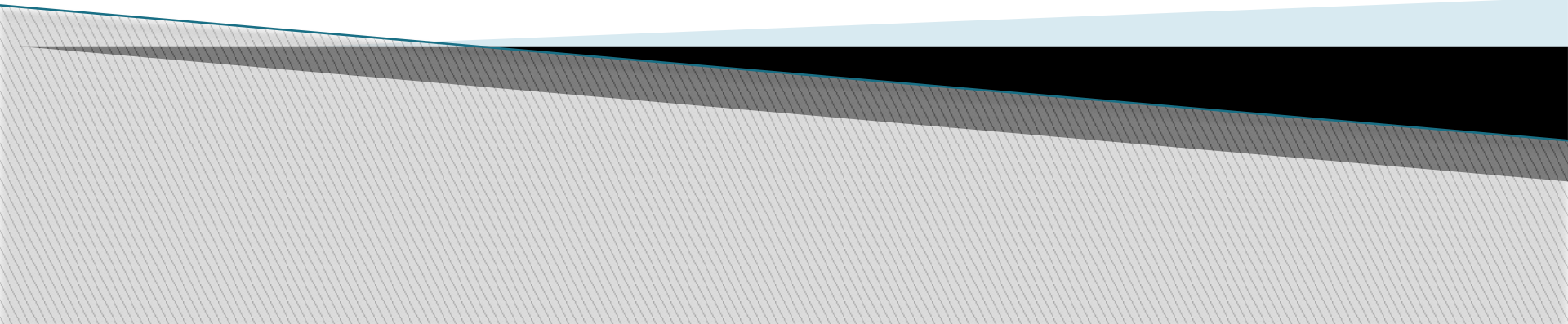


Public International Law

By: Ararso Taddese (LL.B, LL.M
on Public International Law)

CHAPTER ONE

INTRODUCTION



Introduction

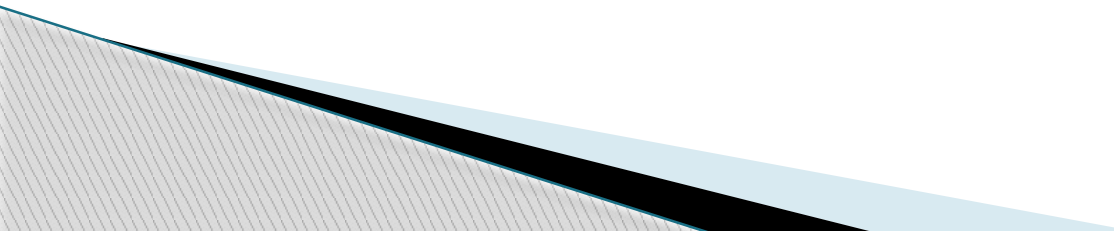
► What Is International Law?

- Basically defined, international law is simply the set of rules that countries follow in dealing with each other.
- There are three distinct legal processes that can be identified in International Law that include
 - ▢ *Public International Law*
 - ▢ *Private International Law* and
 - ▢ *Supranational*

► *What is public international law?*

- is the law that applies to *international actions*, whether committed by States, international organizations, or even individuals (are international actors).

- ▶ You may think of international law as the law that governs inter-State relations.
 - (This is to focus on States, the primary international actors, rather than secondary international actors like international organizations and individuals.)
- ▶ As Brierly puts it, international law is “the body of rules and principles of action which are binding upon civilized states in their relations with one another.”
- ▶ Public international law, as opposed to conflict of laws, involves a super-legal system that **operates between States** and exists separate from domestic laws.

- ▶ It is not codified like the domestic laws
 - ▶ Has no international government/executive organ
 - ▶ It is the byproduct of actions of States and other international actors like the United Nations.
 - ▶ It entirely depends on the state's interest that creates that laws
 - ▶ For this reason, public international law has a political aspect that is lacking in other legal subjects
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THE STATE SYSTEM

- ▶ State is the basic unit of the international legal system
- ▶ It has a personality at international law
- ▶ It is the collection of an indivisible whole.
 - difference between the State and that State's government?
 - ▢ The State is an idea that has a great deal of meaning to its citizens and incredible endurance over the long term despite whatever internal divisions and tensions it may suffer.
 - ▢ The **stability** of the State System rests on the stability of States, and for this reason international law places a great deal of emphasis on a State's continued legal existence and relative permanence of its borders.
 - ▢ The government of a State may **change**, through normal constitutional processes or otherwise, and the State itself will continue to exist.

- ▶ Unlike the national legal system, the international legal system is **incredibly decentralized and loosely bound** together,
 - Thus, some scholars conclude that the international legal system is not a “legal” system at all but rather a changing network of moral bonds between largely autonomous State actors
- ▶ States operate under international law,
 - like the actions of individuals in the national arena States acts in the international arena
 - There is no international government or legislature that makes laws applicable to all States.
 - ▢ Rather, States have to consent to the laws individually, either by entering into treaties with other States or by creating customs through their behavior.

- ▶ The state system refers to the fact that as individual acts under national law- states acts at international law
- ▶ The state system came into being with the birth of the so-called “**nation-state**” in Europe in the 16th and 17th centuries
- ▶ *Even the modern* international law is based almost entirely on the State system
- ▶ It is derived in the first instance from the principle of State *sovereignty* that establishes the State as the relevant unit that is to be ordered by international laws.
- ▶ Positivist argues that it should not be called a ‘law’ as by definition, law requires some centralized enforcing power.
- ▶ It has no centralized enforcing power.
- ▶ Rather, there is a loose amalgamation of individual sovereign States who may or may not follow their own rules.

- ▶ The traditional state system, w/c thinks it is only the state who is an international actor, is being eroded b/s of more recent changes from globalization and improved use of technologies
- ▶ The modern international system is still a “State System,” composed of States, but many new actors now play a role in international relations.
 - Principal among these new actors are **international organizations** like the **United Nations and the World Trade Organization**.
 - ▢ They can enter into treaty, assume rights and duties, sue or be sued at international level
 - Interestingly, in some international tribunals even **individuals** may assert rights against States.
 - ▢ A set of **human rights laws** has emerged that imposes obligations on States in respect of their citizens.

State Sovereignty

Definition of Sovereignty and History

- ▶ A State's sovereignty is its independence.
- ▶ The word “sovereign” implies some ultimate authority, **a master with no master above him**, a free and autonomous entity.
- ▶ It has two core elements:-
 - **Internal sovereignty**- State has exclusive control over its territory and its internal affairs.
 - **External sovereignty**- States are autonomous entities and, in principle, cannot be bound to an obligation without their consent

- ▶ The concept of State sovereignty has many implications for **interstate relations**
 - that the **State must speak with one voice** at the international level
 - ▢ in reality, a State has many voices, dissenting political parties, and even groups within its territory that oppose the central government.
 - Other States, out of respect for State sovereignty, **are not supposed to engage** in dealings with these **sub-state groups at all**.
 - other States **should not concern themselves** with **certain internal matters** of a sovereign State like the type of government a State adopts – whether monarchical, tyrannical, democratic, socialist, or otherwise – or the State's religion or the way a State treats its citizens
 - other States **should not concern themselves** with **anything that the State does within its territory** that does not affect other States.

- ▶ The principle of State sovereignty is based on **international customary law** but it is often confirmed in international treaties
 - E.g. UN Charter states in Article 2, Section 7
 - ▢ “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...”
- ▶ Another expression of State sovereignty is found in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States* (a **UN General Assembly resolution** adopted in 1970, not a treaty):
 - ▢ [n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.

- ▶ State sovereignty and the modern nation-state really came into being in **1648** with the Treaty of **Westphalia** that ended the 30 Years War between Catholics and Protestants in Europe
 - this religious disputes in the same State came to involve Catholic and Protestant rulers.
 - As a result, nations were destabilized.
- ▶ The Treaty of Westphalia resolved religious tensions by giving **each State the power to determine religious affairs within its own territory**
- ▶ it can be said that the end of the 30 Years War saw the birth of the modern *secular* state
- ▶ the Treaty recognized independent territorial States and gave State governments exclusive authority to deal with their internal affairs

- ▶ the second aspect of sovereignty was related to the **freedom of States in their relations** with other States that emerged as a result of the
 - ▢ theory of **legal positivism**
 - ▢ Not out of the **treaty of Westphalia**
- ▶ If States are truly independent of one another, then their relations must be based on their **free consent.**
- ▶ A treaty is **binding** on a State only so long as that State agrees to be bound by it
- ▶ Even International customs apply only so long as States continue to act in the customary way.
- ▶ A positivist argued that:
 - A sovereign state is a free state and a free state does not abide by the will of other states

Erosion of State Sovereignty

- ▶ State sovereignty is a background concept in international law.
- ▶ It is an **international custom**, established through the behavior of States, but it is a custom so fundamental that it is not necessary to prove it when arguing before an international court.
- ▶ But, **currently** it is argued that **States are no longer free and sovereign**;
 - that sovereignty has been eroded by **international laws and international bodies**;
- ▶ that such laws and such bodies tend to restrain the activities of States from the outside
 - Globalization is changing the view of state sovereignty

- ▶ Similarly, states no longer view the **treatment of citizens of one state** as only the exclusive concern of that state.
- ▶ **International human rights law** is based on the idea that the entire global community is responsible for the rights of every individual.
 - **International treaties**, therefore, bind states to give their own citizens rights that are agreed on at a global level.
 - In some cases, **other countries can even monitor and enforce human rights treaties** against a state for the treatment of the offending state's own citizens
- ▶ Currently there are strong opposition from different countries, e.g. USA, against the erosion of the concept of sovereignty.
 - Against actions of the ICC
 - WTO requirement to become a member

► Let us say that Egypt is trying to prevent Ethiopia from building a hydro-electric dam on the Nile river.

E.g., The case of Nile river b/n Ethiopia and Egypt

- As representative for Ethiopia, you might say the following: “This portion of the Nile is in Ethiopian territory. According to the principle of State sovereignty, the Ethiopian government has exclusive control over its own territory. Therefore it is our sovereign discretion whether to build the dam or not.”
- On the other hand, Egypt may assert various treaty rights to the water that flows from Ethiopia into Egypt and furthermore may remind Ethiopia of its obligation under international custom to use its water resources in such a way as to not bring harm to downstream neighbors.

► How do we resolve such a conflict between State sovereignty and other

Theories of State Behavior

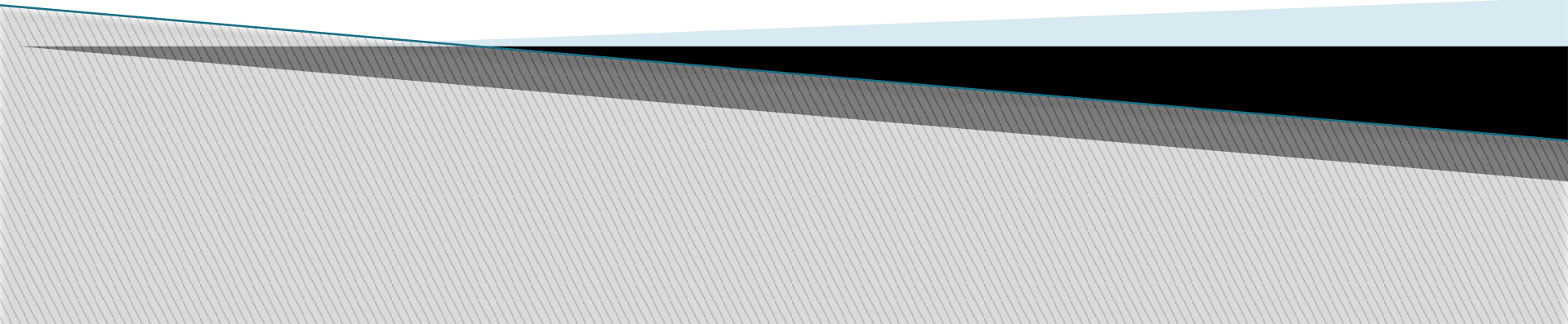
- ▶ lawyers argue that States will perform treaties and continue to follow international customs out of a **sense of legal obligation on the part of the officials** in those States' governments
- ▶ The “laws” are more **flexible**, more **subject to power relations**, and therefore more elusive and harder to grasp
- ▶ International laws **must incorporate previously established claims** that are defended by strongly interested States, whether fair or not (one thinks immediately of Egypt's claims to Nile waters)
- ▶ These are the **necessary sacrifices** for consensus among States

- ▶ Many theorists argue that lawful behavior by States is **merely a coincidence that arises out of a mixture of other motives** on the part of States
- ▶ **The concerns of a State official** –
 - to satisfy the citizens of the State,
 - to satisfy other officials,
 - to work against enemy States and help friends,
 - to leave some lasting imprint on world affairs/history
- ▶ Even **theories based on self-interest**, however, admit that it may be in a State's self-interest at least to give the impression of following international laws most of the time.
- ▶ Officials tend to prefer predictability in State relations that only a legal system can provide

- ▶ The **main problem** with any theory of State behavior is that it is **difficult to define what the controlling interests** of the State are.
 - For example, a theory based on the State's self-interest merely begs the question,
 - ▢ *What* is the State's self-interest?
 - ▢ How do we connect the individual interests of State officials with the interests of the State?
 - ▢ Are we talking about long-term interests or short-term interests?
- ▶ Contemporary theories of State behavior can be divided broadly into two
 - (1) **interest-based theories** including realism, institutionalism, and liberal theory; and
 - (2) **norm-based theories** including constructivism and legal process theories.

