International Law

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Unit 1: Introduction to International Law

A What is International Law?

1. International law is a project in construction; it represents a long process of change from the foreign office system to a system of global governance since the end of WWI
   - Foreign office system – rules made by diplomats representing individual governments (this is still the basic framework of international law); manifestation of the positivist doctrine, which held that only states could be subjects of international law in the sense of enjoying international legal personality and being capable of possessing international rights and duties, including the right to bring international claims
   - System of global governance – sets out to accommodate the pervasiveness of global markets, political interdependencies and the advances of natural sciences and technology; reflects the necessity to address problems in an international framework; actors include private corporations or individuals, NGO's, departments w/in each government besides the foreign office, among others
2. Five major reasons for these changes:
   - **Increasing role of international institutions** – these institutions have a limited competence for governance; there is a lot of variability here for certain organizations (IMF) and circumstances
     - i.e., the ICJ – originally intended to resolve disputes b/t governments; *Breard* is an example of an individual's rights being adjudicated before an international body (although, the government of Paraguay had to initiate the case); the case is couched in the language of Paraguay's rights; compare the ICJ's decision to Supreme Court's, which expounds the rights of the individual vs. the rights of Paraguay under an international right
   - **Normative importance of national democracy** – premium has been placed on democracy as a key value; this privileges democracy over the ability of foreign offices to shape policy
     - i.e. *Breard* – in the conflict b/t an act of Congress and the supremacy of international treaties the Supreme Court considered legislation to be presumptively democratic over the treaty-making power
     - Contrary views
       - National democracy should favor the treaty-making power as a democratic process since international agreements are made under an international *democratic* arrangement; which is the more important value in national democracy – national or democracy?
       - States must also consider the boundaries b/t democracies, especially in federal systems (i.e., in *Breard*, Virginia did not bargain away its right to structure its criminal legal system); balance this concept w/the compromise states reach on reciprocity
   - **Disaggregation of the State** – the state is no longer just the foreign office; the international reach in negotiation by other departments (i.e., Defense, Treasury); in addition, federalism and separation of powers affects the power of the foreign office to negotiate and deliver on treaties
   - **Development of trans-national civil society** – national interest groups network w/national interest groups in other countries (i.e., NRA ☹) to facilitate their own national agendas (i.e., in *Breard*, the anti-capital punishment element of international interest groups interacted w/domestic groups)
   - **Global liberalism** – sentiment among states since the end of Cold War is that there is a better way of doing things → Western ideals of liberalism (the rule of law) has been normatively embedded into the international system; some could consider this a continuance of Western imperialism
3. Conflict b/t Multilateral (EU) and U.S.-Dominated International Legal Systems
   - European Union – created through the traditional structure of an international treaty and the establishment of a European Court of Justice, imbued w/the supremacy of a European legal system; represents a multilateral mechanism in its formation
     - Coercion through force is not available b/c there is no unitary European military force; it is a natural extension for the EU to use global structures (multilateral institutions) as opposed to coercion

- Although the goals of the EU may not be universally held by the global community, it has been more successful in garnering global support through this multilateral approach
- Member states are more amenable to taking steps that have unknowable consequences b/c of the proscriptive nature of the EU
- However, the idea of a "global community", as espoused by the EU, is not very "global"; the ten most populous nations are outside the structure of the EU

- United States – has more options for achieving international goals b/c of the availability of coercion by force (hegemony/dominance); this value conflicts w/the idea of a "global order"
  - U.S. is reticent to approach international law in a multilateral framework for a variety of reasons: the distinct American idea of popular sovereignty which underpins a particular idea of "national democracy"; constitutionalism and federalism create a distancing from internationalism; U.S. culture of legalism (scrutiny of legal agreements dissuades the U.S. from taking on commitments)
  - Although other countries (Brazil, China, India) seem to appreciate the multilateral approach of the EU, these same countries utilize the powerful voice of the U.S. to support their positions
  - Domestic Effect – U.S. uses its system of policy-making and certification to generate global policy-setting and to certify compliance by other states (i.e., drugs, terrorism, human rights, religious freedom, family planning); U.S. courts have also been used to effect global policy (i.e., ATCA); however, there has been no effort to do so for criminal accountability
  - International Effect – U.S. sanctions, economic aid and military pressure can operate in similar fashion to enact global change on issues

4. Definitions – Akehurst's
   - General international law refers to rules and principles that are applicable to a large number of states, on the basis of either customary international law or multilateral treaties; if they become binding on all states, they can be referred to as universal international law
   - Regional international law applies only to certain groups of states; regionalism tends to undermine the universality of international law, but it is an important existing feature of international law; particular international law denotes rules w/are binding upon two or a few states only
   - International law has often been described as a "primitive legal system" – although it is true that the impact of power and politics is much more immediately recognizable and directly relevant in international law and international law is heavily dependent on national legal systems for its implementation, this characterization fails to distinguish the different nature of international law (as a horizontal, decentralized legal system governing primarily the relations b/t states) and of developed (centralized and institutionalized) national legal systems

B The *Breard* Case

1. Vienna Convention on Consular Relations, 1963, Art. 36 and the Optional Protocol
   - The Convention entered into force in 1967; at least 164 states are parties to it, including the Germany, Paraguay, and the U.S.
   - The Preamble recognizes that an international convention on consular relations, privileges and immunities would contribute to the development of friendly relations among nations and that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States
   - Article 36 provides that Consular officers and foreign nationals shall be free to communicate w/each other and that the competent authorities shall inform the foreign national w/o delay of their rights
   - Optional Protocol Concerning the Compulsory Settlement of Disputes (these three states are also parties)
     - Article I provides that disputes arising out of the interpretation or application of the Vienna Convention shall lie w/in the compulsory jurisdiction of the ICJ and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the Protocol

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2. The Facts and Procedural History of *Breard*
   - Facts: In 1992-1993, Breard was arrested and convicted for murder and attempted rape; in 1996, he filed a writ for *habeas corpus* concerning the failure of Virginia police to inform him of his rights under the Vienna Convention; the federal court denied the writ on the basis of the doctrine of "procedural default" (failure to raise a claim at trial prejudices the court against the claim)
3. ***Paraguay v. United States of America*** (ICJ 1998)
   - Paraguay brought the case before the ICJ to request a restoration to the *status quo ante* – b/c the planned execution of Breard "would render it impossible for the ICJ to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims", the ICJ found "that the circumstances require it to indicate, as a matter of urgency, provisional measures" → the ICJ unanimously indicated, as provisional measures, that the U.S. *should* take all measures at its disposal to ensure that Breard is not executed pending the final decision in the proceedings before the ICJ
   - The ICJ seemed at pains to indicate that it was not trying to expand its jurisdiction into new areas by stating that the issues did not "concern the entitlement of the federal states w/in the U.S. to resort to the death penalty for the most heinous crimes" and that the function of the ICJ is to resolve international legal disputes b/t States and not to "act as a court of criminal appeal" → ICJ is aware of its limits
4. ***Breard v. Greene*** (U.S. 1998)
   - After the ICJ issued its provisional measure, Breard filed a petition for a writ of *habeas corpus* and a stay application in order to "enforce" the ICJ's order; Paraguay filed a motion for leave to file a complaint, citing original jurisdiction over cases "affecting Ambassadors . . . and Consuls" (U. S. Const., Art. III, §2)
   - The Departments of State and Justice filed amicus briefs urging the Court to deny a writ of certiorari and a stay, arguing that the ICJ provisional measure was not binding and highlighting that the ICJ used language suggesting that the context of the American criminal legal system should be taken into consideration (imposition of limits on the federal government to interfere w/the of the States)
   - Decision: (by a vote of 6 to 3) denied the petition for *habeas corpus* and the petitions for *certiorari*; found that Breard had procedurally defaulted his claim under the Vienna Convention by failing to raise that claim in the state courts; rejected, on two grounds, the contention by both Breard and Paraguay that the Vienna Convention claim should still be heard in a federal court b/c the Convention is the supreme law of the land and trumps the procedural default doctrine
     - While the interpretation of an international treaty rendered by an international court w/jurisdiction to interpret such should be given respectful consideration, it is recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State; this proposition is embodied in the Convention itself, *provided* that the procedural rules enable full effect to be given to the purposes of the Convention
     - Although treaties are recognized as the supreme law of the land, that status is no less true of the Constitution itself, to which rules of procedural default apply; an Act of Congress is on a full parity w/a treaty; when a statute which is subsequent in time is inconsistent w/a treaty, the statute renders the treaty null to the extent of conflict; the Antiterrorism and Effective Death Penalty Act (AEDPA) accepts the procedural default rule in these cases
     - Immunity – 11th Amendment's prescribes that the States, in the absence of consent, are immune from suits brought against them by a foreign State; the Court rejects that the suit is w/in an exemption dealing w/continuing consequences of past violations of federal rights (notification of the Consul)
     - No private right of action under the Vienna Convention for Paraguay; since the Consul General is acting in his official capacity, he has no greater ability to proceed under §1983 than does Paraguay
5. Federalism and U.S. Foreign Relations (theoretical notes)
   - Conventional wisdom suggests that the federal structure is irrelevant to the national government's exercise of its foreign relations powers; some claim that federal courts should apply customary international law as self-executing federal common law that trumps state law; that the treaty makers can

make supreme federal law even if otherwise beyond the authority of the federal Government; and that courts should invalidate state laws affecting foreign relations under a "dormant" pre-emption rationale

- The contrary view rejects the irrelevance of federalism to foreign relations; the Constitution did not make foreign relations an absolute value and did not exclude all state authority that might have an effect on foreign relations; the institutional arrangement treats foreign relations and federalism as competing values and leaves it to the federal political branches to decide when a state act has sufficiently adverse effects on foreign relations to require pre-emption

C American Exceptionalism – *Lawrence v. Texas*

1. American Exceptionalism
   - Must recognize two distinct approaches that have emerged w/in our the Supreme Court's jurisprudence toward America's role in the world:
     - "Nationalist jurisprudence" – characterized by commitments to territoriality, national politics, deference to executive power, and resistance to comity or international law as meaningful constraints on national prerogative
     - "Transnationalist jurisprudence" – looks forward toward political and economic interdependence and outward toward rules of international law and comity as necessary means to coordinate international system interests and to promote the development of a well-functioning international judicial system
2. ***Lawrence v. Texas*** (U.S. 2003)
   - Recognized that many Western states, w/which the U.S. shares a wider civilization, have rejected the reasoning and holding in *Bowers*; for instance, the European Court of Human Rights followed not *Bowers* but its own decision in *Dudgeon* and upheld the right to privacy to include sexual intimacy

D *Loewen v. USA*

1. ***Loewen Group & Raymond Loewen v. USA*** (ICJ, 26 June 2003)
   - Facts: dispute originated in the $500 million verdict against Loewen Group, a Canadian corporation, by a Mississippi jury (including $400 million for punitive damages) in a relatively small commercial dispute b/t Loewen and the O'Keefe family; Loewen contended that the lawsuit was partial and discriminatory; the main problem emerged from the impossibility for Loewen to appeal the decision; Loewen contended that the appeal bond requirement combined w/the level of the judgment made it impossible for them to seek an appeal w/o running bankrupt; Loewen negotiated w/O'Keefe for a $175 million settlement
   - Award:
     - Discrimination – concludes that the trial and resultant verdict were clearly improper and discreditable and cannot be squared w/minimum standards of international law and fair and equitable treatment; however, the full judicial process available to the parties must be utilized before a violation of Article 1105 is established (not the same as the rule of exhaustion of local remedies) → declares the interpretation of Art. 1105 of the Free Trade Commission (representatives of the three governments) as binding in that "fair and equitable" treatment does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens
     - Jurisdiction – NAFTA lost jurisdiction b/c Loewen, in the bankruptcy proceedings, was dissolved into a non-foreign investor (incorporated into a Canadian company whose only asset was the case before the NAFTA tribunal even though the owner was American)
2. Significance of *Loewen*:
   - NAFTA dispute settlement mechanism could be used to redress grievances deriving from the laws, policies and jury verdicts of a Party to NAFTA; directly challenges the jury system and concept of punitive damages in American courts; could hold the State and its taxpayers liable for violations of international law and enforcement of environmental or health measures (Global Watch)
   - Transparency – no mechanism for public disclosure of a State's potential liability under NAFTA
3. NAFTA Chapter 11 and the five developing norms of international law:

- Institutional framework:
  - Encourages investment – gives a level of security to private investors for otherwise risky investments
  - Reduces cost of obtaining investments for the receiving State (can offer less incentives)
  - Shifts distribution of costs – shifts burden to the national level
  - Tribunals must weigh the institutional costs w/in the relevant country: must respect the institutional set-up of the member-states; tribunals must be concerned w/their fragility and legitimacy
- National Democracy:
  - Democratic process at stake – the liability of the member states is counter to the democratic process; individuals and sub-states have no guarantee that the member state will defend their interests; example of possible special interests (foreign investors) triumphing of general interest (public)
  - International minimum standard vs. a standard of national treatment – the former is upheld by the U.S. and the latter by developing trading partners; international human rights law has pushed national treatment to the level of an international minimum standard; choice b/t the two boils down to the investment interests of the parties
- Disaggregated State:
  - Oddity in allowing private investors to circumvent federal/internal actors in pursuing suits on their investments; cushions the costs by spreading the costs across the national government
  - Externality created by actions of the States – flaw in international law in that there is no solution
  - Unevenness in support and opposition for foreign investment throughout a nation; international treaties are a means of locking in the gains of one side (i.e. the pro-foreign investment faction); individual states w/in the federal system cannot participate in the process and must subsume their interests to the federal government
- Trans-national Civil Society:
  - Local groups often hook-up w/groups w/in other states to express concern for the force of tribunal decision-making (i.e. environmental groups or pro-investment groups)
  - Such groups must also be concerned w/the gains that they may receive through these international agreements for trade, etc. as well as their traditional interests (i.e. tort-reformers in the U.S.)
- Global Liberalism:
  - General trend is still towards global liberalism; however, Chapter 11 only protects foreign investors, does not necessarily protect local investors that may be prejudiced by local decision-making
  - Value placed on global decision-making – NAFTA is a bargain, not a communal project among states; the FTC decision to re-interpret Article 1105 (minimum international standard) is a good example of a negative result stemming from NAFTA

E U.S. Military and the International Criminal Court

1. **International Criminal Court and U.S. Exceptionalism**:
   - Jurisdiction:
     - Jurisdiction over all individuals for a limited number a crimes committed w/in a State-Party
     - Individuals are also under its jurisdiction if they are nationals of a State-Party to the Statute
     - Jurisdiction can be gained if the Security Council refers a matter to the ICC
   - U.S. methods for exclusions:
     - Proposed that a State-Party could sanction an individual's actions and gain immunity (abandoned)
     - Attempt to persuade other countries not to be parties to the Rome Treaty; some success w/larger states, but many states have become parties
     - Is Attempting to enact bilateral agreements w/State-Parties so that they will not surrender U.S. nationals to the ICC (Art. 98 Agreements)

