of their member States, the latter are considered third parties to the debts and liabilities of organizations and are therefore not liable for said debts.

Revision tip

International organizations possess rights and duties from their founding treaty as well as under general international law. The *Reparations* case made sure that organizations enjoy implied powers in order to fulfil functions and tasks assigned to them. Organizations have a personality that is distinct from that of their member States.

Individuals

Individuals (or natural persons) enjoy international legal personality in three principal fields, namely: human rights, international criminal law, and free trade areas. **Article 34 of the European Convention of Human Rights** (**ECHR**) allows individuals to bring claims against States before the European Court of Human Rights (ECtHR). The same is true in respect of other treaty-based human rights courts, commissions, and quasi-tribunals. Individuals are also responsible for crimes under international law and can be prosecuted before international tribunals or domestic criminal courts (**Art 25 ICC Statute**). Finally, individuals may be granted enforceable rights and duties under free trade agreements, such as the right of movement and establishment, as is the case with the European Communities (***Van Gend en Loos v Netherlands Inland Revenue Administration*** (1963)). It is clear that the personality of individuals is limited in comparison to international organizations.

(p. 67) Looking for extra marks?

For a while it was disputed whether international crimes taking place in internal (domestic) armed conflicts can give rise to the liability of the offender under international law, as opposed to liability under domestic law only. The International Criminal Tribunal for the former Yugoslavia (ICTY) has clarified that this liability is international (***Prosecutor v Tadić*** (1996)) and this has also been confirmed by **Art 8(2)(c) and (e) ICC Statute**. Thus, most international crimes, including war crimes and crimes against humanity, taking place in domestic settings, give rise to liability under international law. As a result, the offenders' liability can never be extinguished by reference to defences or other mitigating circumstances under domestic law.

Multinational corporations and non-State actors

The status of multinational corporations and other domestic legal persons (ie companies, non-governmental organizations, charities, etc) is similar to that of individuals, save for the fact that corporations do not enjoy human rights and at present do not incur criminal liability for international crimes. They do, however, enjoy rights and duties under international law in other fields, particularly in their contractual relations with States and international organizations. Contracts entered into between States and corporations/individuals in which the State waives any future claims to immunity or agrees to bring any future disputes to arbitration give obvious rights to the corporation/individual. The State is obliged to submit to, and respect, the award of the arbitral tribunal (***Texaco v Libya and BP v Libya*** (1974)). As a result of bilateral investment treaties (BITs), States are obliged to respect rights guaranteed to foreign investors, particularly against **expropriation**, unfair treatment, and access to international arbitration. Although the regime governing the liabilities of multinational corporations under international law is complex and cloudy, courts in several nations have accepted that they can incur liability in tort for their implication in human rights violations by autocratic regimes (***Doe v Unocal (I)*** (1997)).

Other non-State actors include rebel movements, terror groups, and non-governmental organizations (NGOs). Their limited international legal personality is diffuse. NGOs, for example, may petition human rights mechanisms on behalf of victims and possess consultative status with intergovernmental organizations. Rebel groups may receive limited recognition as de facto governments and participate in inter-State summits, whereas the conduct of terror groups may amount to an '**armed attack**' for the purposes of self-defence.

> Looking for extra marks?
>
> The liability of multinational corporations is found almost exclusively in private law, not international law, save where a particular relationship between a State and such a corporation has been grounded on an agreement governed by international law. Several soft-law instruments have been adopted in order to fill the absence of international law in the operation of multinationals, chief among these being the OECD Guidelines for Multinational Corporations and the UN Guiding Principles on Business and Human Rights.

Recognition of States and governments

Even if an entity fulfils the **Montevideo Convention** criteria for statehood it will seek its recognition by other States. This is because external recognition provides **legitimacy** and allows the exercise of beneficial and meaningful foreign relations. Recognition is usually sought for statehood itself, as well as in respect of a newly installed government. Besides the reasons already mentioned, recognition of statehood is important because it leads to admission in international organizations and access to capital markets.

It should be pointed out that issues of recognition usually arise as a result of State succession (ie when a constituent nation breaks up into two or more new State entities, as was the case with the breakup of the USSR). Succession that is unopposed and constitutionally sanctioned presupposes recognition and is not problematic.

The declaratory and constitutive theories of State recognition

According to the declaratory theory, recognition of a State is merely a political gesture without any legal significance. Therefore, if an entity fulfils the criteria for statehood it automatically achieves statehood even if other nations fail to recognize it as such (***Deutsche Continental Gas Gesselschaft v Poland*** (1929)).

The constitutive theory, on the other hand, suggests that without sufficient recognition a new entity claiming to be a State cannot attain statehood. According to this theory, recognition is yet another criterion for statehood.

The declaratory theory is the one with the greatest degree of approval, at least in theory and in scholarly writings. Nonetheless, new States are keen to be recognized by other nations, particularly powerful ones, because this ensures their political survival. In the ***Kosovo Declaration*** case, a number of nations that were home to ethnic and

other minorities refused to recognize the statehood of Kosovo and made strong appeals in this regard to the ICJ. The recognition or not of an entity claiming statehood raises practical issues of daily importance, such as the recognition of foreign judgments, deeds and titles and the movement of persons. Courts dealing with such matters are generally inclined to distinguish between the non-recognition of a State as such from the day-to-day administrative acts performed by the authorities of such States. As a result, they generally tend to recognize said administrative acts but not the State that issued them (***Hesperides Hotels v Aegean Holidays*** (1978)). This distinction is very important.

Opinion No 1 of the Badinter Committee emphasized that 'the effects of recognition by other States are purely declaratory'.

Emin v Yeldag [2002] 1 FLR 956

The case concerned a divorce granted by the authorities of the TRNC, which the applicant brought for enforcement in the UK. The UK does not recognize the TRNC as a State but only accepts that **(p. 69)** with the aid of Turkey it is in effective **occupation** of northern Cyprus. The British court distinguished between the official acts of the TRNC from other personal transactions of people living therein, giving full recognition only to the latter.

Apostolides v Orams [2010] 1 All ER (Comm) 992

The applicant's land in occupied TRNC was sold by the TRNC authorities to a British couple, the Orams. He petitioned the courts of Cyprus for vacation of his land and the payment of compensation by the Orams despite the fact that Cyprus possessed no authority in the occupied part of the island. The applicant then sought to enforce the judgment in England. Following a round of litigation before the ECJ the judgment of the Cyprus court was deemed enforceable against the Orams throughout Europe, including the UK.

Looking for extra marks?

An important, although not definitive, element in State recognition may be the very name of the entity seeking statehood. The Former Yugoslav Republic of Macedonia (FYROM) is only recognized under this designation and not under its constitutional and self-proclaimed name of Macedonia.

Recognition of governments

In the past it was very common to recognize, or refuse recognition, to foreign governments, particularly where the statehood of the nation they represented was not in doubt. The rationale for such recognition was the frequency of dictatorial coups, which made it imperative for Western States to decide if it was in their interests to legitimatize and do business with each new government through an act of recognition. There was always the risk that a government recognized today could be overthrown tomorrow by its adversaries, in which case the new regime's relations with the recognizing State would come into jeopardy. Moreover, if a rebel group or national liberation movement effectively occupies part of a territory, then just like the ***Hesperides*** and ***Emin*** cases it is essential that some degree of

recognition be given to the fact of occupation so that day-to-day affairs can be regulated.

De jure and de facto recognition

De facto recognition aims to recognize and legitimize a situation whereby a new government is in effective control of a territory. It does not necessarily mean that the recognizing State is happy with the government it recognizes. In most cases it is simply a declaration that the recognized government is in effective control and that all future dealings should henceforth be carried out with it, rather than with the previous regime (***Luther v Sagor*** (1921)).

(p. 70) *De jure* recognition refers to a government that is recognized as the legitimate holder of power, but which has not yet achieved full and effective control over part or all of its territory. Equally, it applies to a government that has been ousted from power and is in exile, as was the case with the Kuwaiti regime that was forcefully removed from power by Iraq in the first Gulf War in 1990.

Exceptionally, non-recognition of a government and the prohibition of entering into any kind of relations with it may be imposed by the UN Security Council (SC). The SC imposed such non-recognition on the apartheid regime of Southern Rhodesia (now Zimbabwe) through resolution 277 (1965).

Looking for extra marks?

In 1980 the UK government undertook a review of its policy with respect to recognition of foreign governments. It decided to refrain from recognition of governments, whether *de jure* or de facto and only recognize States as such.

Revision tip

The declaratory theory is the one mostly accepted. Nonetheless, recognition is important in fulfilling the Montevideo criterion that States should have the capacity to enter into relations with each other. This was dictated by the frequent dictatorial coups that occurred in the developing world and the embarrassment of recognizing governments that were eventually unpopular and short-lived.

Key cases

The facts of the most significant key cases have already been explained in various sections of this chapter.

Case	Facts	Principles
Reparation for Injuries Suffered in the Service of the United Nations (***Reparations Case***), ICJ Rep (1949), p 174	A Swedish diplomat under the service of the UN was sent by the UN to Jerusalem, where he was assassinated. Although Israel had not yet become a State, the UN General Assembly asked the ICJ whether it had the legal capacity to bring a claim against Israel for reparation. The practice at the time would have been for Sweden to bring the claim on behalf of its national.	The ICJ effectively held that the international legal personality of international organizations was dependent on the functions assigned to them by their member States. This personality is independent from that of the member States and international organizations are able to bring claims for harm they have sustained. Moreover, the ICJ stipulated that the powers of organizations are more extensive than those prescribed in their founding treaties. It referred to *implied powers* which exist so that they can fulfil all the functions mandated in their founding treaties.
(p. 71) ***Republic of Somalia v Woodhouse Drake and Carey (Suisse) SA*** [1993] QB 54	In 1993 the government of Somalia was overthrown and a new regime was installed in its place which controlled large parts of the country's territory. A contract for the delivery of rice had been entered into by the previous government and the new regime sought to recover funds under the contract before the courts of England. The question was whether the new regime was eligible to bring this claim.	The principles devised by the presiding judge, Hobhouse J, have become known as the Hobhouse guidelines for the judicial recognition of a provisional government, especially in relation to cases dealing with matters such as contract succession. These guidelines require that the plaintiffs be the constitutional government; that they exercise a high degree of administrative control over the territory; that they produce evidence of prior dealings with the British government; and that they enjoy some degree of international recognition.

Key debates

Topic	**Do non-State actors have human rights obligations in the same manner as States?**
Author/Academic	Andrew Clapham
Viewpoint	It is strongly debated whether non-State actors, such as terrorists and multinational corporations have human rights obligations. Human rights obligations are owed to individuals only by States. The fear is that if such obligations are extended to non-State actors then States will be slack in their duty to prevent and punish violations and will blame non-State actors for many abuses which they should have prevented. The most accepted viewpoint is that such obligations continue to be addressed only to States and that non-State actors play a complementary role.
Source	*Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006)
Topic	**Is Kosovo a State under international law?**
Author/Academic	Colin Warbrick
Viewpoint	Kosovo was a federal unit of Yugoslavia that came under UN territorial administration and then made a unilateral declaration of independence. The ICJ's Advisory Opinion did not examine whether it had attained statehood and the academic community is split on whether it is actually a State in the absence of consent by the parent State and with many countries refusing to recognize it. The status of Kosovo is still unclear in academic debates as well as in the practice of the international community.
Source	'Kosovo: The Declaration of Independence', 57 *International & Comparative Law Quarterly* (2008) 675

Exam questions

Problem question

Country X is largely homogenous but is home to an ethnic minority, the Batas. They comprise roughly 10 per cent of the entire population. For years they have tried to secede but were blocked by X from doing so. They have suffered abuse and human rights violations as a result and having had enough the Batas decide to declare their independence and begin an internal armed conflict with X. Although the war is far from over, the Batas have effective control over the territory they live in. Critically discuss whether:

1. The Batas satisfy the **Montevideo Convention** criteria for statehood, as well as the Badinter criteria.
2. The achievement of statehood can come about by non-peaceful means as is the case with an armed revolution.
3. Minorities within an existing State do not as a rule possess the right to statehood and external self-determination under international law and, if not, consider what rights they do have.
4. Although the Batas are not recognized by many nations as a State, it is still possible for the day-to-day administrative acts of this new entity to be recognized by the courts and authorities of other countries.

An outline answer is included at the back of the book.

Essay question

Critically discuss whether Kosovo satisfies the criteria for statehood required under contemporary international law. Your answer should take into consideration the practice of States with regard to the recognition of Kosovo and you should critically discuss whether recognition has a declaratory or constitutive character.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.

International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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6. Sovereignty and jurisdiction

Chapter: (p. 73) 6. Sovereignty and jurisdiction
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The examination

The principal reason that States enjoy jurisdiction is because they are sovereign. Sovereignty is a very fluid subject that is not susceptible to practical assessment and therefore it is unlikely to be demanded in an exam in the form of a stand-alone topic. On the other hand, there are many possible questions concerning the jurisdictional competences of States and students will be well advised to command a good understanding of all five jurisdictional principles. In addition, it is not uncommon for questions dealing with jurisdiction to demand exceptions to jurisdiction, particularly immunities or other defences to jurisdiction. Therefore, students are advised to consult chapter 7 ‘Immunity’ and familiarize themselves with the links inherent between the two notions.

(p. 74) Key facts

• Jurisdiction refers to the power of States to enforce their laws and authority (judicial and police actions) over persons and property.

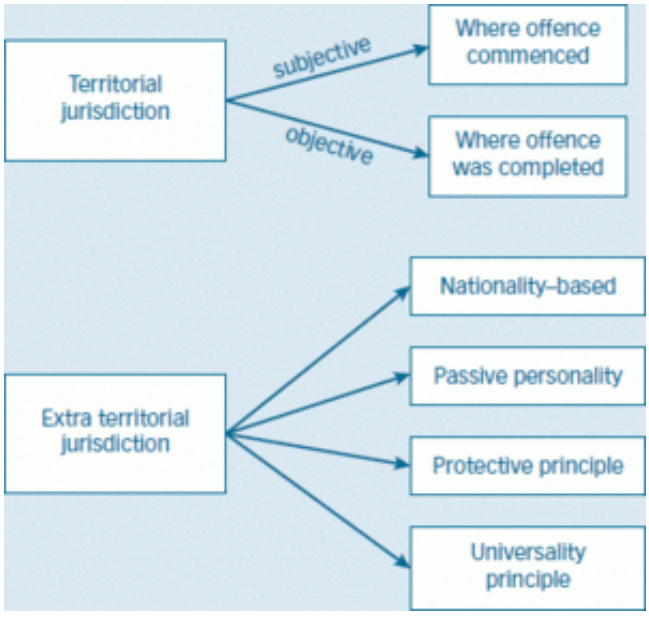
• The various bases of jurisdiction (eg territorial, passive personality, etc) are exercisable by States in accordance with their national laws, unless otherwise mandated by a treaty. In practice, this means that States are generally not obliged to exercise extraterritorial jurisdiction, this being exceptional and subject to sovereignty-based limitations.

• Although a State may possess legitimate jurisdiction over a person or property, such jurisdiction may be suspended by the operation of a particular immunity. In this case, the jurisdiction continues to exist and is thus not extinguished until such time as the immunity itself ceases to exist.

• Jurisdiction may be civil or criminal in nature. In the latter case it refers only to powers over persons. International law textbooks and university courses do not as a general rule deal with civil jurisdiction, save for legal actions brought against State entities and international organizations on commercial grounds (eg debts incurred by embassies or public corporations). Other law suits concerning transnational family issues, property, or tort are dealt by the jurisdictional rules of the forum country (ie the country where the suit is lodged) as well as by specific international treaties that resolve jurisdictional conflicts in these fields. This area of law is known as private international law or otherwise as conflicts of laws.

• The jurisdiction of a country's courts may be in conflict with the jurisdiction available to the courts of many other countries, especially where all these countries possess a link with the crime, the offender, or the victims. Jurisdictional conflicts of this nature are best dealt through inter-State cooperation as is the case with extradition. The jurisdiction of national courts may moreover be complementary (ie parallel) with that of international courts or tribunals. The statutes of the respective tribunals will determine which of the two has primary jurisdiction. There is nothing awkward with more than one State having legitimate claims of jurisdiction over a case. In fact, sometimes, international law aims to give jurisdiction to as many States as possible (eg in respect of transnational crimes) as a means of ensuring the administration of justice.

(p. 75) Chapter overview



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Jurisdiction

Sovereignty

This concept belies the entirety of inter-State relations and is a fundamental building block of international law. It refers to the authority or power of all States to determine their own affairs without external interference. An obvious

corollary of sovereignty is the power to enforce one's laws in one's own territory, as well as object to any form of external intervention. Sovereignty is very much an extension of self-determination, although theoretically the latter belongs to the peoples of a nation, whereas sovereignty is vested in the executive apparatus of the State. The traditional notion of sovereignty is diminishing in an era where States are willing to confer extensive powers to international organizations such as the European Union. This is equally true in situations involving indebted nations dependent on loan conditions imposed by international financial institutions such as the International Monetary Fund.

Sovereignty is subject to several limitations. Although States are free to refuse to cooperate or converse with other nations, they are not allowed to violate international law, as would be the case with the unlawful use of armed force contrary to the **UN Charter**. Equally, all States must adhere to the principle of self-determination, respect for human rights, and may not unilaterally redraw their borders. This is true even of those nations whose borders were drawn on their behalf by their former colonial rulers (the principle of ***uti possidetis juris***).

(p. 76) ***Netherlands v USA*** (***Palmas Islands Arbitration***) (1928) 2 RIAA 829

The case concerned contested sovereignty claims over the Palmas islands. The sole arbitrator pointed out that: 'sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of the State'. He noted that this exclusive competence over one's own territory 'is the point of departure in settling most questions that concern international relations'.

Jurisdiction: the basic idea

Jurisdiction is the power of States to make law and enforce it against persons and objects, especially in their territory. This power can take three particular forms, namely to make laws, which is known as prescriptive jurisdiction; to apply laws through the courts, known as judicial jurisdiction; and enforcement of laws, known as enforcement jurisdiction.

These three powers encompassed within the notion of jurisdiction are territorial in nature—that is, they can be exercised without limitation against all persons, entities, actions, and property on the territory of the State (save against persons and property benefiting from immunity). This means that ordinarily States do not enjoy jurisdiction in respect of persons or property situated outside their territory (so-called extraterritorial jurisdiction). The rationale for the preference in favour of territoriality is the proximity between the local authorities and the object or purpose of the suit, which in practice makes investigation and prosecution much simpler. Although international law favours **territorial jurisdiction** with a view to preventing conflicts of sovereignty between nations, it does not exclude various forms of extraterritorial jurisdiction if this is expressly provided in treaties or is otherwise permitted under customary international law. An obvious example would be serious international crimes, such as genocide, which the territorial State is unwilling to prosecute. Clearly, the international community cannot afford to let genocide go unpunished and will allow non-territorial countries to investigate and prosecute the offenders.

There are four types of extraterritorial jurisdiction, namely nationality-based, passive personality, protective, and universal.

Moreover, there may well arise situations involving conduct taking place on the territory of more than one nation (transnational), as is the case with computer crimes which may cause harm to multiple victims around the world. Clearly, in such circumstances, many States enjoy jurisdiction over the same offence or offender. International law does not prescribe a general hierarchical rule in order to resolve jurisdictional conflicts. In principle, and in relation to criminal conduct, a State may assume jurisdiction if this is not precluded by another rule of international law (***France v Turkey (Lotus case)*** (1927)) and equally the State that has apprehended the accused enjoys primacy of jurisdiction. The system is based on inter-State collaboration and countries may validly surrender their jurisdiction in

any particular case by means of extradition or by simply not exercising their entitlement.

(p. 77)

Revision tip

A State does not have the authority to exercise judicial or enforcement jurisdiction except over persons that are lawfully present within its jurisdictional remit (ie its own territory or territory over which it exercises effective control, such as occupied territory). An exception to this fundamental rule is the principle of **universal jurisdiction** which is explained below.

Territorial jurisdiction

A State's territory consists of its land and maritime masses as well as its airspace. States exercise absolute and unimpeded jurisdiction on their land territory as well as the airspace above this territory.

Maritime jurisdiction: the general rule

In respect of maritime belts, States possess absolute jurisdiction in their **internal waters**, but less so in their territorial sea. As a general rule, jurisdiction over offences committed on board a vessel lies with the flag State (ie the country with which the ship is registered), save for piracy on the high seas or such conduct in territorial waters that is injurious to the coastal State (**Arts 27, 30, 97 UN Convention on the Law of the Sea 1982** (**LOSC**)).

Looking for extra marks?

There are three exceptions to flag State jurisdiction for offences committed on the high seas. The first relates to piracy *iure gentium* which is subject to universal jurisdiction under both customary international law and **Art 105 LOSC**. Any ship can seize a pirate vessel on the high seas, irrespective of its flag. The second exception relates to stateless vessels on the high seas which are deemed devoid of any national protection (***United States v Marino-Garcia*** (1982)). The third concerns situations in which the flag State waives its jurisdictional entitlement and confers it upon another country by mutual agreement.

Objective and subjective territoriality

Where conduct occurs on the territory of two or more States both may claim jurisdiction on the basis of the territoriality principle. The country where the offence commenced (subjective territoriality) seems to have an equally valid claim as the country where the effects of the conduct were completed or consummated (objective territoriality). Of course, one may also view both of these forms of territorial jurisdiction as an encroachment of the other's sovereignty.

The effects doctrine

Certain States adhering to the objective territoriality principle have chosen to exercise jurisdiction not only because the unlawful conduct was completed on their territory, but (p. 78) alternatively because its effects may have materialized there. In principle, it is possible for the harmful conduct never to have been completed on the territory of country A, yet its completion elsewhere produces harmful effects upon persons and property in country A. This is known as the **effects doctrine** and the USA has employed it extensively for criminal conduct as well as for anti-competitive practices occurring wholly abroad (***USA v Aluminium Co of America*** (1945)). The extensive use of the effects doctrine has been criticized for causing political tension with countries enjoying much closer links to the

contested conduct. As a result, in more recent times the US Supreme Court has constrained the use of the effects doctrine by claiming that an anti-competitive practice committed abroad and which harmed consumers in the USA could not be used as a basis for asserting the jurisdiction of US courts in that case (***F Hoffman-La Roche Ltd v Empagran SA*** (2004)).

Exceptional territorial jurisdiction

Frequently States try to avoid assuming jurisdiction over cases that would risk over-burdening their justice systems or raise the likelihood of State responsibility and compensation. This has arisen in situations of military occupation abroad where the occupying powers argued that their domestic laws—and by extension their obligations under treaty law—were not applicable to the occupied territory. The European Court of Human Rights (ECtHR) has consistently held that an occupying power owes similar human rights obligations to an occupied population as it does to its own people and its local laws and international human rights obligations apply in full in the territory of the occupied nation. The only limitation to this rule is that the occupier must be in 'effective control' of the territory in question (***Loizidou v Turkey*** (1997)). This conclusion has been endorsed by the ECtHR in respect of the British military presence in Iraq (***Al-Saadoon and Mufdhi v UK*** (2010) as well as ***Al-Skeini and ors v UK and Al Jeddah and ors v UK*** (2011). This is despite the fact that the House of Lords had initially held a contrary view as to the extraterritorial reach of British laws (***R v the Secretary of State for Defence, ex parte Al-Skeini and ors*** (2008)). The matter is now well settled in European jurisprudence.

Revision tip

The jurisdiction of States and their attendant entitlements (legislative, judicial, and enforcement) should be distinguished from the jurisdiction of international courts and tribunals. The latter's powers are prescribed by treaty and are generally not vested with legislative powers. Among all international criminal tribunals only the ad hoc criminal tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) possess overriding enforcement powers against UN member States. On the other hand, the jurisdiction of the International Criminal Court (ICC) is generally complementary to that of its member States. This means that member nations to the ICC possess a primary entitlement over the ICC in enforcing and exercising their own jurisdiction in a particular case. The ICC's jurisdictional entitlement is therefore secondary (or complementary) to that of its member States.

(p. 79) Extraterritorial jurisdiction

Jurisdiction

This type of jurisdiction allows States to prosecute their own nationals for criminal conduct committed abroad. The application of this principle assumes that said conduct is punishable in the offender's home State, even if it does not constitute an offence in the country where the offence took place. For example, country A may prosecute its national X for having sex with children in country B, despite the fact that country B does not prosecute X. The rationale for the nationality principle has traditionally been the avoidance of impunity for crimes committed abroad in cases where the territorial State was unable or unwilling to prosecute.

Joyce v Director of Public Prosecutions [1946] AC 347

Joyce had fraudulently acquired British nationality and during World War II broadcasted pro-Nazi propaganda in Germany. The House of Lords held that despite the fraudulent acquisition of nationality he had a duty of loyalty to the Crown and was therefore liable for the crime of treason, which is enforceable against a State's own nationals.

Looking for extra marks?

Countries traditionally applying the nationality principle (typically civil law nations) have refused to extradite their own nationals. This attitude has now changed with the advent of the European arrest warrant, which obliges member States to extradite their nationals in respect of a mandatory list of offences (Council Framework Decision 2002/584/JHA [2002] L 190 OJ 1).

Passive personality jurisdiction

This type of jurisdiction is based on the nationality of the victims of extraterritorial criminal conduct and is exercisable by the victims' country of nationality. It has historically been considered the weakest of all jurisdictional principles because the claim of the territorial State is much stronger in comparison. Nonetheless, in the wake of terrorist attacks against US nationals abroad in the mid-1980s, the USA has increasingly applied passive personality jurisdiction. Its justification has been that most countries are either unable or unwilling to apprehend terrorists in respect of crimes committed on their territory. Passive personality jurisdiction is affirmed in multilateral treaties, as is the case with **Art 5(1)(c) of the 1984 UN Torture Convention**. It was also among the chief legal bases (the other being universal jurisdiction) for the Spanish extradition request to the UK for ex President Pinochet of Chile (***Pinochet Ugarte*** (1998)).

(p. 80) ***United States v Yunis (No 3)***, 681 F Supp 896 (DC, 1988)

Yunis had hijacked an airliner with American passengers and was involved in other terrorist incidents. He was lured by US secret agents onto the high seas for a supposed drugs deal but was arrested and flown to the USA to face terrorism charges. The court upheld the validity of the arrest and the jurisdiction of US courts for terrorist crimes committed abroad and directed against US nationals.