CHAPTER TWO

STATE FORMATION AND SELF-DETERMINATION OF PEOPLE



Legal and Political Issues of Statehood

- ▶ States come into existence in many different ways
 - A former colony may gain its independence;
 - a part of a State may split off to form a new State;
 - an old State may die and dissolve into several new States; or
 - two States may merge to form a single new State.
- ▶ *When does an emerging entity become a legal State with all the rights and duties of a State under international law?*
 - the international community must decide the question

- ▶ It is none of the business of the IO
 - It is left to the **discretion of each existing State to recognize** and **whether or not to confer the *benefits of Statehood*** on an emerging entity
 - But, International bodies, like the UN, may be **influential in directing the opinion** of the international community
 - Some scholars have argued that,
 - ▢ for example, Ethiopia has a **duty under international law to recognize** an emerging entity as a State once that entity has met the legal criteria for statehood
 - This does not change the fact that each State has a great deal of discretion in regard to its foreign relations and there is little opportunity for the international community to force a State

- ▶ The **purely legal question** of when a State becomes a State is a different matter
- ▶ The 1933 Convention on the Rights and Duties of States (known as the Montevideo Convention), sets out four simple criteria for statehood
 - a) a permanent population;
 - b) a defined territory;
 - c) government;
 - d) capacity to enter into relations with the other states.”
 - The criteria's will be interpreted rather liberally in application
- there is no minimum number of inhabitants necessary to make a State. E.g. 10,000 or above

- ▶ Second, an entity's territory may qualify as a "defined territory" even though its borders are disputed, as for example with Israel.
- ▶ Third, States have been recognized in the midst of civil war when the States are seemingly without effective governments. E.g. Somalia
- ▶ Finally, in regard to the fourth and last criterion, there are many cases in which all or part of the foreign relations of a State is undertaken by another State.
 - E.g. The national defense of Liechtenstein is managed by Switzerland; the defense of Monaco is managed by France.

- ▶ the criteria of Statehood differ in theory and in practice.
 - In practice, even after new States have met the four legal criteria of Statehood, they are not automatically recognized as States by other States
 - These does not mean that there are additional legal criteria for Statehood but rather to point out that there is a **strong political dimension** to this issue

- ▶ There are two views on the role that recognition of States plays in deciding whether an emerging entity is a State.

- **“declaratory” view** that a State exists once it has met the four legal criteria, whether or not it has been recognized by any other State.
- The other view is the **“constitutive” view**, holding that other States “constitute” or create a new State by recognizing it.
 - But, it does not provide a clear point at which a State becomes a State and in fact may misrepresent the way that States make recognition decisions.

- ▶ Similar problems arise when determining whether a State is no longer a legal State.

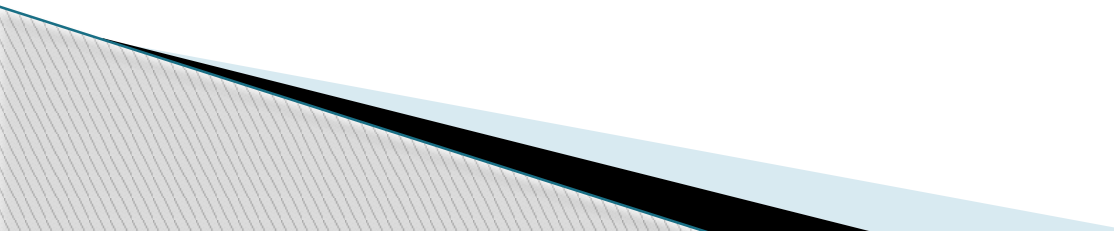
The Right of Self-Determination

- ▶ No principle has been as important to the formation of new States as the so-called “right of peoples to self-determination
- ▶ was articulated first as a right of colonized people to self-government, but it has since been used to justify the creation of States in other ways, as by secession.
- ▶ U.S. President Wilson was one of the first to advocate the right of self-determination, following World War I.
- ▶ Wilson envisioned “a post-war order informed by the notion that **ethnically identifiable** peoples or nations would govern themselves.”

- ▶ Whatever Wilson's intentions, European powers continued to have colonies after World War I and carefully ignored any right of these colonized peoples to self-determination.
- ▶ The League of Nations, begun after World War I, included the "Mandates System" for the administration of the colonies of the losing European powers.
- ▶ It did not provide for independence of the colonies, but it did require the new rulers (Mandatory Powers) to treat inhabitants better
- ▶ even at this time, was not exclusively a matter of decolonization.
- ▶ At that time, Hitler invoked the right of self-determination to unite German speaking peoples from other nations in Europe into one Reich.

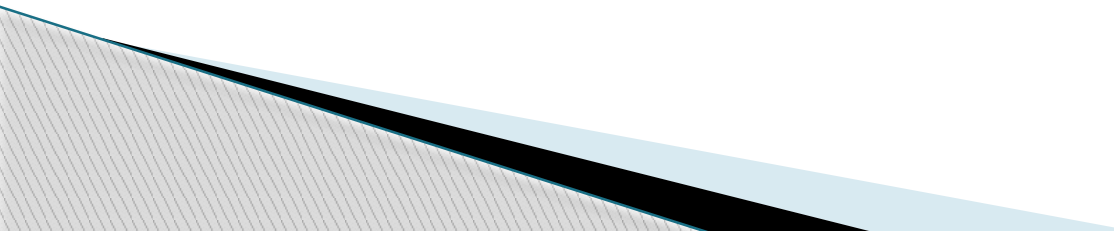
- ▶ The right was affirmed as an international law by the Charter of the United Nations in 1945
- ▶ Was included in Article 1 as one of the major purposes of the United Nations:
 - “To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples...”
- ▶ But, many of the victorious Allied Powers like France, Britain, and the Netherlands still had their colonies
 - b/s the Charter did not call specifically for decolonization, nor did it explain exactly what was meant by the self-determination of peoples.
- ▶ Nowhere does the Charter specifically call for freedom for colonized territories
- ▶ The Charter set up a “Trusteeship System,” similar to the Mandates System under the League, to administer colonies of the losing powers.

Assignment

- ▶ Please discuss the concept of the right to self-determination vis-à-vis the sovereign rights of states and state's right to territorial integrity. As both are enshrined under the UN Charter.
 - Do one contradicts with the other or not?
 - Are differently applied?
 - How do we reconcile the two, i.e. people's right with state's right?
 - Which prevails over the other?
- 

- ▶ ICCPR and ICESCR contain identical statements affirming the right of peoples to self-determination.
- ▶ The Covenants begin in Article 1 with
 - ▢ “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”
- ▶ The right of self-determination is contained also in the African Charter on Human and People’s Rights.
 - According to the African Charter, “[all peoples] shall have the unquestionable and inalienable right to self-determination...”
- ▶ Interestingly, the ICCPR contains a separate article dealing with minority rights.
 - Article 27 explains that “persons belonging to... minorities shall not be denied the right... to enjoy their own culture, to profess their own religion, or to use their own language.”
- ▶ As with the UN Charter, the Covenants do not go on to explain what is meant by the right of self-determination or who the “peoples” are.

- ▶ Two very important General Assembly resolutions make reference to the right of peoples to self-determination.
 - The first, passed in 1960, is the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.
 - The resolution repeats the language of the ICCPR and ICESCR
- ▶ The second resolution, passed in 1970, is the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.
- ▶ This resolution seems to reinstate the tension between self-determination and territorial integrity.

- ▶ Interestingly, Ethiopia deals with these same problems regarding the right of self-determination in its constitution.
 - ▶ Unlike the international instruments, Ethiopia's Constitution is quite clear about what the right of self-determination means, who the “people” are, who can claim this right, and how this right can be lawfully exercised under article 39 of the const.
 - “Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.”
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State Territory and Borders

- ▶ The formation of a new State inevitably brings with it the question of where the new State's boundaries will be
 - ▢ E.g. the case of Eritrea with Ethiopia
- ▶ Such border disputes in Africa have been decided by the principle of ***uti possidetis***, a Latin phrase which means literally, “**you may keep what you had.**”
 - is meant that former colonies, on gaining independence, will keep the borders established previously by the colonizing power
 - It is still recognized in modern times in Africa

- ▶ The principle applies both to
 - **administrative boundaries in territories** controlled by one sovereign (e.g. Italy has two colonies that border one another) and
 - **boundaries established by treaty between two sovereigns** (e.g. Italy enters into a treaty with Ethiopia establishing the border between Italy's colony and the Ethiopian State).
- ▶ It will be determined by **looking at maps** showing the administrative divisions of the colony or by treaties
- ▶ there is **no other peaceful way** to determine the territory and borders of States in previously colonized territories
- ▶ **OAU** itself issued an opinion on this crucial matter. "Recognizing the colonial boundaries... necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States ..."

State Succession

- ▶ There are **additional legal issues** involved when the **political map changes** and **control over territory shifts** from one State to another.
- ▶ It is related to issues of succession of states
- ▶ **“Succession of States”** means the replacement of one State by another in the responsibility for the international relations of territory; a
- ▶ **“predecessor”** State is the parent State from which the new State is formed or territory transferred; and
- ▶ a **“successor”** State is the new State, the “child” of the predecessor (or the State that

- ▶ Even if the international community **unanimously recognizes a new State**, there remain certain “succession” issues, or in other words issues over how **obligation, property and rights** will be transferred from the predecessor State to successor States
- ▶ ***The possible issues are:-***
 - Will the new State inherit the treaty obligations of its predecessor?
 - Will the new State inherit membership in international organizations?
 - Will the new State inherit assets and debts of the predecessor?
 - Will the new State be responsible for wrongs committed by the predecessor State?
- ▶ succession issues arise basically during
 - ▮ decolonization, secession of part of a State, dissolution of an entire State, and merger of two States to form one State

- ▶ The succession of States should not be confused with a succession of governments.
 - For new governments, there is a simple rule.
 - ▢ i.e. The new government will inherit *all* the rights and obligations of its predecessor government.
- ▶ international law in relation to succession of States is *not* clear.
 - In theory, there are two extreme positions, and in practice there is everything in-between.
 - ▢ “**clean slate**” **position**, which holds that the successor State should assume *none* of the rights and obligations of the predecessor State.
 - ▢ “**continuity**” **position**, which holds that the successor State should assume *all* the rights and obligations of the predecessor State.
 - ▢ Most of the time our answer to succession issues will fall somewhere between these two extreme positions.

- ▶ The issues of succession is more or less similar to the contract b/n two parties
- ▶ At the absence of the agreement the default rule of the civil code is applicable
- ▶ The same is true for succession
 - Predecessor States may negotiate among themselves and with successors to determine the **rights and duties** of successors.
 - Such an agreement is called a **devolution agreement**.
 - ▢ E.g. East and West Germany entered into three devolution agreements to determine the rights and duties of their successor, unified Germany.
 - In cases of **treaties** successor States may negotiate **with other parties** to the treaty on a case-by-case basis.
 - ▢ E.g. if there is a bilateral treaty between the predecessor state and the U.S., the successor state and the U.S. can negotiate as to whether the treaty will apply between them.

- ▶ In the absence of the agreement we use the default rule
 - there are few default rules in State succession that have attained the status of international law.
 - **Two important treaties on succession** have been created
 - i.e.
 - ▢ the Vienna Convention on Succession of States in Respect of Treaties, was completed in 1978
 - ▢ the Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts, was completed in 1983.
 - ▢ It is not yet in force for lack of State signatories
 - ▢ But they will have a persuasive authority
- ▶ **Nonetheless**-some scholars think that
 - many of the rules in these treaties are already binding as **international customary laws**, and
 - the rules are in the background of negotiations over succession issues and may **tell the parties what to ask** for and create expectations of what they deserve in their agreements.