- Continues to pressure the Security Council to exempt members of UN peace operations

- Rationale for U.S. apprehension for a ICC:
  - Likelihood of U.S. nationals being brought before the ICC; U.S. commitments throughout the world, not just UN peacekeeping commitments, may make the U.S. more vulnerable to prosecution
  - Constitutional safeguards in criminal law are highly sanctioned in the U.S.
  - Fear that the ICC would be used for political aims
- Three features to allay U.S. Concern:
  - The institutional design of the ICC would have to be strong enough to safeguard against political prosecutions; there is an argument that the power of the ICC is not its authority to prosecute but to cast a shadow – domestic courts/governments may be buttressed by the institutionalization of the ICC
  - Since the court is not based on the legitimacy of the state, it must act in accordance w/its mandate
  - Complimentarity – the ICC is only complimentary to the national system – it must only take action where national remedy is not taken; contrasts w/the ICTR/ICTY in that they have primacy in jurisdiction over proceedings
- Structure of the ICC:
  - Prosecutor – HRW and other NGOs wanted to have an independent Prosecutor, some states wanted to have a veto over the prosecution; the final agreement is to have an independent Prosecutor, but to require approval of some of the judges to continue the case after initiation
  - Who can be prosecuted? – there are proposed guidelines in the statute for delineating who should be prosecuted; the quandary is that the Prosecutor may be manipulated by internal forces (i.e. DRC)

2. **U.N. Security Council Resolution 1422** – grants citizens of States not Party to the Rome Statute immunity from prosecution before the ICC, unless the Security Council decides otherwise; renewable every year until there are no States not Party to the Statute
   - Effort by the U.S. to w/draw jurisdiction

Unit II: The International Court of Justice

A The Court and Its Jurisdiction: Overview

1. Legal Texts:
   - The UN Charter:
     - **Article 92** – establishes the International Court of Justice as the principal judicial organ of the UN
     - **Article 93** – establishes that all Members of the UN are *ipso facto* parties to the Statute of the ICJ; a non-member of the UN may become a party to the statute on conditions to be determined in each case by the General Assembly and upon the recommendation of the Security Council
     - **Article 94** – establishes that each member of the UN would comply w/decisions of the ICJ in any case to which it is a party; if any party to a case fails to perform the obligations under a judgment rendered by the ICJ, the other party may have recourse to the Security Council, which may make recommendations or decide upon measures to be taken to give effect to the judgment
     - **Article 95** – establishes that nothing in the statute prevents members from entrusting the solution of their differences to other tribunals by virtue of other agreements
   - Statute of the ICJ:
     - **Article 36** – Jurisdiction of the ICJ
       - Establishes that the jurisdiction of the ICJ comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the UN or in treaties and conventions in force
       - Gives jurisdiction, at the request of states-parties to the statute, all legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation
       - 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
2. Legal Methods of Dispute Settlement:
   - Composition – ICJ made up of fifteen judges; may not include more than one judge of any nationality, but composition must represent main forms of civilization and principle legal systems of the world; *ad hoc* appointments can be made for a particular case if the party's nationality is not represented, though this brings into question the impartiality and independence of the ICJ
     - Do the judges act as delegates of state power or do they function, as in a national system, as independent agents applying rules of law? – we find elements of both in the discourse of; but, by and large, these judges act as independent jurists, but often are seen in the context of political pressure
   - Jurisdiction in contentious cases:
     - Only states may be parties in contentious proceedings before the ICJ
     - **Jurisdiction is contingent upon consent of the states** – 3 means:
       - States may make a special agreement to give the ICJ jurisdiction
       - Compromissory clause w/in a treaty can stipulate that the ICJ will have jurisdiction
       - Optional clause in Art. 36(2) of the ICJ statute – states can make a declaration that they subscribe to the ICJ's jurisdiction; **reciprocity** – a state may apply the reservations of another party in relation to jurisdiction; jurisdiction will only be given where there is overlap
     - Phases in ICJ Proceedings:
       - Provisional measures
       - Jurisdictional and Admissibility
       - Merits (*LaGrand* is an example)
       - Remedies and Follow-up

- *Ad hoc* chambers – rule of the ICJ provide for the establishment of *ad hoc* chambers that can speed up the process and provide quick results; though the procedure puts to question the independence of the tribunal
- Enforcement of judgments: judgments of the ICJ are binding
  - Art. 94 of the UN Charter authorizes the Security Council to "make recommendations or decide upon measures to be taken to give effect to the judgment" – though this only applies to settlement of disputes; a Security Council member can veto enforcement of a judgment (see *Nicaragua Case*)
  - Problems of enforcement are not serious – the real roadblock is to get a party to accept jurisdiction
- Evaluation of the ICJ:
  - The ICJ may be more effectual if it was given jurisdiction over cases brought by non-state actors, as is the case w/the European Court of Justice in relation to European Law
  - Poor states cannot afford the adjudicatory costs of the ICJ; a trust fund was established, but it is hard to raise funds when UN members are reluctant to pay their dues
  - Judicial settlement may not be the most efficient way to settle disputes b/t states, especially when the line b/t political and legal disputes are thin
  - **Competence** – it is an ongoing debate whether the ICJ has competence in certain areas; the dissenting and concurring opinion of individual judges is illustrative of this ongoing debate and the development of international law; one area of discussion is the ability of the ICJ to act as a constitutional court – the prevailing view is that each organ of the UN has the autonomy to determine the scope of its own competence under the Charter
  - **Hierarchy of Judicial Systems** – proliferation of international tribunals has created up to 70 established international tribunals, 15-20 of which play a significant role
    - Is the relationship b/t these tribunals horizontal or do they constitute an international judicial system w/elements of hierarchy and comity?
    - Is the system too fragmented? – there is no agreed to, formal hierarchy among the tribunals; it has been argued that the ICJ should be given primacy in the hierarchy; but others believe that competition b/t the courts will engender increased efficiency of these tribunals
- Two Ideas pervade international dispute resolution:
  - **Peaceful Settlement of International Disputes** – suggests settlement b/t sovereign nations and is centered on diplomatic resolution of issues; it is not important whether wider international policy issues are considered (i.e. ICJ)
  - **International Adjudication** – suggests a supranational authority to settle disputes and that the authority would apply internationally recognized legal principles; would be responsive to precedent and would not be persuaded by extraneous considerations (i.e. ICC)

B Problems of Jurisdiction and Admissibility in Contentious Cases

1. Problems w/and alternatives to the ICJ model
   - Problems:
     - Lack of enforcement of remedies except by state-acquiescence
     - Under-enforcement of the rights of individuals
     - Inability of individuals to press for recognition of private rights under treaties
     - Foreign office model in contentious cases
     - Non-compliance in federal systems of governments
     - International law often embodies Western concepts that should not be forced upon non-Westerners
     - ICJ personnel and judges may adhere to a political awareness
   - Alternatives:
     - Allow third parties to submit amicus briefs
     - Give private rights to individuals in the context of international relations

- Open up the jurisdiction of the ICJ to include more subject matters
- Reevaluate the conditions of intervention (intervention by right or discretionary intervention)

2. **The *Interhandel* Case** [*Switzerland v. United States*] (ICJ 1959) – Exhaustion of Local Remedies
   - Facts/Issue: Swiss government sued the U.S. for not converting the assets of a Swiss company, formerly German before the U.S. entry into the war, back to the company; under an agreement b/t the parties, the issue was to come to arbitration, yet the U.S. insisted that the company exhaust domestic remedies
   - Decision:
     - The ICJ had authority to determine jurisdiction regardless of the optional reservation of the U.S. that stated that domestic remedies be used, as determined by the U.S; the ICJ relied upon its Statute to determine that the ICJ has the authority to decide matters of jurisdiction, not parties
       - This issue often comes up in relation to diplomatic protection, when states take the case of their nationals, and the opposing state challenges jurisdiction before the ICJ
     - The rule that **local remedies must be exhausted before international proceedings may be instituted** is a well-established rule of customary international law; the rule has been generally observed in **cases in which a State has adopted the cause of its national** whose rights are claimed to have been disregarded in another State in violation of international law
3. **The Exhaustion of Local Remedies Rule**
   - Intended to prevent the ICJ from being inundated w/claims and to marshals against forum shopping
   - Justice is done much better w/in an appellate system (the pyramid scheme unifies the emerging jurisprudence); the remoteness of the ICJ from the situs of the dispute would not aid its fact-finding
   - Creates a dialogue b/t and harmonizes international and national systems of law (i.e. *Lawrence*); cultural affiliations may aid concurrence in application of legal concepts; can work to stimulate development of local remedies that are efficient and effective
   - Functional to the foreign office model of international affairs
     - **Sovereignty** – international order is contingent upon the state as the primary unit w/primary j'n
     - **Three units of value** – individual, the state, the international – liberal view; suggests that democracy on the state level is the proper means to enacting international rule-making; gives priority to the local, but implies that a hierarchy exists in which the international is the legitimate priority
     - **Subsidiarity** – international body should only act when the goals of individuals w/in the individual states cannot be achieved or where local units cannot act effectively; respects the local but privileges the international
   - Alternatives to the rule:
     - Allow international courts to act as courts of referral for issues of international/regional law; to assert universal jurisdiction; to direct claims to the proper court (guard against complete fragmentation); regional courts could assert that they facilitate local remedies (i.e. European Court of Human Rights); creation of an international civil court for private parties
4. ***Nicaragua v. United States*** (ICJ 1984) – Jurisdiction, Admissibility and Intervention
   - Facts: dispute b/t Nicaragua and the U.S. filed 9 April 1984; Nicaragua contends that the U.S. was responsible for military and paramilitary activities conducted in Nicaragua and in the waters off its coasts; the present phase concerns the jurisdiction of the ICJ to entertain and pronounce judgment
   - Issue 1: on 6 April 1984, the U.S. notified the UN that the U.S. was no longer subject to the ICJ's jurisdiction in regards to issues arising out of actions in Central America; the question is whether this made the U.S. free to disregard the clause of six months' notice in the U.S.'s 1946 Declaration → the Court decided that the three-day period was not sufficient notice of w/drawal; there is a customary international law rule that requires reasonable time to w/draw from treaties
   - Issue 2: the U.S. claimed that, though the case arises under a multilateral treaty *and* under violations of general and customary international law, the ICJ does not have jurisdiction b/c the multilateral treaties

reiterate the UN Charter, which falls under the U.S.'s *proviso* regarding multilateral treaty reservation → since the instruments enshrine general and customary international law, they are justiciable

- Issue 3: the ICJ finds Nicaragua's application to be admissible over the various objections of the U.S.
  - U.S. objections included: necessary parties (see below), reformulation and multiplication of a single claim, subject-matter jurisdiction (use of force and right to individual or collective self-defense are issues delegated to the Security Council and amounts to an appeal to the ICJ → responded that the ICJ has jurisdiction over all legal issues), justiciability of an on-going conflict, exhaustion of conflict resolution mechanisms in Central America [Contadora process])
- Why did the ICJ feel compelled to assert jurisdiction over this matter while risking antagonizing the U.S.? – rule of law suggests that the ICJ, w/proper jurisdiction, can properly adjudicate the matter; rather than the assumption that the ICJ was playing politics in this case
  - Ruling engendered support from developing countries – turned out to be a watershed for the ICJ in relation to non-Western states; the ICJ had been viewed as a tool of Western law-making; this opinion had been "validated" by the *South West African Case* (1966) [Liberia and Ethiopia complaint against South Africa's involvement in South West Africa; the ICJ ruled that they did not have standing]
- **Articles 62** and **63** (discretionary intervention and intervention as of right) – ICJ has tended to dismiss discretionary interventions but to w/hold judgment when a state's rights may be affected
  - El Salvador attempted to intervene (Nicaragua aided rebels); ICJ rejected El Salvador's claims b/c (1) difficulty in hearing the issues and (2) Cold War concern that the U.S. was pulling the strings
  - Article 62 – should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the ICJ to be permitted to intervene → it is to the discretion of the ICJ to decide upon this request
  - Article 63 – whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states → every state so notified has the right to intervene; but if it uses this right, the construction given by the judgment will be equally binding upon it

C Section 3 of the ICJ Statute: Interpretation of Treaties

1. **Article 31 – General rule of interpretation**:
   - 1. A treaty shall be interpreted in good faith in accordance w/the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose
   - 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
     - (a) any agreement relating to the treaty which was made b/t all the parties in connection w/the conclusion of the treaty;
     - (b) any instrument which was made by one or more parties in connection w/the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty
   - 3. There shall be taken into account, together w/the context:
     - (a) any subsequent agreement b/t the parties regarding the interpretation of the treaty or the application of its provisions;
     - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
     - (c) any relevant rules of international law applicable in the relations b/t the parties
   - 4. A special meaning shall be given to a term if it is established that the parties so intended
2. **Article 32 – Supplementary means of interpretation**:
   - Recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

3. **Article 33 – Interpretation of treaties authenticated in two or more languages**:
   - 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each, unless the treaty provides or the parties agree that a particular text shall prevail
   - 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree
   - 3. The terms of the treaty are presumed to have the same meaning in each authentic text
   - 4. Except where a particular text prevails in accordance w/paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted

D Provisional Measures, National Law and Federalism

1. **The *LaGrand* Case** (ICJ 2001) – Provisional Measures
   - Facts/ Procedural History:
     - Germany instituted proceedings against the U.S. for violation of the Vienna Convention on Consular Relations, arguing that the competent authorities in the U.S. did not notify two German nationals of their right to contact their consulate or inform the consulate of the arrest in 1982; the LeGrands were subsequently executed; the U.S. conceded that the relevant authorities erred and apologized
     - Before the execution of one of the brothers, the ICJ issued a provisional measure ordering the U.S. to take all measures to prevent the execution; on the same day, Germany instituted an action in front of the Supreme Court; the U.S. argued that an order of the ICJ indicating provisional measures was not binding and did not furnish judicial relief; the Supreme Court dismissed the motion on the ground of the tardiness of Germany's application and jurisdictional barriers under U.S. domestic law
   - Jurisdiction: Article I of the Optional Protocol – disputes arising out of the interpretation or application of the Vienna Convention shall lie w/in the compulsory jurisdiction of the ICJ and may accordingly be brought by any party to the present Protocol
   - Decision – Individual Rights under Article 36 of the Vienna Convention:
     - Based on the text, Article 36, paragraph 1, creates individual rights in addition to the right of the state, which may be invoked by the national State of the detained person; these rights were violated in the present case; the VCCR provides both as derived from a textual interpretation of the treaty; avoided the human rights implication enshrined in other instruments (too specific to be a human right?)
     - "Procedural default" rule – in itself, the rule does not violate Article 36 of the Vienna Convention; the problem arises when the rule does not allow the detained individual to challenge a conviction and sentence by claiming that the competent national authorities failed to comply w/their obligation to provide the requisite consular information "w/o delay" – the procedural default rule had the effect of preventing full effect to the Vienna Convention, and thus violated paragraph 2 of Article 36
     - Separate Opinion of Vice-President Shi
       - Questions whether Art. 36 creates individual right in addition to the rights pertaining to states-parties; alludes to the Convention as contributing to the friendly relations among nations, not to the creation of rights of individuals; this is substantiated in the *chapeau* of the VCCR and the *travaux préperatoire*
   - Decision: Failure to comply w/an ICJ Order:
     - Concerns interpretation of Article 41 of the Statute – the French text, written in 1920, is equally authoritative to the English and diverges in meaning; however, as drawn from the *travaux préperatoire*, the object and purpose is to enable the ICJ to fulfill its functions of judicial settlement of international disputes by binding decisions