The protective principle of jurisdiction

This principle is employed to confer judicial and police powers on a State in respect of extraterritorial conduct that threatens its national security interests. The scope of this type of jurisdiction is broad and may be abused by powerful nations. There is no general consensus as to the meaning of 'national security' but it is not confined solely to violent acts, such as the bombing of embassies or the murder of government agents. US courts have naturally accepted that attacks abroad against the country's armed forces and its equipment gives rise to jurisdiction on the basis of the protective principle (***USA v Yousef*** (2003)). It may also encompass non-violent activity such as the computer hacking of government agencies and espionage (***USA v Zehe*** (1985)). Naturally, the protective principle may be at conflict with the interests and jurisdiction of the territorial State. Its employment is not usually confined to judicial and legislative types of jurisdiction but also enforcement action entailing the use of armed force. This was the case for example with the toppling of the Taliban regime in Afghanistan in response to its assistance of Al-Qaeda operations outside the USA.

Attorney-General of Israel v Eichmann, 36 ILR (1962) 5

The accused was responsible for the planning of the Jewish Holocaust by the Nazis. He was abducted by Israeli agents in Argentina and stood trial in Israel. The Israeli Supreme Court held that even though Israel was not in existence when the Holocaust took place it was in its national interests (as an extension of the interests of Jewish people) for all offenders to be prosecuted. Other jurisdiction principles were also claimed in this case.

Revision tip

Remember that jurisdiction refers to the power of the State, which takes three forms, namely legislative, judicial, and enforcement. Jurisdiction may thereafter be civil or criminal. Criminal jurisdiction is further distinguished between territorial and extraterritorial. Territorial jurisdiction can be objective or subjective, whereas its extraterritorial counterpart is based on four types, namely nationality-based, passive personality, the protective principle, and universal jurisdiction.

(p. 81) Universal jurisdiction

Unlike the other three types of extraterritorial jurisdiction, the universality principle does not require any kind of link between the offence, the offender, the victims, and the State exercising criminal jurisdiction. Universal jurisdiction is justified on two bases:

1. the universally repugnant nature of certain international crimes;
2. their location in areas beyond the territorial authority of any State, namely the high seas and outer space.

Piracy on the high seas (or *jure gentium* piracy) is subject to universal jurisdiction irrespective of the nationality of the pirate ship. However, not all universally repugnant crimes give rise to universal jurisdiction. This type of jurisdiction is conferred either by treaty or by the operation of customary law. The **Geneva Conventions** of 1949 on the laws of war subject grave breaches (ie very serious war crimes) to universal jurisdiction as does **Art 105 LOSC** with respect to piracy. Beyond these treaties there is fierce debate as to which other international crimes attract universal jurisdiction under customary law. A conservative school of thought restricts the range of offences subject to customary universal jurisdiction, whereas a more **expansive school** takes the opposite view by relying on the aforementioned ***Lotus*** case. They claim that as long as the exercise of universal jurisdiction over a particular offence is not prohibited by treaty or resisted by a large number of States, then it is legitimate. Customary universal jurisdiction is thought to encompass, at the very least, genocide, crimes against humanity, and torture. National courts keep on adding others, as is the case with aggression by the House of Lords (***Regina v Jones (Margaret)*** (2007), although in this particular case aggression was held not to have been criminalized under English law).

It is disputed whether universal jurisdiction is an obligation or simply an entitlement which a State may choose not to exercise. While there is no definitive answer to this question it is irrational to expect nations with limited finances to pursue crimes in far-away places with all the logistic and financial implications this entails (***Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [*the Kingdom of Saudi Arabia*]** (2006) per Lord Bingham, para 27).

Looking for extra marks?

The Princeton Principles of Universal Jurisdiction are an informal document adopted by leading international scholars which contains the principles and crimes subject to universal jurisdiction. This is very much in the tradition of the expansionist school.

Instances where national courts refuse to exercise their ordinary jurisdiction

A national court may well enjoy jurisdiction over a particular offence, yet may refuse to exercise jurisdiction either because the accused is covered by the privilege of immunity (p. 82) (covered in chapter 7 'Immunity'), or increasingly because his or her arrest was illegal. There are two schools of thought on this issue:

1. The rule in England and Wales is that the surrender of an accused before a court in violation of international extradition treaties and the rights of the accused, particularly by means of transnational abduction, constitutes an abuse of process. As a result, courts adhering to this rationale have refused to exercise jurisdiction until proper procedures are followed (***R v Horseferry Road Magistrate's Court, ex parte Bennett*** (1993)).
2. The US Supreme Court has taken a much different view. In a case where a Mexican national was abducted by US secret agents under charges of kidnapping and murdering a US federal agent with a view to being prosecuted in the USA, the US Supreme Court upheld the jurisdiction of American courts in cases of abduction. The court noted that while the abduction itself may have been a violation of general international law, it was not explicitly a violation of the US-Mexico Extradition treaty (***USA v Alvarez-Machain*** (1992)). This approach demonstrates an unconvincing attempt to justify the jurisdiction of US courts in cases of extraterritorial abduction.

Revision tip

There are no hard rules for settling jurisdictional conflicts. The system is largely based on comity and priority is generally granted to the country where the accused is detained. Moreover, countries with otherwise weak jurisdictional links enhance their claim where the courts of the territorial country are unable or unwilling to prosecute.

Key cases

Case	Facts	Principle
France v Turkey (Lotus case), PCIJ, Series A, No 10 (1927)	A French ship and a Turkish ship collided on the high seas, resulting in the death of the Turkish vessel's crew. The Turkish authorities proceeded to arrest the captain of the French ship and prosecuted him for manslaughter. The French authorities intervened and brought legal action against Turkey before the Permanent Court of International Justice arguing that collisions on the high seas attract flag State jurisdiction only.	The Court assimilated the Turkish ship with Turkish territory and from there it was not a far leap to claim that the offence occurred on Turkish territory. This part of the judgment is bad law given that the **LOSC** makes it clear that high seas collisions attract only flag State jurisdiction. The case is best known for the claim that States may exercise any form of jurisdiction, as long as this is not prohibited by any rule of treaty or customary international law.
(p. 83) ***USA v Yunis***, 681 F Supp 896 (1988)	Yunis, a Lebanese national, was involved in the hijacking of a Jordanian airliner, which carried among others two American nationals. US secret agents lured Yunis under the guise of a drugs deal to international waters off Cyprus and arrested him. The accused argued that the USA had for a long time resisted the	Although passive personality jurisdiction is controversial it is wholly legitimate and in any event the **Hostages Convention** encompasses it among its acceptable forms of jurisdiction. This type of jurisdiction is increasingly accepted when applied to

	application of the passive personality principle and thus claimed that its courts did not enjoy jurisdiction.	terrorist and other organized attacks on a State's nationals by reason of their nationality.
Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium, ICJ Rep (2002), p 3 (separate opinion of Judges Higgins, Koojmans and Buergenthal)	Belgium issued a law in 1993 which vested its courts with jurisdiction to entertain criminal suits on the basis of the universality principle. Consequently, a Belgian Prosecutor indicted the then incumbent Congolese foreign minister for a series of international crimes, including crimes against humanity. In response, his country lodged a suit before the International Court of Justice, arguing that the indictment violated the privilege of immunity enjoyed by foreign ministers. The validity of this argument was accepted by the Court. Universal jurisdiction was ultimately not the main issue in the case, but was discussed at length in a separate opinion to the judgment.	There is no rule of international law that prohibits the exercise of universality by national courts. There is, however, inconsistent State practice as to whether it is required that the accused be actually in the hands of the prosecuting State at the exact moment of prosecution. It is accepted that the accused need not be in the hands of the prosecuting State and his or her presence may just as well be sought by means of extradition. What is absolutely prohibited is the exercise of criminal jurisdiction on the territory of another State without its consent.
Boumediene v Bush (2008) 47 ILM 650	Following the 9/11 terrorist attacks the US government detained a large number of individuals at its naval base in Guantánamo Bay, which is situated in Cuba. The territory of the base was leased to the USA under a treaty with Cuba signed in 1903. The USA had argued that detainees at Guantánamo Bay possessed no *habeas corpus* claims before US courts on the ground that the naval base was not part of US territory and the USA did not exercise sovereignty there. The petitioner challenged this argument and the case reached the US Supreme Court.	The Supreme Court held that although Cuba possessed *de jure* sovereignty over Guantánamo Bay, the USA exercised effective sovereignty and this alone sufficed to trigger the jurisdiction of US courts. The jurisdiction of US courts is moreover strengthened by the fact that Cuban courts do not themselves possess jurisdiction.

 Key debates

Topic	**Africa's opposition to universal jurisdiction by European countries**
Author/Academic	Harmen van der Wilt
Viewpoint	The African Union has accused European States of 'legal colonialism' by making extensive use of universal jurisdiction against African nationals. They have claimed this to be abusive and in violation of African sovereignty. The counter-argument is that such jurisdiction has been assumed because African countries have failed to prosecute those responsible for heinous crimes in the continent.
Source	'Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States', 9 *Journal of International Criminal Justice* (2011) 1043
Topic	**Jurisdiction to enforce criminal laws abroad**
Author/Academic	Anthony J Colangelo
Viewpoint	The USA has gone beyond its own constitutional constraints which have long favoured the exclusive territorial competence of all States. The extension of its laws and arrest practices abroad in the absence of consent violate both domestic and international law.
Source	'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law', 48 *Harvard Journal of International Law* (2007) 12

Exam questions

Problem question

A UK national living in London fraudulently sells shares over the internet to persons in Guatemala and Aruba and subsequently flees to Aruba to escape prosecution. The UK does not have extradition arrangements with Guatemala, where the offender's conduct constitutes a criminal offence, much in the same way as in the UK. The laws in Aruba, on the other hand, only criminalize internet crime if the conduct commenced there and the UK has already entered into a bilateral extradition treaty with Aruba.

1. Critically discuss the available bases of jurisdiction open to the UK and Guatemala and advise the government of the UK how, if at all possible, it can prosecute the offender.
(p. 85) **2.** If Aruba ultimately decided to prosecute the offender itself, would he have a valid claim against the exercise of this jurisdiction?

An outline answer is included at the back of the book.

Essay question

Critically analyse the consistency of existing State practice in relation to jurisdiction based on the passive personality principle.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.

International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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7. Immunity

Chapter: (p. 86) 7. Immunity
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The examination

Questions concerning immunity may touch upon topics falling within the subject of jurisdiction, given that immunity is an exception to the ordinary jurisdiction of national courts. Questions on immunity often relate to the distinction between personal (***ratione personae***) and functional (***ratione materiae***) immunities. Another important topic is the distinction between acts described as either sovereign or public (***jure imperii***) and commercial transactions (***jure gestionis***). You may also be asked to offer a critique of immunity afforded to conduct that is of a criminal nature. The immunities afforded to international organizations may either fall under the general law of immunity or form part of questions dealing solely with international organizations.

(p. 87) Key facts

• Immunity serves to stay (or stop) the jurisdiction of national courts. It is a procedural bar to their ordinary jurisdiction, not a substantive bar. This means that it stops the courts from actually hearing the case, not that the substance of the claim is no longer valid. As a result, if and when the immunity is subsequently lifted in the future, the claim may be brought before a court once again.

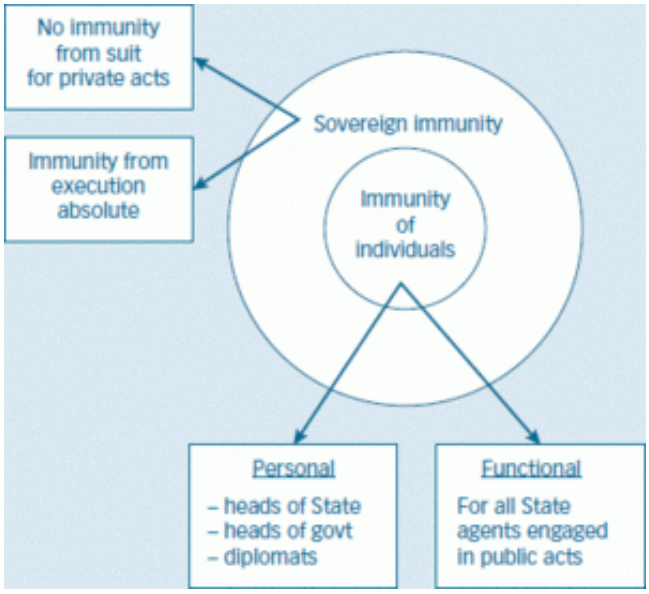
• A distinction is made between State (or sovereign) immunity and diplomatic and consular immunities. The first concerns States as such (covering both acts and persons) whereas the latter concerns the personal immunities of a State's representatives abroad.

• The international law of immunity is primarily found in customary international law in the form of domestic legislation and decisions of national courts. The International Court of Justice (ICJ) has also issued judgments that have fundamentally shaped the law in this area. There is also a small body of treaties that are largely devoted to diplomatic and consular immunities.

• Immunity from the jurisdiction of national courts should be distinguished from the ordinary jurisdiction of international courts and tribunals. The jurisdiction of international courts is derived from their statutes, not from customary international law or from treaties dealing with immunities. Therefore, immunity before international tribunals may be completely different to immunity under treaty and customary international law.

• Immunities should not be confused with amnesties. The former are afforded by the laws and courts of foreign nations, whereas amnesties are granted by the home country of the accused. Unlike immunities, amnesties constitute substantive bars to the prosecution of an accused person because amnesty laws forgive the perpetrator for the actual crime he or she committed.

(p. 88) Chapter overview



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Immunities

The meaning and purpose of immunity

Immunity is a privilege that may be enjoyed by States and their agents, whereby national courts of other nations are denied jurisdiction in respect of certain categories of law suits lodged before them. Through immunity, national courts and executive authorities can also be precluded from enforcing foreign judgments against the property of States on their territory. The purpose of immunities is to shield States and their dignitaries from legal action abroad in order to allow them to conduct their international relations unhindered. Moreover, immunity is a natural extension of the principle of sovereign equality of nations under which one sovereign cannot be tried in the courts of another (***Schooner Exchange v McFaddon*** (1812)).

Immunity is a principle derived from international law and therefore any unwillingness or failure to enforce it domestically gives rise to State responsibility. Absolute immunity grants the relevant privilege to all government

actions and agents (including commercial and private acts), whereas its restrictive counterpart restricts it solely to sovereign acts.

(p. 89) The sources of immunity

Although immunity has traditionally been regulated under customary international law, it has recently been the subject matter of two specific treaties, namely the 1972 **European Convention on State Immunity** and the 2004 **UN Convention on Jurisdictional Immunities of States and their Property**. It should be noted, however, that both of these conventions have been sparsely ratified. Moreover, the 1961 **Vienna Convention on Diplomatic Relations** deals in part with the immunities afforded to diplomatic personnel. An important aspect of the relevant law is the proliferation of domestic statutes, such as the UK's **State Immunity Act 1978** (**SIA**) and judgments delivered by national and international courts.

Sovereign or public acts

Acts of States performed in a sovereign capacity (also known as acts *jure imperii*)—as opposed to commercial activities—are immune from the jurisdiction of foreign courts. This is true even in respect of wrongful conduct attributed to State agents, as is the case with war crimes. Although the individual who committed the war crime would incur criminal liability without the privilege of immunity, the State cannot be sued for the tort (ie the damage resulting from the war crime) before a national court (***Germany v Italy*** (***Jurisdictional Immunities of the State***) (2012)). Of course, that State may be sued before an international tribunal, such as the International Court of Justice, on an inter-State basis (ie one State seeking damages from another). The judgment of the ICJ in ***Germany v Italy*** has put an end to the practice of certain courts, particularly those of Italy, to entertain law suits in tort against foreign States (***Ferrini v Germany*** (2006)). The rule is therefore that all acts performed by a State in a public capacity—including violations of the laws of war—are immune from civil suit before the courts of other nations.

Private or commercial conduct of States

It is not always easy to discern when a State is acting in a private (also known as *jure gestionis*), as opposed to a public, capacity. By way of illustration, waging war or making political decisions in the UN are clearly public acts. Equally, when a State oil corporation sells oil in international markets it is acting in a commercial capacity. However, when a State sells government bonds to finance its healthcare or education system, there is a mix of both public and private acts, making it difficult to assess which of the two is more prevalent. It is crucial to answer this question through a solid test because conduct undertaken in a private/commercial capacity is not immune from the jurisdiction of foreign courts.

There is no single test under international law for ascertaining the commercial character of an act of a State. However, it is generally accepted that the best determinants are the *nature* and *purpose* of the act. This is consistent with **Art 2(2) of the 2004 UN Jurisdictional Immunities Convention**, **Art 10** of which stipulates that commercial transactions of States are (p. 90) not immune from the jurisdiction of foreign courts. The convention mentions other activities that are equally not immune, namely: employment contracts (**Art 11**), acts causing personal injury or damage to property (**Art 12**), immovable property-related activities (**Art 13**), and certain others (**Arts 14–17**). Moreover, a State may waive its privilege to immunity where it enters into a contract with a foreign private entity and agrees that in respect of all future disputes it waives its immunity from the jurisdiction of national courts and arbitral tribunals.

The mere fact that an entity exercises a public function, such as a public airliner or a public factory, is not sufficient, per se, for it to be granted immunity under international law. It is a precondition that it must be an organ of the State and not a *separate* entity (***Pocket Kings Ltd v Safenames*** *Ltd* (2009)).

I Congreso del Partido [1981] 3 WLR 328

The Cuban government was involved in the sale and transportation of sugar through its own merchant fleet

or by chartering foreign vessels. On one occasion it withheld the sugar belonging to private merchants and they in turn brought an action before English courts which demanded the seizure of a vessel belonging to the Cuban government. The House of Lords (per Lord Wilberforce) held that Cuba had acted as owner and not as a sovereign, especially since the relevant contract was premised on Cuban law, and therefore found that it did not enjoy immunity.

Kuwait Airways Corporation v Iraqi Airways Co [1995] 1 WLR 1147

Following the invasion of Kuwait, Iraq ordered its government-run airliner, Iraqi Airways, to transport aircraft belonging to Kuwait Airways to Iraq. The House of Lords held that although the taking of the aircraft was done in time of war, which would otherwise render it a public act, in the present case it was not. This was because 'an act done by a separate entity of the State on the directions of the State does not possess the character of a government act…The mere fact that the purpose or motive of the act was to serve the purposes of the State will not be sufficient to enable the separate entity to claim immunity…'

Revision tip

The privilege of immunity from the jurisdiction of foreign courts covers all public/governmental acts of the State (based on their nature and purpose). It does not cover entities that are merely under the direction or employment of the State. Immunity does not cover those acts of the State that possess a commercial character, although in many cases it is difficult to distinguish with clarity a public from a private act.

Looking for extra marks?

The property of central banks is always immune from suits and attachment irrespective of the purpose for which it was intended to be used (***AIG Capital Partners Inc v Kazakhstan*** (2005)). This result is confirmed by **s 14(4) SIA** and **s 1611(b)(1) of the US Foreign Sovereign Immunities Act** (**FSIA**). It was **(p. 91)** more recently reiterated in ***La Générale des Carriéres v FG Hemisphere Associates*** (2012), decided by the Privy Council on appeal from the courts of Jersey.

Act of State doctrine

The **act of State** doctrine has been developed in common law jurisdictions and, unlike immunity which is a procedural bar to law suits against States, it serves as a substantive bar. This means that the existence of an alleged tort committed by a State or its agents cannot be assessed by the courts of foreign nations if it was part of a government act. This would be the case if the tort in question was incorporated in a law or a ministerial decree. The rationale for this defence is that the courts of one nation cannot sit in judgment of the public acts of other nations. This defence applies in civil suits and when the courts uphold it, it means that any further action is dependent on the wishes of the executive branch of government. In ***Underhill v Hernandez*** the US Supreme Court refused to assess the legality of the detention incurred by the plaintiff in the hands of an insurrectionist movement which was later recognized as the successor government of Venezuela (***Underhill v Hernandez*** (1897)). The doctrine requires the defendant to establish that the performed activities were undertaken on behalf of the State and not in a private capacity. In another US case the accused had used his position as former president and dictator of Venezuela to

commit financial crimes. The Fifth Circuit court rejected that these acts were attributable to Venezuela (***Jimenez v Aristeguieta*** (1962)).

The act of State doctrine does not necessarily confer immunity on the person undertaking the conduct in question. It simply serves to avoid passing judgment on the sovereign acts of foreign nations as such.

Looking for extra marks?

In early 2012 the DC District Court ruled that ordinarily the nationalization (expropriation) of a foreign enterprise by the territorial State would not give rise to a civil suit before the courts of the plaintiff (the entity whose property was nationalized) because of the operation of act of State defence. However, the case was different where the expropriation was undertaken without a law or governmental action for the benefit of the local population. In the case at hand the local government abused its position as majority shareholder, thus depriving its actions of a public character (***McKesson Corp v Islamic Republic of Iran*** (2012)).

Functional and personal immunities

So far we have looked at the immunities afforded to States or their instrumentalities, such as government departments, central banks, and government-run enterprises. All these cases concerned immunity from civil suit and attachment (of property). This section will focus on immunities afforded to natural persons exercising governmental functions and authority. **(p. 92)** While some pertain to civil suits, in many cases they also involve immunity from the criminal jurisdiction of national courts.

Personal immunities

Personal immunities (or *ratione personae*) shield a limited number of persons from the jurisdiction of foreign courts on the basis of their particular status, irrespective of whether the act which has given rise to the suit or the criminal prosecution is a governmental or a private act. Personal immunities are afforded to a very narrow list of persons, namely: heads of State, heads of government, foreign ministers, and ambassadors (or heads of diplomatic missions). Immunity *ratione personae* persists for as long as the office-holder maintains his or her status, following which the immunity is lost and the person may lawfully be sued or prosecuted. Once the person is no longer immune, he or she may be sued or prosecuted in respect of all acts done during his or her tenure in office. This type of immunity may help shield persons that have committed serious international crimes, but if the international community is willing to prosecute an accused head of State it can lawfully refer him or her to the prosecutor of the International Criminal Court (ICC). In fact, the Security Council (SC) has done exactly this in the case of the heads of State of Libya (SC Resolution 1970 (2011) and Sudan (SC Resolution 1593 (2005)).

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) (1999) 2 All ER 97

Pinochet was a former head of State of Chile who arrived in the UK for medical treatment. Spain sought his extradition on the basis of widespread crimes committed during his 20-year reign in Chile. The House of Lords held that while the immunity of a current head of State is absolute and subject to no limitations, a former head of State enjoys immunity only in respect of acts performed while in office such that could be characterized as ‘official’. Immunity for all other acts committed while in office ceases to exist.

Case Concerning the Arrest Warrant of 11 April 2000 (***Congo v Belgium***), ICJ Rep (2002), p 3

Pursuant to its universal jurisdiction law the Belgian authorities indicted the incumbent foreign minister of the Congo, alleging that he was involved in the commission of serious international crimes, including crimes against humanity. Congo rebuked the legality of the indictment, arguing that the minister enjoyed immunity. The ICJ held that incumbent foreign ministers enjoy absolute immunity under international law, this being personal rather than **(p. 93)** functional immunity. This implies that the nature of the contested act as official or private is irrelevant.

Functional immunity

All acts of the State are afforded immunity from the jurisdiction of foreign courts but only if they constitute governmental or official acts. Because States perform acts through their agents (ie the military, security forces, government employees, etc) the immunity covering said acts incidentally also covers the persons performing them. That is why this type of immunity is called functional—because its purpose is to provide immunity to the act/function, rather than the individual behind the act. As a result, even if the individual is removed from office, the immunity of the act itself persists.

It is not true that all acts performed by agents of the State constitute official acts. The House of Lords in the ***Pinochet (No 3)*** case observed that the **UN Torture Convention** could not have possibly afforded immunity to those accused of the offence. This is because the definition of torture in the convention requires that the perpetrator be a State agent, in which case all acts of torture would be immune, a result which would be contrary to the elaborate 'prosecute or extradite' structure of the convention. Despite some judgments to the contrary on the basis of the US **Aliens Tort Claims Act**, it is generally admitted that functional immunity shields States and their agents from the civil jurisdiction of foreign courts, even if the act complained of is an international crime (***Bouzari v Islamic Republic of Iran*** (2004)).

Al-Adsani v United Kingdom (2001) 34 EHRR 273

The plaintiff was tortured in Kuwait by agents of that country. He subsequently went on to sue them in tort in the UK but his suit was turned down because the defendants were found to enjoy immunity as agents of Kuwait. The plaintiff applied to the European Court of Human Rights (ECtHR), arguing that the privilege of immunity deprived him of the right to a fair trial. The ECtHR, with a thin majority, held that immunity, being a principle of international law, was not in conflict with the right to a fair trial, in particular the right to judicial remedies. The two principles were not in conflict because they were found to service different objectives. Essentially, the operation of immunity in a particular case does not disproportionately affect the other party's human rights.

Revision tip

Immunities essentially belong to the State as such, but the effect and the privilege afforded by an immunity encompasses a State's property as well as the person of its agents. In the case of civil suits the conferral of immunity will depend on the nature of the conduct as private/commercial or public/sovereign. In respect of

criminal suits (or prosecution) the culprit will be covered by immunity whether by virtue of his or her status (*ratione personae*) or by the sovereign function of the contested conduct (*ratione materiae*).

(p. 94) Diplomatic and consular immunities

Diplomatic immunities

The privileges and immunities of diplomatic personnel are explicitly provided in the 1961 **Convention on Diplomatic Relations**. Their nature may be considered similar to immunity *ratione personae*, given that they shield diplomatic agents from all possible action that can be undertaken by the receiving State. The basic rule is that the person of the diplomatic agent is inviolable (**Art 29**) and moreover that the premises, archives, and correspondence of the mission are equally inviolable. The receiving State is under an obligation to protect the agents, the premises, archives, and correspondence (**Arts 22, 24, 27**). Although in no case do the courts of the receiving State enjoy criminal jurisdiction over diplomatic agents, said courts may assume civil jurisdiction in three situations: law suits relating to immovable property in the receiving State; legal action relating to succession which is of a private nature; and legal action relating to any professional or commercial activity undertaken by a diplomatic agent outside of his or her official functions (**Art 31**). In case a diplomatic agent is thought by the receiving State to have violated its laws or prejudiced its public order, it can dismiss him from its territory without any justification as ***persona non grata*** (literally as a non-welcome person) (**Art 9**).

US Diplomatic and Consular Staff in Iran (USA v Islamic Republic of Iran), ICJ Rep (1980), p 3

In 1979 Iranian students seized the US embassy in Tehran, under the direction, or at least the tacit consent, of the then new Iranian government. A number of US diplomatic agents were held for well over a year. Iran argued that this was a spontaneous reaction by the people and that in any event US diplomatic staff had abused their position in the country by consciously suppressing the people's will and collaborating with the previous regime. The ICJ held that even if this were indeed so, Iran could have expelled such persons from its territory. Moreover, it emphasized that the protection of diplomatic premises and the inviolability of the person of diplomats is a concrete obligation of the receiving State.