- ▶ According to the default rule:-
 - **If the State is newly independent from foreign domination** the State generally begins its life with a “**clean-slate.**”
 - **If the new State is a product of dissolution** default rules for succession in respect of treaties will be **more complex.**
 - ▢ **most treaties will pass to the successor States**
 - ▢ Any treaty that deals with the **entire territory** of the predecessor State will apply to all of the successor States.
 - ▢ On the other hand, if the **treaty concerns the territory of only one or two successor States**, then only those successor States will be bound by this treaty.
 - What **if two or more States merge to form one State?**
 - ▢ The Vienna Convention says, **apply all treaties of the two predecessor States** to the successor State, **but only in the territory that was controlled** by the particular predecessor that entered into that treaty

- Accordingly, when **territory is transferred** from one State to another, as for example when Britain transferred Hong Kong to China, the Vienna Convention's default rule is to **cancel old treaty obligations for the territory in question and apply the treaties of the acquiring State.**
- ▶ According to the Vienna Convention, **immovable property** will **go to the successor State** in which the property is found.
- ▶ Any property that we can **connect to territory**, including **currency and state public funds** located in the territory of the successor, probably will **stay in the territory where the moveable property is found**

- ▶ Finally, **moveable property not connected to territory** (for example, any property outside the territory or intangibles like bank accounts) will be **distributed in some equitable fashion**.
 - But, If the predecessor State continues to exist after succession, then it **will take all moveable property**.
- ▶ For **debt**, more than for treaties or property, the **parties are likely to come to an agreement** and the default rules will not matter.
 - The **general rule** from the Vienna Convention is that “the State debt of the predecessor State **shall pass to the successor States in equitable proportions**, taking into account...the property rights and interests which pass to the successor States in relation to that State debt.”
 - According to the Vienna Convention, States emerging from foreign domination **will inherit none of the debt** of their predecessors

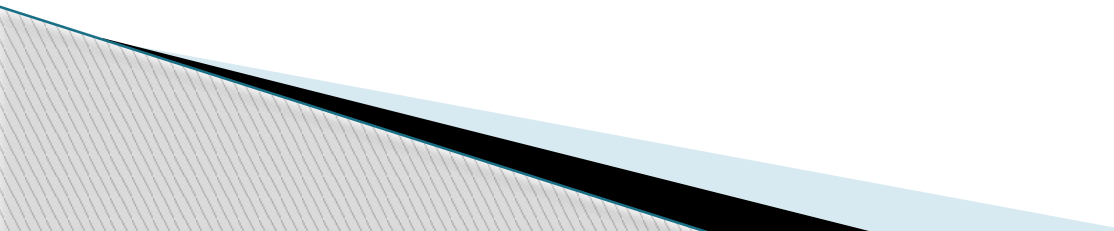
Recognition of Governments

- ▶ Change of government is quite common
- ▶ The **international obligations of a State do not change** when the government changes through democratic way.
- ▶ **But** Problems may arise when a change in government happens through **unconstitutional means**
 - ▢ other States' governments may not like the new government and may want to change their relations with it. E.g. the government of Ukraine
 - ▢ this is a political decision and not a matter of international law
- ▶ Other governments have **various options for expressing their dissatisfaction with a new government.**
 - As an expression of disapproval, other governments may **refuse to recognize the government, cut off diplomatic contacts, suspend travel to that country, or cut off trade and foreign aid**
 - Or may refuse to recognize a new government and **continue to recognize the previous government living in exile**

- ▶ Each State has discretion as to how it will conduct its foreign relations.
- ▶ Recognition of new governments is thus a decision for each State to make on its own
- ▶ It is argued that recognition of governments is an **interference in the sovereignty of a State**
 - ▢ b/s lack of international recognition weakened a new government
- ▶ There are two views on recognition issues
 - **“Tobar Doctrine”**- which said that, in order to promote democratic transfers of power, new governments formed by use of force or subversion of legitimate democracies would not be recognized
 - **“Estrada doctrine”**- it deemphasize and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of **whether we wish to have diplomatic relations** with the new governments.”
 - ▢ This is the prevailing view – that it is better not to engage in recognition practice at all. This view was most strongly expressed in a statement by the Mexican foreign minister Estrada

- ▶ It is all about the legitimacy of the government that took power unconstitutionally
- ▶ For such cases, there are **two opposite legal positions** that one can take.
 - First, there are the so-called **de jure** criteria of governmental legitimacy, is most of the time recognized
 - ▢ The question is, Does the government have a legal title to govern (based on internal laws)?
 - ▢ Going by these criteria, all governments formed by revolutions are not recognized.
 - On the opposite end there are **de facto** criteria.
 - ▢ The only question here is whether the government has effective control over the State's territory
 - ▢ In recent years, the United Nations has taken action several times against governments that came to power unlawfully. For example, in Sierra Leone, Haiti, Afghanistan, and Somalia
- ▶ In all of these cases the UN refused to recognize *de facto* governments.
- ▶ It seems as though the UN is continuing the Tobar Doctrine in a different form.

Assignment

- ▶ Discuss whether Crimea of Ukraine has a legal right to form new state.
 - ▶ What are the doctrines followed by USA and Russia in recognizing the government of Ukraine and the New Government of Crimea and the criteria they have followed in doing so?
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CHAPTER THREE



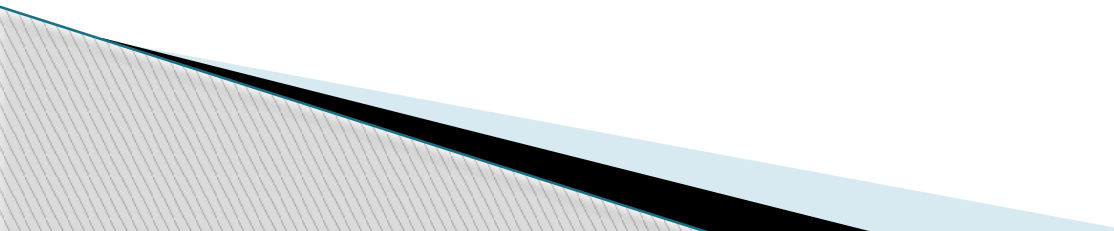
INTERNATIONAL ORGANIZATIONS
AND
OTHER INTERNATIONAL ACTORS

International Organizations and Other International Actors

- ▶ The term “international organization” is meant to designate a distinct type of organization with particular characteristics
 - ▶ So, an international organization is an organization, typically established by treaty, whose members are States or other international organizations
 - ▶ The **treaty** that establishes an international organization usually acts as a **constitution** for that organization
- 

Characteristics of International Organizations

- ▶ International organizations can **enter into treaties.**
- ▶ international organizations **can sue and be sued in national and international tribunals.**
- ▶ international organizations **enjoy certain privileges and immunities**
 - But this is not to say that international organizations have the same status as States in the international system.
- ▶ International organizations are the creation of States, and their powers are limited to the powers that the constituting States have given them

- An international organization cannot invoke “sovereign immunity
 - only States can appear before the International Court of Justice in contentious cases
 - But IO’s will request the ICJ for an advisory opinion
- 

The United Nations System

- ▶ UN has not met the expectations of U.S. President Woodrow Wilson who in 1919 encouraged the formation of the League of Nations,
- ▶ The League was the precursor to the United Nations, and envisioned an era of peaceful cooperation among States.
- ▶ The ineffectiveness of the League was proven in 1935 when Italy invaded Ethiopia in blatant violation of the Covenant of the League and the League failed to muster the will of its member States to oppose the aggressor Italy.
- ▶ The UN is modeled on the League of Nations and carries forward the League's intent to prevent wars among States.

- ▶ It is a complex network of organizations
- ▶ has various bodies with different functions
 - incorporates five principal organs, but a vast array of underlying specialized agencies, programs, funds, and related organizations maintain ties with the UN while operating under differing levels of independence
- ▶ The five principal organs of the UN operate as the political base of the United Nation
 1. The General Assembly
 2. The Security Council
 3. Economic & Social Council/ECOSOC
 4. The Secretariat
 5. International Court of Justice/ICJ
 6. Trusteeship Council

1. General Assembly

- ▶ Is made up of the whole UN member states
- ▶ is the **main deliberative body** of the UN that meets annually in New York.
- ▶ the member states address issues of international concern and debate resolutions
- ▶ resolutions hold no legally binding authority over member states
- ▶ Each member states has one vote
- ▶ The GA is composed of six committees:
 - First Committee: Disarmament and International Security Committee
 - Second Committee: Economic and Financial Committee
 - Third Committee: Social, Humanitarian and Cultural Committee
 - Fourth Committee: Special Political and Decolonization Committee
 - Fifth Committee: Administrative and Budgetary Committee
 - Sixth Committee: Legal Committee

2. Security Council

- ▶ primary responsibility for the maintenance of international peace and security
- ▶ Pass legally binding resolutions,
- ▶ has 15 members, including five permanent members with veto power
 - ▢ China, France, Russia, the U.K., and the U.S.,
- ▶ and ten non-permanent members selected on a regional basis by the GA
 - three to Africa, two to Asia, two to Latin America, two to Western Europe, and one to Eastern Europe
- ▶ Abstentions by permanent members will not matter.
- ▶ Technically, a resolution could pass even if the five permanent members all abstain from voting.

3. Economic and Social Council(ECOSOC)

- ▶ composed of 54 member-states elected by the GA according to fair regional representation standards
- ▶ charged with making reports and recommendations in the fields of “economic, social, cultural, educational, health and other related matters
- ▶ oversees the work of 14 UN Specialized Agencies and 14 specialized commissions, which deal with issues such as drugs, crime prevention, and the status of women
- ▶ It has relation with external organizations like WTO, the World Food Program, and the World Summit on Information Society

4. Secretariat

- ▶ The Secretariat, headed by the Secretary-General, offers administrative and substantive support to all of the programs of the UN
- ▶ Individuals working within the Secretariat are international civil servants
 - ▢ They work for the good of the international community than the orders of their home country
- ▶ The Secretary-General plays a leading role as the spokesperson of the UN
- ▶ Using his “good offices” settle international disputes

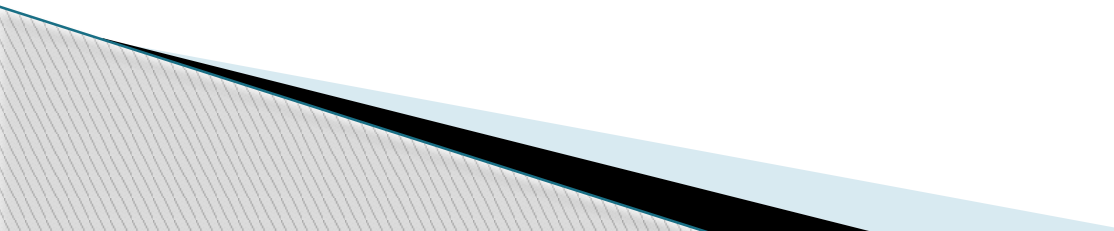
5. International Court of Justice(ICJ)

- ▶ the principal judicial organ of the UN, resolves disputes among States and gives advisory opinions to the UN.
 - ▶ Judges of 15 different nationalities make up the body of the ICJ
 - ▶ Established with the Statutes
 - ▶ Uses four different sources of law
 - Conventions/treaties
 - Customary international laws
 - Generally accepted principles of civilized nations
 - Scholarly materials and case laws
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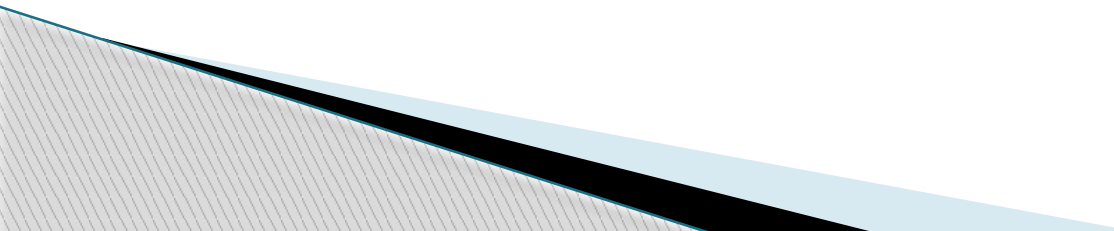
6. Trusteeship

- ▶ Established to administer a mandated territories become independent from colonial powers
- ▶ Currently not functional because there is no country under colonial power

A Note on the African Union

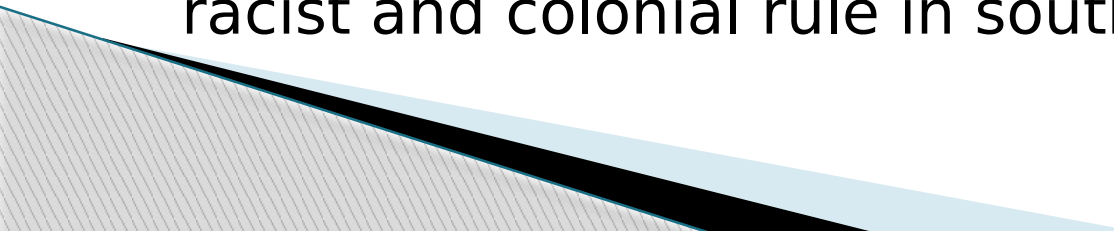
- ▶ African Union is modeled on the European Union, the most radical and most interesting international organization of the present time.
 - ▶ One of the most interesting aspects of the European Union is the extent to which it has achieved economic integration among the countries of Europe, printing and controlling a uniform currency and regulating banking from a central body.
 - ▶ The African Union is attempting to follow some of the successes of the European Union.
- 

AU- From the Pan-African Movement to the OAU

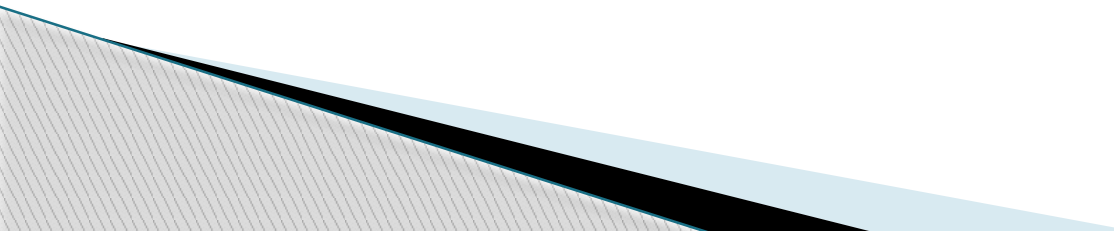
- ▶ Pan-African movement and the OAU was the precursor of the AU
 - ▶ The OAU was not formed in a vacuum.
 - ▶ Its founding was the culmination of a long struggle by **Pan Africanist**, a struggle which goes back to the 19th Century
 - ▶ The Pan African movement was essentially **born outside the continent**.
 - ▶ It was driven by the black intellectuals of African descent in the Diaspora – in the **US**, the **Caribbean** and **Europe**.
 - ▶ At first the movement was essentially a protest movement of black people **against their exploitation, against racism and for the dignity and uplifting of the black people**
 - ▶ The first Pan African conference was held in **London** in **1900** and was followed by others in **Paris** and **New York**
- 