- The preparatory work of Article 41 did not preclude the conclusion that orders have binding force; it shows that the preference given in the French text was motivated by consideration that the Court did not have the means to assure the execution of its decisions; however, the lack of means of execution and the lack of binding force are two different matters
- The Order of 3 March 1999 was adopted pursuant to Article 41 and was consequently binding in character and created a legal obligation for the U.S.
- A review of the steps taken by the authorities of the U.S. w/regard to the 3 March 1999 Order of the ICJ indicates that the various competent U.S. authorities failed to take all the steps they could have taken to give effect to the Court's Order – the U.S. did not discharge its obligation

2. ICJ's approach to provisional orders:
   - The issue is whether provisional measures are binding; ICJ realizes that it is in a competitive business; there are other forums that can provide resolution to a dispute and the ICJ must be efficient and effective in providing resolution (i.e., Law of the Sea Tribunal can issue binding provisions; ECHR cannot)
3. ***Mexico v. United States*** (current case before the ICJ)
   - Mexico filed a petition to have the ICJ give an "indication" of provisional measures regarding Mexican nationals on death row in the U.S.
   - **Remedy** – must provide a post-conviction reconsideration if there was a violation; this is significant for the Mexico cases; U.S. claims that the clemency procedure fulfills this obligation; however, this would causes problems w/federalism and would place the reconsideration, a politically sensitive issue, into the hands of the political branches
4. Why was there internal inconsistency b/t interpretation (textualism vs. outside sources)? – tension b/t legal cultures; outcome determinative (expand power of the court by creating binding orders and by upholding the concept of an individual right; especially since individual's do not have the ability to bring a case)

E Necessary Parties to Contentious Cases and the Law of Self-Determination

1. The Law of Self-Determination:
   - Principle of equal rights and self-determination of peoples explicitly mentioned in the UN Charter at Articles 1(2) and 55 and implicitly referred to in Articles 73 and 76(b) (dealing w/colonies and dependent territories); these provisions are vague and do not specify consequences for non-adherence; later UN resolutions and conventions have widened the scope of the concept
   - The Friendly Relations Declaration of 1970 – stipulates that the principle includes the right of all peoples "freely to determine, w/o external interference, their political status and to pursue their economic, social and cultural development" and the duty of other states to respect this right
2. Manifestations of self-determination:
   - **Mandates and Trusteeship** – after WWI, League of Nations set up territories under mandates to be administered by foreign powers (read, white people); these were either proxies for eventual independence or colonies; after WWII, UN set up trust territories for administration by the UN Trusteeship Council
     - "Strategic trust" in which the supervision was done by the Security Council; these were islands in the Pacific that were of interest to the U.S. for strategic reasons and for nuclear testing; these were granted a "compact of free association" w/the U.S.
     - Non-self-governing territories – territories of western states that were mandated to be given the choice of independence or federation w/the governing state
   - **Distinct territories** or Mal-administered territories – gross failure of sovereignty – difficult to determine how to identify these states; organization of this grouping was based on the creation of Bangladesh (by force); rationale was that Bangladesh was so badly administered by Pakistan that the people had a right to self-determination; another example is Eritrea
   - **Agreement** – self-determination by agreement of the parties involved

- **Federal Disintegration** – highest-level units w/in a disintegrating federation would have a right of self-determination; this provided a rationale for Slovenia and Croatia to secede from Yugoslavia but prevent Kosovo from acting similarly
- **Reassertion of prior sovereignty** – significant examples are the three Balkan countries of Latvia, Lithuania and Estonia; these states assert independence based on reliance of past independence and unlawful coercion to join; a weak point to this argument is that history cannot be a final arbiter of determining a point of reference for past independence in the modern world

3. History of Indonesia and East Timor
   - After WWII, the Dutch decided that holding colonial possessions was untenable in the face of a growing Indonesian nationalism; it was decided to organize all of the Dutch possessions into a single country; this proved difficult b/c the unifying force of the movement was anti-Dutch/Japanese; the only institution that held the islands together was the military
   - Portuguese control of East Timor was an anomaly; Portugal remained a military dictatorship at the end of WWII and did not succumb to the democratic principles prevalent in other Western European countries (self-determination); in 1974, the dictatorship collapsed and colonialism was laid away, but there was no institutional structure established to prevent civil dissolution
   - Indonesia invaded in 1975 to absorb East Timor into Indonesia; the locals accepted Indonesian rule; international law condemned the act though – right to self-determination found in the 1960 Declaration on De-colonization (General Assembly resolution) and embodied in the 1966 International Conventions on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR)
   - Politically, what emerged was a *de fact* recognition of Indonesia's occupation (Indonesia became a big player in anti-communism and western states stopped asserting East Timor's right to self-determination)
4. ***The East Timor Case – Portugal v. Australia*** (ICJ 1995)
   - Issue: Portugal claimed that Australia had, by its conduct, failed to observe the obligation to respect the duties and powers of Portugal as the administering power of East Timor and the right of the people of East Timor to self-determination and the related rights
   - Facts:
     - Security Council resolutions in the mid-70's called upon all States to respect the territorial integrity of East Timor as well as the right of its people to self-determination; called upon Indonesia to w/draw w/o delay from the Territory; and acknowledged that Portugal as the administering Power
     - Australia, in 1978, extended *de facto* recognition to East Timor as part of Indonesia; later that year, Australia declared the it would extend *de jure* recognition by negotiation w/Indonesia the delimitation of the continental shelf b/t East Timor and Australia; these negotiations did not come to fruition; in 1989-1991, a Zone of Cooperation was established for joint exploration and exploitation of the resources in that area of the continental shelf; the area under the zone was based on past international rules regarding maritime boundaries and a 50/50 split on oil revenues
   - Decision:
     - Existence of a dispute – it is not relevant whether the "real dispute" is b/t Portugal and Indonesia rather than Portugal and Australia
     - **Necessary Party** (Indonesia) – Australia complained that adjudication would infringe upon the rights of Indonesia as a necessary party by determining the lawfulness of its occupation and the legality of the agreement b/t Australia and Indonesia; Portugal contended that the issue was exclusively Australia's conduct in relation to East Timor
       - ICJ determined that it would be necessary to adjudicate Indonesia's rights (its ability to enter into an agreement w/Australia and the human rights aspect of self-determination) in order to adjudicate Australia's alleged breaches
     - Administrating power – ICJ rejects that the Security Council and General Assembly resolutions establish a third-party obligation to respect Portugal's right to negotiate on behalf of East Timor

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- Dissent:
  - Australia is party to a treaty which deals w/resources belonging to the East Timorese people, who are a non-self-governing people; the international legal system protects their rights and must take serious note of any event by which their rights are disposed of w/o consent; the international community is under an obligation to protect these assets (as natural resources)
  - Until an internationally acceptable solution is found, it must be determined whether international rule of law allows Member-States:
    - To enter into a treaty w/another State, recognizing that the territory awaiting self-determination has been incorporated into another State as a province of that State
    - To be party to arrangements in that treaty which deal w/the resources of that territory, w/o the consent either of the people of the territory, or of their authorized representative
  - The ICJ is under no obligation to reinvestigate matters dealing w/UN resolutions; the ICJ does not need to investigate whether the UN has reaffirmed East Timor's right to self-determination

5. Is *East Timor* consistent w/the *Nicaragua* ruling?
   - **Necessary Party** – determination of the rights of a party cannot be made if they are not a party to the dispute; whether or not the acts of Indonesia were legal is central to this dispute; the rights of other Central American countries may not have been central to the analysis of U.S. involvement there
   - Judgment on this issue would only take judicial notice of what had already been determined by the UN in its past resolutions concerning East Timor and would not have been as controversial as *Nicaragua*
   - Other states are constantly going to have an interest in disputes before the ICJ; the dissent suggests a move away from the "bilateral-opposition dispute mechanism" of the foreign office model to a global system that limits concern w/necessary powers; this is a struggle b/t constitutional theories
   - Indonesia did not give its consent to any kind of jurisdiction of the ICJ; this has affected the analysis and provided a cop-out, whereas the jurisdiction over the U.S. was established
6. ***Erga omnes*** – Portugal asserted that there was a breach against the rights of the people of East Timor but the case did not touch the issue and turned on jurisdiction
   - Should the Portuguese have standing on the issue as the former colonial power?
     - Portugal was under a mandate by the UN, had a moral imperative to right past wrongs and was a Catholic country to boot; however, Portugal was not taken seriously b/c it had previously made a similar agreement w/Morocco in Western Sahara
   - Isn't this illustrative of the weakness of the ICJ: that a non-self-governing territory has no standing before the ICJ to bring a dispute and must rely on other states to bring suit?
   - This may have been an attempt by the court to prod international bodies to bring an end to the East Timorese dispute; the many references to self-determination are dicta worth noticing; Australia would be bound to negotiate faithfully w/an East Timorese government

F The Court's Advisory Jurisdiction

1. Legal Text:
   - **Article 65** of the ICJ Statute – Advisory Opinion Role
     - The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance w/the UN Charter to make such a request (see UN Charter Art. 96)
     - Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.
   - **Article 96** of the UN Charter – establishes that the General Assembly, other organs or specialized agencies of the UN or the Security Council may request an advisory opinion on any legal question

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2. Overview of the ICJ's advisory jurisdiction
   - Requirements: 1) open only to intergovernmental organizations; not open to states; 2) the issue must concern an abstract legal question and not a particular dispute; 3) judgments are only consultative, though certain instruments can make a judgment binding; 4) only IGOs can submit *amicus* briefs
   - *Reparation for Injuries Case* – advisory opinion (end of 1940's) in relation to the murder in the mandate territory of Palestine of a UN delegate by an Israeli extremist; issue: does the UN have a legal personality to bring a claim on behalf of one of its delegates; key decision on a separate identity of an intergovernmental organization
   - To be determined issues: can the UN be liable to others; does the UN have immunity in national courts
     - Power to get an advisory opinion lies w/certain branches of the UN (only the Security Council and General Assembly can vote to request for the advisory opinion) and subgroups w/in the UN; it is unlikely that the UN would try to determine this issues on this basis
3. Past advisory opinions – *Namibia* (ICJ 1971, whether the RSA occupation of a newly independent state affects its legal status); *Western Sahara* (ICJ 1975, *uti possidetis juris* – principle for setting boundaries based on colonial possessions – important for issue of self-determination)
4. ***Nuclear Weapons Advisory Opinion*** (ICJ 1996)
   - Two requests:
     - WHO General Assembly – ICJ rejected its request b/c there was not an identified interest
     - UN General Assembly – ICJ accepted this request even though there was a political angle; governments were joined by NGOs in pushing for the advisory opinion (many NGOs tried to file *amicus* briefs, but these were rejected on the basis that only IGOs that can petition the ICJ for an advisory opinion can also file *amicus* briefs)
   - Reasoning and Decision:
     - **Advisory Jurisdiction** – Article 65 gives the ICJ jurisdiction over advisory opinions submitted by the General Assembly; rejected that the nature of the question had to be relevant to the role of the party asking for the opinion; determined that the request of the General Assembly, b/c of its general role w/in the UN, was acceptable
     - **Legal question** – advisory opinion must relate to a legal question as defined in the ICJ Statute and the UN Charter; the question is indeed a legal one, since the ICJ is asked to rule on the compatibility of the threat or use of nuclear weapons w/the relevant principles and rules of international law; the political aspects does not suffice to deprive it of its character as a legal question
     - On the merits – rejects that nuclear weapons are illegal on a human rights basis, according to environmental law or in the law governing the use of force (*jus ad bellum* and *jus in bello*)

Unit III: Sources of International Law: The Role of Custom and Treaty

A Sources of International Law

1. Definition and General Notes
   - In a non-legal sense, sources refers to a causal or historical influence explaining the factual existence of a given rule of law at a given place and time; in a legal sense, sources are the criteria under which a rule is accepted as valid in the given legal system at issue
   - International law has been approached, traditionally, from a positivist framework of sources (i.e., deriving law from authoritative sources); a conflicting approach would be one that focused not on the source of international law, but on its content (i.e., if the content is just, or conforms to concepts of morality, or conforms to religious tenets); arguably, international law today has drawn on Western concepts of natural law; today, there is a push toward the concept-focused method, where the lack of a positivist source of an international legal rule should not prevent adherence to conceptual approaches to international law
   - Role of consent – 19th Century concept of international law is rules derived from the consent and will of individual states; obligations become binding through the mechanism of consent; the rules of international law are broadened by the means in which states can give consent
2. **Article 28(1) of the Statute of the ICJ** – sources of international law
   - Stipulates that the ICJ, whose function is to decide in accordance w/international law, shall apply:
     - International conventions, whether general or particular, establishing rules expressly recognized by the contesting parties
     - International custom, as evidence of a general practice accepted as law
     - The general principles of law recognized by civilized nations
     - Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law
3. Treaties:
   - Treaties are the major instrument of cooperation in international relations; they are often instruments of change; the general trend has been to enhance the role of treaties in international law-making; to some extent, treaties have begun to replace customary law
   - Law-making treaties vs. contract treaties:
     - **Law-making treaties** – some writers argue that treaties should be regarded as sources of international law only if they resemble national statutes in content, that is, if they impose the same obligations on all parties to the treaty and seek to regulate the parties' behavior over a long period of time → purpose is to conclude an agreement on universal substantive legal principles
     - **Contract treaties** – treaties often resemble contracts in national systems of law; they can also perform functions which in national systems would be carried out by statutes, conveyances or by memoranda of association of a company; treaties that resemble contracts, some argue, are not sources of international law, but merely legal transactions
     - Distinction is difficult to draw since many treaties contain characteristics of both
   - Only the subjects of international law – states, international organizations and other traditionally recognized entities – can conclude treaties under international law; there is an expansion of international instruments being used to govern contractual relationships b/t governments and multinational corporations; the rationale is to establish a balance b/t the parties and prevent a state-party from evading its obligations under the contract by changing its internal laws
4. Custom:
   - Custom is constituted by two elements: the objective one of "a general practice"; and the subjective one "accepted as law"