Consular immunities

Consular agents, who as a rule perform purely administrative functions, do not enjoy immunity *ratione personae* as is the case with their diplomatic counterparts. Under **Art 41 of the 1963 Vienna Convention on Consular Relations** consular agents do not enjoy absolute immunity from the criminal jurisdiction of the receiving State, since in cases of 'grave crimes' (p. 95) they are susceptible to arrest and other judicial proceedings. Nonetheless, under **Art 43** of this convention they are entitled to immunity in respect of acts performed in the exercise of consular functions.

Immunities of international organizations

International organizations possess international legal personality and their charter or constituent instrument, which is a treaty, will spell out the range of privileges and immunities afforded to each of them. These will bind member States of said organizations. Moreover, international organizations will enter into headquarters agreements, which too are treaties, with the countries where they are located, which contain immunities provisions. Finally, most States have enacted legislation concerning the legal status of international organizations active on their territory, which too contain immunity privileges. In addition, the 1946 **Convention on the Privileges and Immunities of the United**

Nations provides extensive immunities from civil and criminal jurisdiction to the staff of the UN.

The law in this area is rather complex. Italian courts, for example, have considered that matters relating to rents and immovable property undertaken by international organizations should be treated as commercial acts that do not attract immunity (***Food and Agriculture Organisation v INPDAI*** (1995)). The Italian government later ratified the 1947 **Convention on the Privileges and Immunities of Specialised Agencies** and dismissed the distinction between public and private acts by providing immunity to all. It is generally agreed that national courts have no authority to inquire whether a particular immunity is functional in order to assess whether the function for which it was granted has been abused or overridden (***Manderlier v UN and Belgium*** (1969)). Nonetheless, some national courts occasionally differ by arguing that only official acts of the staff of international organizations attract immunity, not private ones. In one case this distinction was used to refuse immunity to an official involved in a bribe (***Arab Monetary Fund v Hashim (No 4)*** (1996)).

In ***Saramati v France and ors*** (2007), the applicants claimed that the failure of **European Convention on Human Rights** (**ECHR**) member States participating in a UN **Chapter VII** operation to defuse cluster bombs which killed one child in Kosovo violated the right to life of the victim. The ECtHR held that the relevant acts were attributable to the UN and not to the participating States individually and concluded that States contributing troops to UN missions cannot be held responsible for their acts and omissions.

Looking for extra marks?

Much like the *Al-Adsani* judgment, the ECtHR has accepted that the immunities afforded to international organizations may constitute a proportionate measure to restrict the application of the right of access to court, guaranteed under **Art 6 ECHR** (***Waite and Kennedy v Germany*** (2000)).

(p. 96) Key cases

Case	Facts	Principles
Jones v Ministry of Interior of the Kingdom of Saudi Arabia [2006] 2 WLR 1424	Several British nationals working in Saudi Arabia were tortured by the Saudi police, which believed they were involved in a bombing incident. The plaintiff Jones undertook legal action in the UK against both the Saudi Interior Ministry and the officer responsible for his torture. The action was civil in nature and no criminal prosecution was pursued.	The judgment by the House of Lords has been criticized as being very conservative. It held that as regrettable as the conduct of the Saudi agents was, both the State and its agents continued to enjoy immunity in the UK, particularly since said conduct did not trigger any of the exceptions to immunity found in the UK's **Sovereign Immunities Act**. In line with the *Al-Adsani* judgment, the conferral of immunity under international law was found not to be disproportionate with the denial of the right to legal remedies which the accused would have otherwise enjoyed.
Germany v Italy (Jurisdictional Immunities of the State), ICJ Judgment of 3 February 2012	Italian courts had begun entertaining civil suits against Germany for crimes committed by members of its armed forces during World War II, as well as enforcing judgments of a similar nature issued by the courts of Greece. Italian courts accepted that Germany did not enjoy immunity from jurisdiction and attachment in respect of its assets in Italy. Interestingly, the Italian government disagreed with the view that Germany did not possess immunity but could not interfere in the judicial sphere. The ICJ was asked to assess whether States enjoyed immunity from jurisdiction and enforcement in respect of criminal conduct attributed to their agents.	The ICJ held that there is no conflict between *jus cogens* rules and the principle of sovereign immunity. The latter is a procedural rule which does not extinguish the peremptory nature of the violated entitlement (ie the fact that immunity from civil suit persists does not mean that the underlying offences are extinguished). States enjoy immunity from the jurisdiction of the courts of other nations even in respect of serious offences. Moreover, **immunity from enforcement** against their assets is much broader because even if a State waives its immunity from jurisdiction it does not also waive its immunity from enforcement. Italian courts were wrong to enforce Greek judgments against German assets in Italy.

(p. 97) Key debates

Topic	**Should immunity trump the right of access to judicial remedies?**
Author/Academic	Emmanuel Voyakis
Viewpoint	Starting with the *Al-Adsani* case it was held that the privilege of immunity is not in conflict with human rights, particularly the right relating to one's access to judicial remedies. While in principle this is correct, many academic scholars argue that both the ECtHR and higher national courts, such as the House of Lords in *Jones v Saudi Arabia*, have missed golden opportunities to limit the ambit of immunities in respect of serious international crimes.
Source	'Access to Court v State Immunity', 52 *International & Comparative Law Quarterly* (2003) 279
Topic	**Are immunities from national jurisdiction applicable to violations of *jus cogens* norms?**
Author/ Academic	Dapo Akande and Sangeeta Shah
Viewpoint	There exists a debate in the wider academic community between those who disfavour the application of the privilege of immunity to persons that have violated *jus cogens* norms and those who share the belief that despite the heinous nature of certain crimes, those who committed them continue to enjoy the immunities available under international law. The authors of this article share the latter view.
Source	'Immunities of State Officials, International Crimes and Foreign Domestic Courts', 22 *European Journal of International Law* (2011) 857

Exam questions

Problem question

The serving president of country X visits country Y for an official two-day visit. He is notorious worldwide for having committed gross human rights violations against his own people. During his stay he gets ill and remains in a private hospital to recover, following which he takes a few days off work for his own leisure. The public prosecutor of country Y decides to bring criminal proceedings against the president by arguing that:

1. His immunity is no longer in operation because his official visit has expired and is now in country Y on private business.
(p. 98) **2.** In any event, the crimes committed by the president are the worst possible offences, namely genocide and crimes against humanity and therefore whatever immunity he might otherwise enjoy, it does not shield him from these offences because these crimes do not constitute public acts.
3. Country Y enjoys universal jurisdiction over these offences (irrespective of whether the president also enjoys immunity in the present instance).
4. The prosecutor declares that if the courts of his country are precluded by the operation of immunity, then the president's country may waive his immunity.

Which of these arguments is correct and why?

An outline answer is included at the back of the book.

Essay question

Are former heads of State entitled to immunity under international law for criminal conduct committed while in office? If so, what kind of immunity is this and is it only available to former Heads or also to other State agents?

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.

International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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8. Law of the sea

Chapter: (p. 99) 8. Law of the sea
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The examination

Typically, exam questions in this field concern jurisdiction of coastal or flag States as well as the delimitation of maritime areas. They usually avoid theoretical issues involving the history of the evolution of the law of the sea. Common questions involve the right of port States to inspect and arrest foreign vessels and their crew members, as well as the right of coastal States to suppress or prevent infringements of their laws and regulations within their coastal zones. They may also involve questions on the sovereign rights of coastal States to explore and exploit natural resources on their continental shelves or within their **exclusive economic zones** (EEZs). Equally, questions about interdiction of vessels on the high seas are frequent, particularly in respect of piracy or armed robbery, for example off the coast of Somalia. In addition, the basic rules of maritime delimitation may be the theme of an examination.

(p. 100) Key facts

• The key treaty on the law of the sea is the **UN Convention on the Law of the Sea** (**LOSC**, 1982). **LOSC** largely reflects customary international law.

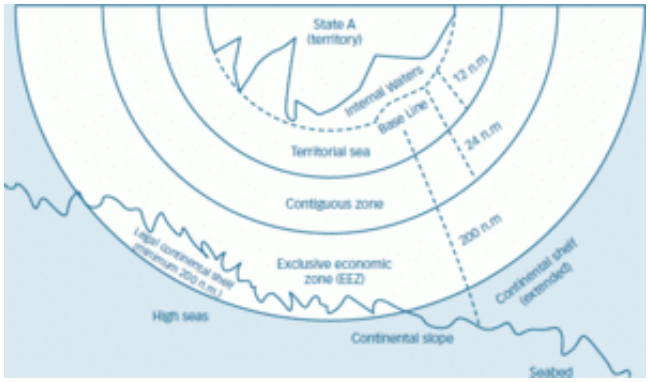
• The regulation of the oceans reflects a compromise between, on the one hand, exclusive claims to maritime dominion on the part of coastal States and, on the other, inclusive claims to the reasonable use of the oceans on the part of the international community as a whole.

• The history of the law of the sea has been marked by the doctrinal controversy and the tensions between the two divergent regimes of *mare clausum*, namely the idea of maritime dominion, and *mare liberum*, ie the freedom of the seas.

• The legal order of the oceans ascribes jurisdictional competences between coastal States and flag States. The countries where vessels are registered (flag States) possess a significant amount of competence over these and their crew in all maritime belts. Likewise, countries with maritime territory (coastal States) possess significant competences of regulation and enforcement therein.

• Coastal States enjoy broad competences in certain maritime belts (namely internal and territorial waters), which is expressed with the term *sovereignty*. In other maritime belts (namely contiguous zone, EEZ) and the continental shelf they enjoy limited competences. These are denoted with the term *sovereign rights*.

 Chapter overview



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Maritime zones and the law of the sea

Determining baselines for maritime zones

The law of the sea fragments the sea into a series of zones in which States enjoy sovereign rights or jurisdictional competences. Instrumental to the establishment of such zones is the determination of **baselines**, which constitute the starting point for measuring the breadth of each zone. Anything landward of these baselines, such as harbours, river mouths or bays, are designated as 'internal waters', and are fully subject to the sovereignty of the coastal State. On the other hand, all water seaward of the baselines are subject to the sovereignty of the coastal State, namely the territorial sea, or are otherwise encompassed under its sovereign rights or jurisdiction, ie contiguous zone, continental shelf and EEZ. The construction of baselines is thus very important and a number of detailed rules are specified in the 1982 **LOSC**.

It should be stressed that maritime zones are available to land territory proper, in addition to islands. Exceptionally, under **Art 121(3) LOSC**: 'Rocks which cannot sustain human habitation or economic life of their own have no Exclusive Economic Zone or continental shelf.'

 Looking for extra marks?

Neither the term ‘rock’ nor ‘economic life’ are expressly defined. Nonetheless, according to **Art 121 LOSC** the only geographical criterion for the designation of an island as such is that it must be ‘a naturally formed area of land, surrounded by water which is above water at high tide’.

Normal and straight baselines

Normal baselines do not start from the beach, but from the low-water lines as depicted in official charts (**Art 5 LOSC**). Such baselines are easy to draw when the coastline is relatively straight; however when coastlines are not straight or where there is a fringe of islands in the vicinity of the mainland coast, normal baselines are avoided. State practice has come up with a different method, ie the drawing of straight baselines. This method consists of drawing a series of artificial straight lines linking the outermost points of rocks, islands and indents; otherwise the drawing of normal baselines would be confusing and unnecessarily complex. Norway was the first to adopt and claim straight baselines in order to delimit its territorial sea. The UK challenged this claim in the ***Anglo-Norwegian Fisheries case (UK v Norway)*** (1951), but the International Court of Justice (ICJ) held that because of the inconvenience in drawing normal baseline in such geographically complicated circumstances it was legitimate to draw straight baselines. **LOSC** stipulates that straight baselines may be drawn if a coastline is deeply indented or if there is a fringe of islands along the coast in its immediate vicinity (**Art 7**).

In order to avoid manipulation by coastal States, straight baselines ‘must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters’ (**Art 7, para 4**).

Archipelagoes

Archipelagic States, ie States ‘constituted wholly by one or more archipelagoes’ and other islands (**Art 46 LOSC**) may draw straight baselines. An ‘archipelago’ is ‘a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such’. Under this definition, States such as Indonesia, Philippines, Fiji, but also the UK or Japan qualify as ‘archipelagic States’. Archipelagic baselines, however, must meet several strict criteria, namely: that they must link the main islands of the group; the ratio of the area of the water to the area of the land must be between 1:1 and 9:1; and their length should not exceed 100 nautical miles. Accordingly, while Fiji and the Philippines may validly draw baselines, Japan and the UK cannot, since the area of the land is more than the area of the surrounding waters. The waters within archipelagic baselines are ‘archipelagic waters’ and are subject to special rules concerning, among others, navigation and fishing (**Arts 49–53 LOSC**).

Revision tip

The drawing of baselines is of paramount importance because they constitute the starting point for measuring the breadth of all maritime zones. There are two major types of baselines, namely normal and straight baselines. Whichever method is employed, the validity of a baseline and consequently the breadth of a maritime zone is contingent upon its consistency with international law (***Anglo-Norwegian Fisheries case (UK v Norway)*** (1951)).

Sovereignty at sea: areas in which coastal States exercise sovereignty

Internal waters

Internal waters comprise waters situated landward (direction-wise) from the baselines, typically encompassing ports,

bays, and rivers. States enjoy exclusive sovereignty in their internal waters. This means that no State is obliged to allow foreign vessels into its internal waters and especially its ports, except in cases of distress or where this is provided for in a bilateral or multilateral treaty. Otherwise, coastal States are free to impose whatever conditions they wish upon entry into territorial waters and especially their ports.

Once a foreign vessel has entered internal waters it is subject to the domestic legislation of the coastal State, which can, in principle, take enforcement action against delinquent vessels and even prevent them from leaving port. The exercise of 'port State jurisdiction' is common in respect of vessels breaching health and safety regulations or causing pollution outside the territorial sea of the State concerned. Port States generally do not enforce their criminal jurisdiction over crimes that do not infringe their customs laws or disrupt peace and public order. Thus, incidents that pertain to the 'internal economy' of the foreign vessel will usually not be subject to the jurisdiction of the port State, unless the master of the vessel or the port consul request intervention.

Territorial sea

The first maritime zone seaward (direction-wise) of the baselines is the territorial sea (or waters), which is subject to the sovereignty of the coastal State. **Article 3 LOSC** recognizes the right to establish a territorial sea of up to 12 nautical miles. The sovereignty of the coastal State extends also to the airspace above the territorial sea, in addition to its seabed and subsoil.

The coastal State exercises sovereignty over its territorial waters, subject, however, to certain restrictions, particularly the right of innocent passage (***Corfu Channel case (UK v Albania)*** (1949)). Ships of all States enjoy a right of 'innocent passage' through the territorial seas of coastal States. A vessel's passage is considered 'innocent' where it is not prejudicial to the peace, good order or security of the coastal State (**Art 19(1) LOSC**). **LOSC** includes a **(p. 104)** long list of activities and circumstances whereby innocence is deemed lost, such as fishing, serious pollution, research, etc. If a foreign vessel engages in such activities the coastal State may request its departure from the territorial sea, in addition to exercising enforcement jurisdiction in accordance with **Art 27 LOSC**. Coastal States may enact legislation only for the range of matters stipulated in **Art 21 LOSC**. This includes, among others, the safety of navigation, conservation of living resources, and violations of customs or immigration laws. In any case, the coastal State may 'suspend temporarily' innocent passage in specified areas only if this is 'essential for the protection of its security' and as long as this is duly publicized (**Art 25(3) LOSC**).

Straits

Less power to exert authority and jurisdiction is granted to the coastal State with respect to narrow straits wholly comprised of territorial seas but linking one part of the high seas with another and used for international navigation, such as the straits of Dover, Gibraltar, and Hormuz.

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania), Judgment (Merits), ICJ Rep (1949), p 1

A British vessel passing through the Corfu Channel and the territorial sea of Albania was hit by mines and sunk. British warships subsequently removed the mines to facilitate international navigation. The UK protested that innocent passage through straits is recognized by international law, whereas the Albanian government contended that foreign warships and merchant vessels had no right to pass through Albanian territorial waters without prior authorization. The ICJ held that warships were entitled to exercise a right of innocent passage through straits used for international navigation and that coastal States are not entitled to suspend innocent passage within such straits for any ship.

Transit passage

Under **LOSC**, the regime of 'non-suspendable innocent passage' through straits is supplemented by another entitlement, ie the right of transit passage. This reflects a compromise between States wishing to extend the breadth of their territorial sea from 3 to 12 miles and the desire of major maritime powers to allow their nuclear submarines to transit below the surface of such strategic waterways. The right of transit passage applies only to Straits connecting high seas or EEZs with other areas of high seas or EEZs and as long as these are used for international navigation. There are also straits covered by particular treaty regimes (eg the Dardanelles). The main difference between the regime of innocent passage and the right of transit passage is that under the latter aircraft are accorded the right of over-flight, whereas submarines may only proceed submerged.

(p. 105) Looking for extra marks?

The most controversial aspect of innocent passage is whether it may be exercised by warships, given that their passage is ordinarily 'non-innocent'. The matter is not directly dealt under **LOSC** and State practice is inconclusive. Major maritime powers have generally favoured the enjoyment of innocent passage by warships. In 1989 the USA and former USSR signed a joint statement supporting this position. Less powerful coastal States usually require prior notification or authorization.

Maritime zones in which coastal States exercise certain sovereign rights

Contiguous zone

It has been long accepted that coastal States may exercise certain police powers outside their territorial waters in relation to offences already committed, or in the process of being committed, there. Under **Art 33 LOSC**, the coastal State is permitted to prevent and punish infringements of customs, fiscal, immigration, or sanitary laws up to 24 miles from its baselines. This coastal belt is known as the contiguous zone.

Continental shelf

Although not accepted by all States, **Art 76 LOSC** stipulates that the continental shelf extends to: (a) 200 miles from the baselines or (b) to the outer edge of the continental margin, whichever of the two is further. The outer lines based on the latter option cannot be drawn more than 350 miles from the baselines or more than 100 miles from a point at which the depth of the water is 2,500 metres.

Following relevant State practice and the work of the ILC, the 1958 **Geneva Convention on the Continental Shelf** stipulated that 'the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources' (**Art 2(1)**). As was later accepted by the ICJ in the ***North Sea Continental Shelf cases*** (1969), this provision reflects customary law and these rights exist independently of an express act or declaration. This was reiterated in **Art 77 LOSC**. Natural resources include both mineral and other non-living resources of the seabed and subsoil as well as sedentary species (**Art 77, para 4**).

Exclusive economic zone (EEZ)

Following State practice and ICJ decisions in the ***Fisheries Jurisdiction cases (Federal Republic of Germany/Iceland)*** (1974)) and the ***Libya v Malta Continental Shelf case (Libyan Arab Jamahiriya/Malta)*** (1985), as later codified in **Art 57 LOSC**, States may claim an EEZ **(p. 106)** up to 200 miles (**Art 57 LOSC**). There, first and foremost, coastal States exercise sovereign rights for the purposes of 'exploring and exploiting, conserving and managing' both its living and non-living resources (**Art 56**). Such exploitation includes also the harnessing of wind and wave power. In addition, coastal States enjoy jurisdiction over the establishment and use of artificial islands and installations, marine scientific research, and the preservation of the marine environment in the EEZ (**Art 56(b) and (c) LOSC**).

As to the juridical nature of the EEZ, it is cited as a *sui generis* zone, ie a zone subject to a distinct jurisdictional

framework and comprised of neither territorial seas nor high seas. Thus, **Art 58 LOSC** provides that three of the freedoms of the high seas—ie navigation, over-flight, and the laying of cables and pipelines—are exercisable by all States within the EEZ in accordance with the general framework governing the high seas. On the other hand, jurisdiction over the resources of the EEZ's seabed and subsoil are exercisable subject to the relevant provisions governing the continental shelf (**Art 56(3) LOSC**).

The major differences between the EEZ and the continental shelf are: (a) sovereign rights over the shelf are automatic (both *ab initio* and *ipso facto*), whereas the sovereign rights available in the EEZ require an express proclamation by the coastal State; and (b) the continental shelf may extend further than the EEZ, which is limited to 200 miles from the baselines.

In respect of fisheries jurisdiction, it is noted that coastal States enjoy broad legislative jurisdiction. They may adopt measures including 'boarding, inspection, arrest and judicial proceedings' that are necessary to enforce laws and regulations concerning the living resources of the EEZ. Nonetheless, the coastal State does not enjoy an unrestricted right to exploit the fisheries resources of the EEZ. Under **Art 61 LOSC**, where the harvestable capacity falls short of the 'total allowable catch', the coastal State is to give other States access to that surplus with priority to be given to developing and land-locked States.

Looking for extra marks?

Although **LOSC** confers enforcement jurisdiction to the coastal State over illegal fishing within its EEZ, it also demands that vessels or crew arrested 'shall be promptly released upon the posting of reasonable bond or other securities' (**Art 73**). In addition, the International Tribunal on the Law of the Sea (ITLOS) enjoys automatic jurisdiction over claims concerning the prompt release of vessels and this has so far been the main judicial activity of the tribunal (***Saint Vincent and the Grenadines v Guinea (The M/V Saiga)*** (1998)).

Areas beyond national jurisdiction

The high seas

Both the 1958 **Geneva Convention on the High Seas** and **LOSC** proclaim the high seas to be free and open to vessels of all States, all of which have a range of non-exhaustible freedoms. **(p. 107)** Under the **LOSC** these are: navigation, fishing, over-flight, the laying of cables and the construction of artificial islands and other installations, and marine scientific research. All are to be enjoyed with 'due regard' to the interests of other States (**Art 87**).

The essential idea underlying the principle of freedom of the high seas is the peacetime prohibition of interference by the ships of one nation against those of another. This prohibition has given rise to the principle of exclusivity of flag State jurisdiction, namely that ships on the high seas are, as a general rule, subject to the exclusive jurisdiction and authority of the State whose flag they lawfully fly.

Central to the application of the principle of exclusivity of flag State jurisdiction is the notion of 'nationality of vessels'. Under the law of the sea and in particular **LOSC**: 'every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag' (**Art 91**). Ships have the nationality of the State whose flag they are entitled to fly. Should a vessel be stateless or fly more than one flag, then, according to one view, any State can exercise jurisdiction over it (***Molvan v Attorney General for Palestine*** (1948)). States are free to set their own conditions for registering ships, while attempts to import the requirement of a 'genuine link' have not been successful and the problem of vessels being registered under 'flags of convenience', which exercises little control over their activities, looms large.

Exceptions to flag State jurisdiction on the high seas

The principle of exclusivity of flag State jurisdiction is not an absolute rule from which no derogation is permitted. On the contrary, international law has recognized certain instances where interference is permissible. Piracy, slave

trade, and illegal fishing are examples involving the right to visit foreign vessels on the high seas in peacetime. It is undisputed that belligerent States may exercise this right against enemy and neutral merchant vessels in wartime.

Under **Art 110 LOSC**, the right of visit is accorded to warships only against those vessels on the high seas reasonably suspected of having engaged in certain proscribed activities. These activities include: (a) piracy, (b) slave trade, (c) unauthorized broadcasting, (d) absence of nationality, or (e) though flying a foreign flag or refusing to show its flag, the ship is in reality of the same nationality as the warship. It is true that not all of the above circumstances are relevant in the contemporary era; for example, both 'unauthorized broadcasting' and 'slave trade' are seldom, if at all, carried out, whereas, 'piracy', which was almost obsolete, has attained greater prominence lately. Furthermore, by virtue of **Art 110(1)**, other forms of interference can by conferred by treaty on a variety of subjects. It is now commonplace for bilateral and multilateral agreements to confer rights of visit in respect of illegal immigration, drug trafficking, maritime terrorism and the interdiction of Weapons of Mass Destruction.

(p. 108) **Piracy**

As regards piracy, it is defined in **Art 101 LOSC** as 'any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft'. The constituent elements of piracy *jure gentium* are, accordingly, the following: (a) the most salient and controversial requirement is that acts must be committed for 'private ends', as opposed to 'public ends'; (b) the two-ship requirement, which entails that situations in which only one vessel is involved, such as the crew seizure or passenger takeover of their own vessel, are explicitly excluded from the definition of international sea piracy; (c) piracy *jure gentium* should take place on the high seas or in the EEZ. Under **LOSC** and customary international law every State may seize a pirate ship or aircraft and accordingly arrest the pirates and seize the property on board. This is tantamount to universal jurisdiction (**Art 105 LOSC**).

Looking for extra marks?

In recent years, there has been an unprecedented growth of piratical attacks in Africa, in particular off the coast of Somalia and the West Indian Ocean. NATO and the EU have launched maritime operations to protect international shipping from such attacks and the UN Security Council has adopted a series of resolutions under **Chapter VII**, starting from 1816/2008, authorizing the entry into the territorial waters or even into the mainland of Somalia for the purpose of arresting the suspect pirates. The problem with Somalia is, first, that under international law the pursuit of a pirate suspect into a State's territorial waters is not permitted, yet many attacks are launched from Somali waters and thus do not qualify as piracy but 'armed robbery at sea'. Secondly, States are extremely reticent to exercise their universal jurisdiction pursuant to **Art 105 LOSC**.

Revision tip

On the high seas, the principle of exclusive jurisdiction of the flag State is paramount. Thus, interference with the vessels of other States is prohibited, save for a sound legal basis under treaty or customary law. The most common customary legal bases are statelessness and piracy, but there are many bilateral and multilateral agreements conferring the right of visit in respect of illegal fishing, smuggling of migrants, drug trafficking, etc.

Looking for extra marks?

Even if States are granted the right to board a suspect foreign vessel on the high seas, this does not automatically mean that they have the power to exercise enforcement jurisdiction over the suspects. They must

have enacted prior domestic legislation and the flag State must consent to it. In ***Medvedyev v France***, the Grand Chamber of the European Court of Human Rights found a violation (p. 109) of the right to liberty of the crew members of a drug-trafficking vessel arrested on the high seas (**Art 5 of the European Convention on Human Rights**). This was because France had not proscribed drug trafficking on the high seas in a precise and foreseeable manner in its domestic legislation. According to the Court's case law, any deprivation of liberty should be pursuant to sufficiently precise and foreseeable laws, which had been the problem in the present case (***Medvedyev and ors v France*** (2010)).