- ▶ However the most important and significant meeting was the **fifth Pan African Congress** which took place in **1945 in Manchester, the UK**
- ▶ It was different from the previous meetings and congresses in three fundamental ways;
 - **(a) a large number of activists** attended this congress – over 200 persons from the US, Europe and Africa;
 - **(b) for the first time leading African nationalist** (such as Kenyatta, Nkurumah etc) took active and prominent part in the Congress – Nkurumah was Secretary of the Congress;
 - **(c) The fifth Congress underscored, as Nkurumah puts it “for the first time the necessity for well-organised, firmly-knit movement as a primary condition for the success of the national liberation struggle in Africa was stressed” (Nkurumah)**

- ▶ The Pan-African movement was strengthened when **Ghana** became the first black African country to gain its independence, and as an independent state, organised the **All Africa Conference in Accra in 1959**
- ▶ **The Accra Meeting**, for the **first time**, brought together on African soil, nationalists from all over Africa where the issue of solidarity and unity in the struggle against colonialism was the central theme of the meeting
- ▶ **In 1963**, four years after Accra the **OAU was formed in Addis Ababa** by those African countries (except Southern Africa) which had achieved their independence.
- ▶ These countries had achieved their independence through nationalist struggles – struggles which were driven by **Pan Africanism**

- ▶ The OAU thus became the **instrument to liberate the remaining African countries** and to forge continental political unity.
 - ▶ The Charter of the OAU was therefore essentially **“designed to protect the fragile sovereignty recently achieved by African states, and to help those still under colonial or racist rule to achieve sovereign independence”** (Abdul Mohammed).
 - ▶ The OAU was mainly concerned with
 - **(A)** the few inter-state conflicts that took place at the time, and
 - **(B)** with political support to the struggle for eradicating racist and colonial rule in southern Africa
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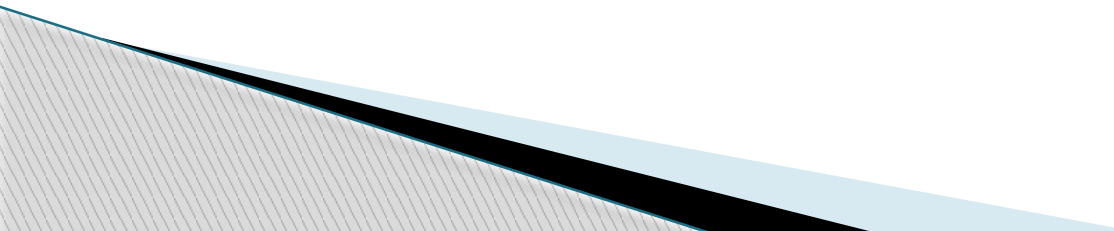
Birth of the AU

- ▶ May 26, 2001, marked the turning of a page in the history of the African continent.
 - ▶ On this date, the **Constitutive Act of the African Union** entered into force, representing the start of a **new political, judicial, and economic organization** for Africa
 - ▶ It also marks the imminent end of the OAU, which has united all African states since 1963
 - ▶ During the cold war, Africa became increasingly marginalized and struggled to define its place and role in the new global system.
- 

- ▶ As the main objectives of the OAU is accomplished, i.e. to free African states from colonial powers,
- ▶ **Experts agreed that the OAU Charter needed revision** the most, specifically with regard to the **principles of sovereignty and noninterference**
- ▶ The creation of the African Union in **Sirte (Libya) in 1999**, the adoption of the **Constitutive Act** of the African Union in **Lome July 2000** and the **inauguration of the AU in Durban, July 2002** were important milestone in the process of creating **political continental unity** and **the African Economic Community**
- ▶ Constitutive Act of the African Union is adopted in Addis Ababa, July 2001.

- ▶ The AU is expected to be a much stronger organisation than the OAU.
- ▶ Amongst the **new principles** of the Union are
 - the **right of the Union to intervene in a Member State,**
 - **respect for democratic principles, human rights and good governance,**
 - **promotion of social justice and promotion of gender equality**
- ▶ Articles 3 and 4 of the [Constitutive Act (CA)] define, respectively, the objectives and principles of the Union

- ▶ The organs and institutions of the Union are defined and described in CA Articles 5 through 22.
- ▶ Article 5(1) declares these to be
 - (1) the Assembly of the Union;
 - (2) the Executive Council;
 - (3) the Pan-African Parliament;
 - (4) the Court of Justice;
 - (5) the Commission;
 - (6) the Permanent Representatives Committee;
 - (7) the specialized technical committees;
 - (8) the Economic, Social and Cultural Council; and
 - (9) the financial institutions.
- ▶ The door is also left open for the Assembly to establish new organs as and when deemed necessary (Art. 5(2)).

- ▶ While the **Pan-African Parliament, the Court of Justice, and the three financial institutions** (consisting of the African Central Bank, the African Monetary Fund, and the African Investment Bank) draw the greatest interest, but these are the least-developed organs in the Act
 - ▶ The Assembly of the Union, like the Assembly of the OAU, will be the supreme organ of the organization
- 

Other International Actors: NGOs, Corporations, and Individual

- ▶ State is the primary actor in international law
- ▶ We have considered how international organizations like the UN also participate, to a lesser extent than States, at the international level
- ▶ There are also other international actors
- ▶ This includes:
 - International organizations
 - non-government organizations (NGOs),
 - corporations,
 - sporting federations,
 - organized religions,
 - regional governments, and
 - international terrorists.

- ▶ In general, these non-state actors do not have the status of legal persons at the international level, so they cannot have rights and duties under international law.
- ▶ their activities are governed by national laws
- ▶ **NGOs**
 - attend international law-making conferences as observers – even present their views in some cases – and lobby governments behind the scenes.
 - also draw government attention to particular issues and sometimes push the government to propose a treaty or enter a treaty.
 - may act like a watchdog, reporting on international events and exposing non-compliance with international law

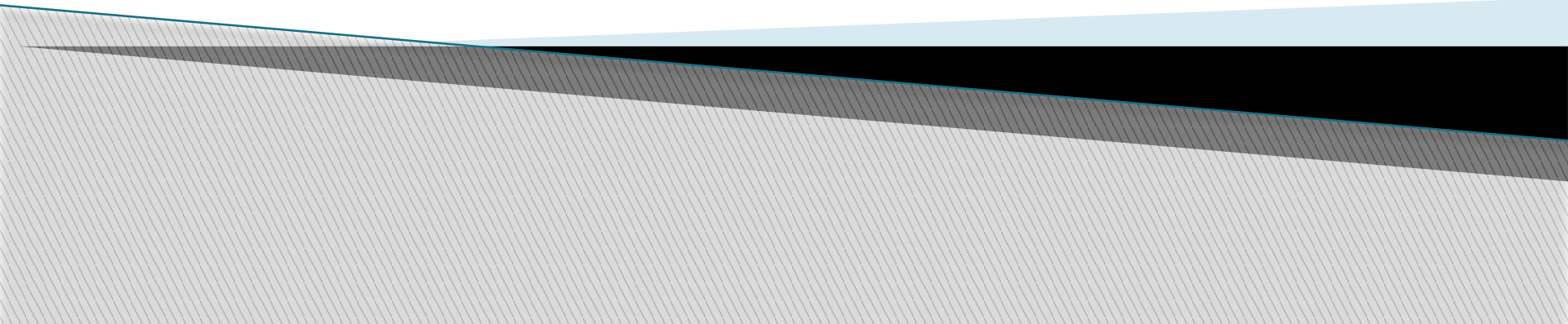
- ▶ **Corporations** are equally involved in international relations.
 - ▶ It is common for a corporation to exist under the laws of one State, the “home” State, and operate in other States, the “host” States.
 - ▶ International corporations enter agreements with host States that give special privileges to the corporation under national laws.
 - ▶ In general, corporations have a strong influence over State governments.
 - ▶ A corporation may push its home State to make a claim against its host State regarding the treatment of its business.
- 

► **Individuals**

- Traditionally, an individual's rights on the international level were mere derivatives of States' rights
- Currently, three new areas of international law give greater standing to individuals in the international arena –
 - ▢ human rights law,
 - ▢ international humanitarian law (law of war), and
 - ▢ international criminal law

CHAPTER FOUR

SOURCES OF INTERNATIONAL LAW

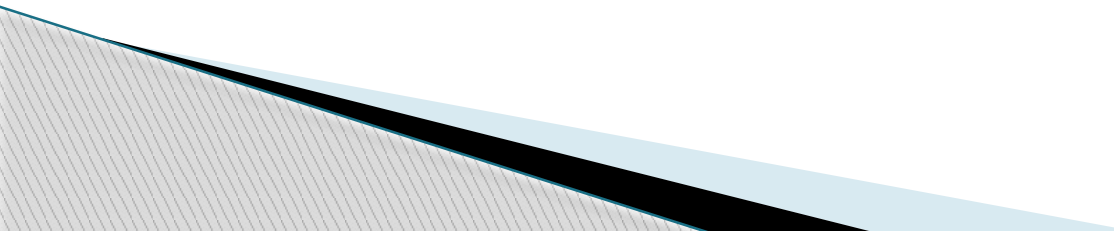


Introduction

- ▶ **Where** does international law come from and **how** is it made ?
- ▶ There is **no “Code** of International Law, no **Parliament** and nothing that can really be described as **legislation**.
- ▶ But, international law is a living body of law and principle – **it grows and develops** in response to **contemporary challenges** informed
 - by how states behave, by what states agree between themselves,
 - by what the international court of Justice and other national courts say, and
 - also by what respected commentators think about how the law should develop

- ▶ Like our own domestic law, international law comes from many sources.
 - ▶ Yet while courts apply domestic laws it look to statutes, cases, regulations, constitutions, and rules
 - ▶ Thus, courts applying international law look to
 - ***treaties,***
 - ***customary international law,***
 - ***general principles of law recognized by civilized nations,*** and
 - ***judicial decisions***
- 

- ▶ These are the sources of international law that the ICJ can apply in the cases over which it presides.
- ▶ It presides over cases between nations who agree to the court's jurisdiction.
- ▶ Article 38 of the Statute is generally regarded as providing the **classic, non-exhaustive listing** of international law sources.
- ▶ The Statute of the ICJ, Art. 38 identifies four sources:-

- ▶ Conventionally, the sources of international law are:
 - treaties
 - custom,
 - general principles of law recognized by civilized nations,
 - judicial decisions, opinions of the most highly qualified publicists of various nations, and
- 

1. Treaties/Conventions

- ▶ Treaties are international agreements that govern the way nations deal with one another.
- ▶ The Vienna Convention on the Law of Treaties, defines a treaty
 - as an international agreement between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.
- ▶ Treaties are referred to by different names, including:
 - agreements, conventions, covenants, protocols and exchanges of notes

Vienna Convention on the Law of Treaties- 1969

- ▶ The law of treaties is set out in the 1969 Vienna Convention on the Law of Treaties
- ▶ It contains
 - the basic principles of treaty law,
 - the procedures for how treaties becoming binding and enter into force,
 - the consequences of a breach of treaty, and
 - principles for interpreting treaties.
- ▶ The basic principle underlying the law of treaties is
 - *pacta sunt servanda*- is a rule of customary international law – “be the man of your word!!”
 - *good faith*- applied in good faith

- ▶ The principle of *pacta sunt servanda* (from Latin, meaning ‘agreements are to be kept’ or ‘treaties are binding’) asserts that:
 - when treaties are **properly concluded**, they are binding on the parties, and must be performed by them in good faith;
 - the obligations created by a treaty are binding in respect of a **State’s entire territory**;
 - a State cannot use **inconsistency with domestic law** as an excuse for failing to comply with the terms of a treaty.

- ▶ It is binding only on States parties
- ▶ not binding on third States without their consent
- ▶ There are now **global conventions** covering most major topics of international law.
- ▶ They are usually *adopted* at an international conference and opened for *signature*
 - If a State becomes a *signatory* to such a treaty, it is **not bound by the treaty**, but it undertakes an obligation to **refrain from acts** which would defeat the object and purpose of the treaty.

Treaty interpretation

- ▶ The general rule is 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 light of its object and purpose.- VCLT, Art 31
- ▶ 1) Textual School- ordinary meaning of text
- ▶ 2) Intentionalist School- Seek intention of the drafters
- ▶ 3) Teleological School- Seek Interpretation which best fulfils the object and purpose of the treaty

Types of treaties

- ▶ Treaties can be bilateral, multilateral, regional and global
- ▶ **Bilateral**- if the treaty is between two parties,
 - it is binding only upon the signatories and
 - is an example of particular international law
- ▶ **Multilateral**- If the agreement is among a large number of states,
 - it is a “law-making treaty”—that might produce a general international legal norm
- ▶ **Regional**- if the agreement involves only one region or a number of region
- ▶ **Global**- if it involves the whole nations of the world
 - They are usually *adopted* at an international conference and opened for *signature*.