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- Where to find evidence of customary law:
  - **State Practice** – published material (from third parties documenting events or from a state's foreign ministry); a state's laws and judicial decisions (legislative and judicial evidence); but this is limited since the majority of the material would be unpublished (correspondence b/t governments and legal advice, which is often too expensive for developing countries to even compile)
    - It is unclear whether declarations are sufficient to establish state practice in the absence of actual action; state practice includes omissions; passiveness and inaction w/respect to claims of other states can produce a binding effect and create legal obligations under the doctrine of acquiescence
  - **Subsidiary Sources** – evidence may also be found in writings of international lawyers and in judgments of national and international tribunals, but these are subsidiary sources
  - **Treaties** – can be evidence of past practices, but care must be taken in respect to bilateral treaties which may reflect the difference in bargaining position for the parties; the network of bilateral treaties must be widespread before it can amount to state practice; multilateral treaties may definitely be considered evidence of customary law, especially if it is claimed to be declaratory of customary law or is intended to codify customary law (then it can be used against a state which is not a party)
- Customary law must be based on a constant and uniform usage
  - Absence of repetition is not a barrier, but the presence of major, inconsistent past practice by states may delegitimate "customary" rules; if there are minor inconsistencies, then there should be evidence of a large amount of practice to outweigh the conflicting practice in question
  - If there are no inconsistencies in practice, then a small amount of practice is sufficient to create a rule of customary law as long as the practice includes all states that can participate in the formulation of the rule and whose interests are specially affected (even if the practice involves only a small number of states and has lasted for a short time → what is the impact of this on states that have not yet reached a certain level of development?)
  - Customary law has a built-in mechanism of change; if states regard a rule as archaic, a new rule of customary international law based on new practice can emerge very quickly; this can be difficult when there is a balance b/t states favoring a new rule and those that favor the old rule
  - **Opposability** – custom provides the default rule, but states can contract out of them: the rule would still apply b/t those states' interactions w/other states not party to the opt-out contract (i.e., if Norway contracted out of a customary arrangement w/the UK, that opt-out would be valid in respect to their interactions, but the customary rule would be relevant to any relationship b/t Norway and other states)
  - Shift from "bi-laterality" to "community"
    - Bi-laterality (traditional method for developing international law) – in determining how a rule should be interpreted, the specific relationship b/t the states involved should be reviewed
    - General community norms – reaction against bi-laterality and the foreign office model; ICJ cases (such as *the North Sea Case*) have moved toward recognizing general principles that can be applicable to a majority of states rather than just the bilateral relationship
- ***Opinio iuris*** – psychological element
  - It is also necessary to examine why a state acts in a particular manner in addition to examining what the effects of the action; state-action must be accompanied by the conviction that it reflects a legal obligation; *opinio iuris* can be gathered from acts (rules imposing duties must be shown to have been thought to be obligatory) and omissions (permissive rules can show that states have acted in a certain manner and other states have not protested)
  - **Comity** – behavior of a state can be based on courtesy b/t states but not from a sense of a legal duty
- **Consensual Theory** – "rules of law binding upon states… emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law"; elements of consent can be fictitious when applied to new states and in current state practice; to prove consent:
  - Must show that the defendant state has recognized the rule in its own state practice
  - Must show that the rule is accepted by other states; the rule is binding unless it can be shown that the

state has consistently rejected the rule since the inception of the rule (does this apply to new states?)
    - Problem of the "persistent objector" – can a disagreeing state ultimately and indefinitely remain outside of new laws accepted by the large majority of states?

5. General principles of law:
    - "General principles recognized by civilized nations (or peace-loving)" – rationale was to provide a solution where treaties and custom provided no guidance; it was feared that the ICJ would not be able to decide cases where there were gaps in treaty and customary law; there is disagreement whether it refers to general principles of international law or national law or both
    - General principles have included: concepts of natural justice common to all legal systems; application of logic familiar to lawyers; and the specific nature of the international community as expressed in principles of *ius cogens* (i.e. prohibition on torture of the prohibition on the use of force); usually applied to procedural issues w/in a case; provides principles – borrowed from national systems – that fill out the procedural aspects of a dispute b/t parties
        - The ICJ has not adopted the concept of estoppel (preventing an argument that was not made at an earlier time) probably b/c civil law systems (French) do not use estoppel
        - *Temple of Preah Vihear* (*Thailand v. Cambodia*) – an original treaty b/t Thailand and the French gave the Temple to the Thais; the French redrew the map to include the Temple; the Cambodians (post-French expulsion) asserted that the Thais had acquiesced to the new map; the Thais argued that the realities of colonialism prevented the Thais from protesting; Taiwanese judge dissented, saying that the Thais were politically prevented from protesting and argued that Asian culture did not protest such situations; the majority held that this was not a general principle of law
6. Judicial decisions and learned writers:
    - There is no formal *stare decisis* doctrine in international courts; international courts often take previous decisions into account b/c judicial consistency is the most obvious means of avoiding accusations of bias
    - Judgments from national courts should only be used w/caution; judges may look as if they are applying international law, when in fact they are applying some peculiar rule of their own national law
    - Learned writers are often cited by governments and vice versa
7. Other sources of International Law:
    - Acts of international organizations – acts of such organizations are often the acts of the member-states; it is questionable whether these acts should be considered as a separate source of law from treaties; resolutions of these organizations usually have nothing to do w/international law; those that do must be explicit (a resolution that declares that X is the law can be considered evidence of customary law)
    - "Soft" law – guidelines of conduct are neither binding norms of law nor completely irrelevant political maxims; they are often considered characteristic of international economic and environmental law; may be relevant from a sociological perspective of international law in regard to the process of formation of customary or treaty law and the issue of legitimacy of an international legal system
    - Equity – it is doubtful whether equity forms a source of international law today; it cannot be assumed that a judge is applying equity as a source of law every time a rule is described as equitable or just; a problem w/equity is that it often references a particular ethical system

B Law of the Sea: the Formation of Customary Law w/regard to the Continental Shelf

1. Historical development:
    - Was not until the 1930's that states began exploring the continental sea shelf for mineral resources; pre-WWII, U.S. and Venezuela agreed to offshore exploration of oil in shallow waters
    - Truman Proclamation on the Continental Shelf (1945) – claimed rights to shelf w/in its jurisdiction; had exclusive control, but did not exclude other states from use rights; water above shelf did not come under this concept (maritime boundaries still held); also an assertion of responsibility for conservation; claim based on the concept of the continental shelf as an extension of the territorial land and security

- U.S. colluded w/its allied on taking this unilateral action; states did not protest and some mimicked
- Chile objected to the scheme and claimed an extension of their territory w/o consideration of its short continental shelf; the U.S. protested based on rules governing the freedom of the seas; the U.S. also continued to use the area around Chile and created tension w/in customary international law
- This tension reached critical w/the newly independent states suggesting that custom should be developed through General Assembly resolutions (represented the interests of a majority of states rather than the interests of a powerful coalition of medium powers); land-locked states also feared that coastal states would be able to monopolize the resources on the continental shelf

- Convention on the Continental Shelf of 29 April 1958
  - Reaction to unilateral action on the part of the U.S. and strongly in favor of developing nations; powerful states were denied an ability to take over areas of developing states through occupation
  - Article 2 – can have jurisdiction over the continental shelf, though it is prohibited to extract resources; historically, states had to prove effective occupation to claim land; the treaty rejected this rationale and provided that states had rights to the continental shelf by virtue of the geography; the fear was that countries w/the technology to develop the resources would exploit them
  - Delimitation – debate on how to determine lines of reference; formulation in the treaty favors equidistance, though gives credence to principles of special circumstances; this latter provision provided an uneven practice in regards to delimitation, so no clear rule emerged

2. ***North Sea Continental Shelf Cases*** (ICJ 1969)
   - Note: taking the case from negotiation to international adjudication prevented the parties from making political concessions in favor of having the law determine a final outcome
   - Convention on the Continental Shelf **Article 6**: in the absence of agreement, and unless justifiable *special circumstances* exist, the boundary is the median line (every point is equidistant from the nearest points of the baselines from which the territorial sea of each State is measured)
   - Issue: is the ICJ driven to silence if there is no established customary rule or general principle? – No!
     - Danish/Dutch position: principle of equidistance, as defined in the Convention, is a principle of fairness; Germany had participated in the negotiations, signed and has acted in accordance w/the provisions of the Convention; the equidistance principle has become part of customary law; also, parties can contract out of this principle under the Convention
     - German position: length of the coastline suggests that Germany has a proportional interest, which is w/in the principle of equity; non-ratification of the Convention left open the right to make reservations; principle of equidistance had not become customary at the time of negotiation
   - Decision: held that there was no custom in the practice of states; and, since Germany was not a party to the Convention, the relevant rule of customary law suggests that delimitation should be based on distributive justice and relevant coast area and good faith negotiation
     - ICJ comes up w/a set of rules where the states must use equitable principles that take into account all relevant circumstances (what qualifies as relevant circumstances?); geological structure, natural resources (oil in this case – there are some problems doing this since oil may be found in other areas, making the boundary irrelevant); this falls w/in the distributive justice argument
     - Arguments based on distributive justice (special consideration for maritime boundaries) have been discarded in modern ICJ cases; they have relied more on geographical considerations
   - Dissent: would have found that there was sufficient practice to create custom
3. ***The Fisheries Case*** (ICJ 1951):
   - Norwegians drew their baselines for territorial waters in straight lines b/t the many outcrops of land and islands; they also claimed a 4 mile territorial sea based on historic use, which no one had objected to (this was when a 3 mile extension was the norm)
   - Should these lines only be valid against the states that have recognized them? – it would be inconsistent to suggest that custom can only be formed b/t individual parties; the ICJ decided that the custom should be binding to all; however, the ICJ does its best not to rely on this claim

- ICJ decision – does not rely on local custom; relies on the fact that it is an application of the general rules; the comment is more about the general rule rather than a local custom; this becomes a focal point for states to come to agreement on the delimitation of territorial sea limit

4. The Law of the Sea – (post-ICJ cases)
   - Territorial waters go out to the 12 mile mark from the low water mark on a coastal state's territory (had been 3 miles, the U.S. and Japan resisted this move b/c of their distance-fishing abilities and the ability of the U.S. to have unrestricted access for reconnaissance); the exclusive economic zone extends 200 miles out from the low water mark; beyond this mark is what is considered the high seas
   - The continental shelf is the sea bed area; the area beyond this is the deep sea bed; the "distance principle" places juridical control over the area of sea bed out to 200 miles (whether it is continental shelf or deep sea bed); a coastal state can claim continental shelf beyond the 200 mile mark if it exists, if the continental shelf ends before this, then the state cannot claim beyond this mark; the maximum is recognized as 350 miles
   - **1982 Law of the Sea Convention** – U.S. has not ratified the treaty but has accepted most of its rules as expressions of customary law; Commission on the Outer Limits of the Continental Shelf (established by the UN under the 1982 Convention) – states are required to submit to this commission their claims; the commission appraises individual states' claims, reviews them and provides determination
   - Rights on the High Seas – includes freedom of fishing, navigation, over-flights, submarine cables, research, etc.; there are increasing restrictions, mostly based on environmental concerns
   - Deep Sea Bed – interest in the development of this area and its possible resources; Part 11, negotiated by compromise, established an International Seabed Authority, which was supposed to create an international mining company called the Enterprise; U.S. objected to this "global socialism"; the compromise allowed an independent authority (state or corporation) would choose two sites, the ISA would decide which the private company and the international company would mine; the U.S. was against it b/c of bureaucracy concerns; this agreement was amended in the 90's w/o an international mining agency; the U.S. accepts that the mining should have some obligation to developing countries
5. **The Persistent Objector Rule** – as applied to the Law of the Sea
   - Japan objected to the 200 mile EEZ for commercial interests; Japan based its argument on consistently objecting to the ability of states to claim EEZs; the rights asserted by other states could not be applied as long as Japan persistently objected; however, this becomes expensive (actually and politically); Japan eventually had to acquiesce in individual negotiations (Japan got limited access to other states' EEZs)
6. **The *Black Sea Affair*** – Innocent Passage for Warships
   - Innocent passage: unclear in international customary law whether warships have right of innocent passage through the territorial sea (12 mile mark); the right had been applied to ordinary vessels but could be suspended during wartime
   - Facts: on March 10, 1986, two American naval vessels entered the Black Sea via the Turkish Straits; their entrance was observed by a Soviet patrol vessel; in the American view, the voyage was a continuation of a policy of showing the flag in the Black Sea two or three times a year
   - Legal issues: no general right to innocent passage for warships; traffic separation schemes were allowable and desirable under international law; U.S. disagreed that there was a general restriction; to inhibit the use of the Soviet model, the U.S. tried to challenge this proposition through practice (see above)
     - "Pueblo" clause of the 1982 Law of the Sea Convention, adopted in the 1983 Rules prohibits "any act aimed at collecting information to the prejudice of the defense or security of the USSR"; a voyage undertaken expressly to test coastal defenses, including passive listening and sensory activities, would seem to fall w/in the prohibition unless naval powers were prepared to characterize such conduct as part of mutual "confidence-building" exercises; activities undertaken for prudent self-protection must be distinguished from those designed to prejudice the coastal state
     - Soviet discontent lay w/the very presence of American vessels in Soviet territorial waters; innocent passage of foreign warships through USSR territorial waters was permitted only in specially authorized coastal areas (U.S. allowed Soviets to do the same; this is an example of the reciprocity

necessary for the development of international law)

- Comment: the Soviet interpretation is not consistent w/the 1982 Convention or w/the 1983 Rules; customary international law and the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone suggest that the international legal system operates on a presumption in favor of the innocent passage of foreign vessels wherever they wish in the territorial sea of the coastal state, subject to the rules of international law and coastal state legislation; since the natural configuration of the Black Sea makes navigation possible almost anywhere and traffic density apparently requires no further guidance from the coastal state, under the 1982 Convention and the 1983 Rules a foreign warship in that body of water has the right of innocent passage; the right of innocent passage is not a "gift" of the coastal state to passing vessels but a limitation of its sovereignty in the interests of international intercourse
- Law of Straights: (no navigable High Seas or less than 24 miles b/t land) innocent passage applies to straights (including warships); there is a historical body of law (Treaty of Montreux 1936) that applies particularly to the Turkish Straights; right to transit passage (1982 Convention) cannot be suspended during wartime (includes right of submarines to remain underwater and for airplanes to fly over); this concession was part of the package deal for U.S. agreement to the deep sea bed arrangement

C Customary Law: How to Find it and How to Prove it (i.e., International Humanitarian Law and International Human Rights Law)