Delimitation of opposing maritime zones

The most controversial question in international theory and practice of the law of the sea has been the delimitation of maritime zones between opposite or adjacent States. It is often impossible for States to extend their jurisdiction as far seawards as international law permits, due to geographical constraints and overlapping claims of other neighboring States. For example, in the Mediterranean Sea no State can claim an EEZ of 200 miles. The problem of delimitation is therefore vexing and has given rise to more cases before the ICJ and other tribunals than any other single subject. As a result, delimitation law is mostly judge-made law, rather than treaty law.

The *equidistance* principle, ie the median or equidistance line between opposite or adjacent coastlines, is among the cornerstones of delimitation law. This is also true of *equity*, namely the idea that delimitation must always achieve an equitable solution. Equidistance has attained greater prominence in the last 20 years, but there are still remnants of equity in both treaty and customary law. All the cases submitted to adjudication or arbitration generally concern the delimitation of EEZs or continental shelves rather than territorial seas. Nevertheless, following the ***Gulf of Maine case*** (1984), the ICJ and arbitral tribunals always draw a single maritime boundary and do not distinguish between EEZs and territorial seas. A significant issue concerns the base points or baselines from which the areas under delimitation are to be measured. In determining these, account is taken of the existence and influence of islands or rocks and the configuration of the particular coastlines. Last but not least, it must be borne in mind that every delimitation case is unique and thus inevitably the delimitation will be unique.

Treaty law

In respect of the delimitation of the territorial sea, **Art 15 LOSC** provides that, in the absence of agreement to the contrary, States may not extend their territorial seas beyond the median or equidistance line, unless there are historic or other 'special' circumstances that dictate otherwise.

Article 6 of the 1958 Geneva Convention on the Continental Shelf adopted the same approach to the delimitation of overlapping continental shelves, but its customary status was not confirmed by the ICJ.

(p. 110) The delimitation process

In the aftermath of the adoption of **LOSC**, and mainly in the ***Jan Mayen case*** (1993), there was a shift in international jurisprudence in favour of the equidistance approach, which has been subsequently confirmed by many judgments and awards. The ICJ now applies the following method: first, it identifies the relevant base points and baselines, as well as the exact area to be delimited; secondly, it examines the existence of any pertinent prior agreement between the disputing; thirdly, it proceeds with a three-stage approach by (i) drawing a provisional equidistance line, (ii) conducting an examination as to whether the line should be adjusted by taking relevant circumstances into account, and (iii) applying the (dis)proportionality test in order to achieve an equitable result. The purpose of this test is to ensure that the areas appertaining to each State are not disproportionate to the ratio between the lengths of their relevant coasts adjoining the area.

Key cases

Case	Facts	Principles
North Sea Continental Shelf Case (Germany v Denmark/The Netherlands), ICJ Rep (1969), p 1	The dispute related to the delimitation of the continental shelf between the Federal Republic of Germany (FRG) and Denmark on the one hand, and between FRG and the Netherlands on the other. The parties asked the Court to state the applicable delimitation principles and rules of international law.	The Court determined that were the rule enshrined in **Art 6 of the 1958 Geneva Convention on the Continental Shelf** to be applied mechanically to the concave German coastline, it would restrict Germany to a modest triangle of the continental shelf to the substantial benefit of its neighbours. It thus rejected the rule of **Art 6** and found that the boundary lines in question were to be drawn by agreement between the parties and in accordance with equitable principles. It indicated certain factors to be taken into consideration for that purpose. It was for the parties to negotiate on the basis of such principles, as indeed they did.
Maritime Delimitation in the Area between Greenland and Jan Majen (Denmark/Norway) (Jan Mayen case), ICJ Rep (1993), p 316	Denmark asked the ICJ to determine the drawing of a single line of delimitation between Danish and Norwegian fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen.	The Court held for the first time that '*prima facie* a median line-delimitation between opposite coasts results in an equitable solution'. The difference between the relevant coastlines was also taken into account in the present case, while the island of Jan Mayen, even though not permanently inhabited, was considered an island as opposed to a 'rock' (see **Art 121(3) LOSC)**.
(p. 111) ***Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)***, ICJ Rep (2007), p 659	Nicaragua filed an application instituting proceedings against Honduras in respect of a dispute relating to the delimitation of the maritime areas appertaining to each of those States in the Caribbean Sea.	In this very exceptional case the ICJ emphasized that equidistance remained the general rule. It held, however, that both the configuration and unstable nature of the relevant coastal area made it impossible to identify base points and construct a provisional equidistance line at all. This amounted to a special circumstance justifying the use of an alternative method, namely the use of a line that bisected two lines drawn along the coastal fronts of the two States.

Key debates

Topic	**Novel threats to maritime security and the law of the sea**
Author/Academic	Natalie Klein
Viewpoint	Whereas the protection of sovereignty and national interests remain fundamental to maritime security and the law of the sea, there is increasing acceptance of a common interest to respond to modern maritime security threats. It is argued that security interests should be given greater scope in our understanding of the law of the sea in light of the changing dynamics of exclusive and inclusive claims to ocean use. More flexibility may be required in the interpretation and application of **LOSC** if appropriate responses to ensure maritime security are to be allowed.
Source	*Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011)
Topic	**The governance of areas beyond national jurisdiction**
Author/Academic	R Rayfuse and R Warner
Viewpoint	A global approach to further developing the high seas regime on the basis of an oceanic trust beyond national jurisdiction could foster environmentally responsible use of the high seas and its resources and ensure the application of modern conservation principles and management tools. In view of escalating threats to the oceans from existing and emerging uses and from the impacts of climate change, transformation to a legal regime better suited to integrated management and preservation of vital ocean ecosystem services and resilience may be a necessity.
Source	'Securing a Sustainable Future for the Oceans beyond National Jurisdiction', 23 *International Journal of Marine and Coastal Law* (2008) 399

(p. 112) Exam questions

Problem question

MV So San, a freighter flying the flag of Panama, is suspected of drug trafficking. While sailing on the high seas it is approached by a UK warship with information that the *MV So San* carries more than 100kg of cocaine.

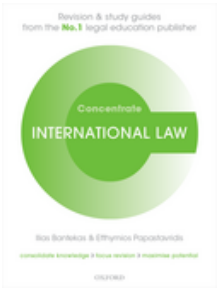
1. Does the UK have a right to halt, board, and search the vessel? On what legal basis can UK exercise the right of visit?
2. Does the UK have a right to exercise enforcement jurisdiction over the alleged crime and seize the vessel, arrest the suspect crew members, bring them to port, and try them? What are the prerequisites for the exercise of enforcement jurisdiction on the high seas under international law?

An outline answer is included at the back of the book.

Essay question

Critically analyse the differences between the continental shelf and the EEZ under the law of the sea and in particular **LOSC**.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



International Law Concentrate: Law Revision and Study Guide

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9. State responsibility

Chapter: (p. 113) 9. State responsibility
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The examination

Exam questions in this field may concern the attribution of the wrongful conduct to States or the circumstances precluding wrongfulness, such as consent or necessity. Questions may also involve the role of de facto organs in bringing about the responsibility of States or the plea of counter-measures in international law. Equally, questions about the invocation of State responsibility and the notion of injured State or the forms of reparation, such as restitution and compensation, are frequent.

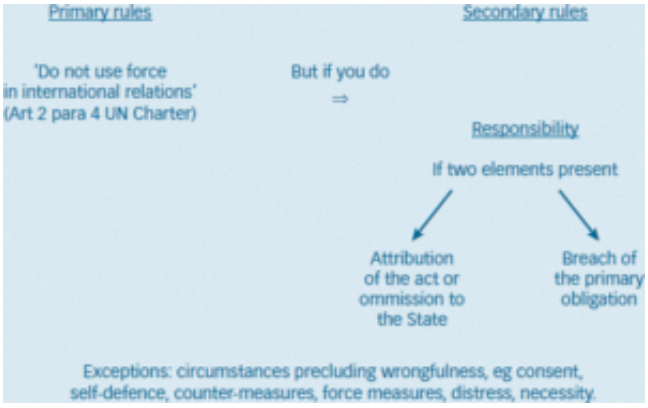
(p. 114) Key facts

- The 2001 International Law Commission (ILC) **Articles on State Responsibility** is the key instrument in this field despite the fact that it is not a treaty.
- State responsibility requires an existing obligation, a breach of this obligation, and attribution of the breach to a State.
- The liability of the State is engaged by both acts and omissions. These may be committed by government

officials as well as by non-government agents if the act or omission may otherwise be attributed to a State.

• Responsibility gives rise to reparation claims by the injured State. These may take the form of restitution, compensation, and just satisfaction.

(p. 115) Chapter overview



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State responsibility

Introduction

Meaning of State responsibility

The rules of State responsibility describe what happens when there is a violation of an international obligation. International law sets out legal obligations and rights for States. However, it is almost certain that not all States comply with these obligations. Should a breach of an obligation occur, it is the law of international responsibility that explains the legal consequences of this breach.

This law of international (or State) responsibility has been developed and codified by the International Law Commission (ILC). The main text and point of reference is the ILC **Articles on Responsibility of States for Internationally Wrongful Acts of 2001** (**ASR**). The **ASR** has not taken the form of a treaty and many of its provisions reflect customary international law. The **ASR** was followed in 2011 by the ILC **Articles on the Responsibility of International Organizations** (**ARIO**). **ARIO** was based primarily on **ASR** and it remains to be seen how international courts will react to it. As a result, it is not clear whether it is reflective of customary law.

(p. 116) ### Wrongful act

The law of international responsibility is based on the notion of '**wrongful act**', that is a breach of an international obligation which may be attributed to a particular State. In accordance with the law of State responsibility, every internationally wrongful act gives rise to the liability of the State that caused it. Internationally wrongful conduct consists of an action or omission: (a) 'attributable to the State under international law' and (b) 'constitutes a breach of an international obligation of the State' (**Art 2 ASR**).

The meaning of international obligations

The law of State responsibility sets out the rules that govern the legal consequences arising from a breach of an international obligation. What distinguishes these from other rules of international law is that they do not lay down primary rights and obligations upon States, but secondary, in the sense that they are triggered following a breach of a primary obligation. To put it simply, the rules of international responsibility would not say 'do not use force in

international law', but 'what will happen, if a country defies this obligation and illegally uses force'. In other words, the 'primary rules' impose particular obligations on States, whereas 'secondary rules' determine the consequences for failing to fulfil obligations established by 'primary rules'. It is true that this distinction is somewhat artificial, but it is central to our understanding of the law of international responsibility.

The general meaning of attribution

State responsibility arises from an internationally wrongful act. This wrongful act constitutes the breach of a primary obligation, which itself is attributed to the culprit State. The act may take the form of action or omission. Although numerous actions or omissions may in fact violate international law, liability only arises in respect to those that are linked to a State. This causal link between the unlawful conduct and the State is called *attribution*. Under the rules of State responsibility, the conduct will be attributed to the State if the act or omission was done by State organs or other private persons or entities under the direction or control of the State.

No requirement for harm

State responsibility is not based on the existence of harm or damage caused by the unlawful act. It arises even in the absence of material harm. The notion of damage may play a role in the compensation procedure, but it is not a prerequisite for the responsibility to arise in the first place. Moreover, responsibility does not require the existence of a tort in the municipal sense. Instead, international responsibility concerns breaches of treaty, custom, unilateral acts, and other international obligations.

(p. 117) Looking for extra marks?

The **ASR** deals only with the responsibility of States, not international organizations. Of course, as the ICJ affirmed in ***Reparation for Injuries Suffered in the Service of the United Nations*** (1949), the United Nations 'is a subject of international law and capable of possessing international rights and duties…it has capacity to maintain its rights by bringing international claims'. Generally, the responsibility of international organizations is premised upon the two elements of **Art 2 ASR**, namely the attribution of the wrongful act or omission to the organization and the breach of an international obligation of the organization (**Art 4 ARIO**).

Attribution to the State

While the breach of a State's international obligation is a matter of fact, the element of attribution is a matter of law and thus merits closer scrutiny. As provided in the **ASR**, the act or omission that constitutes the wrongful conduct should be attributable to the State concerned. Under international law, the only conduct attributed to the State at the international level is that of its organs or of persons and entities acting under the direction, instigation, or control of those organs, ie as agents of the State. As a direct consequence, the conduct of private persons in their private capacity is not attributable to their country of nationality or any other country.

The attribution of conduct to a State is based on criteria determined by international law and not on the mere recognition of a link of factual causality. In **Arts 4–11 ASR**, the ILC sets out the conditions under which conduct is attributed to the State for the purposes of determining its international responsibility.

State (or *de jure*) organs

It is reasonable that the acts or omissions, which by definition, bring about State responsibility, would be those of the organs of the State. **Article 4(1) ASR** provides that the conduct of any State organ shall be considered an act of that State under international law. The reference to a 'State organ' encompasses all individuals or collective entities which make up the organization of the State and act on its behalf. The range of persons thus considered State organs may be ascertained by reference to a State's internal law (**Art 4, para 2 ASR**). The acts of *de jure* State organs are attributable to that State, regardless of the character of the organ concerned and whatever function it

exercises. For example, the acts of the head of State as well as those of a foot soldier would both be attributable to the State because they are an integral part of the official State apparatus.

In particular, it has been acknowledged that governmental action or omission by the executive gives rise to international responsibility. In addition, actions by the judiciary, as was recognized in the ***Advisory Opinion in Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*** (1999), as well as by the legislative **(p. 118)** (eg ***Certain German Interests in Polish Upper Silesia*** (1926)) may bring about the responsibility of the State. Equally, actions by organs of territorial communities that are subordinate to the State or federal units are attributable to the latter.

Interestingly, in a recent case, the ICJ recognized another form of '*de jure* organ'—that is, organs acting in 'complete dependence' on the State without, however, having any official capacity under domestic law. Such organs are usually agents of the State, but the latter is unwilling to admit that they are part of its official machinery, a James Bond type of agent! It has been stressed that attribution in such cases 'must be exceptional, for it requires proof of a particularly great degree of State control' (***Application of the Convention for the Prevention and Punishment of the Crime of Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)*** (2007)).

It is often the case today that private institutions are called upon to exercise elements of governmental authority, eg private persons acting as prison guards. **Article 5 ASR** recognizes that the conduct of these 'parastatal entities' is to be attributed to the State. The justification lies in the fact that the internal law of the State has conferred on the entity in question the exercise of specific functions, which are akin to those normally exercised by organs of the State.

Finally, it has long been recognized that acts of public authorities which are unauthorized or *ultra vires* should not release the State from liability. Accordingly, **Art 7 ASR** sets forth that 'the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'.

Velásquez Rodríguez v Honduras case, Inter-American Court of Human Rights, Series C, No 4, (1988), ILR, vol 95, p 232

Honduran citizens demonstrated a systematic policy of enforced disappearance by members of the country's security forces. The Honduran government argued, *inter alia*, that it had not ordered or sanctioned this policy. The Court emphatically held that a breach of the **American Convention of Human Rights** 'is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law' (p 296).

De facto organs

There has been no issue surrounded with so much controversy as that of 'de facto organs' in the law of State responsibility. The most typical question is under which circumstances acts or omissions of persons or other entities, which have no official capacity, are attributable to a particular State. In general terms, the approach of international courts and scholarly opinion **(p. 119)** is twofold and, as you will see, there are disagreements between the various international courts and tribunals on the matter.

1. The ***sticto sensu*** approach, which dictates that only the conduct of truly 'de facto organs', ie organs under the 'complete control' or under the 'effective control' of the State, is attributable to the latter; the ***Nicaragua*** case exemplifies this approach:

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Rep (1986), p 14

The ICJ was asked to assess the responsibility of the USA for violations of international humanitarian law by the Contras, an armed group in rebellion against the government of Nicaragua which was supported by the USA. As the Contras were not *de jure* organs of the USA, the Court had to formulate a test for the attribution of the acts of the Contras to the USA. It came up with two tests of attribution. Under the *complete control* test, which is of general application, attribution requires control by the State over the entire functioning of a group. The *effective control* test is subsidiary to its *complete control* test counterpart. It concerns a State's control over the conduct of a specific operation in the course of which violations have been committed and applies when the conditions of the first test have not been met.

2. The ***lato sensu*** approach: it suffices to prove that there exists *overall control*, as there is no need to require a high threshold for the test of control:

Prosecutor v Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999) 38(6) ILM (November 1999) 1518

The question was whether the financing and military support provided by Yugoslavia to a rebel group in Bosnia during that country's civil war rendered the rebels an agent of Yugoslavia with the consequence that the conflict had become international. The ICTY Appeals Chamber held the appropriate test was that of *overall control* which went 'beyond the mere financing and equipping of such forces and involved also participation in the planning and supervision of military operations' (p 1541).

The ICJ preferred the Nicaragua's 'effective control' approach to the ICTY's 'overall control' test in ***Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*** (2007). The ILC eschewed taking a firm position. **Article 8 ASR** provides in general terms that 'the conduct of a person or group of persons shall be considered an act of a State under international law, if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

(p. 120) Looking for extra marks?

In the ***Nicaragua*** case the ICJ held that 'persons under the complete control of the State' were de facto agents of the controlling State. Years later, in the ***Bosnia-Serbia Genocide*** case it considered them *de jure* organs.

Conduct acknowledged and adopted by the State *ex post facto*

Article 11 of ASR envisages the attribution of conduct that was not, or may not have been, attributable to a State at the time of commission, but which was subsequently acknowledged and adopted by it as its own. However, the conduct will not be attributable under **Art 11** where a State merely acknowledges its existence or expresses its

verbal approval in respect of it; the term 'acknowledges and adopts' in **Art 11** makes it clear that what is required is something more than a general acknowledgement of a factual situation.

Revision tip

The attribution of particular conduct to a State, as an element of international responsibility, is governed by the rules set out in **Arts 4–11 ASR**. Fundamental is the distinction between *de jure* and de facto organs, ie organs that act or which are empowered by law to act in an official capacity and organs that are controlled or directed by the State. Attribution on the basis of conduct committed by de facto organs remains controversial. International courts and tribunals adopt varying interpretations of the 'control' requirement, with the ICJ insisting on a high evidentiary threshold of 'effective control'.

Circumstances precluding wrongfulness

Circumstances precluding wrongfulness are 'excuses', 'defences', and 'exceptions' that serve as justifications available to States for excluding responsibility in a particular case. The invocation of these circumstances has the function of 'a shield against an otherwise well-founded claim for the breach of an international obligation'. The ILC included in the **ASR** six types of circumstances precluding wrongfulness:

1. **Consent** (**Art 20**): consent to particular conduct done by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given. Consent is very frequent in everyday State practice; for example, a coastal State consents to the otherwise illegal pursuit of a drug-trafficking vessel by a third State within its coastal waters. The requirements are that the consent should have been given prior to the wrongful conduct; *ex post facto* consent is rather a waiver of responsibility claim under **Art 45 ASR**. In addition, the consent should be valid and clearly expressed, not tacit or presumed.

(p. 121) ***Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)***, ICJ Rep (2005), p 168

The Court had to assess whether the DRC's consent to the presence of Ugandan troops on its territory had been withdrawn pursuant to a DRC statement of 28 July 1998. It concluded that 'the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent. Even had consent to the Ugandan military presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted' (para 52).

2. **Self-defence** (**Art 21**): here self-defence does not operate as a 'primary norm', ie an individual or collective right enshrined in **Art 51 UN Charter** and customary law, but as a 'secondary norm', namely a circumstance precluding the wrongfulness of the armed force by the defending State.
3. **Counter-measures** (**Art 22**): as was stated in the ***Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*** (1997), counter-measures might justify otherwise unlawful conduct when 'taken in response to a previous international wrongful act of another State and…directed against that State', provided certain conditions are met. These conditions are set out in **Arts 49–54 ASR**. Generally, before resorting to counter-measures a state that finds itself injured must call upon the culprit State to cease the wrongful conduct and offer reparation for the injury. **Article 52(1)** adds the requirement to formally notify the responsible state of the decision to take

counter-measures, as well as the need to negotiate.

A central requirement is that counter-measures must be proportional to the wrongful conduct. In the ***Gabčíkovo–Nagymaros*** case, p 56, the Court found that the unilateral assumption of control over a large part of the waters of the Danube was not commensurate with the injury suffered, taking into account the rights in question. Finally, there are certain fundamental obligations which may not be subject to counter-measures, such as human rights law, the prohibition of **reprisals** under humanitarian law, the prohibition of the use of force (**Art 50 ASR**).

Air Service Agreement of 27 March 1946 between the United States of America and France (1978) 18 RIAA, 417

In this case, the US invoked counter-measures to justify measures adopted in response to the French interpretation of the 1946 agreement. The arbitral tribunal clarified that 'if a situation arises, which in one State's view results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through counter-measures' (p 443). The tribunal placed emphasis upon the requirement of proportionality and concluded that the counter-measures taken by the US were lawful, as not being 'clearly disproportionate when compared to those taken by France' (p 444).

(p. 122) One issue is whether counter-measures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question. **Article 54** leaves open the question whether any State may adopt counter-measures to ensure compliance as a matter of general interest as opposed to personal interest as an injured State.

4. ***Force Majeure*** (**Art 23**): involves a situation where a State is effectively compelled to act in a manner not in conformity with the requirements of an international obligation. A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) the event is beyond the control of the State concerned; (c) which makes it materially impossible in the circumstances to perform the obligation. *Force majeure* situations may arise due to a natural or physical event (eg earthquakes, floods) or to human intervention (eg loss of control over a portion of the State's territory).
5. **Distress** (**Art 24**): the Article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with under **Art 23**, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril. In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.

Case Concerning the difference between New Zealand and France arising from the Rainbow Warrior affair, UNRIAA, vol XX (1990), p 215

France removed two French officers from the island of Hao following their direct involvement in the death of environmental activists in New Zealand. It justified their removal on the ground of 'circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State'. The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two officers, who was under serious health risk.

6. **Necessity** (**Art 25**): denotes those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, to avoid performing some other international obligation of lesser weight or urgency. Under conditions narrowly defined in **Art 25**, such a plea is recognized as a circumstance precluding wrongfulness.

In the ***Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*** judgment, paras 51–2, the ICJ carefully considered an argument based on the ILC's draft article, expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case.

Looking for extra marks?

In accordance with **Art 26 ASR**, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Thus, for example, **(p. 123)** one State cannot, through consent, dispense its obligation to comply with a peremptory norm, eg in relation to genocide or torture, whether by treaty or otherwise.

Consequences of an internationally wrongful conduct

In the event of an internationally wrongful act by a State, other States may be entitled to respond. This may be done by invoking the responsibility of the wrongdoer, seeking cessation and/or reparation, or possibly by taking counter-measures. We have already referred to counter-measures. Cessation and reparation are dealt with in Part Two of **ASR**. It must be stressed from the outset that international responsibility is undifferentiated: there is no difference in principle between responsibility arising from the breach of a treaty (*ex contractu*) or of general international law (*ex delicto*).

Cessation

Cessation refers to the basic obligation of compliance with international law, irrespective of a continuing violation committed by another State. It is true that as a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. As **Art 29** states, the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. Thus, it becomes important that the responsible State ceases the wrongful conduct and assures, if circumstances so require, its non-repetition in the future (**Art 30 ASR**).

Reparation

The obligation to make full reparation is the second general obligation of the State that committed the wrongful act. It is used to refer to all measures which may be expected from the responsible State, over and above cessation: it includes restitution, compensation, and satisfaction, either alone or alongside other forms of reparation (**Art 34 ASR**).

Restitution

In accordance with **Art 34**, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the wrongful act. In its simplest form, this involves the release of persons wrongly detained or the return of property wrongly seized. Besides the ***Factory at Chorzow case*** (1928), in which restitution **(p. 124)** was considered as the natural redress for violation of or failure to observe the 1922 **Geneva Convention**, ***Pulp Mills on the River Uruguay (Argentina v Uruguay)*** (2010) is also relevant: the ICJ reaffirmed that 'customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of

the situation which existed before the occurrence of the wrongful act' (para 273).

Compensation

Pecuniary compensation is usually an appropriate and often the only remedy for injury caused by an unlawful act. Under **Art 36 ASR**, whenever restitution is not possible, compensation becomes the standard consequence for injury. It covers 'any financially assessable damage including loss and profits'. This is consistent with the jurisprudence of international courts and tribunals, such as ***Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*** (1997).

Satisfaction

It is any measure that the responsible State is bound to take, apart from restitution or compensation. Satisfaction may take many forms, which may be cumulative: apologies or other acknowledgement of wrongdoing by means of a payment or indemnity; the trial and punishment of the physical perpetrators and others. In ***Corfu Channel*** (1949), Albania requested the Court to simply declare that the British Navy had violated its sovereignty by means of an unlawful minesweeping operation.

Revision tip

In cases of a breach of international obligation, which is attributed to a particular State, the latter has to do the following under the rules of State responsibility: first, if the violation is continuing it must cease and, if so requested, provide assurances of non-repetition; secondly, it has to make reparation to the injured State, which may take the form of restitution, compensation, and/or satisfaction.

Invocation of responsibility

Central to the invocation of responsibility is the concept of the injured State. Central to the concept of injured State is the nature of the obligation breached. This concept is set out in **Art 42** and takes a twofold form. Under **Art 42(a) ASR**, the key is the existence of an individual obligation: a State is 'injured' if the obligation breached was owed to it individually. The expression 'individually' indicates that, in the circumstances, performance of the obligation was owed to that State, eg pursuant to a bilateral treaty.

Under **Art 42(b)**, the key is the violation of collective obligations; these are obligations that exist between more than two States and whose performance is not owed to one State **(p. 125)** individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures a particular State if additional requirements are met: for example, the breach specifically affects that State, or it is of such a character as to radically alter the position of all other States to which the same obligation is owed. An example provided by the ILC is the following: 'if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution'.

What about the other 'non-injured' States to whom collective obligations are owed? Are they entitled to invoke the responsibility of the culprit State? This is addressed by **Art 48**, which is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States (obligations *erga omnes partes*) or the interests of the international community as a whole (*obligations erga omnes*) responsibility may be invoked by States which are not themselves injured in the sense of **Art 42**. Under **Art 48(2)**, these States 'may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached'.

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), ICJ Judgment of 20 July 2012

In this case, Belgium instituted proceedings against Senegal in respect of a dispute concerning 'Senegal's compliance with its obligation to prosecute Mr. Habré for acts including crimes of torture or to extradite him to Belgium pursuant to the UN Convention against Torture'. Senegal disputed the existence of any specific legal interest on the part of Belgium to invoke the responsibility of Senegal. The Court held that all the States parties to **UN Convention against Torture** (**CAT**) 'have a legal interest' in the protection of the rights involved and that these obligations may be defined as 'obligations erga omnes partes' in the sense that each State party has an interest in compliance with them in any given case.