Steps of conclusion of treaty

- ▶ The process for concluding a treaty generally includes the following steps:

1. Negotiation - Each state has the capacity to negotiate a treaty.

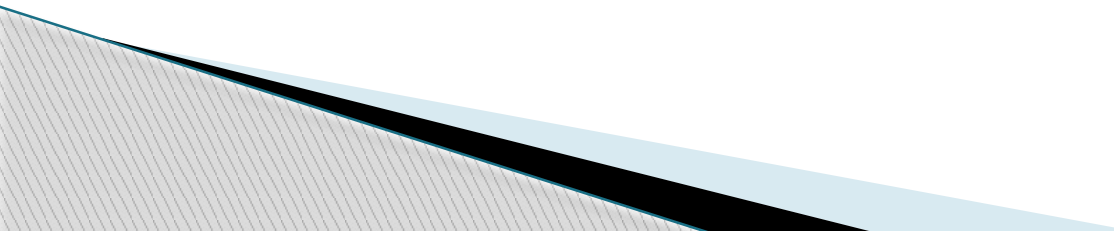
- ▶ See Vienna Convention on Treaties, art. 6.

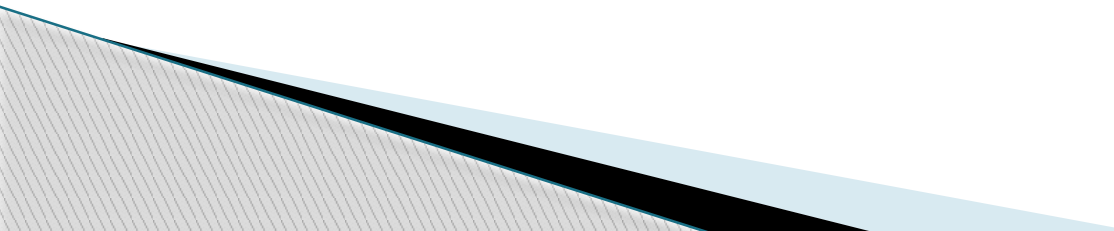
2. Adoption - when the negotiators of the treaty finalize the text, the text is adopted.

- This may occur at a specially-called conference, or at a meeting of a body such as the UN General Assembly.
- see Article 11 of the Vienna Convention on the Law of Treaties

3. ***Signature*** - signature indicates an intention to become a party to a treaty, and does not usually establish consent to be bound by the terms of the treaty, **unless** the treaty provides for the signature having that effect.

4. ***Ratification*** - this is the **confirmation** of the signature of the treaty, and is the formal act by which a State indicates that it consents to be bound by the treaty. It is usually carried out by the sovereign or head of State.



- ▶ Before ratifying a treaty, a State will usually have carried out any necessary steps to enable it to comply, such as legislation or other forms of domestic approval.
 - ▶ A State which has signed a treaty is obliged not to act in such a way that would defeat the object and purpose of the treaty.
 - ▶ A State is not, however, bound by a treaty until ratification, and is not bound to ratify a treaty it has signed.
- 

5. **Accession** - a State which has not signed a treaty can formally indicate its intention to be bound by the treaty before or after the treaty has come into force.

6. **Entry into force** - the terms of a treaty will usually specify **how** and **when** it comes into force.

- ▶ Many multilateral treaties require that a specified number of States consent to be bound before the treaty can enter into force.
- ▶ An example Rome Statute of the ICC, which required 60 ratifications before it came into force

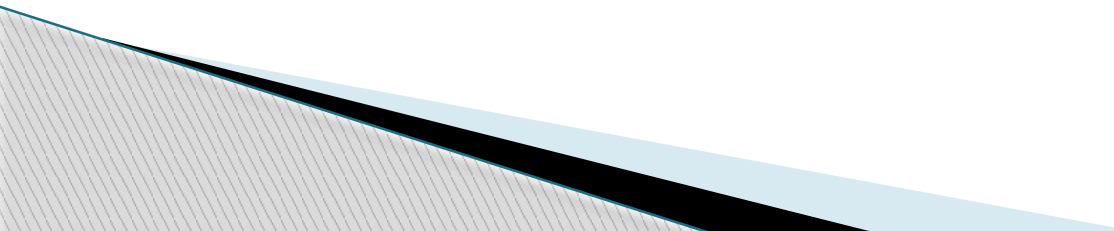
7. Official depository- A State expresses its *consent to be bound* by the provisions of a treaty when it deposits an **instrument of accession or ratification** to the *official depository* of the treaty.

- ▶ If a State is a signatory to an international convention it sends an *instrument of ratification*.
- ▶ If a State is not a signatory to an international convention but decides to become a party, it sends an *instrument of accession*.
- ▶ The legal effect of the two documents is the same.
- ▶ Once a State has expressed its consent to be bound and the treaty is in force, it is referred to as a party to the treaty.

Reservations to treaties

- ▶ **Once a treaty comes into force**, a **State cannot decide** which parts of a treaty it chooses to be bound by.
- ▶ However, **upon signing a treaty**, a State may lodge a formal **reservation** to it which may modify the scope of the legal obligation owed by that State under the treaty.
- ▶ A reservation cannot be made
 - If the terms of the treaty exclude reservations, or
 - If the reservation is incompatible with the object and purpose of the treaty; and
 - If other parties to the treaty can also object to a reservation.
- ▶ A **party objecting to a reservation** may either not enter into a treaty relationship with the reserving State, or may enter into a treaty relationship, but not enjoy the provision to which the reservation relates.

Termination/suspension/ withdrawal of Treaty

1. Express provision in treaty
 2. Or Consent of all parties
 3. Material Breach, supervening impossibility of performance, fundamental change of circumstances
- 

2. Customary International Law

- ▶ It is typically **defined** as a “customary practice of states followed from a sense of state’s legal obligation.”
 - It results from a **general and consistent practice of states** followed by them &
 - from a **sense of legal obligation.**
- ▶ It is a Law that has evolved from the practice or customs of states
- ▶ It describes general practices accepted as law by States.

- ▶ It emerge from ***patterns of state behavior***
 - i.e. it may be expressed by action or inaction
- ▶ It places binding legal obligations on nations according to their patterns of behavior.
- ▶ Over time, nations come to depend on the patterns of other **nations' actions, words, and responses**, and, if these become reliable, they crystallize into law.
- ▶ CIL derives from nations' **actions**, as well as from their **silence** (what they

- ▶ The development of CIL is an **ongoing process**, making it more **flexible** than law of treaties.
- ▶ The task of identifying or describing customary international law, involves consideration of the following elements:
 1. The principle is widespread;
 2. The principle is longstanding;
 3. There is a sense of obligation between nations to follow this principle; and
 4. Acceptance of the practice by others.

- ▶ The State alleging its existence
 - has the **burden of proving** its **existence** by showing a consistent and virtually **uniform practice among States**
 - **E.g. ICJ** *Paguate Habana Case*- whether fishing vessels on high seas are subject of arrest at time of war.
- ▶ Practically it can be difficult to prove
- ▶ No code or other authoritative compilation
- ▶ Rather, it is determined by proof of two elements:
 - State practice

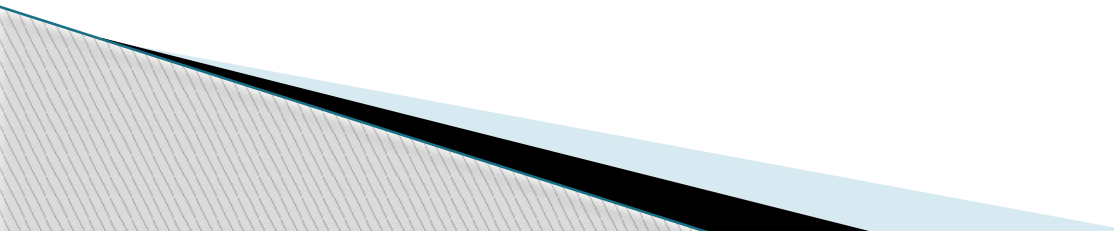
1. State practice

- ▶ State practice is determined by examining
 - What States and their officials do, and
 - Statements they made at different stages
- ▶ Formality is not important
 - ◻ E.g. ICJ Opinion on Nuclear Test case b/n French & Australia- a number of diplomatic correspondences
- ▶ Such practice need not be universal among all states;
 - rather, it must be “general and consistent,” indicating “wide acceptance among the states particularly involved in the relevant activity.”

- ▶ There are several theoretical problems with the state practice issue
- ▶ For instance:
 1. How wide spread must the practice is?
 2. How long does it take to be established?
 - E.g. North Sea Continental Shelf Case- ICJ provides that short period of time is sufficient to establish the CIL

2. *Opinio juris*

- ▶ The States who engage in the alleged customary practice do so out of a sense of legal obligation or *opinio juris*
 - rather than out of comity or for political reasons.
 - ▶ It is only when states adhere to the practice out of a sense of legal obligation not for friendship
 - ▶ In theory, *opinio juris* is a serious obstacle to establishing a rule as custom
 - because it is extremely difficult to find evidence of the reason why a State followed a particular practice.
- 

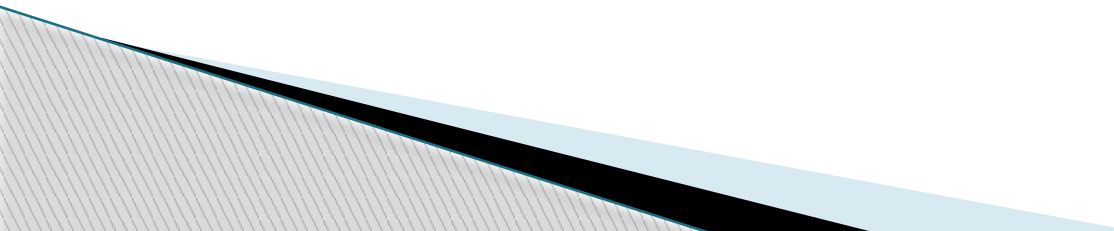
- ▶ The *opinio juris* requirement raises more problems.
 - ▶ For instance:
 1. To what does the psychological state refer?
 2. How does one identify it?
- 

Persistent State Objection and Absence of State Objection

- ▶ CIL is binding on all states
- ▶ except:
 - A state that demonstrated its rejection of a CIL norm, by **objecting persistently** while the norm was forming, is not bound to that norm-called **Persistent objector**
 - Conversely, a state that **remained silent** during the period of formation is deemed to have implicitly accepted the rule.

- ▶ Undisputed examples of rules of customary law are:
 - (a) giving foreign diplomats criminal immunity;
 - (b) treating foreign diplomatic premises as inviolable;
 - (c) recognizing the right of innocent passage of foreign ships in the territorial sea;
 - (d) recognizing the exclusive jurisdiction of the flag State on the high seas;
 - (e) ordering military authorities to respect the territorial boundaries of neighboring States; and
 - (f) protecting non-combatants such as civilians and sick or wounded soldiers during international armed conflict..
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Difference b/n Custom & Treaty

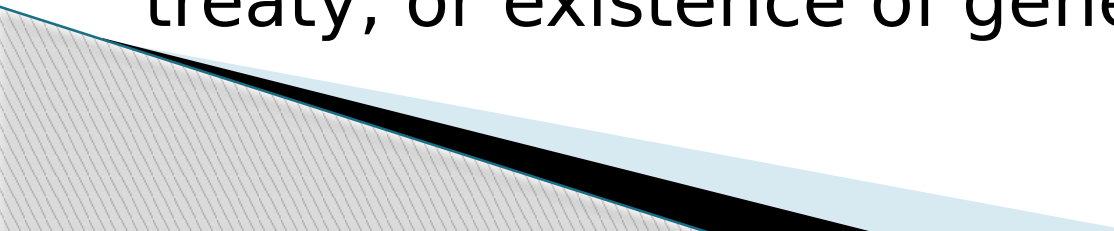
1. Formation- by practice vs by agreement
 2. Applicability- on all states vs among parties
 3. Clarity- ambiguous vs clear
 4. Flexibility- flexible vs rigid
 5. Reservation- no reservation vs allowed
 6. Specificity- general vs specific
- 

3. General Principles of Law

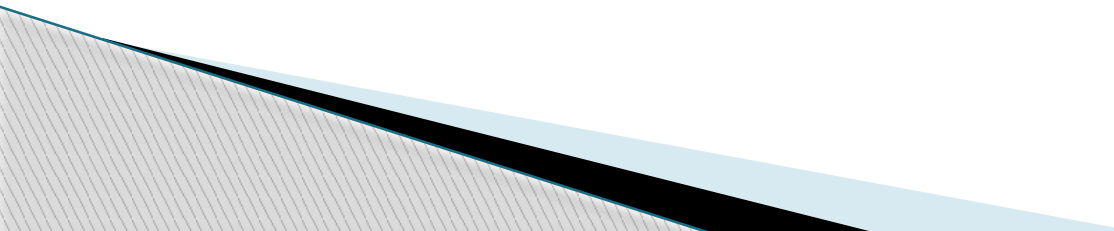
- ▶ General principles of law recognized by civilized nations are often cited as a third source of law.
- ▶ These are general principles that apply in all major legal systems.
 - E.g. the principle that persons who intentionally harm others should have to pay compensation or make reparation.
- ▶ usually used when no treaty provision or clear rule of customary law exists-
 - used as a gap filling provision

- ▶ It seems to be that international tribunals use domestic law **selectively** where situations are comparable to make the administration of international law work
- ▶ Established by comparing national legal systems of civilized nations
 - b/s it is difficult to assess legal systems of all nations
- ▶ Any principle common to all or most of the states may be applied
 - E.g.
 - ▢ Protection of acquired rights
 - ▢ Prohibition of unjust enrichment
 - ▢ Principle of procedural fairness before court of law
 - ▢ *Res judicata*, Equity, Good faith

4. JUDICIAL DECISIONS AND WRITINGS OF PUBLICISTS

- ▶ Applied as 'subsidiary means for the determination of rules of law'
 - ▶ Judgments or opinions providing evidence of international law may be issued by national courts;
 - indeed, the decisions of a state's courts may be deemed indicative of state practice for purposes of determining customary international law.
 - ▶ It help the Court to identify the scope of customary law, proper interpretation of a treaty, or existence of general principles.
- 

- ▶ ICJ in its decisions identify and articulate international law rules based on treaty, custom, general principles of law, judicial decisions of international and national courts and tribunals, and the writings of jurists.
- ▶ It assist in application of particular aspects of the law.
- ▶ Decisions of domestic courts, which interpret rules of international law can provide guidance as to the law, and provide evidence of the practice of that State in the development of customary international law.