1. Custom in International Humanitarian Law
   - Must make a distinction b/t *jus ad bellum* – laws governing resort to use of force – and *jus in bello* – laws governing use of force when a state is actually engaged in armed conflict; distinction was thought to be necessary to determine whether there had been an actual justification for *jus ad bellum*
   - Why would states impose rules for war?
     - Reciprocity b/t states – reprisals are legal (if a state acts illegally, a state can react in reprisal); there is a general hostility to states using force as a response to non-use of force (general rule of countermeasures – response to non-use of force has to be non-use of force); if force is used, states can respond by the use of force; the development of this custom hinges upon reciprocity
     - Lack of stability – the rules of war are not centralized, unstable, and insufficient to be efficient; these rules operate to mitigate this lack of stability; moreover, it simplifies the operation of war
     - Nature of warfare – distinction b/t combatants and non-combatants (civilians) may push states to create rules that will protect both from exploitation
     - Sense that war has lawful limits may be more palatable to domestic support (and international concern); rules of war help to fight wars by recruiting external and internal support to the effort
     - *Jus in bello* is relevant to the *jus post bello* – the view that a state fights a war in order to shape the peace; certain activities during war (respect for adversaries) are important for peaceful settlement
   - What are the rules of humanitarian law?
     - Conventional law of war is limited and is based on work done by the International Committee of the Red Cross and culminating in the Geneva Conventions and Optional Protocols
     - Customary law – *jus in bello* operates in a decentralized way; courts that have approached this issue have done so through national courts; Conventions require states to bring their own citizens to justice if they violate rules embodied by the Conventions; states have been all too amenable to apply these rules against their adversary (creates tension b/t victor's justice and living w/the enemy)
2. ***Von Leeb Case*** (U.S. Military Tribunal – Nuremberg, 1948)
   - Concerns the applicability of the Hague Conventions (1899 and 1907) and Geneva Conventions on Treatment of POWs to the belligerents
     - Cannot apply these treaties directly; some of the belligerents were not parties to the treaty (Germany was a party, but Bulgaria and Italy were not); the treaties contain a clause stating that they could not be applied unless all belligerents were parties (this embodies the concept of reciprocity; contractual rules would not be opposable in cases where a non-party joined the war effort)

- Customary international law – second best alternative to establish rules (custom establishes the substantive standards, not the procedural standards for the courts, which are national in character)
    - The very specific sections of the treaties cannot be considered as custom; those that are less detailed (treatment of prisoners versus compensation) can be considered as declaratory of customary rules; even if it was not declaratory, it had become custom as seen through state practice
    - Global custom? – many of the rules are determined by Western states and apply to Western dominated rules of war (i.e., requirement of sending white POWs back to temperate regions if captured in the tropics)

3. Development of Custom in Human Rights Law – ***Filartiga v. Peña-Irala*** (2nd Cir. 1980)
    - Alien Tort Claims Act (1789) – gave U.S. jurisdiction over torts committed against aliens by aliens when contrary to the law of nations; the Paraguayan victim was tortured and killed in Paraguay by a Paraguayan, who was found in the U.S. for overstaying his visa; although torture has become *ius cogens* and many states have constitutional provisions prohibiting torture, it is still practiced in these countries
    - Approach to custom relied upon international material (completely different from ICJ method):
        - Evidence from states – looked at national laws of other states not concerned
        - United Nations resolutions – what states had said in international fora
        - Scholarly work – used the writings of learned scholars to determine international norms
    - Why would the court approach the issue of custom differently than the ICJ in the North Sea Cases?
        - Institutional problem; need to come up w/principles and states are basically against it
4. U.S. Arguments against ATCA cases – Amicus Brief for the U.S. in the *Unocal Case*
    - ATCA is a simple grant of jurisdiction and cannot properly be construed as a broad grant of authority for the courts to decipher and enforce their own concepts of international law; the Act was intended to provide the federal government jurisdiction over issues that may be of national importance rather than leave such jurisdiction to the states; ATCA gives federal courts subject matter jurisdiction over issues arising under *other* Acts of Congress that affirmatively incorporate principles of the "law of nations" into the laws of the U.S.; under this understanding, Congress must enact a cause of action; the ATCA does not give a private cause of action (international law is b/t states and not b/t private individuals)
    - International law norms are not self-enacting in federal court; U.S. has not made a proactive stance on these international measures nor has the U.S. ratified some of these conventions; the Supreme Court has determined that non-self-executing treaties are addressed to the political branches and not to the judiciary; claims that labelling of an international law norm as *jus cogens* violations does not grant any greater legitimacy to the judicial enforcement of such norms
        - Are these arguments correct (should custom be so limited)? – international understanding of custom is that it should be viewed globally and not by individual state action, but should the domestic courts apply "custom" according to what the executive *or* legislative branch say
    - Matters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action; such an interpretation would infringe on the right of the political branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents → will hamper the war on terrorism, the war on drugs…
5. General Assembly Resolutions
    - The Resolutions dealing w/condemnation of Israel are indicative of the questionable character of using GARs as custom; they were also used in *East Timor*, but ignored, suggesting that they do not have probative value in the ICJ

D Beyond Customary Law: Obligations *Erga Omnes* and *Ius Cogen*

1. Hierarchy of Sources
    - Desuetude – term used to describe a situation in which the treaty is consistently ignored by one or more parties, w/the acquiescence of the other party or parties; treaties can come to an end through desuetude

- Treaties and custom are of equal authority: the latter in time prevails – *lex posterior derogat priori* (a later law repeals an earlier law); but *lex posterior generalis non derogat priori speciali* (a later law, general in nature, does not repeal an earlier law which is more special in nature) and *lex specialis derogat legi generali* (a special law prevails over a general law)
- Judicial decisions and learned writings are considered "subsidiary" to the other sources: treaties, custom and general principle; in practice, treaties > custom > general principles > subsidiary sources

2. ***Ius cogens*** – preemptory norms of general international law
   - Idea that a treaty cannot override natural law; w/the decline of natural law, the theory is based on the idea of a check on the tendency of international law to disintegrate into different regional systems
     - States are not able to contract out of *ius cogens* norms
   - **Article 53** of the Convention on the Law of Treaties (Vienna Convention) – a treaty is void if it conflicts w/a peremptory norm of general international law, which is a norm accepted and recognized by the international community of States as a whole
     - *Ius cogens* must find acceptance and recognition by the international community at large and cannot be imposed upon a significant minority of states; an overwhelming majority of states is required, cutting across cultural and ideological differences
     - Very few rules pass this test – prohibition of the use of force, of genocide, slavery, of gross violations of the right of people to self-determination, of racial discrimination and of torture are suggested as having considerable agreement; the rule against aggression is definitely considered *ius cogens*
     - Can be derived from custom and possibly from treaties, but probably not from other sources
3. Obligations ***Erga Omnes*** and "international crimes"
   - Concerned w/the enforceability of norms of international law, the violation of which is deemed to be an offence not only against the state directly affected by the breach, but also against all members of the international community; however, a breach does not always imply commission of an international crime
     - *Erga omnes* can be rights "owed to all" and obligations "owed to all"; every rule that has become *ius cogens* has become *erga omnes*; but not vice-versa b/c an *erga omnes* determines to whom the obligation is owed (can have an important rule but obligation is not owed to all)
     - There is a procedural aspect to *erga omnes* – it gives a state the right to intervene
   - Use of the terminology tends to confuse the international criminal responsibility of individuals w/the criminal responsibility of states, which does not exist in international law
     - International crimes are described in the ILC's Draft Articles on State Responsibility; it is an internationally wrongful act that breaches an international obligation so essential for the protection of the fundamental interests of the international community that its breach is recognized as an international crime by the entire community
       - See Akehurst's p. 60 for description of different "international crimes"
       - Other internationally wrongful acts that are not international crimes are considered by the ILC as international delict (a legal offense; a misdemeanor)
     - According to the ILC, the breach of an *erga omnes* obligation does not imply a breach of an international crime (*erga omnes* is a broader concept); likewise, the concept of an international crime is narrower than the notion of *ius cogens*

Unit IV: Treaties in International Law (w/Extended Treatment of Human Rights Treaties)

A The International Law of Treaties

1. The Vienna Convention's Definition of a Treaty
   - 1969 Vienna Convention on the Law of Treaties (entered into force 1980)
     - U.S. is not a party to the Convention; however, different articles reflect pre-existing customary law and have been cited as accurate statements of the customary rules relating to treaties
       - There are points of contention – initial question is whether the Convention applies; if not, then arguments must be based on customary law (though the Convention can be used as evidence of customary law) or the law governing the treaty
     - Only applies to treaties made after its entry into force (Article 4) → 1980
     - Only applies if the treaty is governed by international law, as opposed to local law or the law of another system; not a particularly sharp line; but a reminder that not every agreement b/t states is governed by international law or by the Convention
   - **Definition of a Treaty** – Article 2(1)(a) – an international agreement concluded b/t States in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments → takes a narrow view of the agreements to which it applies
     - Excludes agreements b/t states which are governed by municipal law; those that are not intended to create legal relations at all; oral agreements b/t states; agreements of any sort b/t IGOs or b/t states and IGOs
       - A separate convention – the Convention on the Law of Treaties B/t States and International Organizations or B/t International Organizations (signed in 1986 but has not entered into force)
     - Does not apply to agreements that are not written, but can be applied to oral agreements if there are texts that surround the issue (i.e., *Cameroon v. Nigeria* (ICJ 2002) – awarded the disputed Bakassi Peninsula to Cameroon partly based on an oral agreement b/t the presidents of those countries; however, the Nigerian President was overthrown in a coup shortly after returning)
   - Distinction b/t bilateral and multilateral treaties – multilateral treaties are usually negotiated in large conferences; this makes it difficult for states to change key provision; it is much easier to renegotiate bilateral treaties
2. Conclusion of a Treaty (The Making of Treaties)
   - Power to negotiate and sign a treaty may differ b/t states; different states have different procedures for negotiations; some will include delegates from the civil society (NGOs) and from states w/in a federal system → formal system is to recognize executive control → see Articles 6-8
   - Article 9 – **Adoption of the text of a treaty**: adoption occurs when by the consent of all states participating in the negotiations, except when an international conference is convened, adoption occurs by 2/3 majority; adoption of the text does not create obligations
   - Article 10 – Authentication of the text – text of a treaty is established as authentic and definitive by such procedure agreed upon by the negotiating states or provided for in the text; or, failing such procedure, by signature by the representatives of the negotiating states
   - Article 11 – **Consent to be bound by a treaty**: may be expressed by 1) signature, 2) an exchange of instruments constituting a treaty, 3) ratification, acceptance, approval or 4) accession, or by any means if so agreed; multiplicity of methods has introduced much confusion into the law; treaties usually expressly state whether or not ratification is necessary; this makes it difficult to know what rule to apply if the treaty is silent; Vienna Convention adopts a neutral attitude → everything depends on the intention of the parties
     - Article 12 – qualifications for consent of a State to be bound expressed by **signature**; intention of the State to give effect to the signature must be either provided for in the treaty, established b/t the negotiating parties or was expressed during negotiations

- Article 13 – qualifications for consent of a State to be bound expressed by **exchange of instruments constituting a treaty**; instrument must express that its exchange has that effect or the States have agreed that exchange will have that effect
- Article 14 – qualifications for consent of a State to be bound expressed by **ratification, acceptance or approval**; instrument must either express that ratification has that effect or it was the intention of the negotiating states or signature was contingent upon such a procedure; should be noted that performance of a treaty can be considered tacit ratification
- Article 15 – qualifications for consent of a State to be bound expressed by **accession**; has the same effect as signature and ratification combined, but can only be used if provided for in the treaty or all parties agree that the acceding state should be allowed to accede

- Complications:
  - Modern practice of leaving certain treaties open for long periods for signature by states which may or may not have participated in the drafting of the treaty has blurred the distinction b/t accession, on the one hand, and signature and ratification, on the other; these often require a minimum number of ratifications before a treaty will formally enter into force
  - Acceptance and approval is sometimes now used in place of ratification; more of a matter of terminology rather than substance
  - Unilateral declarations – see material below

3. Entry Into Force
   - Article 24 – **Entry into force** – treaty enters into force in such manner and upon such date as agreed by the negotiating parties; failing such agreement, the treaty enters into force upon consent to be bound by all parties → a treaty normally enters into force as soon as all the negotiating states have expressed their consent to be bound by it; but the negotiating states are always free to depart from this general rule
     - Article 18 – (codifies customary international law) describes the obligation of states to refrain from acts which would defeat the object and purpose of a treaty when the state has given consent, in any of the above ways, or has expressed consent to be bound, pending the entry into force of the treaty
       - Upon signature, a state is obliged to do nothing to defeat the object and purpose of a treaty; the treaty does not have full legal effect in relation to that state, but prevents the state from acting inconsistently w/the treaty; Article 18 provides that a state can abrogate these obligations by making it clear that the state never intends to ratify the treaty (i.e., the Clinton administration signed the ICC Statue (Rome Treaty), but the Bush administration "unsigned" it)
     - Tacit ratification – states can become bound to an agreement, in the absence of ratification, if they conduct themselves in accordance w/the provisions of the treaty (i.e., Law of the Sea Treaty); this is possible b/c most states function w/executive branches in sufficient control of their governments to act in accordance w/the prescribed rules (consistent w/the foreign office model)
   - Articles 19-23 – **Reservations** – (see Section E for details)
     - Article 2(1)(d) – defines a reservation as a unilateral statement when consenting to a treaty, whereby a state purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state; a state may object to provisions of the treaty while accepting most
     - **Legal effect of reservations** – depends on whether it is accepted or rejected by the other states concerned; ICJ has determined that a state may be regarded as a party to a treaty if the reservation is compatible w/the object and purpose of the treaty; since states are likely to disagree whether a certain reservation is compatible w/the treaty at issue, the state making a reservation is likely to be regarded as a party to the treaty by some states but not by others
   - Registration – Article 102(1) of the UN Charter provides that every treaty that comes into force shall be registered w/the Secretariat (depositary) and published as soon as possible
4. Validity of Treaties
   - Vienna Convention Articles
     - Article 42(1) – provides that the validity of a treaty or the consent of a state to be bound by a treaty

can only be impeached through the application of the Vienna Convention

- Article 46 – **Provisions of internal law** – a state may not invoke the violation of internal law as invalidating consent unless that violation was (1) manifest – if it would be *objectively* evident to any state conducting itself in good faith and normal practice – *and* (2) concerned a rule of internal law of fundamental importance
  - These requirements minimize the extent to which a state can invoke this article; Article 46 has seldom been invoked by any state as a basis for a claim of invalidity; examples…
  - Iraq-Kuwait Border – Iraq challenged the presumed boundary 1990, claiming that the 1962 Exchange of Notes was invalid because its approval by the Iraqi government had not been accompanied by the approval of the Iraqi Parliament; this was not widely accepted on the merits
  - U.S.-Israel – Senate claimed that a 1975 agreement between the U.S. and Israel was concluded w/o their advice and consent, and was therefore w/o force under domestic law and international law (violated a rule of fundamental importance and Israel should reasonably have known of this constitutional defect); State Department rejected that position and the Senate took no action
- Article 47 – Restrictions on authority – if the authority of a representative was subject to observance of a restriction, omission to observe a restriction may not be invoked as invalidating consent unless the restriction was notified to the other negotiating states prior to expression of consent
- Article 48 – **Error** – treaty can be invalidated by mistake/error is the error relates to a fact of situation which was assumed by that State during conclusion and formed a basis for consent; does not apply if the conduct of the State contributed to the error or if the State was on notice of the possible error
- Article 49 – **Fraud** – a treaty can be invalidated by the fraud of another negotiating state
- Articles 50-51 – **Corruption or coercion of a State's representative** – a treaty can be invalidated if consent was procured through the corruption of a state's representative or by coercion of a state's representative by another state
- Article 52 – before WWI, coercion through the threat of force was valid; since then, there has been a growing tendency to regard aggression as illegal; accordingly, Article 52 provides that a treaty is void if its conclusion was produced by threat or use of force in violation of principles of international law
  - Hypothetically, would the treaty be invalid through economic or political coercion → "economic coercion" does not appear in Article 52 – illustrative of the conflict b/t the West and third world countries (it was part of a political deal for the Vienna Convention to not include economic coercion); a separate declaration, made by the states at the conference, stated that economic coercion could create obligations under international law; this framing also allows states to use the "threat to not use force" (i.e., U.S. has garnered agreements w/states to exempt U.S. personnel from the ICC through such means!)
  - Peace agreement: legal question exists re the validity of treaties concluded during war and at the conclusion of war
- Article 53 – **Conflict w/*ius cogens*** – a treaty is void if, at the time of its conclusion, it conflicts w/*ius cogens* (preemptory norm of general international law from which no derogation is permitted and can only be modified by a subsequent norm of general international law)
  - *Krupp Case* – criminal prosecution of a German national who factories owned that used slave labor w/a high mortality rate; there was an agreement b/t the Vichy government and Nazi Germany to help organize the deportation of French citizens to be used in these factories; agreement was void b/c it was a breach of *ius cogens* – slavery
  - **What is *ius cogens*?** – right to self-determination; prohibition against systematic racial discrimination; torture; extra-judicial killing; slavery and the slave trade; use of force (treaty that allows a right to intervention by an outside state probably violates *ius cogens*); genocide; crimes against humanity; grave war crimes