Looking for extra marks?

Under the law of State responsibility there exists the possibility of joint/multiple responsibility: this may take the form of multiple States being responsible for the same wrongful conduct. **Article 47** states the general principle that in such cases each State is separately responsible for the conduct attributable to it. In addition, there may be responsibility of a State in connection with an act of another State; for example, **Art 16** provides for responsibility in cases where one State aids or assists another in the commission of a wrongful act.

 ## Key cases

Case	Facts	Principles
US Diplomatic and Consular Staff in Tehran (US v Iran), ICJ Rep (1980), p 3	On 29 November 1979, the USA had instituted proceedings against Iran for the seizure and detention of US diplomatic and consular staff in Tehran and other Iranian cities.	The ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court: 'The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State' (para 74).
Application of the Convention for the Prevention and Punishment of the Crime of Genocide case (Bosnia and Herzegovina v Serbia and Montenegro), Merits, ICJ Rep (2007), p 43	Bosnia initiated proceedings against the then Former Republic of Yugoslavia (FRY) in March 1993 concerning the application of the **Genocide Convention** to the events in and around Srebrenica. Bosnia claimed that the FRY was responsible for the acts of genocide perpetrated by the rebel Bosnian-Serb Army.	The Court found that Serbia was neither directly responsible for the Srebrenica genocide nor complicit. However, it did rule that Serbia had breached the **Genocide Convention** by failing to prevent the Srebrenica genocide. The Court based its conclusion on the rules of attribution under the **ASR** (**Arts 4–11**), which were considered as reflective of customary law. It also referred to the customary rule of complicity under **Art 16 ASR**. However, according to the Court, the genocide as such was not attributable to FRY.

Key debates

Topic	**Circumstances precluding wrongfulness**
Author/Academic	AV Lowe
Viewpoint	The author takes the view that the ILC could have characterized the conduct for which circumstances precluding wrongfulness exist as wrongful but excused. This paper explores the theoretical differences between those alternatives and, in particular, the distinction between the right of an injured State to waive its entitlement to reparation and the right of an injured State to release other States from their obligation to obey the law. It argues that even if the creation of international legal obligations is, by virtue of the principle of opposability, an essentially bilateral matter, violation of those obligations engages a wider community interest and is not a matter of concern to the law-breaker and the injured State alone.
Source	'Precluding Wrongfulness or Responsibility: A Plea for Excuses', 10 *European Journal of International Law* (1999) 405
Topic	**Counter-measures**
Author/Academic	LA Sicilianos
(p. 127) **Viewpoint**	The author critically discusses the ambivalent provision of the **ASR** concerning the possibility of collective counter-measures (**Art 54**). The controversies inherent in this article concern, on the one hand, the circle of States that are entitled to take such measures and, on the other, the fear that there will be an overlapping with the institutional powers of the Security Council under **Chapter VII** of the **UN Charter**.
Source:	'Countermeasures in Response to Grave Violations of Obligation Owed to the International Community', in J. Crawford *et al*. (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)

Exam questions

Problem question

State A enters into a bilateral agreement with State B, which provides for the joint exploration and exploitation of resources within their continental shelf. After several years, State A faces an unprecedented and unforeseen economic crisis; its government decides that it should retain for the survival of its population the profits from the exploitation of the joint continental shelf. In response, State B, without any warning, freezes all the assets of the nationals of State A within its territory; it also forcibly invades and occupies a small island belonging to State A.

1. Does State A have a right to stop sharing the profits of the joint venture on its continental shelf in light of the economic crisis?
2. Does State B have the right to freeze the assets and to occupy the island of State A?

Essay question

The notion of ‘injured State’ in the law of international responsibility.

Discuss.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.

International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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10. Peaceful settlement of disputes

Chapter: (p. 128) 10. Peaceful settlement of disputes
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The examination

Exam questions will almost certainly revolve around the International Court of Justice (ICJ) and concern the jurisdiction of the Court, the issuance of provisional measures, and intervention by third States. In addition, questions concerning the advisory proceedings of the ICJ as well as the difference between international adjudication and arbitration are frequent. Moreover, there may be questions regarding the diplomatic means of dispute settlement.

(p. 129) Key facts

• States are obliged to resolve their disputes by peaceful means. The principle of peaceful settlement of disputes, enshrined in **Art 2(3) UN Charter**, is the other side of the coin regarding the prohibition of the use of force in international relations.

• A range of dispute settlement methods have been developed, many of which are enumerated in **Art 33 UN Charter** and the **1982 Manila Declaration**. The basic distinction is of that between diplomatic means of

settlement (negotiation, mediation, inquiry, and conciliation) and legal means (namely arbitration and judicial settlement). States, however, are free to choose their own means of dispute settlement, including resorting to regional arrangements or good offices of the UN.

• The ICJ, the principal judicial organ of the United Nations, is a standing court to which States may bring their legal disputes. The Court's jurisdiction is based upon the consent of the parties to the dispute. This consent may be expressed either directly in respect of a specific dispute or in advance of future disputes. The Court is also empowered to provide advisory opinions to UN organs and specialized agencies.

(p. 130) Chapter overview

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Dispute settlement

Introduction

The principle that international disputes should be settled by peaceful means rather than by the use of force has been the cornerstone of the UN era and is enshrined in **Art 2(3) UN Charter**. It complements the other fundamental principle of the **UN Charter**, namely the prohibition of the use of force under **Art 2(4)**.

These provisions essentially oblige States, whenever a dispute arises amongst them, to endeavour to resolve it peacefully and, in any event, not to use force. They have an obligation of conduct, namely to try to resolve their disputes through peaceful means. This does not entail an obligation to resolve their disputes. Disputes may well linger without giving rise to the international responsibility of the States concerned.

A 'dispute' is a disagreement about something and an 'international dispute' is a disagreement, typically, but not exclusively, between States, with consequences on the international plane. International law sets out various means of dispute settlement, both diplomatic and legal. These are stipulated in **Art 33 UN Charter** as well as in an important resolution of the UN General Assembly, the 1982 **Manila Declaration on the Peaceful Settlement of Disputes**. There is no hierarchy among these methods and the choice belongs to the disputing States.

In general terms, States initially attempt to negotiate. If this proves unsuccessful, they will try other methods of political resolution such as inquiry, mediation, conciliation, as well as resort to regional organizations or the 'good offices' of the UN Secretary-General. These are the political or diplomatic methods, which are complemented by the legal methods, ie (p. 131) arbitration or adjudication by the ICJ. The outcome arising from legal methods is final and binding, whereas this is not the case with diplomatic methods.

Legal methods entail a referral of the dispute to the ICJ or arbitration. Until the twentieth century, States could only submit their differences to international arbitration. The establishment of the Permanent Court of International Justice (PCIJ) in the 1920s and its successor, the ICJ in 1945, as the main judicial organ of the United Nations, provided

States with a standing forum for the adjudication of their disputes. This forum, however, is open only to States that have given their consent. This is the most significant difference from national courts, in which the applicant can submit his/her case unilaterally.

The ICJ functions on the basis of a set of detailed rules set out in the **UN Charter**, the **ICJ Statute** and finally, the Rules of the Court. The Court's decisions are final and binding upon the parties. In the overwhelming majority of the cases, States do comply with the decisions of the Court. If they fail to do so there is the possibility of the Security Council taking action.

Diplomatic methods

Negotiation

Negotiation is the most widely used means of dispute settlement in international law. It is the first diplomatic method that is applied when a dispute arises and it is often the only one if it proves successful. Since negotiation allows the disputants to retain control of their dispute without involving third parties, it is not surprising that governments find it attractive. Nonetheless, the decision to negotiate is sometimes controversial, as it implies an acknowledgement of the other party's standing and the legitimacy of its claims.

Negotiation is so fundamental that it must not be thought of as only a first stage in the settlement of all disputes, but rather as an option available to parties throughout a dispute. It may exist alongside other processes. For example, in the ***Aegean Continental Shelf case (Greece v Turkey)*** (1978), the Court indicated that the initiation of negotiations during litigation is not a bar to the exercise of its powers and vice versa.

North Sea Continental Shelf cases (Germany v Denmark/Netherlands), Judgment, ICJ Rep (1969), p 3

> The Court decided that according to customary international law the delimitation of continental shelf boundaries between neighbouring States must be effected by agreement in accordance with equitable principles. On specifically how the negotiations must be conducted, the Court held that 'the parties are under an obligation to enter into negotiations with a view to arriving at an agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it' (para 85).

 ### Mediation

When negotiation fails, a third party may be involved upon invitation. If the invitee does no more than encourage the protagonists to resume negotiations, or simply acts as a channel of communication, the role is described as 'good offices'. The mediator is expected to do more, in the sense of being an active participant, authorized to advance fresh ideas and transmit the parties' proposals to each other.

Mediation can only take place if the parties to a dispute consent and a mediator is available. In fact, the United Nations, especially the Secretary-General, and other regional organizations commonly act as 'mediators' or provide 'good offices'. Once mediation has been accepted, the task of the mediator is to devise or promote solutions that are acceptable to both parties. Much can be achieved by simply facilitating communication, especially if the parties are unable to deal with each other directly. This was the case with the Diplomatic Hostages dispute between Iran and the USA in 1980, in which Algeria acted as an intermediary. The success of mediation ultimately depends on the parties' readiness to compromise.

Inquiry

Inquiry relates to the resolution of a disputed issue of fact; it can be either a process performed in the course of another dispute settlement procedure—for example, in the context of arbitration or adjudication—or as a distinct and autonomous fact-finding process. In this case it will take the form of a specific institutional arrangement which may be selected in lieu of arbitration or other means. A commission of inquiry will be established to ascertain the conditions under which a specific situation occurred. Such commissions of inquiry were envisaged by the 1899 **Hague Convention**. They are rarely used in practice and resemble arbitration.

Red Crusader case (1962), 35 ILR 485

A Scottish trawler, the 'Red Crusader', was arrested in 1961 off the coast of the Faroe Islands by Danish authorities. Through the exchange of notes between the governments of the UK and Denmark, a commission of inquiry was set up to investigate the circumstances surrounding the arrest. In addition to written memorials there was also oral evidence and cross-examination of witnesses. Based on the report of the Commission, the two States decided to waive their claims.

Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011)

A very interesting commission of inquiry was set up by the UN to investigate the events surrounding the interdiction and killing of Turkish activists on board the Turkish-flagged *M.V. Marmara* by **(p. 133)** Israeli forces on 31 May 2010. The UN Secretary-General established a Panel of Inquiry which issued its report in September 2011. The report took the view that the blockade of Gaza was legal; however, Israel was found to have used 'excessive and unreasonable' measures in boarding the *M.V. Marmara*, resulting in 'unacceptable' loss of life.

Conciliation

If mediation is essentially a continuation of negotiation, conciliation is a continuation of mediation in a formal or institutionalized sense. It involves a commission set up by the parties either on a permanent or an ad hoc basis, which proceeds to an impartial examination of the dispute and proposes settlement terms. However, this settlement will not be binding upon the parties. Although conciliation is regularly included in provisions on dispute settlement, the number of cases in which it has actually been used remains very small (eg *Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen: Report and Recommendations to the Governments of Iceland and Norway*, Decision of June 1981 XXVII RIAA, pp 1–34).

Revision tip

States are under an obligation to resolve their disputes in a peaceful manner. International law distinguishes between political and legal means. Political means are not binding upon the disputants, who are free to follow the outcome or pursue other means of settlement. Amongst these, the primary role is ascribed to negotiation, which is usually the starting point for any dispute settlement, whereas mediation, conciliation, and inquiry

encompass the involvement of a third party. This third party or the relevant commission is activated upon the consent of the parties to the dispute.

Legal methods

Arbitration

The origins of arbitration in the modern era can be traced back to the 1794 Jay Treaty between Great Britain and the USA. The parties to a dispute on legal matters set up a tribunal on the basis of international law and agree to treat its decisions as binding. Each party selects one or two members of the arbitral tribunal, while the president of the tribunal, the umpire, is selected by consent, the arbitrators, or the president of the ICJ. States also select the applicable law and other procedural matters and rules, such as the public character of the proceedings. Frequently, they will resort to an established arbitral institution, such as the Permanent Court of Arbitration (PCA), otherwise it is considered ad hoc.

Arbitration, like conciliation, can be employed when a dispute arises, or stipulated in advance in a treaty. Arbitration clauses are found in the dispute settlement provisions of multilateral and bilateral conventions, as either an optional or compulsory procedure, and (p. 134) often in combination with other methods. The textbook example is the 1982 **UN Convention on the Law of the Sea**, which provides for compulsory settlement of disputes and which gives a prominent role to arbitration as the default rule.

Looking for extra marks?

Disputes between foreign investors and host States are usually resolved through investment arbitration which is frequently triggered by bilateral investment treaties (BITs). These are entered into by the host State and the investor's home State. Investment arbitration is governed by international law and its outcome is binding on the disputants.

International Court of Justice

Introduction

The ICJ (or the 'Court') is the 'principal judicial organ' of the UN (**Art 92 UN Charter**). It is the successor to the PCIJ.

The ICJ is a standing mechanism for the judicial settlement of disputes between States, should they wish to make use of it. No dispute can be the subject of a decision unless the disputing parties have consented to the Court's jurisdiction. Access to the Court is enjoyed by all member States of the UN. It is not open to international organizations or individuals. It is also empowered to provide advisory opinions to questions referred to it by UN organs or other competent agencies. The legal framework of the Court is set out by the **UN Charter**, the **ICJ Statute**, and Rules.

Structure and composition

The Court consists of 15 judges, elected by the Security Council and the General Assembly for terms of nine years. Judges can be re-elected and this is frequent, but care is taken that the membership of the Court is regularly renewed. Judges are elected in their individual capacity and not as representatives of their States and undertake a solemn oath of impartiality in the exercise of their functions. The disqualification or withdrawal of a judge from a case is provided in the **ICJ Statute**; the commonest ground for exclusion is one's prior involvement in a case, eg as Counsel of a State.

The presence on the bench of a judge with the nationality of one of the parties was not seen as a ground for

withdrawal; on the contrary, this ensures that the Court will fully understand the circumstances of the case. Accordingly, the **ICJ Statute** ensures equality by enabling the other party (ie which does not have a national sitting as judge) to nominate someone as a judge solely for that case, with the title of *judge ad hoc.* Moreover, in cases where neither party has a judge of its nationality, each party may choose a *judge ad hoc.*

(p. 135) **Procedure**

The proceedings in contentious cases are set in motion by the conclusion of an agreement (*compromis*) or by the filing of an application from one State instituting proceedings against another. The proceedings as such are divided as follows: in a first stage the parties exchange written pleadings (Memorial by the applicant and Counter-Memorial by the respondent, followed by a Reply and a Rejoinder). There then follows a hearing at which the parties address their arguments to the Court.

Evidence is normally submitted in the form of documents or other forms; witnesses may provide written evidence or appear at the hearing instead. The burden of proof rests with the party alleging the fact or making a claim (*onus probandi incumbit actori*). In line with the principle *iura novit curia* (the law is known to the Court), the parties are not required to prove the existence of the rules of international law they invoke. The sources of international law are enumerated in **Art 38 ICJ Statute**.

Jurisdiction

It has already been emphasized that the jurisdiction of the Court, like that of any international judicial or arbitral body, is based upon the consent of States. Such consent is expressed in particular ways. Before enumerating these, it should be recalled that 'only States may be parties to cases before the Court' (**Art 38 ICJ Statute**). To be a party to a case, a State must also be one of those to which the Court is open under **Art 35**—that is, parties to the **ICJ Statute** (and UN Members) or non-State parties upon the recommendation of the Security Council.

The Court's jurisdiction is triggered as follows:

Special agreements or '*compromis*'

The easiest way for two States that wish to have their dispute settled by the ICJ is to express their consent by entering into an agreement to that effect. This is the classic *compromis*, used also in order to submit a case to arbitration. Such an agreement will define the dispute and record the agreement of the parties in accepting the Court's decision as binding. There have been few cases submitted to the Court by *compromis*, eg ***Continental Shelf (Libyan Arab Jamahiriya/Malta)*** (1985).

Compromissory clauses

There are numerous cases whereby States have already given their consent to submit future disputes to the Court. This is achieved by concluding a treaty providing that all disputes relating to its interpretation or application may be referred by any party to the Court by a unilateral act. Such a clause, known as a *compromissory clause*, is frequent and is found either in the final clauses of a treaty or optional protocols. The submission to the Court may be preceded by negotiations but the existence of such a clause suffices as a jurisdictional basis. Compromissory clauses triggered the Court's jurisdiction in ***US Diplomatic and*** (p. 136) ***Consular Staff in Tehran (US v Iran)*** (1980), specifically the Optional Protocol to the 1961 **Vienna Convention on Diplomatic Relations**. The same instrument was utilized in ***Application of the Interim Accord of 13 September 1995 (the former Yugoslavian Republic of Macedonia v Greece)*** (2011).

Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation), Preliminary Objections, Judgment of 1 April 2011

Georgia instituted proceedings against the Russian Federation in respect of a dispute concerning 'actions on and around the territory of Georgia' in breach of the 1965 **International Convention on the Elimination of All Forms of Racial Discrimination** (CERD). Jurisdiction was claimed on the basis of **Art 22 CERD**, which contained a compromissory clause. However, the Court upheld the preliminary objections of Russia on the basis that the two disputants had not negotiated prior to the Georgian application, as dictated by **Art 22 CERD**.

Such contractual consent to the jurisdiction of the Court may be given not only through a *compromissory clause*, but also by a treaty that has been concluded for the purpose of making advance provision for the settlement by the Court of all or some of the disputes that may subsequently arise between the parties. Such a treaty was the 1928 **General Act for Pacific Settlement of International Disputes**, unsuccessfully used in the ***Aegean Sea Continental Shelf case*** (1978).

Optional clause

Under **Art 36(2) ICJ Statute**, a State may deposit with the UN Secretary-General a declaration whereby it accepts the jurisdiction of the Court in respect of international legal disputes in relation to any other State accepting the same obligation. States making such declarations accept the jurisdiction of the Court as compulsory. Nonetheless, a reservation to an optional clause declaration is possible. This is linked with the idea of 'reciprocity' enshrined in **Art 36(2) ICJ Statute**, namely that the acceptance of jurisdiction is contingent on any other State accepting the *same* obligation. Of the limited group of States that have made such a declaration (around 60), many have appended reservations. The effect of these reservations is that one needs to find the lowest common denominator of the jurisdiction not excluded by reservations on each side and consider whether the particular dispute falls within this. If such a common denominator exists the Court enjoys jurisdiction.

Reservations to optional clause declarations vary from: (a) *ratione temporis* reservations, ie the Court would have jurisdiction over all disputes arising from a particular date onwards (eg declaration by the former Republic of Yugoslavia in 1999 in ***Legality of Use of Force, Yugoslavia v Belgium*** (1999)); (b) *ratione personae* reservations, eg the 'commonwealth' reservation excluding disputes among commonwealth States; (c) *ratione materiae* reservations, namely that a State excludes particular disputes from the jurisdiction of the Court (eg declaration of Greece excluding military measures taken for self-defence).

(p. 137) Forum prorogatum

An application may be made which in effect invites the State named as respondent to consent to jurisdiction simply for the purposes of that particular case, despite the absence of any of the previous jurisdictional bases. In view of its potential abuse, a special provision was included in **Art 38(5)** of the **Rules of the Court**, whereby an application of this kind is treated for procedural purposes as ineffective until the consent of the named respondent is expressed in writing. Such means of establishing jurisdiction were used in the case of ***Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*** (2008).

Jurisdiction and admissibility: preliminary objections

A well-established principle of the law relating to international arbitral and judicial proceedings is that a tribunal or court has power to decide, with binding effect for the parties, any question as to the existence or scope of its own jurisdiction (the principle of *compétence de la compétence* enshrined in **Art 36(6) ICJ Statute**). The court must exercise this power in any case in which the existence of its jurisdiction is disputed. It would do so either *proprio motu* or after a 'preliminary objection' raised by the respondent. If the respondent considers that the court lacks jurisdiction he may normally raise an objection at an early stage. This may include an objection to the jurisdiction of the court or to the admissibility of the application.

Objections against admissibility include: (a) claims that the applicant lacks ***locus standi***, ie absence of a particular

legal interest (see eg ***South-Western African cases, Ethiopia/Liberia v South Africa*** (1966)); (b) that local remedies have not been exhausted (eg ***Interhandel case, Switzerland v US*** (1959)); (c) that the case is, or has become, 'without object' or moot (eg ***Northern Cameroons*** (1963)); and (d) that the presence as a party of a third State is essential to the proceedings, because its rights or obligations would form the very subject matter of the decision, namely the *Monetary Gold principle*.

Provisional measures

According to **Art 41 ICJ Statute** the Court has 'the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party'. For a long time it was debated whether the measures so indicated created an obligation of respect, binding on the States addressed. This was fuelled by the wording of **Art 41**, which uses the terms 'indicate' or 'measures to be taken'. The question long remained unsettled. The matter was addressed in the following case:

LaGrand (Germany v USA) (Merits), Judgment, ICJ Rep (2001), p 466

The Court decided that the provisional measures addressed to the USA, ie the non-execution of Walter LaGrand, which had not been complied with (the person was executed despite the provisional **(p. 138)** measures order of the Court), had created a legal obligation, the breach of which gave rise to a duty of reparation. The Court warranted its conclusion on an interpretation of **Art 41** as having been intended to achieve that result (paras 98 et seq).

When dealing with a request for the indication of provisional measures the Court begins by examining whether there is prima facie jurisdiction, ie the Court has to satisfy itself that the provisions relied on by the applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded. The Court has the power to indicate provisional measures only if there is urgency, in the sense that there is a *real and imminent risk* that irreparable prejudice may be caused to those rights. After ascertaining the existence of this risk the Court will assess whether the proposed provisional measures are adequate and effective.

This three-stage test sufficed for the Court to order provisional measures. However, very recently, the Court has added another requirement, namely that *the rights asserted by a party are at least plausible*, and that a link exists between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (see eg ***Certain Activities carried out by Nicaragua in the Border Area, Costa Rica v Nicaragua*** (2011)).

Intervention

On what grounds may a third State be involved in a case in which it is neither respondent nor applicant? The **ICJ Statute** provides two possibilities: under **Art 62**, a State may request the Court to permit it to intervene in a pending case if it 'considers that it has an interest of a legal nature that may be affected by the decision in the case', while under **Art 63**, it may request to intervene in cases where the subject matter is the interpretation of a treaty to which the requesting State is also a party. The possibility of intervening under **Art 63** had been of virtually no use, until very recently, in ***Whaling in the Antarctic (Australia v Japan), Request of New Zealand to intervene*** (2013), which concerns an interpretation of **Art VIII of the International Convention for the Regulation of Whaling**.

Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment of 3 February 2012

The case concerned a dispute originating in the violations allegedly committed by Italy through its judicial practice 'in that it has failed to respect the jurisdictional immunity which Germany enjoys under international law'. Among this judicial practice were the recognition and the declaration of enforceability in Italy of judgments of Greek courts against Germany concerning the reparation for war crimes committed during the German occupation of Greece during WWII. In view of this, Greece requested to intervene pursuant to **Art 62**, as it had a legal interest in the outcome of the Greek cases in Italy. By an Order of 4 July 2011, the Court authorized Greece to intervene in the case as a non-party, in so far as this intervention was limited to the decisions of Greek courts which were declared by Italian courts as enforceable in Italy.

(p. 139) Looking for extra marks?

What about the enforcement of judgments? What would happen if a State party to a contentious case does not comply with the decision of the Court? The only relevant provision is **Art 94(2) UN Charter**, stating that 'if any party to a case fails to perform the obligations on it under a judgment…the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'. It is apparent that the Council has discretion in respect of enforcement measures, which would, of course, be subject to the veto of its permanent members. Nicaragua actually claimed that the USA had not complied with the 1986 decision of the Court. Nonetheless, the overwhelming majority of States do comply with ICJ decisions.

Advisory proceedings

In addition to settling contentious cases, the Court is empowered to provide advisory opinions. The Court is to give opinions that are advisory and not determinative; the opinion, in principle, does not oblige any State, not even the organ or agency that requested it, to take or refrain from particular action. It merely expresses the view of the Court on a specific legal matter. In practice the advisory opinions of the Court hold great juridical value as authoritative statements of international law.

Under **Art 96(1) UN Charter**, the General Assembly or the Security Council may request advisory opinions on any legal question, as well as 'other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities'. Such authorizations have in fact been given to the Economic and Social Council (ECOSOC) and other specialized agencies; however, the key fact is that such requests must be relevant to their powers. This became evident in ***Legality of the Use by a State of Nuclear Weapons in Armed Conflict*** (1996), which involved a request by the World Health Organization (WHO). The Court held that under the 'principle of speciality' the WHO could not deal with matters beyond what was authorized by its Constitution; in the case at hand, the legality of the use of nuclear weapons.

Revision tip

The ICJ has both the power to settle disputes between States and the power to give advisory opinions to legal questions posed by the organs and specialized agencies of the UN. As regards the power to settle contentious cases, of paramount importance is the prerequisite that States that are party to a dispute should have expressed their prior consent. This consent, which forms the jurisdiction of the Court, is expressed by the following means: (a) a special agreement, (b) a compromissory clause within a treaty, (c) an optional clause declaration, and (d) *forum prorogatum*. The Court has the inherent power to examine its jurisdiction over a case as well as the admissibility of the application in question.

(p. 140) Key cases

Case	Facts	Principles
Monetary Gold removed from Rome in 1943 (Italy v UK, France and Germany), Judgment, ICJ Rep (1954), p 19	The disputed gold had been removed from Rome by Germany during World War II, but was subsequently found by an arbitrator to have belonged to Albania. Italy and the US however each claimed the disputed gold on the basis of legal claims against Albania.	The Court found that in order to determine the validity of Italy's claim, it would have to 'determine whether Albania has committed any international wrong against Italy, and thus to decide a dispute between Italy and Albania'. Nonetheless, Albania was not before the Court as a party to the proceedings and had not consented to the dispute being settled by the Court (p 32).
Legal Consequences of the Construction of the Wall in the Occupied Palestine Territory, Advisory Opinion, ICJ Rep (2004), p 136	The Court had to address the following question posed by the General Assembly: 'what are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power?' Due to the increased political character of the subject matter of the request, there were calls that the Court should have abstained from giving an advisory opinion.	The Court held that it could not accept the view that it has no jurisdiction because of the 'political' character of the question posed. The Court considers that because a legal question encompasses political aspects, 'does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute", and the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task'. Moreover, with regard to the argument concerning the discretionary power to decline to give an advisory opinion, the Court held that the request for an advisory opinion 'represents its participation in the activities of the Organization, and, in principle, should not be refused'.