- ▶ “the teaching of publicists” is perhaps better referred to as scholarly writings.
 - ▶ Assuming that the writing is sufficiently authoritative, it may aid a court’s determination of the existence and content of an international law norm.
- 

‘HARD LAW’ AND ‘SOFT LAW’

- ▶ ‘Hard law’ refers to binding law such as:-
 - UN Security Council resolutions, treaty obligations to which a State has agreed and rules of customary international law:
- ▶ The term **soft law** is non-binding law w/c is used in two different situations.
 - *Where treaty obligations are expressed in vague or flexible terms, rather than clear and concrete terms.*
 - *Where principles or guidelines are not legally binding but may still shape behaviour.*
- ▶ Soft law in this sense can articulate principles that may subsequently develop into binding customary law.

Chapter Five

» State Responsibility

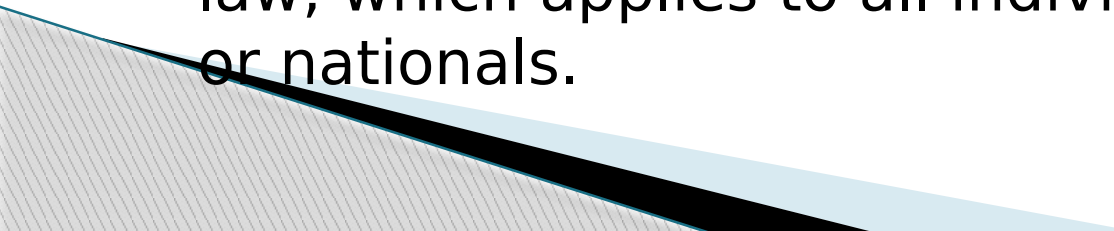
Introduction

- ▶ The laws of **state responsibility** are the **principles governing when and how** a state is held responsible for a breach of an international obligation.
- ▶ It is called "**secondary**" **rules** that address basic issues of responsibility and remedies available for breach of "**primary**" **or substantive rules of international law**
- ▶ It establish:
 - the **conditions** for an act to qualify as internationally wrongful;
 - the **circumstances** under which actions of officials, private individuals and other entities may be attributed to the state; and
 - the **consequences** of liability.

- ▶ Primarily, law of state responsibility was not well developed
 - ▶ But it is governed by CIL
 - ▶ **Draft Articles on the Responsibility of States for Internationally Wrongful Acts** ("Draft Articles") by the International Law Commission (ILC) in August 2001
 - ▶ already been cited by the ICJ and have generally been well received.
- 

Meaning

- ▶ Traditionally;
 - referred **only** to state responsibility for **injuries to aliens /foreigners.**
 - It included both the primary and secondary rules
 - ▢ Primary- rights & duties of states/substantive rules
 - **Early efforts** by the League of Nations and private bodies to codify the rules of "state responsibility" **reflected the traditional focus** on responsibility for injuries to aliens
 - But, the League's 1930 Codification Conference in The Hague was able to reach an agreement only on "secondary" issues

- ▶ The attempts continued throughout the life of the United Nations.
 - ▶ It took nearly 45 years for the ILC of UN GA to reach agreement on the final text of the Draft Articles
 - ▶ At the same time, the CIL of state responsibility has been rendered less important
 - by the development of international human rights law, which applies to all individuals, whether aliens or nationals.
- 

- ▶ State responsibility is a **fundamental principle of international law** and it lies on the understanding that **states are sovereign and equal**.
- ▶ It **provides** that whenever one state commits internationally unlawful act against another state, international responsibility is established between the two.
- ▶ This obligation gives rise to a requirement for **reparation**.
- ▶ it is interested with the **procedural and other consequences** flowing from a breach of a substantive rule of international law

The nature of State Responsibility

- ▶ The essential characteristics of responsibility centers on certain basic factors:
 - First the **existence of an international legal obligation** in force as between two particular states;
 - secondly, that there has **occurred an act or omission** which violates that obligation and which is imputable to the state responsible; and
 - Finally, that **loss or damage** has resulted from the unlawful acts or omission.

- ▶ Article 1 of the International Law Commission's Draft Articles provides the general rule, widely supported by practice;
 - that every internationally wrongful act of a state entails responsibility
 - ▢ *“Every internationally wrongful act of a State entails the international responsibility of that State.”*

- ▶ Article 2 provides elements of internationally wrongful act;
 - There is an internationally wrongful act of a State when conduct consisting of an action or omission:
 - ▢ (a) Is **attributable to the State** under international law; and
 - ▢ (b) **Constitutes a breach** of an international obligation of the State.

- ▶ It is **international law** that determines what constitutes an internationally **unlawful act**, irrespective of any provisions of municipal law.
- ▶ Article 12 stipulates that;
 - there is a breach of an international obligation **when an act of that state is not in conformity with what is required** of it by that obligation, regardless of its origin or character
- ▶ A state assisting another state to commit an internationally wrongful act will also be responsible
 - if it so **acted with knowledge** of the circumstances and
 - where it would be **wrongful if committed by that state**.

The Question of Wrongfulness

- ▶ There are contending theories as to whether responsibility of the state for unlawful acts or omissions is
 - **one of strict liability or**
 - **Fault based or intention** on the part of the officials concerned
- ▶ The **principle of objective responsibility** (the so called 'risk' theory) maintains that
 - the liability of the state is **strict**.
- ▮ Once an unlawful act has taken place that state will be responsible in international law to the state suffering the damage **irrespective of good or bad faith**

- ▶ The **subjective responsibility concept** (the '**fault**' theory) which emphasizes that;
 - an element of **intentional or negligent conduct** on the part of the person concerned is **necessary before his state can be rendered liable** for any injury caused.
 - ▶ The relevant cases and academic opinions are divided on this question,
 - ▶ But, the majority tends towards the strict liability, objective theory of responsibility.
- 

Examples of the tests

- ▶ In the Caire Claim, the French-Mexican claims commission had to consider the case of a French citizen shot by Mexican soldiers for failing to supply them with 5,000 Mexican dollars.
- Verzijl, the presiding commissioner, held that Mexico was responsible for the injury caused in accordance with the objective responsibility doctrine that is the responsibility for the acts of the officials or organs of a state, which may devolve upon it even in the absence of any “fault” of its own.

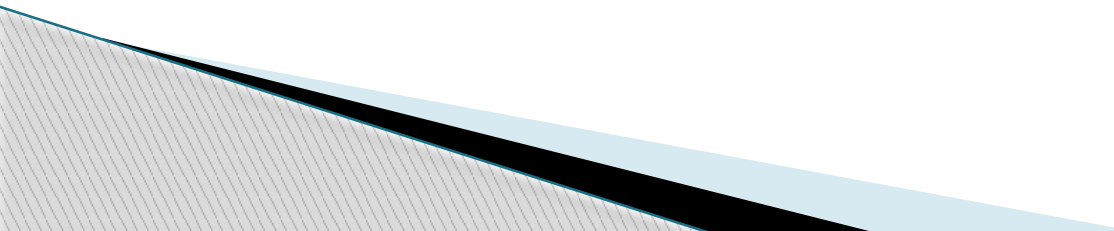
- ▶ In the Home Missionary society claim in 1920 between Britain and the United States.
 - In this case, the imposition of a 'hut tax' in the protectorate of Sierra Leone triggered off a local uprising in which society property was damaged and missionaries killed.
 - ▢ The tribunal dismissed the claim of the society (presented by the US) and noted that it was established in international law that no government was responsible for the acts of rebels where it itself was guilty of no breach of good faith or negligence in suppressing the revolt.

- ▶ The commentary to the ILC Articles emphasized that;
 - the Articles **did not take a definitive position** on this controversy,
 - **but** noted that standards as to objective or subjective approaches, fault, negligence or want of due diligence would **vary from one context to another depending up on the terms of the primary obligation in question.**
- ▶ "Breach of an international obligation" is **defined** as "an act ... not in conformity with what is required ... by that obligation."
- ▶ Furthermore, the **state cannot avoid responsibility by declaring something legal under its own domestic law.**

- ▶ Some older cases and commentaries discuss whether state responsibility is based on notions of fault or strict liability.
 - It may be said that **states are more "strictly liable"** for the actions of their **officials** than for the actions of **private individuals**.
 - ▢ In the latter case, it may be **necessary to prove** some **"failure to control" the private individuals** (i.e. "fault") before the state itself is held responsible.
- ▶ The articles leave it to the **primary rules of obligation to determine** whether the wrongfulness of an act depends on fault, intention, lack of diligence, or the like.

Immutability/Attribution

- ▶ **A causal connection** between the **injury** and an **official act or omission** attributable to the state alleged to be in breach of its obligations must be established
- ▶ The state is responsible for all actions of its officials and organs, even if the organ or official is formally independent and even if the organ or official is acting *ultra vires*. – Article 4
- ▶ A state may be held responsible for actions of "private" individuals that are, in fact, controlled by the state.

- ▶ *Article 5 provides that;*
 - ▶ *Conduct of persons or entities exercising elements of governmental authority*
 - The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.
- 

- ▶ *Article 7 provides that;*
- ▶ *Excess of authority or contravention of instructions*
 - The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.
- ▶ *Article 8 provides that;*
- ▶ *Conduct directed or controlled by a State*
 - 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.

- ▶ Where there is a **breakdown of normal governmental authority and control**, such as in so-called "**failed states**", the actions of those acting as the "government" in a **de facto** sense will be acts of the state. –Article 9
- ▶ The acts of an "**insurrectional or other movement that becomes the new government** of an existing state or succeeds in establishing a new state" can also be attributed to the state. –Article 10
- ▶ This is also the case **where a state acknowledges and adopts the conduct of private persons as its own**. – Article 11

- ▶ State responsibility covers many fields.
- ❖ It includes unlawful acts or omissions directly committed by the state and directly affecting other states:
 - for instance,
 - ▢ the breach of a treaty,
 - ▢ the violation of the territory of another state, or
 - ▢ damage to state property
- ❖ The state may also incur responsibility with regard to the activity of its officials in injuring a national of another state, and this activity need not be one authorized by the authorities of the state

- ▶ The doctrine depends on the **link that exists between the state and the person or persons actually committing** the unlawful act or omission.
- ▶ The **state as an abstract legal entity** can not, of course, in reality 'act' itself. It can only do so through authorized officials and representatives.
- ▶ The state is not responsible under international law for all acts performed by its nationals.
- ▶ Since the state is responsible only for acts of its servants that are imputable or attributable to it, it becomes necessary to examine the concept of Imputability (also termed attribution).

- ▶ **Imputability** is the legal fiction which **assimilates** the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien
- ▶ Article 4 of the ILC Draft Articles provides that the conduct of any state organ shall be considered as an act of the state concerned under international law where;
 - the organ exercises legislative, executive, judicial or any other function,
 - what ever position it holds in the organization of the state and
 - whatever its character as an organ of the central government or of a territorial unit of the state.

- ▶ Article 5 of the Draft Article provides:
 - The conduct of a person or entity which is not an organ of the State under article 4
 - but which is empowered by the law of that State to exercise elements of the governmental authority
 - ▢ shall be considered an act of the State under international law,
 - ▢ provided the person or entity is acting in that capacity in the particular instance.

- ▶ This provision is intended *inter alia* to **cover the situation of privatized corporation** which retain certain public or regulatory functions
 - E.g. state-owned airlines, rail way company,

***Ultra vires* acts**

- ▶ The act of officials of a state may result in the responsibility of a state even when the former have acted beyond their authority
- ▶ Article 7 of the ILC Articles provides:
 - *The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.*

State Control and Responsibility

- ▶ Article 8 of Draft Article of the International Law Commission provides:
 - *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.*
- ▶ The commentary to the article emphasizes that, 'such conduct will be attributable to the state only if it directed or controlled the specific operation and the conduct complained of was an integral part of the state's operation.'
 - E.g. military forces,

- ▶ Article 9 of the ILC Articles provides 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 exercising elements of the governmental authority in the absence or default of the official authorities and
 - ▢ in circumstances such as to call for the exercise of those elements of authority.
- ▶ For example, where there is a breakdown of a governmental authority and control,
 - such as in so-called "failed states",
 - ▢ like the case of the recent Somalia, the actions of those acting as the "government" in a de facto sense will be acts of the state.