- Consequences of invalidity articles
  - In cases covered by Articles 8 and 51-53, the treaty is void or consent is w/o legal effect → no basis for the treaty to have ever operated b/c these are serious violations (more serious than Articles 46-50)

- In cases covered by Articles 46-50, the state may merely *invoke* the vitiating factor as invalidating the treaty; the treaty is probably *voidable* rather than void (the treaty is valid until a state claims that it is invalid, and the right to make such a claim may be lost in certain circumstances) → acts done in accordance w/the treaty are still lawful
  - The distinction b/t the former and latter categories may not be as clearly established in customary international law as the Vienna Convention suggests
- Article 45 – **Loss of invalidity** – to allows a state to cure defects in its consent; does not cover treaties that are on their face void (for reason of violation of *ius cogens*); stipulates when a state loses the right to invoke a ground for invalidating, terminating, w/drawing from or suspending the operation of a treaty → if the state expressly states that the treaty is valid or remains in force or continues in operation or does so by reason of its conduct then the treaty is considered as valid

5. Termination of Treaties

- Article 42(2) – provides that the termination of a treaty can only take place as a result of the application of the provisions of the treaty or of the Vienna Convention
- Article 54 – **Termination or w/drawal** – termination or w/drawal may take place in conformity w/the provisions of the treaty or at any time by consent of *all* parties after consultation
  - Article 56 – a treaty that contains no provision regarding its termination and does not provide for denunciation or w/drawal is not subject to denunciation or w/drawal unless: a) it is established that the parties intended to provide for such possibility; or b) it may be implied by the nature of the treaty; if either of these apply, a party must give at least 12 months notice of intent to w/draw
- Article 60 – **Material breach**
  - Article 60(1) – in a bilateral treaty, the material breach by one party entitles the non-breacher to terminate or suspend the treaty (or sue for damages)
  - Article 60(2) – in a multilateral treaty, material breach by one party entitles the remaining parties to either (a) unanimously terminate the agreement (b/t all parties or just w/the breaching party); (b) allow a particularly affected party to suspend the agreement w/the breaching party; or (c) allow any party to claim that the breach radically changes the position of every party w/respect to further performance of its obligation
  - Article 60(3) – defines a material breach as a) a repudiation of the treaty not sanctioned by the Convention; or b) the violation of a provision essential to the object and purpose of the treaty
  - Material breach does not automatically terminate a treaty; it merely gives the injured party(ies) an option to terminate or suspend the treaty and, according to Article 45, an injured party loses this right if, after becoming aware of the facts, it expressly or implicitly (by reason of its conduct) determines the treaty remains in force
- Article 61 – **Impossibility** – provides that a state may invoke impossibility of performance as a ground for terminating or suspending (temporary impossibility) a treaty, but a state may not do so if the impossibility was garnered by breach of *any* international obligation (under the treaty or otherwise)
- Article 62 – **Fundamental change of circumstances** – to be a valid reason for termination, the change must have a) constituted an essential basis of consent and b) the effect of the change radically transform the extent of obligation still to be performed; the change of circumstances cannot have been a result of a breach of *any* international obligation by the party invoking the rule
  - ***Rebus sic stanibus*** – the idea was that every treaty contained an implied term that it should only remain in force as long as circumstances remained the same; tendency today is to regard the implied term as a *legal fiction* by which it was attempted to reconcile the principle of the dissolution of treaties in consequences of a fundamental change of circumstances w/the rule *pacta sunt servanda*
  - ILC Commentary: though few treaties are entered into that do not provide the parties w/the opportunity to modify its terms, some do; *rebus sic stanibus* allows for a powerless party to obtain legal relief from outmoded and burdensome provisions and serves as a lever to induce a spirit of compromise in the other party; it also gives an incentive to states to act w/in the rule of law

        - An implied term was rejected by the ILC in favor of an **objective rule of law**; moreover, this rule is not limited to "perpetual treaties" and can be applied to term-treaties
    - U.S. Government Comments: expressed reservations about the incorporation of *rebus sic stanibus*; acknowledged that the concept is of unquestionable utility if adequately qualified and circumscribed so as to guard against abuses of subjective interpretation
        - Expressed concern over whether the requirement is one that implies *improbability* of knowing or *impossibility* of knowing and w/the possibility that there is no safeguard against the use of Article 62 under Article 33 that would provide secure methods of protecting the other party's interests → this provision should be harmonized w/the treaty's chosen dispute settlement process
- Article 64 – provides for possibility of the emergence of *ius cogens* that may conflict w/the treaty and cause it to become void and terminate (cannot apply retroactively)

6. The Panama Canal Treaty of 1903
    - Was it valid? Arts. 46, 49, 50, 52, 53
        - Article 46 – competent authority – although the treaty was signed by a Frenchman, Bunau-Varilla, who was appointed through connections to the U.S. representatives and the canal building company, it was ratified by the Panamanian government; they had acquiesced even though he may not have been the proper representative
        - Articles 49-50 – fraud and corruption – Bunau-Varilla rewrote treaty offered by the U.S. in the U.S.'s favor; this suggests that he was operating in the interest of the U.S. rather than Panama, which he was supposed to be representing
        - Article 52 – threat to use force – U.S. would not have supported Panamanian independence w/o the treaty for the canal; threat from Columbia may have been relevant; but this may have not been illegal at the time of the signing of the treaty → inter-temporal law – customary law did not recognize coercion through threat of force as a reason for invalidation; this highlights the tension b/t stability and the need to make revisionist claims for justice
    - Could it be revoked? – Arts. 42, 45
        - Article 42 – the doubtful applicability of the Vienna Convention to a scenario like the Panama Canal Treaty exhibits the power differential b/t bigger and smaller states in negotiating the Convention
        - Article 45 – Panama's continued observance of the treaty and the changes in provisions (increasing payments, etc.) would prevent Panama from being able to invoke a right to invalidate the treaty
7. Theoretical structure of treaties – **Capturing gains**
    - The law of treaties can be useful to insulate a regime based on cheating, monitoring and sanctioning; agreement b/t states is a tool to address problems of collective action
        - **Coordination problem** – treaties are self-enforcing once an agreement is reached
        - **Collaboration problems** – based on the prisoner's dilemma (proposition that a party is better off by cheating if the other party cooperates); treaties provide an incentive for a party to make an agreement and cooperate; however, treaties create situations in which the gains are not met through simple cooperation; there has to be actual negotiation for a state to realize a particular gain
            - **Reciprocity strategy** – understanding that a resulting tit-for-tat situation will not be beneficial to either party; interest of stabilizing expectations pushes parties to create agreements
    - **Two Level Game** – Article 46, provisions of internal law, provides an *insulating effect* to the two level game – the game states must play b/t international cooperation and the domestic politics (i.e., politics b/t the executive, legislative, interest groups and the population)
8. Legal Effects of Unilateral Declarations
    - A treaty is not the only method in which a state can enter into a legal obligation; a unilateral promise is binding in international law on the state making the promise, *if* that state intended its promise to be legally binding; similarly, a state can lose a legal right by unilaterally waiving it, provided that the intention to do so is sufficiently clear

- **Significance** – does this stabilize the tension b/t domestic and international politicking? (maybe not); giving the declaration the same legal effect as a treaty w/o going through the process of formal domestic procedure may increases the ability of the President to exert power over domestic players!
- This dynamic parallels the use of self-executing treaties in the domestic setting!

- *Legal Status of Eastern Greenland* (*Norway v. Denmark*) (PCIJ 1933)
  - Dispute b/t Norway and Denmark concerning sovereignty over Eastern Greenland; during negotiations, Denmark made important concessions, to which the Norwegian Foreign Minister declared that Norway would not make any difficult on the issue; the PCIJ considered this a binding treaty and rejected that VC Article 46 would apply
- *Nuclear Tests Case* (*Australia and New Zealand v. France*) (ICJ 1974)
  - Australia and New Zealand demanded that France cease atmospheric nuclear tests in the South Pacific; while the case was pending, France announced that it had completed its series of tests and did not plan any more
  - ICJ – unilateral declarations concerning a legal or factual situation may have the effect of creating legal obligations even w/o any reply or reaction from other States; but not all unilateral acts imply obligation; there are no special or strict requirements in regard to the form (written or oral, etc.) of the unilateral act (the sole relevant question is whether the language employed reveals clear intention)
- *Case Concerning §§301-310 of U.S. Trade Act of 1976* (*EC v. U.S.*) (WTO Panel Report 1999)
  - Addressed the legal significance of unilateral statements made by U.S. representatives in connection w/a complaint initiated by the EC concerning the matter before the WTO Panel; the U.S.T.R. had stated that the official U.S. policy was to implement the challenged legislation in a manner consistent w/WTO obligations; the Panel accepted that the statements were a reflection of U.S. policy and understanding of international obligations as incorporated into U.S. law

B Treaties in United States Law

1. The Constitution, Treaties, and Foreign Affairs
   - U.S. Constitution – See Handout
     - Article I, Sections 7-8 – legislative role and enumerated powers of Congress – power to act coherently for national interests (tax and spend, borrow money, commerce, immigration, coin money, postal service, declare war, raise and support an army and navy, to call forth the militia, etc.); power to make all necessary and proper laws for carrying out these enumerated powers
     - Article I, Sections 9-10 – prevents Congress from exercising preferential powers as b/t the states and proscribes states from contracting treaties w/foreign governments (makes an implied distinction b/t treaties and "agreements of compacts", but does not prohibit them, states may make these agreements upon the consent of Congress)
     - Article II, Section 2 – gives the President status as commander-in-chief and the ability to make treaties and appoint ambassadors, etc. (upon the advice and consent of the Senate – 2/3)
       - If Senate gives consent to *making* the treaty, the President then concludes it; if it had been previously signed by authority of the President, the President later ratifies it for the U.S. after obtaining Senate consent → "advice and consent" has been effectively reduced to "consent"
     - Article III – gives the Supreme Court original jurisdiction for cases arising under treaties, affecting ambassadors, admiralty jurisdiction, controversies w/the U.S. or a foreign state or citizen as a party
     - Article VI – **Supremacy Clause** – treaties, like the Constitution, are the supreme law of the land; however, a later-in-time statute would narrow the scope of a treaty (i.e., *Breard*)
2. How can the U.S. make credible commitments?
   - It is particularly difficult for the U.S. procedure to seem credible when a treaty is to be acted upon *sequentially* (the other side has to perform first before the U.S. fulfils its commitments); b/c of risk, the would-be first performer will be less inclined to enter into an agreement

- Unverifiable performance – in the short term, it is difficult to know whether a state is complying or not; there are no other means of pressing the state into performance; inserting international agreements into domestic law makes the treaty more likely to be credible in the eyes of the treaty partner(s)

3. Treaties and other International Agreements
   - **Role of the Senate** – often gives its consent subject to conditions (i.e., modification in the terms, a particular interpretation, or some limitation of its consequences); this may require renegotiation and commonly takes the form of "reservations", "understandings" or "declarations" to the original treaty
   - ***Curtiss-Wright*** (U.S. 1936) – even though the Constitution does not confer a general foreign affairs power in the executive branch, the understanding is that one exists (i.e., the Constitution is silent on what institutional actor can "unmake" treaties; it is accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty); this case bolsters the view of those that the other branches should not be so involved in foreign affairs
   - Executive Agreements
     - **Congressional-Executive Agreements** – has had strong appeal; permits approval of an agreement by simple majority of both houses and gives an equal role to the House of Representatives, which has long resented the "undemocratic" anachronism that excludes it from the treaty-making process; assures cooperation of both houses; typically used in trade agreements
       - Patterns show that arms control and human rights treaties are treated under Article II (2/3 majority of the Senate); trade agreements are usually taken under the congressional executive agreement model (simple majority) based on the Commerce Clause powers
     - **Presidential Executive Agreements** – in *United States v. Belmont*, J. Sutherland suggested that the authority of the President to conclude executive agreements (international compacts) is quite large; suggests that there is a category of agreements that the President can make on his own; usually drawn from the war powers and diplomatic powers of the Executive office
       - "One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only w/the consent of the Senate (or of both houses), no one has told suggested which are which"
     - Assumption is that both types of Executive Agreements are covered by the Supremacy Clause
   - Self-Executing and Non-Self-Executing Treaties
     - Judiciary has enacted a rule that a treaty can only be relied upon if it is self-executing
       - Supremacy Clause provides that treaties shall be the law of the land (as opposed to constitutional systems where treaties are just obligations and not effective in domestic law); this clause was intended to assure that treaties do not require Congress to translate them into law; but not all treaties are law in their own accord; some require political enactment before it can become a rule for the Court → this is a judicially-created rule
       - Whether a treaty is self-executing or not, the obligation of the U.S. becomes effective w/exchange of ratifications; if the treaty is not self-executing, the President is obliged to seek any required legislative implementation promptly; non-self-executing treaties still create obligations
       - Some obligations cannot be executed by treaty – a treaty cannot appropriate funds; a treaty cannot itself enact a criminal law (i.e., enforcement of a treaty obligation to criminalize certain acts – say genocide or torture – can be effected only by Congress) → these are actions that only Congress, not the Executive, can take
       - Difference b/t self-executing and non-self-executing treaties is commonly misunderstood; whether a treaty is self-executing or not, it is legally binding on the U.S. and is the supreme law of the land; if it is not self-executing it may not be "a rule for the Court", but CJ. Marshall did not suggest that it is not law for the President or for Congress
       - Current practice, according to the political branches, is that human rights treaties are not self-executing; however, the courts do not have to follow this logic; since these types of treaties affect the rights of the states, representatives of the states (House of Representatives?) should be more