Key debates

Topic	**Intervention of third States**
Author/Academic	B Bonafé
Viewpoint	The interest of a legal nature is a crucial requirement under **Art 62** and the scope of intervention largely depends on the definition of such a requirement. In light of the recent case law of the Court, the author explores the different types of legal interests that could justify permitting a third State to intervene before the ICJ.
Source	'Interests of Legal Nature Justifying Intervention before the ICJ', 25 *Leiden Journal of International Law* (2012) 739–57
Topic	**International adjudication**
(p. 141) **Author/Academic**	Chester Brown
Viewpoint	This book makes a significant contribution to understanding the impact of the proliferation of international courts by addressing one important question: namely, whether international courts and tribunals are increasingly adopting common approaches to issues of procedure and remedies. This book's central argument is that there is an increasing commonality in the practice of international courts to the application of rules concerning these issues, and that this amounts to the emergence of a common law of international adjudication.
Source	*A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007)

Exam questions

Problem question

State A has concluded a bilateral agreement with State B which provides for the joint exploitation of a part of their respective continental shelf. The agreement envisages the establishment of a joint venture encompassing oil platforms and drilling. However, after a short period, the relationship between the two States deteriorates to the extent that they start threatening each other with the use of armed force. State A decides then to denounce the above agreement and cease its part of the joint venture. It proceeds to expel all the nationals of State B from its territory. In response, State B initiates proceedings before the ICJ with the claim that State A has violated the bilateral treaty and the prohibition against the threat of the use of force under **Art (4) UN Charter** as well as the customary law concerning the treatment of its nationals in State A. State B also requests the Court to order provisional measures concerning the cessation of the allegedly illegal acts of State A.

State A has declared that it recognizes as compulsory the jurisdiction of the Court under **Art 36(2) ICJ Statute** in respect of all disputes, save for those that relate to military measures for national defence. State B has made a similar declaration recognizing the jurisdiction of the Court in all disputes without exception.

1. Does the Court have jurisdiction to hear the present case?
2. Supposing that the Court does have jurisdiction, can it order provisional measures and will State A be

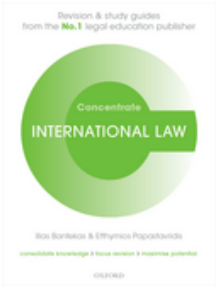
obliged to comply with them?

An outline answer is included at the back of the book.

(p. 142) *Essay question*

Discuss the differences between political and legal means of dispute settlement.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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11. Use of force

Chapter: (p. 143) 11. Use of force
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The examination

There are some key cases which concern the use of force which you should ensure you are familiar with. They are all International Court of Justice (ICJ) cases, namely the ***Nicaragua*** case, ***Oil Platforms***, the ***Nuclear Weapons*** Advisory Opinion and ***Serbia & Montenegro v Belgium (Case Concerning the Legality of Use of Force)***. It is also useful to have a good understanding of the ***Caroline*** case. Examination questions will often focus on one of two areas, namely: (a) the prohibition of force and self-defence (**Arts 2(4) and 51 UN Charter** and (b) **collective security** and the role of the Security Council (SC) under **Chapter VII** of the **UN Charter**.

(p. 144) Key facts

- The law on the use of force concerns the lawful preconditions for the use of military force by States and the UN through the SC. This is regulated in **Arts 2(4) and 51 and Chapter VII** of the **UN Charter**.
- The UN is the only international body with the power to authorize the use of force, outside cases of self-defence. The UN does not possess its own armed forces and necessarily relies on coalitions willing to contribute their forces.

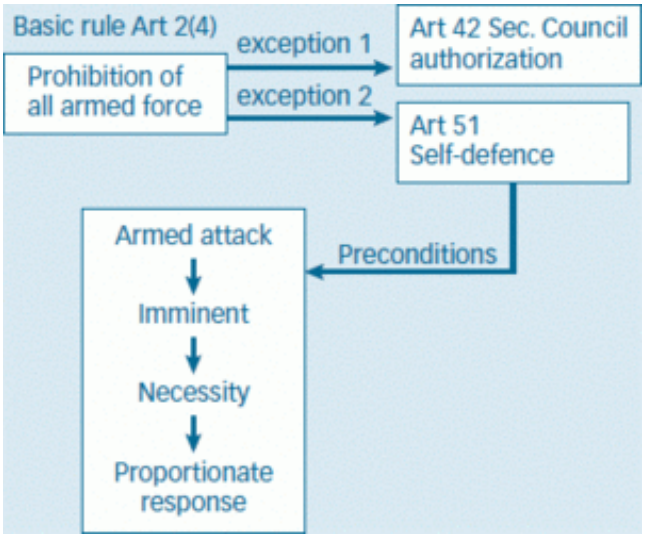
• Collective security concerns the power of the SC to authorize the use of armed force against States or non-State entities, such as pirates.

• States are only entitled to use armed force in situations of self-defence. Self-defence arises only where the target State is under an 'armed attack'. An armed attack is a very significant use of armed force against the target nation.

• Whereas an 'armed attack' is a necessary precondition for self-defence, it is not a precondition in the context of collective security.

• The legality of some types of force is not clear. This is particularly true in respect of **humanitarian intervention**, **pre-emptive self-defence**, **anticipatory self-defence**, and extraterritorial action to save nationals abroad.

(p. 145) Chapter overview



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Rules regarding use of force

The prohibition of force before 1945

At the end of World War I, in 1918, the international community attempted to limit recourse to war as a means of settling inter-State disputes. **Article 12 of the League of Nations Covenant** (essentially the predecessor to the UN) introduced a very weak provision which stipulated that if a dispute arose between two or more nations they were to seek peaceful settlement, failing which they agreed to wait three months before resorting to war. The covenant did not prohibit war as a matter of international law and did not impose any kind of liability on aggressor States.

In 1928 the so-called Kellogg-Briand Pact (or Treaty of Paris) was adopted. Although its wording is stronger than the League Covenant, the signatories merely 'condemned recourse to war' and 'renounced it as an instrument of national policy'.

Thus, right up to the beginning of World War II in 1939, recourse to war was not totally prohibited, at least under treaty law. This is confirmed by the fact that various nations prior to 1939 entered into bilateral non-aggression agreements, the majority of which were subsequently violated. At the end of World War II, in 1945, it became apparent that the reorganization of the international community would need to be grounded on an express and concrete prohibition of *war* and other forms of *armed force* in order to prevent the proliferation of protracted and destructive international conflicts.

(p. 146) The general prohibition of force in the UN Charter

The principal provision is **Art 2(4)** which states that:

> UN Charter Art 2(4)
>
> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations.

This is a 'loaded' provision, which means that each set of words has a deeper meaning than may immediately be apparent.

Threat or use of force

Article 2(4) prohibits all threats to use force, as well as the actual use of force. Threats are now uncommon, but they do still exist. Turkey has issued a long-standing threat to Greece that it will treat any extension of the latter's territorial sea as an act of war. A threat is unlawful even if it is not followed by armed force.

The term 'force' in **Art 2(4)** refers to armed or military force and hence does not encompass economic or political sanctions and measures. This is confirmed by the fact that when the matter was discussed in 1945 the delegates to the **UN Charter** conference excluded economic sanctions from **Art 2(4)**.

Article 2(4) prohibits all types of armed force, from the lowest-intensity skirmishes to the highest-intensity armed conflicts. The rationale is that by containing even the slightest potential for military force the international community is preventing the escalation of conflict.

Against the territorial integrity or political independence of other States

Since all instances of armed force are prohibited the cause for which they are undertaken (save for self-defence) is irrelevant. Military force is illegal even if it is not aimed at disrupting the territorial integrity or political independence of other nations. In ***Albania v UK (Corfu Channel case)*** (1949), a British warship entered Albanian waters with the aim of removing mines that impeded international navigation and which had earlier been responsible for the destruction of passing British ships. The removal of the mines was undertaken without Albanian approval. The British government argued that it had not violated **Art 2(4)** because its actions intended to remove the mines and had no effect on the territorial integrity or political independence of Albania. The ICJ disagreed, holding that a violation of Albanian (p. 147) territorial integrity had taken place irrespective if the action was temporary and had limited objectives.

This also means that unilateral actions (ie action not authorized by the UN SC) with the aim of restoring democracy or for the purposes of regime-change constitute violations of **Art 2(4)**.

> Revision tip
>
> **Article 2(4) UN Charter** prohibits all types of armed force, from the slightest (ie removal of mines) to the most severe. It does not encompass economic or political sanctions. However, some authors such as Dinstein and Brownlie have argued that 'armed force' requires the use of a weapon that causes physical damage. This of course goes against the *Corfu Channel* judgment.

Looking for extra marks?

The unilateral imposition of political and economic measures or sanctions is prohibited under customary international law. This is attested in UN General Assembly Resolution 2625 (XXV) of 24 October 1970. This is one of the most important resolutions adopted by the General Assembly and is known as the **Friendly Relations Declaration**. It is generally agreed that it represents customary international law. The very essence of the declaration is that it prohibits all kinds of external interference in the domestic affairs of other nations. The rule against **non-interference** is stipulated in **Art 2(7) UN Charter**. The only exception to this rule concerns actions and interventions of the UN SC acting under **Chapter VII** of the **UN Charter**.

Exceptions to the prohibition of force

- Use of force in self-defence.
- Authorization of armed force by the UN SC, also known as collective security.

Self-defence

Self-defence is regulated under customary international law, as well as under **Art 51 UN Charter**. This is another loaded provision, which we shall explain in more detail. It reads:

Article 51 UN Charter

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Key terms in this Article are '*inherent right*', '*armed attack*' and '*occurs*'. Another issue that has traditionally been taken for granted in **Art 51**, but is now in dispute, is whether non-State actors, particularly terrorists, can commit an armed attack.

(p. 148) **The meaning of 'armed attack'**

This term is not defined. However, given that **Art 2(4)** prohibits even the slightest use of armed force, it is assumed that in order for a State to be entitled to respond with force against an armed attack, the attack must be of considerable gravity. If the attack is not of considerable gravity, then the defending State does not have the right to use armed force in retaliation and must employ peaceful methods.

USA v Nicaragua (Military and Paramilitary Activities in and against Nicaragua or Nicaragua case), ICJ Rep (1986), p 14

In this case the ICJ provided an indication of what an armed attack encompasses, namely:

> not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of

armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein.

The mere provision of assistance or logistical support to rebels by a third State was not found, by the ICJ, to constitute an armed attack.

Iran v USA (Oil Platforms case), ICJ Rep (2003), p 161

In a later case, US warships attacked Iranian commercial oil installations as a response to an alleged armed attack by Iran. This alleged armed attack consisted of laying sea mines and the firing of missiles against commercial vessels flying a US flag. The ICJ was asked to decide whether a single attack against a warship amounts to an armed attack and whether cumulative, but small, incidents of armed force also amount to an armed attack.

With regard to the first question, the Court did 'not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defence'. As to the *accumulation approach*, although the ICJ did not directly address its validity, its judgment does suggest that it is not hostile to the idea if appropriate cases arise in the future.

Proportionality and necessity

When an armed attack takes place, the response of the defending State is not unlimited. **Article 51** does not address what is an appropriate response to an armed attack. This is regulated by customary law and encompasses the principles of proportionality and necessity. Self-defence must be proportionate to the armed attack. This does not mean that it must necessarily be the same. It can be of such gravity as to dissuade the attacking State and prevent any further strikes. Proportionality is therefore assessed on a case-by-case basis. Necessity **(p. 149)** refers to the measures adopted for self-defence. These must be necessary to respond to the armed attack (***Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*** (1996)). For example, the aerial bombardment of heavily populated cities is both disproportionate and unnecessary as a response to an exchange of fire between two naval warships on the high seas.

The Caroline case

In 1837 Britain was the sovereign of Canada. The steamship *Caroline* was used by Canadian rebels to send troops and arms into Canada to fight the British. At the time of the incident it was moored in US waters where the British army destroyed it, killed its crew, and sent the boat over the Niagara Falls. The case never went to court or international arbitration and was instead resolved through an exchange of letters between the US and British foreign ministers. The letter of the US Secretary of State is cited as the definitive statement on necessity and implicitly on the right of anticipatory self-defence. He stipulated that necessity must be:

instant, leaving no choice of means, and no moment for deliberation…It must be [shown] that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have

been unavailing…but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board…

Inherent right of individual or collective self-defence

The term 'inherent' signifies that pre-**UN Charter** customary law pertinent to self-defence continues to apply following the adoption of the **UN Charter**. The problem is that certain pre-**UN Charter** justifications for self-defence are incompatible with the high-gravity threshold for an armed attack established by **Art 51**. For example, prior to 1945 it was lawful to use armed force as a reprisal against what might have been a small-scale attack. Reprisals are no longer permitted under **Art 51**. Two schools of thought have emerged on the issue. The ***restrictive* school** (Brownlie and Franck) renders the threshold of armed attacks the only yardstick, thus restricting the application of self-defence. The *expansive* school (Bowett and Reisman) takes the opposite view by relying on pre-**UN Charter** practices as being valid today. The likelihood of complementary or equal rules in both treaty and customary law on the use of force was emphasized in approval by the ICJ in its ***Nicaragua*** judgment, paras 183–201.

These pre-**UN Charter** practices, although it is by no means clear that they ever constituted customary law, include: anticipatory self-defence (ie use of force in anticipation of an imminent or anticipated armed attack); humanitarian intervention; armed force to rescue nationals abroad; reprisals; and pre-emptive force against an enemy that is preparing to strike, although said strike is not necessarily imminent but rather remote.

Self-defence is primarily individual, ie by one State against another. **Article 51**, however, allows collective instances of self-defence. This includes armed responses to an armed attack by more than one nation against the aggressor. In order for collective self-defence to be (p. 150) legitimate it is required that: (a) the target country is indeed under an armed attack; (b) its government has specifically called other States to its assistance; (c) the assisting States have consented; and (d) their response is proportionate and necessary.

The timing of self-defence

The verb 'occurs' in **Art 51** seems to suggest that self-defence is lawful only after an armed attack (or an accumulation of smaller attacks) has taken place. As a result, pre-emptive force would be unlawful because the threat is remote. Where the threat is imminent, however, a good number of nations, particularly Israel and the USA, argue that it is absurd to wait for the enemy to strike first when there is ample evidence that he is preparing to attack. They have used this argument to justify defensive action against States that are in the process of building up their nuclear arsenal, as is the case with Iran and North Korea, but such cases are best described as pre-emptive defence rather than anticipatory. We have already explained that the ***Caroline*** case is employed to demonstrate that anticipatory self-defence has traditionally been recognized under customary international law. This is not the case for pre-emptive self defence.

Can non-State actors commit an armed attack?

The **UN Charter** is an inter-State treaty and the obligations contained therein are addressed to States. Moreover, in 1945, the drafters of the **UN Charter** clearly did not envisage that entities other than States would be physically capable of carrying out anything close to an armed attack. The terrorist operations of 9/11 seem to have changed the dynamics of the law of self-defence. In the aftermath of 9/11 the UN SC adopted Resolution 1368 (2001) which linked the right of self-defence to terrorism and threats to international peace and security. Implicitly, this seems to suggest that an operation of the scale and the number of victims inflicted by the 9/11 terrorists will meet the criteria of armed attack under **Art 51**.

Commentators, although not dismissing this line of thinking, have identified some serious practical problems. The most poignant concerns proportionality and necessity. Given that terrorists may undertake small attacks from the territories of more than one nation, how does one decide which country, if at all, is targeted and what is an appropriate response in each case? One should not also forget that in the ***Caroline*** case the incident which gave rise

to the self-defence claim was committed by a rebel group, ie a non-State actor. Thus, it may be assumed that under customary law (*inherent*) non-State actors have traditionally been deemed capable of committing an armed attack. See chapter 9 'State responsibility' for a discussion of attribution to a State of acts undertaken by non-State actors.

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (**Palestinian Wall**)*, Advisory Opinion, ICJ Rep (2004), p 136

Israel justified the construction of a wall to prevent Palestinians from occupied territories freely entering its territory on security grounds. Palestine is not a State and any attacks against Israel come **(p. 151)** from groups of individuals engaged in a war of liberation or terrorism. The ICJ did not categorically say that an attack by non-State actors can give rise to self-defence.

The requirement to inform the Security Council

The relevant part of **Art 51** is somewhat misleading. The right of self-defence is by no means dependent on informing the UN SC and waiting for it to take action first. It is an independent entitlement. However, once the SC undertakes military measures itself and specifically demands that the target State terminate its defensive action, in theory the target State must terminate such action. In practice the SC's measures may be deemed inadequate by the defending State, in which case it can choose to ignore the SC's demands, and risk the consequences.

Collective security

Collective security refers to the power of the SC to authorize the use of armed force against recalcitrant States as well as to demand that a target State cease its defensive action. Collective security is different from the right of collective self-defence in **Art 51** because the latter does not involve any authorization from the SC. It is merely an expression of individual self-defence undertaken by more than one nation acting together.

Collective security does not, however, only concern the use of armed force by the SC. Rather, it generally concerns the SC's principal mandate and power to maintain and restore international peace and security. This may well entail action that falls short of the use of armed force, as well as measures intended to restore peace and justice to a country that has emerged from a war. Given that the United Nations does not possess a standing army, collective security also involves delicate questions of authorizing other actors, namely States and coalitions thereof, to maintain international peace and security on behalf of the SC.

Collective security is principally contained in **Chapter VII** of the **UN Charter**, whereas **Chapter VIII** discusses regional arrangements which the Council may use to respond to threats or breaches of the peace. The key provisions in **Chapter VII** are **Arts 39, 41, and 42**.

Measures not involving the use of armed force

The SC is charged with primary authority—above other States and international organizations—to determine the 'existence of any threat to the peace, breach of the peace, or act of aggression' and accordingly make recommendations and decide what measures are to be taken to maintain and restore international peace and security (**Art 39**). The SC is thus charged with an important preventative role. Whereas traditionally the SC has considered threats to the peace to primarily arise from inter-State conflicts, since the end of the Cold War, and beginning with the conflict in the former Yugoslavia, it has made it clear that international peace and security are equally threatened by internal conflicts and gross human rights violations (SC Resolution 827 (1993)). This is important because it expands the ambit of **Art 2(7) UN Charter** **(p. 152)** which would not otherwise permit the SC to intervene in the internal affairs of a country if said affairs did not also threaten international peace and security.

Once the SC determines a threat or a breach under **Art 39** it will seek a peaceful solution with the parties concerned, by means of negotiation, mediation, adjudication, or other. If the situation persists, it may then impose measures not involving the use of armed force, such as interruption of communications, embargoes, severance of diplomatic relations, sanctions, and others, in accordance with **Art 41**. The list of measures in **Art 41** is merely indicative, not exhaustive. If these measures are of no avail the SC may then authorize the use of armed force under **Art 42**. **Chapter VII** does not establish an obligatory sequence between **Arts 41 and 42**. As a result, the SC may, although unlikely in practice, impose measures under **Art 42** without first exploring action not involving the use of armed force.

Revision tip

Resolution 827 (1993) which set up the International Criminal Tribunal for the former Yugoslavia (ICTY) was implicitly based on **Art 41 UN Charter**, despite the fact that **Art 41** makes no mention of the SC's power to set up tribunals.

Looking for extra marks?

The imposition of naval or other blockades and sanctions, although strictly encompassed under **Art 41**, requires in most cases an element of force against those who attempt to violate them. This may be implicit or explicit in the relevant resolutions and hence these measures are known informally as **Art 41** and-a-half measures.

The authorization of armed force by the Security Council

Article 42 does not mention the term 'armed force'. In fact, all relevant SC resolutions refrain from using this term altogether and do not even cite **Art 42** as their basis. Instead, the SC authorizes the use of 'all necessary means' in place of 'armed attack' in all its resolutions, grounding said authorization on **Chapter VII** of the **UN Charter**, rather than **Art 42** thereof. Although resolutions authorizing the use of armed force are clearly more important than resolutions on other matters, they are adopted with the same majority (ie all permanent members in addition to four non-permanent members).

Although the language is the same in all resolutions (ie use all necessary means) the mandate in each resolution may in fact be very different. Resolution 794 (1992) authorized nations making up the UN Mission to Somalia (UNOSOM) to use all necessary means to ensure a secure environment for humanitarian relief operations. Resolution 1816 (2008) authorized States to employ force in order to deter and prevent piracy off the coast of Somalia. Resolution 678 (1990), on the other hand, authorized States participating in the liberation of Kuwait to use all necessary means to not only restore Kuwaiti sovereignty but moreover to **(p. 153)** 'restore international peace and security in the region'. The mandates in the three resolutions differ significantly geographically, spatially, and quantitatively.

Delegation of collective security

Although **Chapter VII** originally envisaged the contribution of troops under the military authority of the SC (**Art 43**), this never materialized. Moreover, there is nothing in the **UN Charter** that suggests that the SC can oblige member States to use armed force. This is only undertaken voluntarily. In practice, the country that tables a resolution of this nature, typically a permanent member of the SC, will have already assembled a coalition of willing States.

Given that the SC is physically unable to undertake enforcement action, it delegates this function. **Chapter VIII** of the **UN Charter** envisages delegation to regional organizations dealing with peaceful settlement, as would be the case with the Economic Community of West African States (ECOWAS). Any operations undertaken as a result remain under the authority of the SC and require an express mandate by it. The SC may retract its mandate at any time.

Besides regional organizations, enforcement action may be delegated to informal alliances or coalitions of like-minded States. Although the military units that make up these coalitions answer to their national authorities, they are nonetheless under unified command and control and the mandate of the coalition is prescribed by the terms of the SC's resolution. Coalitions of this nature include those that participated in the liberation of Kuwait in 1990 and the deposition of the Iraqi regime in 2003.

Collective security against Iraq: 1990 and 2003

Following the invasion of Kuwait by Iraq in 1990 the SC adopted a series of resolutions encompassing non-forcible measures. These did not deter Iraq and so the SC adopted Resolution 678 (1990) which authorized a coalition to liberate Kuwait in order to 'restore international peace and security in the region'. This latter part of the mandate is very broad because it does not have a termination date and the security of the entire region may be interpreted to include States other than Iraq. As a result, Resolution 678 was used by the coalition for over a decade to establish no-fly zones and to justify anew the invasion of Iraq in 2003. Another justification for the 2003 invasion was the alleged failure of Iraq to comply with the SC's nuclear disarmament demands (Resolution 1441 (2002)).

Collective security without the council: the doctrine of implied authorization

Collective security without the SC's express consent cannot exist. Yet, certain powerful nations have argued that where a country consistently fails to ensure the maintenance of peace in material breach of SC resolutions, there is an implied authorization to use all necessary means to compel that country to comply with its international obligations. Resolution 1441 **(p. 154)** (2002) was one of the bases for implied authorization in the campaign against Iraq in 2003. This resolution called for a 'final opportunity to comply'. The doctrine is not supported in the majority of scholarly writings and was rejected by those countries sitting in the SC that would have refused to adopt a resolution authorizing the use of force in the particular case.

Revision tip

The SC may delegate the authority to use force to regional organizations or informal coalitions of willing States. These are at all times under the authority of the SC and the terms of the mandate dictated by the relevant resolution. A typical coalition of willing nations was that established under US leadership to restore Kuwaiti sovereignty in 1990.

Looking for extra marks?

In 1990, the military coalition acting for the liberation of Kuwait could have relied on collective self-defence under **Art 51** and taken action sooner. Instead, it waited for a SC authorization because the USA wanted the broad mandate of Resolution 678, which it was not entitled to under the terms of collective self-defence.

Humanitarian intervention

Humanitarian intervention (HI) involves the use of military force by one or more States against another State that is violating the human rights of its people on a gross and systematic scale. Examples include the invasion of East Pakistan (now Bangladesh) by India in 1971 and that of NATO against Yugoslavia in 1999 in respect of the latter's alleged repression of the Kosovar minority. The **UN Charter** does not endorse this doctrine and intervening States do not argue it as their principal justification for fear that it may be claimed as a general entitlement under international law. In ***Serbia v Belgium*** (***Case Concerning the Legality of Use of Force***) (2004), involving the legality of the NATO bombing of Serbia, Belgium was the only NATO member that pleaded humanitarian intervention.

Responsibility to protect

Because of the legal and moral ambiguity surrounding humanitarian intervention the UN General Assembly formulated and endorsed the responsibility to protect (R2P) doctrine. It rests on three pillars:

1. Every State has a primary responsibility to protect its people.
2. The international community is responsible for assisting States to protect their people.
3. If the target State fails to protect its people, the international community is obliged to assume that role and may use of force to do so, albeit only as a means of last resort.

The difference between R2P and HI is that the former was formulated by the international community acting as a whole and therefore lacks arbitrariness. Moreover, R2P requires **(p. 155)** some degree of input by the SC and unlike HI it involves a process whereby the primary goal is to offer assistance and avert a humanitarian crisis. In the course of the 2011 Libyan uprising the SC adopted Resolution 1973 (2011) which specifically invoked the principles underlying R2P. This does not mean, however, that R2P is free of ambiguity and several critics argue that it is an attempt to legitimize otherwise forbidden interventions.

Looking for extra marks?

R2P was endorsed in the 2005 World Summit Outcome Document, adopted as GA Res 60/1 (2005). This is one of the key documents on R2P.

Key cases

Case	Facts	Principles
USA v Nicaragua (***Military and Paramilitary Activities in and against Nicaragua or Nicaragua case)***, ICJ Rep (1986), p 14	Nicaragua claimed that the USA had financed and supplied arms to a rebel group, the Contras, in order to launch attacks against its legitimate government. It also claimed that US agents had trained the Contras. The USA argued that it was merely acting in collective self-defence in favour of Nicaragua's three neighbouring States, which Nicaragua had attacked. The basic question before the Court, for the purposes of this chapter, was whether this level of assistance amounted to an armed attack.	The Court's assessment as to the criteria of an armed attack has been provided above. In relation to the specific circumstances of this case the ICJ held that the mere delivery of assistance to rebels in the form of weapons or logistical support does not amount to an armed attack. This was in line with the Court's requirement of gravity which is essential for an attack to be classified as an armed attack. This gravity test seems to have been slightly watered down in the ***Oil Platforms*** case.
Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, ICJ Rep (1996), p 226	The UN and the WHO requested an advisory opinion from the ICJ as to whether the threat or use of nuclear weapons would in any circumstance be permitted under international law.	The ICJ's opinion is not entirely clear. What is clear is that the use of nuclear weapons other than for self-defence is always unlawful. However, under treaty and customary law it is not unlawful to possess nuclear weapons. The Court noted that nuclear weapons are incapable of discriminating between military and civilian objectives and as such are contrary to the laws of war. Nonetheless, in urgent situations where the very existence of a nation is under threat from a nuclear attack the use of similar weapons as a means of self-defence may not be unlawful. The opinion has been criticized because it approached its subject matter from a very legalistic viewpoint.