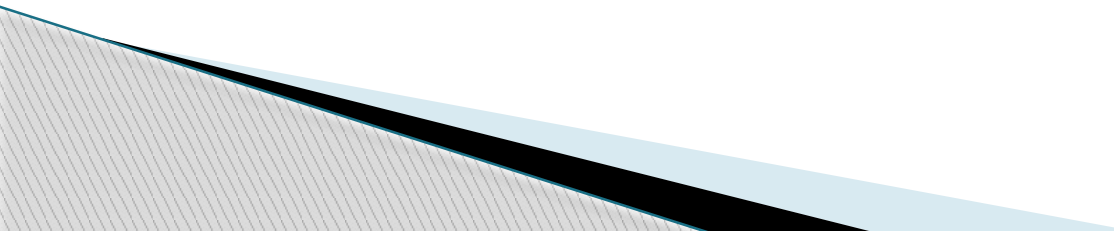
- ▶ Article 10 of the ICL articles provides that
 - "where an insurrectional movement is successful either in becoming the new government of a state or in establishing a new state in part of the territory of the pre-existing state, it will be held responsible for its activities **prior** to its assumption of authority.

- ▶ Where a state subsequently acknowledges and adopts conduct as its own, then it will be considered as an act of state under international law entailing responsibility, even though such conduct was not attributable to the state before hand.
 - Even though the act could not be imputable to state before hand but, the subsequent approval of the act by state organs translate that action into a state act

Consequences of Breach and Reparation

- ▶ The breach of an international obligation entails two types of legal consequences.
- ▶ Firstly, it creates new obligations for the breaching state,
 - ❖ principally, duties of cessation and non-repetition (Article 30), and
 - ❖ a duty to make full reparation (Article 31).
- ▢ Article 33(1) characterizes these secondary obligations as being owed to other states or to the international community as a whole.
- ▢ It indirectly acknowledge in a savings clause also that states may owe secondary obligations to non-state actors such as individuals or international organizations.

- ▶ Second, the articles create new rights for injured states,
 - ❖ principally, the right to invoke responsibility (Articles 42 and 48) and
 - ❖ a limited right to take countermeasures (Articles 49-53).
- These rights, however, are heavily state-centered and do not deal with how state responsibility is to be implemented if the holder of the right is an individual or an organization.
- certain violations of international obligations can affect the international community as a whole such that state responsibility can be invoked by states on behalf of the larger community. (Article 48)

- ❑ If illegal actions are continuing, the state has a duty to cease. [Art. 30]
 - ❑ The state also has duties to make reparation, which could involve restitution, compensation, or satisfaction.
 - ✓ **Remedies** (type and amount) will be dependent on the particular **forum**,
 - ✓ such as the United Nations, International Court of Justice, World Trade Organization, International Tribunal for the Law of the Sea, International Criminal Court.
- 

ASSIGNMENT-

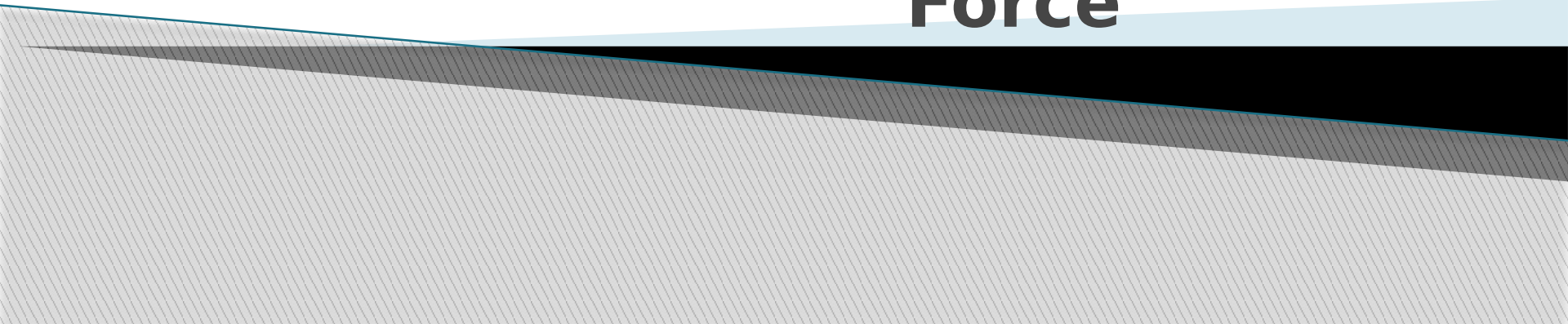
1. READ THE ETHIOPIAN CLAIM AGAINST ERITREA CLEARLY AND PREPARE A SUMMARY OF THE CASE- max. page limit (2) two
 - Discuss whether the act or omission by Eritrea to qualify as international wrong.
 - Discuss circumstances under which actions of Eritreans may be attributed to the state.

READING ASSIGNMENT

2. Read the **Rainbow Warrior Case from your module (page 253-273).**

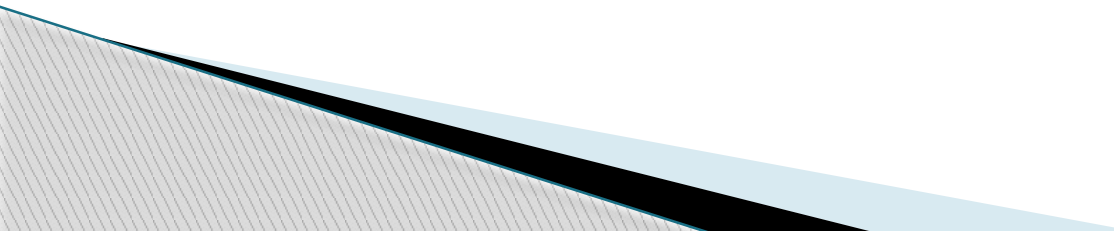
CHAPTER SIX

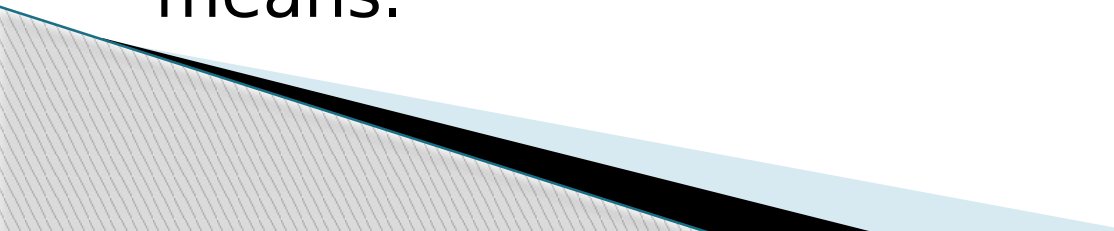
**War and the
Prohibition on the
Threat or Use of
Force**



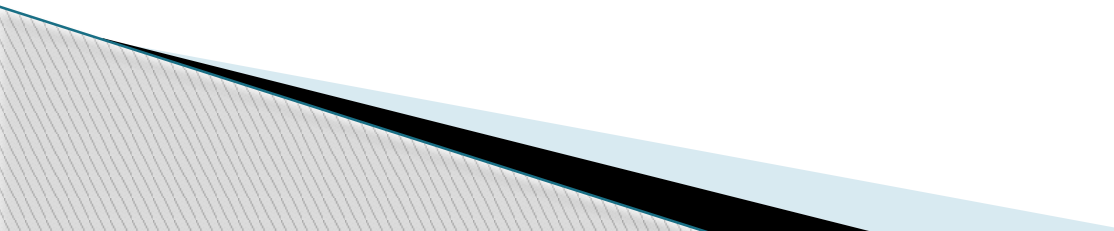
History of use of force: from just war to UN

- ▶ Previously during the Christianization of the Roman Empire the doctrine of 'JUST WAR' is developed
- ▶ It was employed as the ultimate sanction for the maintenance of an ordered society
- ▶ St Augustine (354-430) defined the just war in terms of avenging of injuries suffered where the guilty party has refused to make reparation.
 - War was to be embarked upon to punish wrongs and restore the peaceful status quo but no further

- ▶ St Thomas Aquinas in the 13th Century define it as it was the subjective guilt of the wrongdoer that had to be punished rather than the objective wrong activity.
 - ▶ He wrote that war could be justified provided
 - it was waged by the sovereign authority,
 - it was accompanied by a just cause (i.e. the punishment of wrongdoers) and
 - it was supported by the right intentions on the part of the belligerents
- 

- ▶ With the rise of the European nation-state, the doctrine began to change.
 - ▶ The requirement that serious attempts at a peaceful resolution of the dispute were necessary before turning to force began to appear.
 - ▶ This reflected the new state of international affairs
 - ▶ Thus the emphasis in legal doctrine moved from the application of force to suppress wrongdoers to a concern to maintain the order by peaceful means.
- 

- ▶ The doctrine of the just war arose with the increasing power of Christianity and declined with the outbreak of the inter-Christian religious wars and the establishment of an order of secular sovereign states
- ▶ These activities were undertaken in order to enforce rights or to punish wrongdoers.
- ▶ The First World War marked the end of the balance of power system and raised afresh the question of unjust war
- ▶ The creation of the League of Nations reflected a completely different attitude to the problems of force in the international order.

- ▶ The Covenant of the League declared that members should submit disputes likely to lead to a rupture to arbitration or judicial settlement or inquiry by the council of the League.
 - ▶ In no circumstances were members to resort to war until three months after the arbitral award or judicial decision or report by the council
 - ▶ The League system did not prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable levels
- 

The UN Charter

- ▶ Article 2(4) of the Charter declares that:
 - (a) 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 other manner inconsistent with the purposes of the United Nations.
- ▶ This provision is regarded now as a principle of customary international law and as such is binding upon all states in the world community.
- ▶ The reference to 'force' rather than war is beneficial and thus covers situations in which violence is employed

- ▶ It was further elaborated under the 1970 Declaration on Principles of International law as:
 - **First**, wars of aggression constitute a crime against peace for which there is responsibility under international law;- ICC- art 5(d)
 - **Secondly**, states must not threaten or use force to violate existing international frontiers or to solve international disputes;
 - **Thirdly**, states are under a duty to refrain from acts of reprisal involving the use of force;
 - **Fourthly**, states must not use force to deprive peoples of their right to self-determination and independence;
 - And **fifthly**, states must refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state and must not encourage the formation of armed bands for incursion into another state's territory.

- ▶ Important exceptions to article 2(4) exist
 - in relation to collective measures taken by the United Nations and
 - with regard to the right of self-defense

□ **Categories of Force**

- ▶ Various measures of self-help ranging from economic retaliation to the use of violence pursuant to the right of self-defense have historically been used.
- ▶ Since the establishment of the charter regime there are basically three categories of compulsion open to states under international law.
 - These are retorsion, reprisal and self-defense.

Retorison

- ▶ Retorsion is the adoption by one state of an unfriendly and harmful act, which is nevertheless lawful, as a method of retaliation against the injurious legal activities of another state.
 - Examples include the severance of diplomatic relations and the expulsion or restrictive control of aliens, as well as various economic and travel restrictions.
- ▶ Retorison is a legitimate method of showing displeasure in a way that hurts the other state while remaining within the bound of legality
- ▶ It would also appear to cover the instance of a lawful act committed in retaliation to a prior unlawful activity

Reprisals

- ▶ Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state.
- ▶ It would be emphasized that before reprisals could be undertaken,
 - there had to be sufficient justification in the form of a previous act contrary to international law
- ▶ reprisals involving armed force may be lawful if resorted to in conformity with the right of self-defense.
- ▶ Reprisals as such undertaken during peacetime are thus unlawful, unless they fall within the framework of the principle of self-defense.

The right of self-defense

- ▶ Article 51 of the UN Charter Provides that:
 - Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measure necessary to maintain international peace and security.
 - Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the security council and shall not in any way affect the authority and responsibility of the security council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security
- 

- ▶ article 51 in conjunction with article 2(4) now specifies the scope and limitations of the doctrine of use of force.
- ▶ In other words, self-defense can only be resorted to 'if an armed attack occurs' and in no other circumstances.

❑ **Anticipatory or pre-emptive self-defense**

- ▶ A further issue is whether a right to anticipatory or pre-emptive self-defense exists.
- ▶ This would appear unlikely if one adopted the notion that self-defense is restricted to responses to actual armed attacks

- ▶ The concept of anticipatory self-defense is of particular relevance in light of modern weaponry that can launch an attack with tremendous speed, which may allow the target state little time to react to the armed assault before its successful conclusion, particularly if that state is geographically small.
 - ▶ States have employed pre-emptive strikes in self-defense.
 - ▶ Today, war instruments are so sophisticated that they can destroy the target in a few moments.
- 

► For example:

- Israel, in 1967, launched a strike upon its Arab neighbors, following the blocking of its Southern Port of Eilat and the conclusion of a military pact between Jordan and Egypt.
- It could, of course, also be argued that the Egyptian blockade itself constituted the use of force, thus legitimizing Israel actions without the need for ‘anticipatory’ conceptions of self-defense, especially when taken together with the other events.
- It is noteworthy that the United Nations in its debates in the summer of 1967 apportioned no blame for the out break of fighting and did not condemn the exercise of self-defense by Israel.