active in determining the implication of human rights treaties

- ***Asakura v. City of Seattle*** (U.S. 1924) – **Reciprocity**
  - Facts/Issue: Seattle ordinance made it unlawful for a person to act as a pawnbroker w/o a license, but made it contingent upon citizenship to get the license; π, citizen of Japan, attacked the ordinance on the ground that it violated a 1911 treaty b/t the U.S. and Japan
  - Decision: ordinance was nullified based on Art. 1 of the treaty, which stated that the citizens of the parties shall have liberty, generally, to do anything incident to or necessary for trade upon the same terms as native citizens; supremacy clause assures that the treaty's terms cannot be rendered nugatory in any part of the U.S. by local ordinances or laws
  - Self-execution and Reciprocity: U.S. has a responsibility to respect provisions of the treaty; breach would undermine a purpose of the treaty – reciprocity; it is unlikely that Japan would have entered into the agreement if there was not an assumption that the treaty would be self-executing
- ***People of Saipan*** (9th Cir. 1974) – **Factors for self-executing treaties and judicial utility**
  - Facts/Issue: challenge to the execution by the Trust Territory High Commissioner of a lease permitting Continental Airlines to construct and operate a hotel on public land over the objections of elected officials; district court held that the Trusteeship Agreement (a Congressional-Executive Agreement) does not vest πs w/individual legal rights that can be asserted in a federal court
  - Decision: although the court finds that Articles 73 and 76 the UN Charter do not confer judiciable rights on citizens of trusteeship territories, Article 6 of the Trusteeship Agreement itself suggests that there is a judiciable right in a domestic court of law (as opposed to the Security Council – this territory is a "strategic trust" – where the U.S. has veto power)
  - Note: why did the court become proactive in this case? → to expand judicial review of treaty arrangements (self-executing treaties provide the judiciary w/a tool of enforcement)
- **Factors for self- or non-self-execution** → extent to which an international agreement establishes affirmative and judicially enforceable obligations w/o implementing legislation must be determined in each case by reference to many contextual factors:
  - The purposes of the treaty and the objectives of its creators
  - The existence of domestic procedures and institutions appropriate for direct implementation
  - The availability and feasibility of alternative enforcement methods
  - The immediate and long-range social consequences of self- or non-self-execution
- ***United States v. Postal*** (5th Cir. 1979) – **Intent to be self-executing**
  - Issue: whether a court of the U.S. can assert jurisdiction over persons arrested aboard a foreign vessel seized beyond the twelve-mile limit in violation of a particular provision of a treaty to which the U.S. and the foreign country are parties (Conventions on the High Seas and on the Territorial Sea and the Contiguous Zone)
  - Must determine if the violated provision is self-executing; this is a matter for interpretation by the courts when the issue is presented → does it make sense to make the determination at this stage?
  - Decision: must determine if the U.S. undertook to incorporate the restrictive language of the provision, which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to domestic jurisdiction → a self-executing interpretation would be wholly inconsonant w/the historical policy of the U.S. concerning vessels beyond the territorial sea and w/the legislative history of the convention
  - Note: interpretation based on intent of the ratifying parties may contrast w/the intent of subsequent political actors (i.e., ABM Treaty underwent various interpretations according to political actors that wanted to develop ABMs in the face of treaty obligations)

- Comparison of U.S. and German constitutional law – both founded on opposite ideals (aversion to entangling alliances vs. aspiration to international integration); yet this difference is reversible
  - Federalism – strong in both countries, but German states are given far fewer areas of subject-matter jurisdiction than U.S. states; Constitutional Court declared that federal government must consider its

duty to take into consideration concerns of the individual states in European matters

- Self-Execution – difference lies in the extent to which German and American courts recognize treaties to be self-executing; German courts and legislators are more accepting of European jurisprudence stemming from the ECHR; Germany has given express declarations that a treaty norm is not self-executing when that provision may have a counterpart in domestic law and political officials did not trust that the courts would interpret treaties directly
- Unconstitutional treaties – as in the U.S., unconstitutional provisions are inapplicable no matter if such a declaration violates the treaty under international law
- Delegation of sovereign powers – German constitution contains two provisions (Articles 23 and 24) that explicitly empower the Federal legislature to delegate sovereign powers; this is different than simple treaty delegations that rely on domestic constitutional measures; this narrow approach to delegation would grant international actors supranational authority (i.e., EC regulations)
- Protection of fundamental rights against the exercise of delegated powers – does not require a treaty system of legal protection equivalent to the German constitutional system of legal protection; however, international institutions must respect the core fundamental rights→ the internationalist idea that consent to transfer power could not have intended to abolish basic freedoms and the nationalist idea that these rights cannot be abolished even by constitutional amendment (inalienability argument)

4. The Constitutional Limits of the Treaty Power
   - Treaties and States' Rights
     - ***Missouri v. Holland*** (U.S. 1920)
       - Issue: constitutionality of the Migratory Bird Treaty Act in relation to the 10th Amendment (gives general protection of rights to states)
       - Decision: found that a treaty can override the States' authority to regulate private relations, and upheld the treaty and regulations on the basis that national regulation was justified for the purpose of the treaty to be attained
     - **Bricker Amendment** – 1954 proposal for constitutional amendment that would alter the balance of power b/t the executive and legislature in the international agreement-making process:
       - Original Version – (1) a provision of a treaty which conflicts w/the Constitution shall not be of any force or effect; (2) A treaty shall become effective as internal law in the U.S. only through legislation – no self-executing treaties; (3) Congress shall have the power to regulate all executive and other agreements w/any foreign power or international organization
       - Final Version – (1) a provision of a treaty or other agreement which conflicts w/the Constitution shall not be of any force or effect; (2) an international agreement other than a treaty shall become effective as internal law in the U.S. only by an act of Congress; (3) on the question of advising and consenting to ratification, the vote shall be determined by yeas and nays; (4) inoperative unless ratified as an amendment by the legislatures of ¾ of the States w/in 7 years
     - Federalism:
       - Federal government cannot use treaties to extend constitutional powers; international law usually would require bad faith if federal governments enter into treaties expressly to increase their power
       - When federal government makes international human rights agreements that could limit the states in their criminal procedure, its agreed that the Senate made these types of treaties self-executing
   - Treaties and Individual Rights – ***Reid v. Covert*** (U.S. 1957)
     - Issue: whether Congress has the power to expose civilians to trial by military tribunals, under military regulations and procedures, thereby depriving them of trial in civilian courts, under civilian laws and procedures and w/all the safeguards of the Bill of Rights
     - Facts: two women, Covert and Smith, killed their husbands, members of the armed services, while they were stationed in the U.K. and Japan, respectively; an executive agreement provided that U.S. military courts would exercise exclusive jurisdiction over such offenses
     - Decision: rejected that the UCMJ can be sustained as legislation *necessary and proper* to carry out

U.S. treaty obligations → obvious and decisive answer to this is that no agreement w/a foreign nation can confer power on Congress, or on any other branch, free from the restraints of the Constitution

- Article II Treaty vs. Executive Agreements – ***Made in USA Foundation*** (Dist. Ct. Mid. Dist. Ala. 1999)
  - Facts/Issue: πs alleged that NAFTA and its Implementation Act are unconstitutional, in that NAFTA was not enacted pursuant as an Article II formal treaty w/the advice and consent of the Senate
  - Article II treaty process is not the exclusive constitutional means for the federal government to enter into an agreement w/a foreign sovereign; Commerce Clause, coupled w/the Necessary and Proper Clause and the President's foreign relations powers, provides sufficient authority for the completion of NAFTA and its Implementation Act to be concluded and enacted in a constitutional matter
  - Refused to apply the "political question doctrine", holding that if courts can determine whether substantive provisions of international agreements are constitutional, courts can also have the authority and responsibility to determine whether the procedures used to adopt international agreements conform to constitutional requirements
- ***Dames & Moore v. Regan*** (U.S. 1981)
  - In 1976, Congress passed the Foreign Sovereign Immunity Act (FSIA), conferring jurisdiction to federal courts over causes of action in commercial claims against foreign government-owned entities; nevertheless, under the Algiers Accords, a Presidential Executive Agreement, the U.S. agreed to terminate claims in U.S. courts against Iran and to submit them instead to an *ad hoc* international arbitration in the Hague; although this effectively overrode FSIA and eliminated state law-based causes of action
  - Supreme Court approved the agreement and enforced the President's orders → does not divest federal courts of jurisdiction; only "suspends" the claims; those claims not w/in the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in U.S. courts; FSIA was designed to remove sovereign immunity as a barrier to bring suit and cannot be fairly read as prohibiting the President from settling claims of U.S. nationals against foreign governments

C Interpretation of Treaties

1. The Relevant Sources of the Vienna Convention on the Law of Treaties
   - Vienna Convention – generally agreed that these provisions state the customary law in the field of treaty interpretation; different tribunals, however, follow different directions in how to apply the Convention
   - Article 31 – General Rules of Interpretation
     - (1) A treaty shall be interpreted in *good faith* in accordance w/the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its *object and purpose*
     - (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
       - (a) any agreement relating to the treaty which was made b/t all the parties in connection w/the conclusion of the treaty
       - (b) any instrument which was made by one or more parties in connection w/the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty
     - (3) There shall be taken into account, together w/the context:
       - (a) any subsequent agreement b/t the parties regarding the interpretation of the treaty or the application of its provisions
       - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation
       - (c) any relevant rules of international law applicable in the relations b/t the parties
     - (4) A special meaning shall be given to a term if it is established that the parties so intended
   - Interpretation of Article 31
     - **Good faith** – must interpret the treaty w/the spirit of the treaty in mind; what this means depends on

where the interpreter stands on the issue (institutional framework)
    - **Ordinary meaning** – **in light of context** – and **in light of the general purpose** of the treaty (i.e., the words in the *chapeau* – see *Golder Case*) → this process may create a meaning different from the text
        - Even though the *chapeau* is not an operative part of the treaty, it is contentiously negotiated b/c of its prospects in the interpretation process
        - Annex and Side Agreements – negotiated concurrently to the treaty itself or made as a package w/the treaty – can be evidence of specific purpose for the meaning of certain words
        - Instrument made by one party and accepted by other parties – a party may suggest the meaning of certain words and ask the other partners to accept these terms although they are not directly found in the treaty itself (i.e., Biodiversity Convention of 1992 – U.S., though not a party, put forth a meaning; other state would have to publicly declare their disagreement)
        - Context can be very narrow – language in the English text of para. 2 is definitive ("context shall comprise"); although para. 3 broadens the scope of context: can look at subsequent agreements, including those entered into by the executive branch alone; subsequent practice in application of the treaty (but this must include elements of consent by other parties, even in cases of omission); and relevant rules of international law applicable to the parties (including rules external to the treaty, such as customary international law or a law from another treaty)
    - Special meaning should be given to a term if the parties intended it – Article 31 does not require that the intention of the parties be primary (reflects old system in which parties may have divergent intentions and these intentions were often kept away from the public and are hard to discover)
    - Different approaches to interpretation: literal interpretation, purposive interpretation (individual purpose of the provision) and teleological interpretation (overall purpose of the whole enterprise)
- Article 32 – Supplementary means of interpretation
    - Recourse may be had to supplementary means of interpretation, including the preparatory work (*traveaux préparatoire*) of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31:
        - (a) leaves the meaning ambiguous or obscure; or
        - (b) leads to a result which is manifestly absurd or unreasonable
- Interpretation of Article 32
    - Do after-the-fact circumstances, such as the ratification process, affect the meaning of the text?
        - In response to this problem in interpretation, Congress approved fast-track legislation that would prevent Congress from making substantial changes to trade-treaty negotiations → should this process be considered in the later interpretation of these treaties?
    - Can only look at the supplementary material when Article 31 leaves the ambiguous or obscure or the result is manifestly absurd or unreasonable
    - Can also look to these things to confirm the meaning of the treaty terms reached through Article 31
        - What if the supplemental material does not support the initial conclusion?
        - This is the result of compromise b/t the negotiating parties; some states have a tradition of using legislative materials domestically whereas other do not

2. Approach of domestic courts
- ***Air France v. Saks*** (U.S. 1985) – interpretation of "accident" vs. "occurrence"
    - Supreme Court's method of interpretation – treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties; however, the analysis must begin w/the text of the treaty and the context in which the written words are used
        - First, reviewed the language of the relevant article w/those of similar consequence (i.e., liability for personal injury and liability for lost baggage) and ascribed an intent to the choice of words

(used cognates in American torts jurisprudence to find the relevant rule)

- Second, looked to the French legal meaning of the words, not to apply French law, but to give the specific words of the treaty a meaning consistent w/the shared expectations of the parties
- Third, looked at the traveaux préparatoires to resolve ambiguities in the text
- Fourth, looked at the interpretation given to the terms in litigation by "sister signatories"

- **Treaties are interpreted differently in different fora** (i.e., national courts vs. international bodies); the arguments are made by those representing state interests and decided by those who are supposedly neutral
  - U.S. Supreme Court is not in the same situation as other international tribunals, such as the ECHR, in approaching the interpretation of an international agreement
    - Supreme Court is a national institution whose goal is to uphold the project of the U.S.; it will be particularly interested in determining what the U.S. intended in entering the agreement → often, the Supreme Court has interpreted a treaty in conjunction w/what the U.S. government says so as not to undermine the executive
    - Supreme Court has *stare decisis* concerns absent for an international arbitrator
    - Supreme Court will rely on preparatory work w/ease; reflects U.S. domestic practice
    - Supreme Court would also approach the language of the treaty differently than an international tribunal; as in the this case, the Court gave a little bit of deference to the English translation, though an international tribunal would *only* rely on the authoritative text (French in this case)

3. Approaches of International Tribunals
   - ***The Golder Case*** (European Court of Human Rights)
     - Majority: Recognizes that the Vienna Convention Articles 31 and 33 enunciate generally accepted principles of international law; uses the *preamble* of the European Convention on Human Rights to come to the conclusion that "rule of law" was intended to inform the *object* or *purpose* of the overall convention even though the relevant provisions do not mention the right of access to courts
     - Dissent: finds that looking at the *preamble* of the convention to determine the existence of a right is faulty; the assumption of the majority is that the right to access is a necessary predicate to the other rights actually enumerated in the relevant provision; this logic is faulty
     - What is at stake b/t the different modes of interpretation? – tension b/t trying to move the treaty forward as a whole AND the conservative view of following the actual intent of the instrument; b/c this is a human rights treaty and the court is a human rights court, there is a push to interpret the treaty in a way that aggrandizes human rights mechanisms, not necessarily the court itself though
   - ***The Shrimp/Turtle Case*** (WTO Appellate Body)
     - State Dept. was concerned that the application of the legislation would violate GATT, but was forced to enact the legislation b/c of domestic pressures (but did so poorly)
     - Purpose of the WTO DSB is to support international trade – the Panel approached the case w/a teleological interpretation of the entire treaty (Art. XX interpreted in the context of the GATT – "so as not to hinder trade"); the AB did not approach the case this way (interpreted Art. XX(g) in light of the *chapeau* but not in the context of the GATT as a whole) → gives the WTO more legitimacy