(p. 156) Key debates

Topic	**Frequency and justification of force by powerful States**
Author/Academic	Thomas Franck
Viewpoint	The UN is unable to prevent powerful nations, especially the Western members of the SC, from resorting to force against regimes they dislike. Although they are able to legitimize their actions by reference to numerous legal principles, these powerful nations kill the spirit of the **UN Charter**'s fundamental provisions on the use of force.
Source	'What Happens Now? The United Nations after Iraq', 97 *American Journal of International Law* (2009) 607
Topic	**Using force against terrorists**
Author/Academic	Christian Tams
Viewpoint	Although the application of **Art 51** to terrorists is technically problematic, several nations have relied on self-defence in order to use force against alleged terrorist incidents and organizations.
Source	'The Use of Force against Terrorists', 20 *European Journal of International Law* (2009) 359

Exam questions

Problem question

Country X is experiencing a civil conflict on its territory with an ethnic minority that seeks independence. The minority receives logistical support and arms from country Y, whose army, however, never enters the territory of X and does not control the military operations of the minority. Critically examine the following issues:

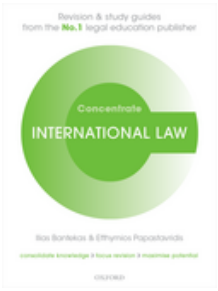
1. Does country X possess the right to self-defence under **Art 51** against country Y?
2. Would the SC be entitled to regulate the civil conflict, assuming that country Y did not provide any support to the minority?
3. If country X had sufficient and credible information that neighbouring country XX was preparing to make a land invasion against it, would it be entitled to use military force against XX as a means of pre-emptive self-defence?

An outline answer is included at the back of the book.

(p. 157) *Essay question*

What does the term 'armed attack' encompass in **Art 51 UN Charter**?

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



International Law Concentrate: Law Revision and Study Guide

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12. Human rights

Chapter: (p. 158) 12. Human rights
Author(s): Ilias Bantekas and Efthymios Papastavridis
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The examination

Typically, exam questions in this field avoid theoretical issues involving the philosophical nature of rights and focus generally on how rights are construed and implemented by the international community. Themes such as **cultural relativism** versus **universalism**, **indivisibility**, interdependence, and **progressive realization**, however, are often mentioned. Equally, questions about individual complaint mechanisms are frequent, particularly the European Court of Human Rights (ECtHR) and **UN Charter**-based mechanisms, as well as their general admissibility criteria. Given that human rights occupies only a lesson in the entire international law syllabus, it is highly unlikely that you will have been taught any specific rights.

(p. 159) Key facts

• The key human rights provisions in the **UN Charter** are **Arts 1(3), 55, 56, 62, and 103**. Note that these carry few, if any, obligations for UN member States. The language they employ is mostly aspirational (ie hope for the future). Nonetheless, their importance cannot be underestimated as they clearly suggest that the protection of human rights is a means to achieving international peace and security.

• Only States are burdened with human rights obligations against individuals. Individuals/natural persons, including terrorists and multinational corporations, do not possess human rights obligations. Rather, if they are responsible for the killing or torture of another person, they are liable under ordinary criminal law.

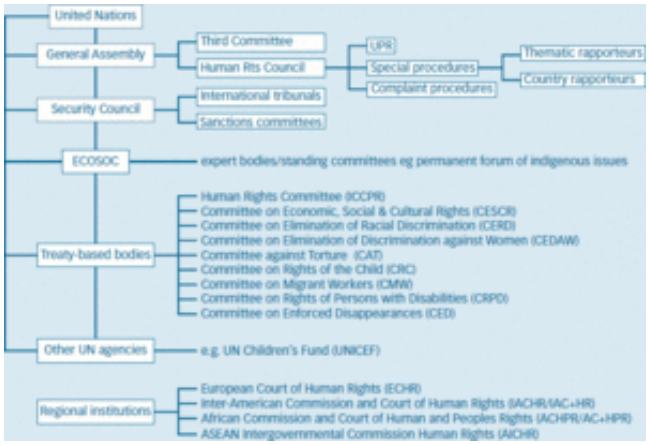
• The ECtHR was established not by the European Union but by the Council of Europe. The Court enforces the **European Convention on Human Rights and Fundamental Freedoms** (**ECHR**) and its additional protocols.

• For ordinary people to enjoy international human rights, the relevant treaties in which these rights are embodied must first be implemented into domestic law and subjected to the jurisdiction of local courts. This provides legal standing (*locus standi*) to bring a claim and gives local courts the power to entertain jurisdiction.

• The Bill of Rights is composed of three instruments: the 1948 **Universal Declaration of Human Rights** (**UDHR**) (which is not a treaty but a resolution of the UN General Assembly), the 1966 **International Covenant on Civil and Political Rights** (**ICCPR**) and the 1966 **International Covenant on Economic, Social and Cultural Rights** (**ICESCR**). **The ICCPR** and **ICESCR** are multilateral treaties.

• Charter-based mechanisms receive their mandate directly from the **UN Charter** or its principal organs. The most important **UN Charter**-based mechanism is the Human Rights Council, although both the General Assembly and the Security Council undertake significant human rights work. Charter-based mechanisms are generally distinguished from human rights treaty bodies. These are quasi-judicial entities that monitor and enforce the provisions of particular human rights treaties such as the **ICCPR** and the **ICESCR**.

(p. 160) Chapter overview



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Brief overview of global human rights institutions

(p. 161) Origins of human rights

Two general theoretical foundations have belied the recognition of rights within societies, namely *natural law* and *civil liberties*. The supporters of natural law contended that since man had been endowed by his Creator with some inalienable qualities these are necessarily inherent in human nature. As a result, no one can deny or restrict them, nor are they subject to approval. From a practical point of view, nonetheless, rights need to be identified before one can speak of promotion and protection. The Magna Carta (1215) and the American Declaration of Independence (1776) rely significantly on natural law. Following the Enlightenment, a new theory emerged, which focused on the relationship between the rulers and the governed, reckoning that since governments enjoyed their power from the people on the basis of a tacit contract, the people enjoy several rights as a result. This notion is the cornerstone of the French Declaration of the Rights of Man (1789) and marks the era of civil liberties.

The contemporary manifestation of human rights starts with the adoption of the **UN Charter**, which is an international treaty. The obligations addressed to States therein use very weak language, such as 'promote' and 'cooperate' in the pursuit of human rights. This clearly suggests that the drafters of the **UN Charter** did not aspire to burdensome human rights obligations at the international level. Nonetheless, the Economic and Social Council (ECOSOC), a principal organ of the UN whose mandate involves making recommendations for the promotion and protection of human rights (**Art 62(2)**), immediately set up the Commission on Human Rights. The commission, although a political body, was responsible for the drafting of the **UDHR**, which was approved by means of a resolution by the General Assembly in 1948. Although General Assembly resolutions are not binding, the **UDHR** is still considered the most important human rights instrument and the majority of its provisions reflect customary law. The **UDHR** was a **standard-setting** tool, in the sense that although not binding sets out a platform for future achievement without placing stress on countries to adopt a particular treaty. Rather, standard-setting is meant to give States time to reflect and in time come to accept the prescribed rights.

Attempts for the realization of the **UDHR** began straight after its adoption through the **ICCPR** and the **ICESCR**, both of which were however adopted almost 20 years later in 1966. During the same time other regional human rights treaties and institutions began to emerge, particularly the **ECHR** (1950), along with its Court, and later the **American Convention on Human Rights** (1969), although the Inter-American Commission on Human Rights was established in 1959 and the Court in 1979. At the same time many specialized regional and global human rights treaties surfaced covering issues such as children, racial discrimination, torture, and others. The main feature of the contemporary era is that those human rights acknowledged as customary or as *jus cogens* belong to all persons, irrespective of whether one's country has ratified the treaties in which they are contained. This encompasses all fundamental human rights, such as the right to life, the right to be free from torture, and others.

(p. 162) **Generations of rights**

For reasons of convenience, some scholars distinguish between three generations of contemporary human rights: the first generation covers civil and political rights; the second economic, social, and cultural rights; whereas the third encompasses so-called *solidarity* rights. Few third-generation rights are codified, as opposed to the first two generations, but are nonetheless embodied in soft law, particularly resolutions of the General Assembly. Some of these are considered binding, such as the right to development, whereas others such as the right to peace or the right to a healthy environment are not as such. In any event, even the latter are considered as *emerging rights*. There is fierce resistance against solidarity rights from most nations, chiefly because their implementation entails significant financial resources (eg foreign aid or debt cancellation) or the curtailment of industrial activities (eg with regard to environmental pollution).

The nature and qualities of international human rights

Human rights are meant to encompass the following qualities, although none is free from difficulty.

Indivisibility

This is based on the idea that there exists no hierarchy among rights and that none is more important than another. If a hierarchy was established, then policy-makers would in principle be free to choose the implementation of one right over another. This is unacceptable because it would justify the violation of rights.

Interdependence

This follows from indivisibility and underlines the fact that no right is realizable in isolation of others. For example, the right to self-determination requires freedom to elect, non-intimidation and torture, freedom of expression, and others.

Universalism

Human rights apply equally to all people and are enjoyed by all under the same terms. This is in contrast to the antithetical notion of *cultural relativism*, which posits that rights can only be validated by a particular society's cultural, religious, or other values. An example of relativism is the denial of the right to convert in Islam and the harsh

penalties imposed in several Muslim nations upon converts. Universalists argue that the freedom to change one's religion applies to all people irrespective of their religion. Other examples include the practice of female genital mutilation, as practised in many parts of rural Africa.

(p. 163)

Revision tip

Human rights obligations are owed only by States to individuals and groups of individuals. They are not owed by individuals to their counterparts. Nonetheless, the State has a duty to oversee what goes on between private parties so that they do not violate the enjoyment of rights. This may be achieved by the duty to criminalize particular conduct and the duty to prosecute. Hence, terrorists do not possess human rights obligations. Their conduct is, however, encompassed under the criminal law.

Individual and collective rights

The majority of rights encompass an individual entitlement, in the sense that they are exercisable on an individual basis and in case of a violation the claim belongs to the victim. By way of illustration, the killing of a peaceful protestor violates that person's right to life. A governmental action may, however, adversely affect more than one person simultaneously, as in the case of restrictions to free speech and movement. In both cases, nonetheless, the entitlement remains individual. The only difference is that in the second example there are multiple victims.

Collective rights, on the other hand, belong to a pre-defined *class* of people, not to individuals within the class. They are exercisable by the class itself. The most important collective right is that of self-determination, found in **Art 1 of both the ICCPR and the ICESCR**.

Looking for extra marks?

The technical term for the recipients of self-determination is *peoples*, rather than people. Self-determination encompasses an internal and an external dimension. The external dimension commands that the group which forms the numerical majority (peoples) may decide on its own particular form of statehood, including secession.

Enforcement and implementation of rights

The fact that a human rights treaty has been adopted and ratified by a State does not necessarily mean that all its provisions are to be implemented straight away. A number of underlying problems persist:

Immediate and progressive realization

Most countries are unable to undertake legislative and practical measures that entail a fundamental change in social relations. For example, in 1958 when the Supplementary Slavery Protocol was adopted it prohibited practices such as offering a bride in exchange for some material wealth, as well as debt-bondage. Although these horrendous practices amount to slavery they were embedded in the social and economic fabric of many developing countries through several generations. In order, therefore, to convince these countries to adopt **(p. 164)** the protocol it was agreed that the abolition of these practices would be undertaken progressively and not immediately, so as to make adaptation as smooth as possible. On the other hand, fundamental entitlements such as the right to life or the right to be free from torture require *immediate realization* as there can be no valid social or economic reason that justifies killing or torturing people.

Resource problems

The implementation of certain rights requires a significant degree of resources, which some countries do not possess. As a result, even if they make appropriate legislative arrangements the right in question will remain on paper only. By way of illustration, the right to free universal education requires the training and payment of teachers' salaries, schools, books, and transportation of students from rural communities to their schools. In order for poor countries to sign up to human rights treaties, their resource problems are resolved through progressive realization and external funding, otherwise they would be unable to satisfy rights requiring resources from the State budget.

Justiciability

Justiciability means that a particular right or rights are susceptible to judicial protection. In reality, the formal recognition of a right and its justiciable character are indistinguishable. In most cases this is self-evident. The victim of a policy that denies him the freedom to publish his artistic work is entitled to challenge the restriction against his freedom of expression. It is acknowledged that progressively realizable rights are also justiciable, as are rights subject to resource scarcity. The lack of resources is relevant only to the substance of the right, whereas justiciability refers to procedure (ie the ability to challenge the infringement), to which resource-scarcity and progressive realization are irrelevant. Nonetheless, most third-generation solidarity rights are viewed by States as non-justiciable, principally because there is no global consensus on the substance of the right, let alone an agreement that their collective rights-holders possess judicial remedies. The South African Constitutional Court in the ***Treatment Action Campaign*** case decided that the non-public availability of a drug that was found to prevent the transmission of HIV from mothers to babies was unreasonable and breached the right of poor mothers and their new-born to effective healthcare (***South African Minister of Health v Treatment Action Campaign*** (2002)).

Looking for extra marks?

Despite the non-justiciable character of most third-generation rights, the Supreme Court of India has devised a broad *right to a healthy environment* on the basis of the constitutionally protected rights to life and livelihood. In this manner, justiciability for the right to a healthy environment arises from the contention that a healthy environment is a prerequisite for the preservation of life (***Subhash Kumar v State of Bihar*** (1991)).

(p. 165)

Revision tip

The first forum to deal with a human rights violation is the executive and judicial branch of the country where the violation occurred. If these prove inadequate, the aggrieved party may ultimately appeal to a regional human rights tribunal, such as the ECtHR, or a UN-based human rights mechanism. Certain systematic violations, such as genocide and crimes against humanity, attract attention from the Security Council through the creation of international criminal tribunals. Their primary consideration is to assess the criminal culpability of the accused not to provide redress to the victims. The same role is also entrusted to the permanent International Criminal Court (ICC). Exceptionally, the ICC possesses a redress mechanism for victims.

The International Bill of Rights and fundamental rights

We have already indicated that the Bill of Rights (which is merely a term of art) consists of the **UDHR**, the **ICCPR**, and the **ICESCR**. There is some overlap between the **UDHR** and the other two, but all three are viewed as embodying customary international law. Despite the indivisibility of rights, in practice certain rights may be subject to some brief restrictions, whereas others cannot. The latter are necessarily fundamental rights.

Derogations

Certain human rights treaties stipulate that, in exceptional circumstances threatening the life of a nation, a State party may temporarily suspend the full applicability of certain rights or adjust its implementation of these rights. This is the essence of derogations. Such public emergencies include armed conflicts, civil and violent unrest, natural disasters, and others. The validity of the restrictions imposed is subject to the severity of the threatening circumstances, their temporariness, the issuance of a proclamation, proportionality, their non-discriminatory character, and their legality under general international law. More significantly, fundamental human rights may never be subject to derogation. Non-derogable rights include the right to life, freedom from torture and slavery, and prohibition of retroactive penal measures.

Derogation clauses are provided in **Art 4 ICCPR**, **Art 15 ECHR**, and **Art 27 of the American Convention of Human Rights**.

Lawless v Ireland (1961) 1 EHRR 15

The ECtHR qualified a public emergency as 'an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community'.

A and ors v UK (2009) 49 EHRR 29

In response to the 9/11 attacks, the ECtHR held that the threat of international terrorism constituted a public emergency within the meaning of **Art 15 ECHR**. It added that a broad range of factors **(p. 166)** determine the nature and degree of *imminent threat* to a nation and that it was not necessary for the institutions of the State under terrorist threat to be in immediate danger.

(p. 167) Looking for extra marks?

Whereas State parties under the **ICCPR** are required to provide careful and detailed justifications for the proclamation of a state of emergency and the measures to be imposed, the **ECHR** gives a wide **margin of appreciation**. This was confirmed in ***Brannigan and McBride v UK*** (1993) and is explained more fully below.

Reservations

Article 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties defines reservations as a unilateral statement by which a State purports to exclude or modify the legal effects of certain provisions of a treaty in their application to itself. While reservations are generally acceptable under international law, subject to their approval by the other parties to a treaty, there is a great debate as to whether they should be permitted at all in respect of human rights treaties. The reason is that each right contained in a treaty is essentially a mini-treaty and any reservations thereto would render the particular right meaningless and ineffective. Imagine a scenario where a State accepts to respect the right to life but enters a reservation to the **ICCPR** that allows it to kidnap, torture, and incarcerate without trial those it suspects of undermining its authority.

Reservations to the Genocide Convention, Advisory Opinion, ICJ Rep (1951), p 15

Contrary to the practice that prevailed in the early 1950s, the ICJ held that the validity of a reservation should be measured by its compatibility with the *object and purpose* of the treaty to which it is addressed. Since the object and purpose of the **Genocide Convention** and other humanizing treaties was to protect populations from crimes and human rights violations, such treaties were not susceptible to individual advantages and disadvantages. As a result, reservations that tended to obfuscate the object and purpose of the crime of genocide were deemed invalid.

UN Human Rights Committee General Comment 24 (1994)

The Committee stressed that in respect of a treaty such as the **ICCPR** which articulates many civil and political rights there is no single 'object and purpose'. Rather, each right reflects the object and purpose of the **ICCPR** as a whole.

Looking for extra marks?

The vast majority of post-1995 human rights and humanitarian treaties contain a provision that prohibits all reservations. A poignant example is **Art 120 of the International Criminal Court Statute**.

Revision tip

Do not confuse reservations with derogations. The object of the former is to exclude the application of certain treaty provisions wholly or partially before the reserving State ratifies the treaty, whereas derogations are made after the treaty has been ratified. Their objective is to exclude the application of certain provisions because of a public emergency.

International courts and institutions devoted to human rights

One can point to four types of bodies, depending on membership and the legal basis upon which they were established.

UN Charter-based bodies

These are typically subsidiary bodies created by the principal organs of the UN (ie the General Assembly, Security Council, and the Economic and Social Council (ECOSOC). The most significant is the Human Rights Council, which replaced the Commission on Human Rights in 2005. It was established by the General Assembly and although it is a political body in theory its member States should possess a good human rights record. It performs three main functions related to human rights. The first is the Universal Periodic Review (UPR) on the basis of which all States are required to periodically submit a brief report on the status of all rights on their territory, to which the Council, with

the participation of other States and non-State actors, responds in a non-confrontational manner. The UPR procedure is public and is meant to engage States with a view to offering concrete recommendations and capacity-building assistance. The second function is centred round a complaint mechanism. This is a confidential procedure (formerly known as 1503 ECOSOC procedure) that is triggered only when there are credible reports of gross human rights violations. The final function concerns the appointment of special rapporteurs to deal with the implementation of particular rights (eg the right to water or food) or the human rights situations in specific countries.

Treaty-based human rights committees

The most prominent is the Human Rights Committee, the watchdog of the **ICCPR**. All of these bodies are considered quasi-judicial (ie not fully judicial) and are open to universal **(p. 168)** membership and the experts appointed therein are independent from any government. All the major universal human rights treaties make provision for such bodies in order to avoid rendering the treaties a mere contractual arrangement between States with no overseeing authority.

The creation of the Human Rights Committee is stipulated in **Arts 2, 28–45 ICCPR**. Its job is to ascertain whether member States adhere to their obligations. It undertakes this role in four ways: (a) through the consideration of periodic reports submitted by member States; (b) by issuing General Comments with the purpose of identifying and addressing common themes arising from the member States' periodic reports, which essentially take the form of a commentary; (c) their competence to hear inter-State disputes, albeit none have yet to be submitted; and (d) consideration of individual communications by those victims and their families whose country has ratified the 1976 Optional Protocol allowing individual communications. Its decisions in such contentious cases are not binding on the parties, but the member States must report to the committee how they have implemented its decisions. Although there is a varying degree of compliance, the Committee's decisions are extremely persuasive before other international courts and tribunals.

Regional human rights courts and the European Court of Human Rights

These include the European, the Inter-American, and the African courts of human rights. These exercise a full judicial function and can offer redress to victims. The appointed judges are independent. Given the centrality of the ECtHR you are unlikely to be quizzed about the other two courts. There are three very important principles that underlie the operation of the ECtHR:

Margin of appreciation

Developed by the Court in order to create a balance between the rights contained in the **ECHR** and the otherwise legitimate practices and the cultural, social, and other sensitivities of member States. For example, while it is impermissible to use physical force against children, the Court cannot be oblivious to the fact that family life across many European States has relied on a certain degree of chastisement of children. The liberty to define these public morals is central to the principle of the margin of appreciation.

Handyside v UK (1976) 1 EHRR 737

The Court determined that the UK authorities could determine the necessary boundaries of obscenity and thus the forfeiture of a children's book with references to sex did not violate the freedom of expression. Although this is not an unlimited power, national authorities are better placed to assess the reality of pressing social needs.

(p. 169) Juridical space of the ECHR

This concerns the territories over which the **ECHR** applies and over which the Court has jurisdiction. The Court has

argued that in order for the **ECHR** to be applicable outside Europe, any one of its member States must possess *effective control* of an area outside its national territory.

Bankovic and ors v Belgium (2001) 11 BHRC 435

The Court held that the aerial bombing of Yugoslavia (not a party to the **ECHR**) by NATO forces (ie **ECHR** member States) did not bring the **ECHR** into operation for the alleged victims of the bombing because NATO had not effectively controlled the territory of Yugoslavia at the time.

Loizidou v Turkey (1997) 23 EHRR 513

The applicant lost control of her property when the northern part of Cyprus was occupied by Turkish forces, which then proceeded to claim that northern Cyprus had become an independent country and was thus outside the jurisdictional reach of the **ECHR**. The Court held that its jurisdiction may be triggered through acts undertaken by the authorities of member States, whether performed within or outside national boundaries, which produce effects outside their own territory, as well as 'when as a consequence of military action—whether lawful or unlawful—a member State exercises *effective control* of an area outside its national territory'.

Exhaustion of local/domestic remedies

The statutes of all international human rights courts and mechanisms require that before they can entertain a case the applicant must have exhausted all national/local remedies. Given that this process can take a very long time, it is generally acknowledged that where local remedies are unduly lengthy, cumbersome, ineffective, and unlikely to be successful, the local remedies rule is deemed to have been satisfied and the international court may assume jurisdiction. The leading contemporary case is ***Selmouni v France*** (2000).

Looking for extra marks?

The ECtHR has struggled with member States on the issue of the **ECHR**'s juridical space, particularly as concerns allegations of abuses by multinational forces operating in Iraq. Contrary to the case law of the ECtHR, the House of Lords held that British forces did not have effective control in their area of operation (***R v the Secretary of State for Defence, ex parte Al-Skeini and ors*** (2008)). The Grand Chamber of the ECtHR disagreed, arguing that the **ECHR** is applicable extraterritorially where a State exercises control or authority over an individual through its agents, as well as where it exercises effective control over an area.

International criminal tribunals

These examine human rights from the perspective of criminal sanctions and are set up: (a) either by the Security Council, as in the case of the ICTY and ICTR; (b) by means of agreement between an afflicted State and the United Nations, such as the Sierra Leone Special Court; or (c) by a universal treaty setting up a permanent ICC. All appointed judges thereto are independent.

Key cases

Cases	Facts	Principle
A and ors v UK (2009) 49 EHRR 29	Following the 9/11 attacks the UK government created extended powers providing for the detention of foreign nationals where it was believed that their presence in the UK was a risk to national security and the person was reasonably suspected of being a terrorist. The government considered that these powers may be inconsistent with **Art 5 ECHR** and entered a derogation. Following the arrest of 11 suspects under these powers the ECtHR was asked to determine whether the derogation was indeed compatible with the **ECHR**.	A threat against the life of a nation need not have taken place as long as it is imminent. Thus, a State cannot be expected to wait for disaster before it takes appropriate action. A derogation to control the imminence of further Al-Qaeda attacks by means of extended detention powers was justified. Nonetheless, the distinction between nationals and non-nationals was discriminatory and disproportionate.
Handyside v UK (1976) 1 EHRR 737	Mr Handyside purchased the publishing rights in the UK of a children's book already in circulation in other European countries which devoted a chapter to sex. The book was banned from circulation and while most copies were seized, some found their way to the market. Whereas the applicant argued that this action infringed his right to freedom of expression, the UK government countered that it was necessary to safeguard public morals.	The margin of appreciation principle allows States to interfere with certain rights as long as the measures taken are defined by law, possess a legitimate aim, and are moreover necessary in a democratic society.

Cases	Facts	Principle
(p. 171) ***Selmouni v France*** (2000) 29 EHRR 403	The applicant was arrested for drug-trafficking in France. While in police custody he was severely ill-treated, including being beaten, tortured and raped. Although the national authorities finally held the police liable, this process took a significant number of years. The applicant argued that his right to be free from torture had been violated as well as his right to a fair hearing.	Domestic remedies must be available and sufficient, not in theory, but in practice. Key criteria are that the remedy is accessible, capable of providing redress in respect of the applicant's complaint, and offers reasonable prospects of success. It falls to the respondent State to establish that these conditions are satisfied. Even so, there may be special circumstances, both political and personal, which absolve the applicant from the obligation to exhaust remedies at his disposal.
Reservations to the Genocide Convention ICJ Opinion, ICJ Rep	When the **Genocide Convention** was put on the table for adoption, a large number of reservations were entered, to which non-reserving States objected. The question then arose as to the status and validity of these reservations vis-à-vis those States that	Reservations cannot conflict with the object and purpose of a treaty. The **Genocide Convention**, as well as all treaties with a civilizing and humanitarian character, are adopted on the basis that all countries share a

(1951), p 15	objected to them. The question was put to the ICJ by the UN General Assembly.	common interest and any reservation to the substance of such conventions is invalid. Equally, objections against very minor reservations which lead to the exclusion of the reserving States defeats their object and purpose, which is to establish universal participation.