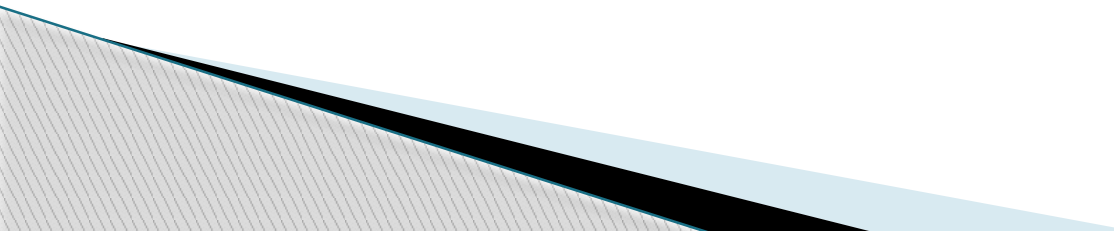
- ▶ The concepts of **necessity** and **proportionality** are at the heart of self-defense in international law.
- ▶ There was a 'specific rule where by self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.'
- ▶ Proportionality as a criterion of self-defense may also require consideration of the type of weaponry to be used, an investigation that necessitates an analysis of the principles of international humanitarian law

Collective Security

- ▶ "Collective Security as an Approach to Peace", is seen as a compromise between the concept of world government and a nation-state based balance of power system,
 - where the latter is seen as destructive or not a good enough safeguard for peace, and
 - the first is deemed unaccomplishable at the present time.
- ▶ And while collective security is possible, several prerequisites have to be met for it to work.
- ▶ **First**: almost every state, especially all major states, has to be in the collective security arrangement and committed to it for it to work.

- ▶ **Second**: no one state can block the decision making process.
 - This was a major issue with the League of Nations, as it gave every state veto power, as well as with the UN, which gives it to 5 powerful nations
- ▶ **Third**: for sanctions to work, the international economy has to be sufficiently interdependent such that sanctions harm the intended country enough, but do not harm the countries doing the sanctioning
- ▶ **Fourth**; that for countries to trust collective security, they have to know it works well enough to safeguard their security

Assignment

- ▶ Discuss what constitute collective security and collective defense, and are they similar or different?
 - ▶ Max one page
 - ▶ Individual assignment
- 

Terrorism

- ▶ It is the systematic use of terror especially as a means of coercion."
- ▶ There is no internationally agreed definition of terrorism.
- ▶ Most common definitions of terrorism include only those acts which
 - are intended to create fear (terror),
 - are perpetrated for an ideological goal (as opposed to a lone attack), and
 - deliberately target or disregard the safety of non-combatants.
- ▶ Some definitions also include acts of unlawful violence and war.

- ▶ Terrorism is often recognized as:
 - **Violence**- "the only general characteristic of terrorism generally agreed upon is that terrorism involves violence and the threat of violence."
 - **Psychological impact and fear** – The attack was carried out in such a way as to maximize the severity and length of the psychological impact.
 - **Perpetrated for a political goal** – Something all terrorist attacks have in common is their perpetration for a political purpose
 - **Deliberate targeting of non-combatants** – It is commonly held that the distinctive nature of terrorism lies in its intentional and specific selection of civilians as direct targets
 - **Disguise** – Terrorists almost invariably pretend to be non-combatants, hide among non-combatants, fight from in the midst of non-combatants, and when they can, strive to mislead and provoke the government soldiers into attacking the wrong people, that the government may be blamed for it.

Group assignment

- ▶ Please take/select any acts of terrorist and identify them whether they seek a collective security action or not? And How do you explain acts of terrorism and self defense?
 - For example actions of the ISIS, Alshabab, Boko Haram, etc
- Max of five pages

Chapter Seven

» International Dispute Resolution

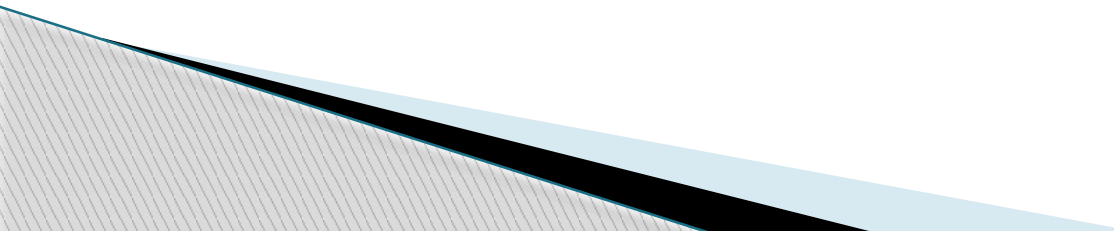
Introduction

- ▶ International disputes are solved in two general methods:
 - Diplomatic means of dispute settlement that includes:-
 - ▢ Arbitration,
 - ▢ Negotiation, and
 - ▢ Mediation
 - Court or Tribunal mechanism
 - ▢ International Court of Justice and
 - ▢ Other International Tribunals

ADR:- Alternative Dispute Resolution

- ▶ It includes:-
 - ❑ **Arbitration**:- It is a dispute resolution process where the opposing parties select or appoint an individual called an Arbitrator.
- The arbitrator will:-
 - arrange the process to hear and consider the evidence,
 - review arguments and
 - afterwards will publish an award in which the items of dispute are decided.
- The Arbitrator's decisions are final and binding on the parties.
- Arbitration may comprise a sole Arbitrator, or may be a panel of Arbitrators.

- ❑ **Mediation:-** A dispute resolution process in which the parties freely choose to participate and any agreements reached to settle disputes is done solely by the parties, without interference.
- The Mediator is selected by the parties and once selected;
 - the Mediator will arrange the mediation process.
 - The Mediator makes no decisions; instead he/she acts as a facilitator only to assist the parties to understand the dispute, provide structured discussion and to help the parties reach a dispute settlement agreement.
- Mediation is a very important form of ADR, particularly if the parties wish to preserve their relationship.
- If not reach on agreement they are free to pursue other options

- ❑ **Conciliation:-** It is a less frequently used form of ADR, and can be described as similar to mediation.
 - ▶ The Conciliator's role is to guide the parties to a settlement.
 - ▶ The parties must decide in advance whether they will be bound by the Conciliator's recommendations for settlement.
 - ▶ The parties generally share equally in the cost of the conciliation.
- 

- ❑ **Negotiation:-** It is a less structured form of ADR, the parties themselves decide to solve their disputes among themselves without the help of third party.
 - ▶ The facilitator's role is to
 - keep the parties talking and bargaining,
 - keeps record of party positions and points of agreement they reach as discussions proceed and
 - finally prepare memorandum of agreement containing all points agreed
 - ▶ The process can be lengthy, as in labor or sports negotiation.
 - ▶ On any matters unresolved, the parties are free to pursue other options.
- 

The International Court of Justice/ICJ/

- ▶ It acts as a world court.
- ▶ It has a dual jurisdiction:
 1. it decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (**jurisdiction in contentious cases**); in which the court produces binding rulings between states that agree, or have previously agreed, to submit to the ruling of the court; and
 2. It gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorized to make such a request (**advisory jurisdiction**). Advisory opinions do not have to concern particular controversies between states, though they often do.

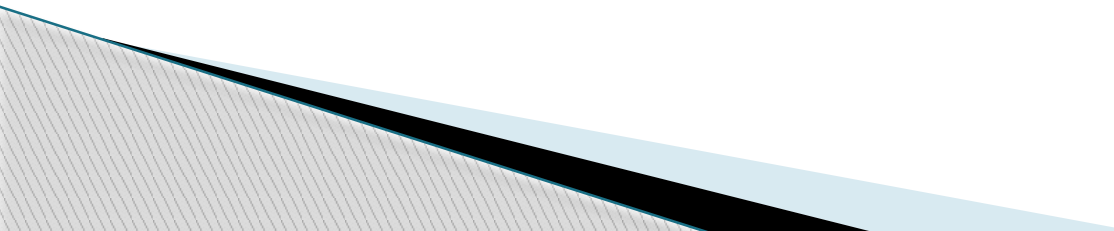
A. Contentious Jurisdiction

- ▶ It has to decide, in accordance with international law, disputes of a legal nature that are submitted to it by States
- ▶ Only States may apply to and appear before the International Court of Justice. (Article 35 of the ICJ Statute)
 - International organizations, other collectivities and private persons are not entitled to institute proceedings before the Court.
- ▶ Article 35, paragraph 1, of the Statute provides that the Court shall be open to the States parties to the Statute, and
- ▶ Article 93, paragraph 1, of the UN Charter provides that all Members of the United Nations are *ipso facto* parties to the Statute.

❖ **Basis of the Court's Contentious Jurisdiction**

- The jurisdiction of the Court in contentious proceedings is based on the consent of the States to which it is open.
- The form in which this consent is expressed determines the manner in which a case may be brought before the Court.

A. *Special agreement*- cases normally come before the Court by notification to the Registry of an agreement known as a special agreement and concluded by the parties especially for this purpose

- B. Cases provided for in treaties and conventions-** the jurisdiction of the Court comprises all matters specially provided for in any treaties and conventions in force.
- c. Compulsory jurisdiction in legal disputes-** A State may recognize as compulsory, in relation to any other State accepting the same obligation, the jurisdiction of the Court in legal disputes. The conditions on which such compulsory jurisdiction may be recognized are stated in paragraphs 2-5 of Article 36 of the Statute
- 

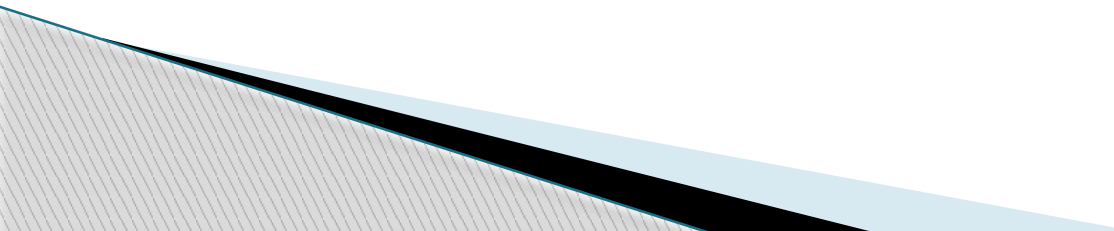
D. *Forum prorogatum****-*** If a State has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of accepting such jurisdiction subsequently to enable the Court to entertain the case: called forum prorogatum.

E. *The Court itself decides any questions as to its jurisdiction****-*** Article 36, paragraph 6, of the Statute provides that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

- F. *Interpretation of a judgment:-*** Article 60 of the Statute provides that in the event of dispute as to the meaning or scope of a judgment, the Court shall construe it upon the request of any party. The request for interpretation may be made either by means of a special agreement between the parties or of an application by one or more of the parties
- G. *Revision of a judgment:-*** An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such party's ignorance was not due to negligence

B. Advisory Jurisdiction

- ▶ Since States alone have capacity to appear before the Court, public (governmental) international organizations cannot as such be parties to any case before it.
- ▶ A special procedure, the advisory procedure, is, however, available to such organizations and to them alone.
- ▶ Advisory proceedings begin with the filing of a written request for an advisory opinion addressed to the Registrar by the United-Nations Secretary-General or the director or secretary-general of the entity requesting the opinion.
- ▶ In urgent cases the Court may do whatever is necessary to speed up the proceedings.

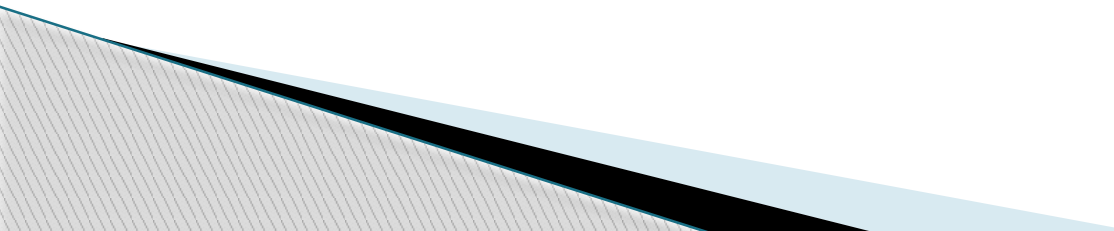
- ▶ The court will list concerned state or IO's and request an information from any info in relation to the question submitted
 - ▶ States listed are the member States of the organization requesting the opinion, while sometimes the other states to which the Court is open in contentious proceedings are also included
 - ▶ The decision of the court have no binding effect, except in rare cases where it is stipulated beforehand that they shall have binding effect
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- ▶ Nevertheless it carry great legal weight and moral authority.
- ▶ They are often an instrument of preventive diplomacy and have peace-keeping virtues.
- ▶ Advisory opinions also, in their way, contribute to the elucidation and development of international law and thereby to the strengthening of peaceful relations between States.

- ▶ In accordance to art 96 of UN Charter,
 - UN SC,
 - UN GA and
 - other organs of the United Nations and specialized agencies up on authorization by the GA has the power to request Advisory Opinion from ICJ

Other International Tribunals

- ▶ International criminal tribunals are established to try individuals for crimes they have committed against international community
- ▶ International war crimes tribunals are courts of law established to try individuals accused of genocide, war crimes, crimes against humanity and crimes of aggression
- ▶ Starting from Nuremberg and Tokyo Military Tribunal to ICC, all are established to fight impunity and to replace it with the principles of accountability
- ▶ It introduced the concept of individual criminal responsibility under international law

- ❖ Nuremberg and Tokyo Military Tribunals
 - ❖ Ad hoc international criminal tribunals- ICTY-1993 and ICTR-1994
 - ❖ Hybrid court/tribunal- Cambodia
 - ❖ Special Tribunals- SCSL
 - ❖ ICC- Rome Statute of 1998
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THE END!!!