Key debates

Topic	**The revamped Human Rights Council**
Author/Academic	Helen Upton
Viewpoint	Unlike its predecessor, the members of the revamped Human Rights Council are far less political in taking decisions to cover their own poor human rights record and a much larger transparency seems to be evident.
Source	'The Human Rights Council: First Impressions and Future Challenges' 7 *HRLR* (2007) 29
Topic	**The legality of targeted killings**
Author/Academic	David Kretzmer
Viewpoint	Targeted killings like that of Osama bin Laden and other known terrorists do not necessarily contravene the right to life, nor do they constitute extrajudicial killings, because the targets are lawful combatants and they pose an imminent security threat.
Source	16 *EJIL* (2005) 171

(p. 172) Exam questions

Problem question

Country X, which is poor and under-developed, adopts the **ECHR** and enters two reservations, as follows:

1. The first suggests that because its rural population has traditionally relied on a family model that precludes women from working outside the family unit, country X cannot provide full equality to its female population as this would risk destroying family cohesion.
2. The second stipulates that because it does not have enough money to employ a sufficient number of judges it is forced to conduct expedited trials without due process guarantees. Therefore it enters a

reservation against the right to a fair trial.

Moreover, three years from the adoption of the **ICCPR**, country X experiences a wave of industrial strikes from disgruntled workers who demand better working conditions and salaries. Country X declares a state of emergency and immediately declares that it will derogate from all non-fundamental rights.

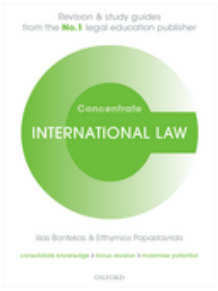
Discuss whether any one of the two reservations is valid and also whether the derogation is legitimate.

An outline answer is included at the back of the book.

Essay question

Critically analyse the circumstances under which an aggrieved applicant may by-pass the requirement that he or she must first exhaust all domestic remedies before applying to an international human rights body.

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/.



International Law Concentrate: Law Revision and Study Guide

Ilias Bantekas and Efthymios Papastavridis

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Exam essentials

Identifying and analysing sources

Unlike other areas of law where the various topics are somewhat relevant to each other, an international law exam may encompass a variety of fields that are not visibly connected. The thread that unites these disparate fields is first and foremost the sources of international law.

Before you begin to discuss an exam question make sure you have identified those sources pertinent to your field of inquiry. These may consist of particular treaties, soft-law instruments, such as UN General Assembly resolutions, leading judgments from domestic or international courts, and customary law in the form of State practice. Once you identify these sources you will have a generally good idea as to the subject matter of your inquiry.

International law is a rational discipline whose various fields are interlinked by their common sources as well as by common principles. By way of illustration, the rules on treaties, responsibility, legal personality, and others apply equally to all areas of international law. Hence, if you possess a good understanding of these you can apply them everywhere.

The key to a good exam answer is the depth of the analysis and the sources one utilizes in order to put across one's argument. This will comprise of the sources identified above. However, it is important to make a qualitative observation at this point. Whereas the sources used in other areas of law possess a more-or-less definite value, in international law a soft-law instrument may possess greater value than a treaty which has not been widely ratified. Equally, a judgment by the courts of one nation may carry significant precedential value with the courts of other nations or the practices of international organizations. Hence, it is important to be aware of the qualitative value of the instruments or cases you mention in your analysis. In this sense international law often seems vague, fluffy, and ultimately indeterminate to many students because of the approach they are familiar with in other areas of law. It is

therefore crucial that you are able to appraise correctly the weight of each source you are referring to.

Using case law

Case law, both domestic and international, is an excellent way of demonstrating knowledge of a particular topic, given that you will have access to a treaty book anyway. So, make sure you are familiar with key cases. When penning your answers do not simply refer to judgments. Make sure you provide some analysis and most importantly ensure that you link the cases to the specific point demanded in the exam question. Markers are frustrated with responses containing all the available cases in a particular field without any attempt to link the cases to the question at hand.

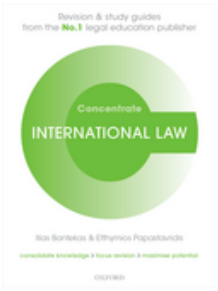
(p. A2) Preparation strategy

When preparing for your international law exam:

1. Ensure that you are familiar with the treaties and other instruments in your statute book.
2. Practice beforehand so that you are confident that you can trace any issue in the relevant treaties and instruments without getting lost in the process.
3. It is important that you have a fairly good idea of the basic principles enunciated in key ICJ cases. You will need to understand these well before you can rely on judgments from domestic courts. Do not get lost, confused, or despair in a web of intricate cases. Make sure you understand the basic principles of all the areas examined in this book. If you are confident that you have a solid comprehension of these you will at the very least be able to respond to the exam question even if you cannot provide any case law.

Final tip

Do not provide verbatim redactions of treaty provisions found in your statute books. This is a waste of valuable time and carries no weight with the examiners!



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Outline answers

Chapter 1

Problem answer

The question here concerns the conflict of norms in international law and more specifically the apparent conflict between *jus cogens* norms. It is inevitable that you will enter into a theoretical discussion over this issue. You will have to produce arguments in favour of the intervention to protect a *jus cogens* norm, ie the protection of the population, and at the same time you have to find arguments in favour of the sanctity of the prohibition of the use of force even in cases where the objective is to 'avert a humanitarian catastrophe'. This precise debate took place at the House of Commons in the context of the Kosovo intervention in 1999 and also underpins the whole discourse over the 'responsibility to protect' doctrine.

Under international law, there is no clear provision of how to resolve a conflict between *jus cogens* norms. Moreover, it seems difficult to use the usual maxims, *lex specialis* and *lex posterior*, in such cases. Both sides have to put forward jurisprudential arguments that would engage well-known theories on the nature of the international legal system. For example, the person that is against the legality of such intervention would argue that under positive law, there is no exception to the prohibition of the use of force concerning the case of humanitarian intervention and thus the intervention in the present case was illegal. On the other hand, the person in support of this humanitarian intervention would use naturalistic arguments along the lines that the protection of fundamental human rights trumps positivistic and formalistic adherence to the prohibition of the use of force in such cases.

Chapter 2

Problem answer

This problem question concerns the application of multiple legal regimes in a dispute and the interrelationship among the sources of international law. The key question is whether the application of the reservation to the optional clause declaration covers all the legal claims put forward by State B or whether there are other sources of obligation available to the Court. This question resembles the ***Nicaragua*** case (1984), in view of the reservation of the USA concerning the application of multilateral agreements.

The reservation in question excludes the application of bilateral treaties; thus, you should first examine which aspects of the dispute are covered by the reservation. Apparently, the reservation would cover the claim regarding the expulsion of the nationals of State B from State A. Is there any corresponding customary law? Here you will cite the aforementioned ***Nicaragua*** case that explicitly stated that treaty and customary law can coexist alongside each other and that the application of one does not exclude the application of the other and vice versa. Hence, if you can establish that the treaty has entered into customary law, then this claim would not be excluded from the reservation. This is dependent upon the existence of sufficient State practice based on the treaty provisions accompanied by *opinio juris* (see ***North Sea Continental Shelf*** cases (1969). It seems difficult to support this contention, as we need practice from third States and not practice based solely upon a treaty. This notwithstanding, State B could argue that the systematic expulsion of its nationals by State A contravenes customary human rights law, eg the prohibition of massive expulsion of aliens.

What about the general principles of good faith and *pacta sunt servanda?* The principle of good faith exists in all formal sources. However, it is not a self-standing legal obligation and if we consider that the treaty is excluded from the jurisdiction of the Court in light of the reservation, it is hard to argue that there is a breach solely on the basis of custom and 'general principles of law'. The same is true also for *pacta sunt servanda*.

Finally, with regard to the use of the territory of State A by State B, you can only argue that in light of the ***Right of Passage*** case (1960) **(p. A4)** there is a special or local custom established by the practice of both States and the respective *opinio juris.*

Chapter 3

Problem answer

1. Assess whether the interpretative declaration of State A is a disguised reservation. On the face of it, it seems like a reservation that sets a precondition for the application of the agreement. In view of its general character and the nature of the disarmament agreement, it would probably be incompatible with the object and purpose of the agreement (see **Art 20 VCLT** and *Reservations to Genocide Convention*, Advisory Opinion). This means that if you accept the permissibility school, it should have been declared null and void (cf the practice of the ECtHR in ***Belilos*** case to sever such disguised reservations). On the contrary, if you accept the opposability school, the fact that no State objected means that it is permissible.
2. The application of **Art 62** has been very restrictive. It has been invoked in few cases, most recently in the ***Gabčíkovo–Nagymaros Project*** case (1997), but it has never been successful. The problem here is the condition of 'unforeseen change of circumstances', which is not so obvious. Political tensions may arise and political relations never remain stable and thus it is very hard to plead that this was 'unforeseen'. In light also of the sacrosanct principle *pacta sunt servanda*, it is difficult to consider the denunciation of the agreement by State A as lawful.

Chapter 4

Problem answer

1. The nuclear terrorism convention has only been ratified by the UK but has not been transformed into its domestic legal order by means of an implementing statute. As a result, Antonio cannot be charged on the

basis of the offence emanating from the convention as such. You may want to ponder, however, although no other facts are mentioned in the problem, whether the UK already possesses a statute whose provisions would give rise to a charge of nuclear terrorism. If so, he could be tried under this specific statute. Otherwise, the terms of the convention are not enforceable in the UK's legal order.

2. If nuclear terrorism is a crime under customary international law, then there exists a significant body of case law that allows British courts to incorporate crimes under customary law without the need for implementing legislation. However, in order for such incorporation of a customary crime to take place its existence must be affirmed by the courts and its application must not infringe fundamental rights, such as the prohibition of retroactive legislation.

3. UN SC resolutions have effect in the UK legal order on the basis of the **UN Act 1946**. Moreover, orders in council specify the precise terms and conditions for their implementation in the UK. The British government, however, and the courts are obliged to construe relevant SC resolutions in conformity with the UK's human rights obligations, including its human rights statutes.

4. This means that if a SC resolution seemingly violates fundamental rights, such as the right of access to justice or the right to an adequate standard of living, it has to be implemented in such a way that the right in question be fully respected. This may require rescinding or amending the particular order or statute or simply providing a construction that is consonant with fundamental rights. The prevailing opinion in the ECJ and Europe is that SC resolutions can never be construed as authorizing the violation of fundamental rights.

Chapter 5

Problem answer

1. The Batas are a minority and minorities do not as a rule enjoy the right to secede from the central State. Minorities enjoy minority rights and any unilateral secession is not necessarily legitimate under international law, irrespective of whether they were abused by the government of the majority. At the very least the Bata entity is not in a position to conduct its external affairs because given the breach of the rule prohibiting minorities from seceding, other nations will not enter into relations with (p. A5) the Batas. The ICJ's opinion in the ***Kosovo*** case simply determined the legitimacy of Kosovo's unilateral declaration of independence, not the legality of the actual secession from Serbia.

2. Statehood through secession need not necessarily come about by the use of force, ie through an armed insurrection. The most legitimate way of seceding is by a plebiscite that is consistent with the constitutional arrangements of the nation concerned. Equally, it may rest on an agreement among federated States within a single country as was the case with the dissolution of the USSR in the early 1990s. However, the right to secession (as expressed through self-determination) against a racist, colonial, and oppressive regime can come about by the use of armed force. Force under such circumstances is exceptionally recognized as a legitimate tool for the secession of oppressed peoples. This seems to be the position of a big part of the international community in the case of Kosovo.

3. Minorities possess minority rights—that is, the right to use their own language and profess their particular culture and religion, among others. This right is enshrined in **Art 27 of the 1966 UN Covenant on Civil and Political Rights**. They may also have, under the local constitution, rights to an autonomous or federal State as is the case with Catalonia in Spain. This type of self-government or autonomy is a reflection of the internal dimension of self-determination that is applicable to minorities. Moreover, the central government has an obligation under international law to respect minority rights. Of course, a point can be made here that the Batas may claim some sort of de facto statehood by the mere fact of being in effective control of their territory.

4. There is a large body of precedent whereby the acts of an occupying power are given recognition by other nations, despite the fact that they do not recognize the legitimacy of the occupying power itself. This is the case with the TRNC described in this chapter.

Chapter 6

Problem answer

1. The particular offence has taken place in a number of jurisdictions, despite the fact that the offender initiated it in the UK. The UK possesses, to start off with, territorial jurisdiction because part of the offence (the selling of the shares) occurred on its territory. At this point, it is also worth mentioning that although the facts provided in the problem question do not provide anything else, it is possible that the UK enjoys further jurisdictional entitlements if its relevant statutes say so (eg nationality-based jurisdiction). This is irrespective of the fact that such broader jurisdictional competence may clash with that of Guatemala and Aruba. If the offender was ever arrested by Guatemalan authorities then he could lawfully be extradited to the UK under the terms of their bilateral extradition agreement. Guatemala, equally, enjoys the type of territorial jurisdiction available to countries on whose territory a crime has been completed (the purchase of the shares). One could certainly advise the British government to make an official request to Aruba for the extradition of the offender, although there is no guarantee that this will take place as there is no requirement on Aruba to accept such a request in the absence of a bilateral extradition treaty.
2. The particular conduct under consideration is not an offence in Aruba and hence normally a person should not be tried there under such a count because it would offend the principle that prohibits the application of retroactive legislation. However, the courts in Aruba may well assess that the particular conduct constitutes a crime under customary international law and decide that custom in Aruba may be incorporated in the legal system without parliamentary decree. In this case they would have to assess whether this is in violation of the offender's rights. This is clearly not the case; he was well aware that this conduct was an offence in the UK, which is the place where he initiated it. Although you do not know anything about the law of Aruba it is useful with such questions to import the legal principles of the system with which you are familiar.

Chapter 7

Problem answer

1. Serving presidents and heads of State enjoy personal immunity—that is, in respect of their person and not on the basis of the public nature of the functions they undertake. Therefore, (p. A6) they enjoy immunity at all times and all places even when they are undertaking personal activities, as is the case here.
2. The answer remains the same as that above. Personal immunity persists at all times irrespective of the heinous nature of the crimes alleged to have been committed by the suspect. There is no solid precedent whereby national courts have violated a suspect's personal immunity. The only possibility to prosecute this person is through a UN Security Council referral to the International Criminal Court.
3. Once again, the operation of universal jurisdiction does not extinguish one's personal immunity. However, if country Y is a member to the **International Criminal Court (ICC) Statute** it may surrender the president of country X thereto.
4. This is certainly possible. One's immunity, whether personal or functional, may be waived by his or her executive authority (eg Parliament), upon which that person's immunity is lifted and the person may lawfully be tried before the courts of a foreign nation. This is a very rare phenomenon, however.

Chapter 8

Problem answer

1. Discuss the legality of the interdiction of the *MV So San* against the background of **UNCLOS**, other treaty law, and customary international law. Under **UNCLOS**, the UK does not hold such right, as the right of visit is not granted for vessels suspected of being engaged in drug trafficking (**Arts 108 and 110**). The UK might have a legal basis for interdiction pursuant to the 1988 **Vienna Convention on Trafficking in Narcotic Drugs**, if both the UK and the flag State, Panama, are parties to said treaty. In this case, the boarding must be conducted in accordance with the terms of **Art 17**. The UK may also request the ad hoc consent of Panama and then board the vessel. Finally, as the law stands, the right of visit in respect of drug trafficking is not recognized under customary law.
2. The prerequisites for the assertion of enforcement jurisdiction on the high seas are as follows. The State

concerned should have established prior legislative jurisdiction concerning the crime—in the present case, drug trafficking on the high seas. However, this presupposes that such jurisdiction is in accordance with international law, more specifically in the present case, protective or universal jurisdiction ones. Moreover, as the crime is committed on board a foreign-flagged vessel, the UK must first be granted the right to exercise enforcement jurisdiction by the flag State, Panama. The latter State should waive its primary jurisdiction over the crimes pursuant to a treaty or on an ad hoc basis.

Chapter 9

Problem answer

1. The central issue is whether State A may invoke any circumstance precluding the ostensible wrongfulness of its conduct in relation to State B. Arguably, State A has breached its obligations from the bilateral agreement with B. This conduct is attributable to governmental authorities, ie the *de jure* organs of State A (**Art 4 ASR**); hence, State A incurs international responsibility for this wrongful act. Nevertheless, there are various circumstances precluding the wrongfulness of conduct. The more relevant one would be 'necessity' under **Art 25 ASR** and customary law. To exculpate State A, you have to prove that the withholding of all profits from the joint venture had been the only way State A could safeguard an essential interest threatened by a grave and imminent peril—that is, the survival of its population. It is true that in recent years the plea of necessity has been recognized by international jurisprudence as customary law, but it has been applied with extreme caution as a rather exceptional measure (eg ***Gabčíkovo–Nagymaros Project* case** (1997)). However, here it would not be so difficult to sustain this argument (cf ***Société commerciale de Belgique*** (1939)).
2. The measures that State B takes in response to the breach of the bilateral agreement, would be assessed against the law of countermeasures. Reference thus should be made to the conditions for the lawful adoption of countermeasures under **Arts 49–54 ASR** and the respective customary law. In view of these provisions, it is readily apparent that the countermeasures were not in compliance with the relevant framework. Mainly, they were disproportionate (p. A7) to the alleged wrongful conduct of State A; in particular, the occupation of the island was in contravention of the prohibition of the use of force. This runs counter to **Arts 26 and 50 ASR**. If it were only the freezing of assets, this would seem more proportionate and thus lawful as a countermeasure.

Chapter 10

Problem answer

1. The jurisdiction of the Court should be based on the consent of the parties to the dispute, expressed by various means. In the present case, the basis of jurisdiction invoked concerns the optional clause declarations under **Art 36(2) ICJ Statute**. The Court must first examine the application for provisional measures under **Art 41 ICJ Statute**; in this phase, the Court would examine only whether there is prima facie jurisdiction. The problem here lies in the reservation that State A has appended to the declaration excluding military measures for self-defence. While it is only the prima facie jurisdiction that it is required to satisfy in the proceedings for provisional measures, the Court would assess whether the measures, which State A has taken, are of a military nature. It is difficult to substantiate the argument that the expulsion of nationals falls under the scope of military measures for self-defence. Therefore, the Court has prima facie jurisdiction for the provisional measures phase and most probably also for the merits phase.
2. Consider **Art 41 ICJ Statute** and the significant case law of the Court. Having established the existence of prima facie jurisdiction, the Court would look at the irreparable harm or injury that State B may face and the seriousness of the danger as well as the effectiveness of the requested measures. Additionally, as the recent jurisprudence dictates (***Provisional Measures on the Application of Revision of the Preah Vihear Judgment*** (2011) and the ***Costa Rica–Nicaragua*** case (2011)), the Court would assess the plausibility of the claims in general. It is most probable that the Court would order provisional measures, especially the planned expulsion of the nationals of State B satisfies the criteria of urgency and irreparable harm or injury. Moreover, the claims seem plausible since the measures by State A are obviously disproportionate to the threat posed

by State B. The Court would therefore order provisional measures, for example, regarding the expulsion of nationals, which would be binding on the respondent (see ***LaGrand*** case (2001)).

Chapter 11

Problem answer

1. The primary consideration for the legality of the use of force is a prior 'armed attack' by the aggressor State against the victim State. This is a particularly high threshold to satisfy and, as noted by the ICJ in the ***Nicaragua*** case, the mere logistical support or the provision of weapons would not amount to an armed attack. As a result, despite the fact that country Y has incurred State responsibility for its actions against X, such actions do not give rise to self-defence by X against Y.
2. Civil conflicts constitute matters that fall within the exclusive jurisdiction of States. Hence other States and international organizations are not entitled to intervene in such conflicts in favour of one or the other party. This rule against non-interference is stipulated in **Art 2(7) UN Charter**. The only exception to this rule concerns interventions by the UN Security Council, given that **Arts 24(1) and 39 UN Charter** confer upon it 'primary responsibility for the maintenance of international peace and security' and authority to determine any threat or breach to the peace or an act of aggression. Hence, the Council, acting under Chapter VII of the **UN Charter** may lawfully intervene in civil wars and has in fact done so on numerous occasions. In the former Yugoslavia and Rwanda, for example, it went on to issue arms embargoes, deployment of peace-keeping missions, limited use of force, the establishment of international criminal tribunals, and others.
3. The *Caroline* incident is good enough precedent to justify the use of force against an imminent strike against the victim nation. Although this would not ordinarily satisfy the criteria under **Art 51** for self-defence, under customary law there is significant agreement that imminent attacks (such as the amassment of forces and arsenal in full combat preparation, coupled with sufficient evidence that an attack is **(p. A8)** about to be launched) triggers the right to self-defence, at least under customary international law. Such anticipatory self-defence should be contrasted from pre-emptive self-defence, whereby the attack is not necessarily imminent.

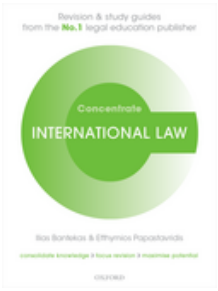
Chapter 12

Problem answer

1. In order to assess whether a reservation is valid one must assess whether it is in conflict with the object and purpose of the particular convention. In the case of human rights treaties there does not exist a hierarchy among the rights provided, other than the fact that some may be derogated under very narrow circumstances in times of emergency whereas others cannot. Given that this is not an emergency the right to equality may not lawfully be subject to derogation. Equality is the cornerstone of an effective human rights regime and the perpetuation of inequality is a recipe for under-development and the perpetuation of disparities affecting other rights, such as ill-health, lack of democratic governance, illiteracy, and many others. Moreover, equality does not even require the provision of resources by the State. It is clear, in any event, that this reservation is invalid because it is contrary to the object and purpose of the ECHR.
2. This second reservation has two strands. Just like the previous reservation, this too suffers from the same defects and is in conflict with the treaty's object and purpose. The second strand, however, suggests that the State in question is unable to provide a universal right to fair trial because of resource constraints. Hence, does this constraint justify the reservation in terms, at least, of the country's physical capacity to deliver the entitlement in question? No human rights treaty justifies a curtailment of civil and political rights on account of resource constraints as the State could go on to argue that it will start to kill part of its prison population because it has insufficient resources to feed and house them. Clearly, this is unacceptable.

The basic issue here is whether there is in fact a state of emergency threatening the life of the nation and, if so, whether the measures adopted as a means of derogation are justified and are proportionate to the situation at hand. The first issue is subjective but various thresholds have been discussed in the case law provided in the chapter. It is

unlikely however that any human rights tribunal will accept that prolonged industrial strikes, no matter how disruptive they are, can ever threaten the life of a nation. This is usually reserved to situations of prolonged armed violence. As a result, the derogation is deemed unlawful.



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Glossary

Act of State
Foreign government conduct not susceptible to legal proceedings

Armed attack
High-intensity military force against a State

Armed conflict
Protracted inter-State armed violence or between States and non-States

Baselines
Points from which to measure the seaward breadth of maritime zones

Collective security
Authorization of armed force by the UN Security Council

Constitutive recognition
Recognition as necessary criterion for statehood

Cultural relativism
The idea that rights are validated by cultural criteria

Custom
The convergence of State practice and the conviction that it corresponds to an obligation (*opinio juris*)

Declaratory recognition
Recognition simply serves to declare the fact of statehood

Derogation
Suspension of non-fundamental rights on account of public emergency

Dualism
International and domestic law are distinct legal orders

Effects doctrine
Exercise of territorial jurisdiction because effects of conduct were felt there

Exclusive economic zone (EEZ)
Maritime zone up to 200 nautical miles seaward from baseline

Expansive school
Armed attack definition exists also in pre-UN Charter law

Expropriation
Nationalization of property of foreign nationals

Extradition
The surrender of a suspect by one country to another to stand trial

Flag State
The State wherein a ship is registered. This possesses jurisdiction for crimes committed by the ship

Humanitarian intervention
Military force by international community on humanitarian grounds

Immunity
Procedural bar to the ordinary jurisdiction of foreign courts

Immunity from enforcement
Judgments cannot be executed against property of States

Immunity *ratione materiae*
Afforded on the basis of public nature of conduct (functional)

Immunity, *ratione personae*
Afforded on the basis of person's status (personal)

Implied powers
Powers conferred indirectly from an entity's constitutive instrument

Incorporation doctrine

International law becomes domestic law upon ratification

Indivisibility
The idea that human rights are inseparable

Internal waters
All water masses landward from baselines (ie rivers, lakes, deltas)

International organizations
Entities set up by States and endowed with distinct legal personality

Jure gestionis
Private conduct of governments

Jure imperii
Public government conduct

Jurisdiction
The power of States to enforce their laws over persons and property

Jurisdiction, territorial
Exercise of authority in own territory

Jurisdiction, universal
Exercise of authority irrespective of location in respect of certain crimes

Jus cogens
Peremptory (highest in hierarchy) rules of international law

Justiciability
That a particular entitlement is susceptible to enforcement proceedings

Legality
That which is lawful under international law

Legitimacy
That which receives universal approval even if outside the ambit of law

Locus standi
The right (or standing) to bring a suit or claim

Margin of appreciation
Authority of States to define social and cultural parameters of certain rights

(p. A10) Monism
International and domestic law are part of the same legal order

Non-interference
Interference in the domestic affairs of other States

Non-state entities
Entities that are not States, such as terrorists, guerrillas and multinational corporations

Occupation
Effective control over territory

Persona non grata
Non-welcome person

Personality
Possessing rights and duties and a capacity to enforce these under international law

Ponsonby rule
Treaties are ratified by Queen following consideration by Parliament

Progressive realization
The idea that some rights are not immediately applicable

Proportionality
Response to conduct in proportion to that conduct

Recognition
Official acknowledgement of an entity's statehood

Reprisal
Unlawful response to prior unlawful conduct

Reservation
Unilateral statement that modifies or excludes treaty provisions for signatory

Restrictive school
Armed attack definition is that found in UN Charter

Secession
The break-up of a country into two or more new nations

Self-determination
Right of peoples to determine their collective status

Self-defence
Right of States to respond militarily to an armed attack

Self-defence, anticipatory
Use of force in anticipation of imminent armed attack

Self-defence, pre-emptive
Use of force to avert possible armed attack

Soft law

Non-binding but highly authoritative rules

Sovereignty
The authority of States to determine their affairs without intervention

Standard-setting
The idea of establishing non-binding but authoritative rules

Statehood
Achieving the criteria for becoming a State

Territorial sea
Maritime zone up to 12 nautical miles seaward from baseline

Transformation doctrine
International law becomes domestic law by a subsequent statute

Treaties, self-executing
Those elaborate enough to be applied without implementing laws

Ultra vires
Exceeding one's vested powers

Unilateral act
Conduct undertaken by one State acting alone which produces legal effects

Universalism
The idea that rights apply equally to everyone irrespective of culture

Use of force
Military force by one State against another

Uti possidetis juris
The drawing of borders based on colonial boundaries

Wrongful act
A violation of an international obligation by a State

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