D Breach of Treaty and State Responsibility

1. State Responsibility – legal consequences of international wrongdoing – see Akehurst's pp. 254-72
   - Law of State Responsibility is concerned w/the determination of whether there is a wrongful act for which the wrongdoing state is to be held responsible, what the legal consequences are (i.e., restoration of the *status quo ante* or payment of compensation) and how such international responsibility may be implemented (i.e., through countermeasures such as reprisals or retortion)
   - Vienna Convention has some rules on breach; in general, those rules dealing w/material breach contemplates retaliatory measures in terms of termination or suspension; examples of this are in the *Hungary/Czechoslovakia Case*

- If the treaty mentions rules governing breach, those rules are substantively controlling; called a self-contained regime (does not depend on other rules of international law to work itself out); the treaty may set up a dispute settlement system (i.e., WTO DSU); there are no outside remedies
- International Rules on State Responsibility – customary international rules that determine obligations and possible breaches; ILC has attempted to codify these rules (these are a good dissertation of current practices, though there are a few areas of debate)
  - Applies to a breach of customary international law in addition to breach of a treaty
  - The Draft Articles make a distinction b/t primary rules (rules about conduct) and rules for the primary rules (a.k.a. secondary rules), such as rules on state responsibility

2. Vienna Convention
   - *See* notes under Section IV:A for Articles 61-62, concerning acceptable reasons for breach
   - Article 70 – Consequences of the termination of a treaty – "legal" termination of a treaty (either under the treaty's provisions or in accordance w/the Convention) provides that the parties are released from any further obligations and does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination (applies to multilateral treaties as well)
   - Article 72 – Consequences of the suspension of the operation of a treaty – "legal" suspension of a treaty (either under the treaty's provisions or in accordance w/the Convention) provides that the relevant parties are released from the obligation to perform the treaty in their mutual relations during the period of the suspension and does not otherwise affect the legal relations b/t the parties established by the treaty
     - During suspension, parties must refrain from acts tending to obstruct the resumption of the treaty
   - Article 73 – Cases of State succession, State responsibility and outbreak of hostilities – provisions of the Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities b/t States
3. International Law Commission, Draft Articles
   - Part I – intended to give guidance as to which grounds and under which circumstances a state may be considered to have committed an internationally wrongful act
     - Chapter 1: defines some of the **basic principles** – every internationally wrongful act entails responsibility on the part of the state committing it (Article 1), every international act consists of two elements, a subjective one and an objective one (Article 2) and the characterization of an act of State as internationally wrongful is governed by international law and not internal law (Articles 3 and 32)
     - Chapter 2: 'Act of the State' under international law – **subjective element** – defines the attribution of action to the state; there has to be a determinable point where the state is no longer responsible for arguably private acts (i.e., acts by members of an armed rebellion – under international law, the government is responsible for rebel groups, but if the rebels are not in power, there is no liability)
     - Chapter 3: Breach of an international obligation – **objective element** – a breach is an act that is not in conformity w/what is required of the State by its obligation, regardless of its character (Article 12)
     - Chapter 4: discusses the responsibility of a State in connection w/the internationally wrongful act of another State for aiding, controlling, or coercing the internationally wrongful act
     - Chapter 5: circumstances when a wrongful act is not wrongful under international law (Articles 20-27 – **excusability**), i.e., consent, self-defense, countermeasures, *force majeure*, distress, necessity, compliance w/peremptory norms and consequences of invoking acceptable circumstance (see *Rainbow Warrior Case* for interpretations of some of the terms)
   - Part II – deals w/the content, forms and degrees of state responsibility covering the legal consequences of an internationally wrongful act has been committed
     - Chapter 1: describes the legal consequences, continued duty of performance, duty of cessation and non-repetition, duty of reparations, the irrelevance of internal law and the scope of international obligations vis-à-vis affected states (Articles 28-36)
     - Chapter 2: describes the entitlement of the injured state to seek full reparation for injury in the form of restitution (must return the state of affairs to the status quo ante, unless restitution is impossible or

if it would involve a burden not in proportion to the benefit to the state), compensation and satisfaction (apologies are adequate forms of redress in international law), either singly or in combination (Articles 35-37)

- Chapter 3 – deals w/serious breaches of peremptory norms of international law (wrongs against all members of the international community); gives rights to third parties cause by a state's internationally wrongful act; but there is a concern for *actio popularis* (ICJ has never upheld this concept and states resist enforcement)

- Part III – deals w/the implementation of the international responsibility of a State through invocation by the injured State and through formal claim (Chapter 1)
  - Chapter 2: describes the law concerning countermeasures: object and limitations; obligations not affected by countermeasures; proportionality, conditions for resorting to countermeasures; termination; and measures taken by States other than the injured State (Article 49-54)

4. ***Rainbow Warrior Case*** (Arbitration 1990) – Sir Kenneth Keith
   - Facts: Greenpeace was protesting French nuclear testing in the Pacific; two French agents sabotaged their vessel, the Rainbow Warrior, off the coast of New Zealand and killed two individuals (one Dutch national); the French nationals pleaded guilty and were consigned, by treaty, to a French base on an island in the Pacific for a period of *no less* than three years; both were subsequently repatriated for medical reasons, but w/o the approval of New Zealand
   - Decision: reviewed principles in the ILC Draft Articles that might be relevant to the present case:
     - ***Force majeure*** – compliance must be made impossible, not merely more difficult or burdensome
     - **Distress** – choice between departure from an international obligation and a serious threat to the life or physical integrity of a State organ or of persons entrusted to its care
     - **Necessity** –concerned w/departure from international obligations on the ground of vital State interests
   - Remedy: New Zealand sought, essentially, an order for the cessation of wrongful conduct; such an order was no longer appropriate now that France's obligations had come to an end (3-year period) – Sir Keith dissented; found that satisfaction would be appropriate since monetary damages were not sought
   - Significance: arbitrators saw the intersection b/t the Vienna Convention on Treaties and the ILC Draft Articles on State Responsibility; the latter includes issues such as necessity, duress, etc. that are not found in the Vienna Convention
5. ***The Gabcikovo-Nagymaros Case*** (Hungary/Slovakia – ICJ)
   - Facts: Hungary breached an agreement w/Czechoslovakia (Slovakia) to concurrently build two dams along the Danube; after the fall of communism, Hungary acquiesced to environmentalist concerns and stopped working on their dam; Slovakia claimed that this was a repudiation of the treaty; Slovakia initiated a plan, Variant C; Hungary claimed that there was no basis for Slovakia to do this w/the treaty, especially since it had repudiated the treaty before Slovakia took action
   - Internationally Wrongful Act? – ICJ determined that Hungary had illegally terminated the treaty; but Czechoslovakia committed an internationally wrongful act by putting Variant C into operation (was not applying the 1977 Treaty, on the contrary, this violated certain of its express provisions); Czechoslovakia claimed that its plan was acceptable as a countermeasure justified by the prior illegal action of Hungary and b/c it was a proximate application of the purpose of the treaty; ICJ determined that Czechoslovakia's actions were not a legal countermeasure b/c it was not proportional to the original illegal act
   - Legal effect of Hungary's notice: 1977 Treaty does not contain any provision regarding its termination; the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention:
     - **Necessity** – Hungary claimed that there was an environmental risk (in 1977, the environmental studies were not sophisticated enough to show effects on the environment); ICJ determined that Hungary's concerns did not rise to the level that would amount to necessity
     - **Impossibility of performance** (defined in the Vienna Convention) – but this must be predicated upon physical impossibility, not political impossibility

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- **Fundamental change of circumstances** – change of government from communism to democracy required a change in regional relationships (Soviet control treated these countries as states w/in a coherent system); the ICJ determined that the treaty must be tenable even after political change
- Found that the notification of termination by Hungary was premature

- Remedy: even though both parties acted illegally and despite that Hungary said they terminated the treaty, the treaty is still in effect (it still defines the basic legal structure of relations b/t the parties concerning the Danube) → This is important for keeping one state from having control over the remedy by unilateral action; also makes sense from a practical standpoint

6. ***Air Services Arbitration Case***
   - Illustrates one way by which international law may be enforced, by **self-help**; arbitral tribunal allowed reciprocity in terminating actions but w/a caveat so that parties would think twice before acting
   - Issue: whether, in customary international law, the U.S. was entitled to take unilateral action immediately prior to the signing of the *compromise*
   - Decision: if a State breaches an international obligation, the affected State is entitled, w/in the limits set by the general rules of international law *pertaining to the use of armed force*, to affirm its rights through countermeasures, which must be proportional to the alleged breach; judging the "proportionality" is not an easy task and can at best be accomplished by approximation
     - When Parties enter into negotiations, they are under a general duty not to aggravate the dispute – general duty emanating from the principle of good faith; however, countermeasures are a "wager on the wisdom, not on the weakness of the other Party" → it is impossible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations
   - Law of Provisional Measures:
     - ***Naulilaa Case*** – the *locus classicus* on the **law of reprisals** – the object of a reprisal must be "to effect reparation from the offending state for the offence or a return to legality by the avoidance of further offences" and is only lawful when preceded by an "unsatisfactory demand" for reparation
       - This latter requirement is not uniformly supported by state practice or writers and may not be appropriate or possible in some circumstances
     - Countermeasures involving the use of armed force are prohibited by virtue of UN Charter Article 2(4); the use of economic or political force against the delinquent state is still permitted, as are countermeasures against a State's nationals (e.g. by their arbitrary expulsion)

E Applying the Law of Treaties: Human Rights Treaties

1. Preliminary: The Western Concept of Human Rights
   - Human rights law is increasingly challenging the foreign-office model to international law:
     - Increasing trans-nationalism w/increasing number of national actors working across boundaries w/national actors of other countries, growing numbers of international institutions that are adding to the complexity of interactions, and the breaking down of traditional methods of interstate bargaining and national-specific relevance of issues → all are contributing to this decline
   - Rationale for making human rights treaties is not solely based on traditional norms (it is not in the interest of the State to take another State to the ICJ based on a bilateral human rights treaties)
     - The human rights movement aims to internalize human rights treaties into domestic law or to use other States' courts (i.e., ATCA); the major push has been to set up an international institution to deal w/human rights issues; the first example of this was the Human Rights Committee (established by the ICCPR – distinct from the UN Human Rights Commission)
2. The ICCPR and the UN Human Rights Committee
   - *See* International Covenant on Civil and Political Rights 1966
   - *See* First Optional Protocol to the ICCPR

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- **Overview of the ICCPR Committee** – Articles 28-45 of the Covenant and in its First Optional Protocol
  - Three dominant functions of the Committee:
    - Article 40 requires States parties to submit reports for consideration on measures taken to give effect to the undertakings of the Covenant and on the progress made in the enjoyment of rights declared by the Covenant
    - The same article instructs the Committee to transmit "general comments" on the meaning of the terms of the ICCPR to these states parties
    - **Optional Protocol** – distinct agreement requiring separate ratification; authorizes the Committee to receive and consider "communications" from individuals claiming to be victims of violations by states parties of the Covenant (there was already a clause that allowed states to lodge complaints against other states, but this has yet to be utilized); the state must be a party to the ICCPR and the First Optional Protocol (the U.S. is a party to the former but not the latter)
  - Membership:
    - Articles 28-31 – provide crucial information about the Committee's membership; 18 members are to have "high moral character and recognized competence in the field of human rights" including "some persons having legal experience"
    - Article 28(3) – all members are to be "elected and shall serve in their personal capacity"; compelling inference is that Committee members are to act independently of the governments of their states, not under orders from their government
  - Article 39(2) – decisions of the Committee should formally be by majority vote; in fact, all decisions to date have been taken by consensus, although any member could demand a vote on any issue
- ***Lovelace v. Canada*** (1981)
  - Example of the ability of an individual to bring a case against a state for violation of the ICCRP under the First Optional Protocol; Lovelace married a non-Native and thereby lost her status as a Native according to Canadian law (the marriage occurred before the ICCPR was enacted, so it may not have applied in the sense of gender discrimination); she subsequently divorced and requested to have access to her tribe (a right granted to Natives in Canada, though the tribe did not want her to rejoin)
  - ICCPR Article 27 – guarantees that persons belonging to recognized minority groups shall not be denied the right, in community w/the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language
  - Communication: finds that the right of π to access to her native culture and language "in community w/the other members" of her group has in fact been interfered w/, b/c there is no place outside the Tobique Reserve where such a community exists; Article 27 should be consistent w/other articles, such as the right to residence
    - By establishing a right, the Committee avoided a situation in which Canada could have circumscribed the right in relation to others (i.e., *Abdulaziz v. UK* – UK redrafted its law to exclude all immigrants rather than extend a right to female immigrants)
    - Article 1 (the right of self determination) – suggests that the tribe could determine the status of women who leave the tribe; however, power to complain under the Optional Protocol is w/the individual; there is no individual right under Article 1 → this procedural aspect conflicts w/the right of a group to determine its own membership

3. Reservations to Human Rights Treaties
   - Vienna Convention Section II: Reservations (should apply regardless of the nature of the treaty)
     - Article 19 – **Formulation of reservations** – a State may, when *consenting* to a treaty, formulate a reservation unless: (a) prohibited by the treaty; (b) the reservation does not fall w/in the specified, acceptable reservations; or (c) the reservation is incompatible w/the object and purpose of the treaty
     - Article 20 – **Acceptance of and objection to reservations**:
       - A reservation expressly authorized by a treaty does not require any subsequent acceptance
       - A reservation requires acceptance by all the parties when it appears from the limited number of

the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety b/t all the parties is an essential condition of consent to be bound by the treaty

- When a treaty is a constituent instrument of an international organization a reservation requires the acceptance of the competent organ of that organization
- In all other cases: **(a) acceptance** by another State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force; **(b)** an **objection** by another contracting State to a reservation does not preclude the entry into force of the treaty as b/t the objecting and reserving States unless a contrary intention is *definitely* expressed; **(c)** an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation
- A reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later

- Article 21 – **Legal effects of reservations and of objections**:
  - **Opposability –** a reservation established w/regard to another party (a) modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party
  - Reservations do not modify the provisions of the treaty for the other parties to the treaty
  - When a State objecting to a reservation has not opposed the entry into force of the treaty b/t itself and the reserving State, the provisions to which the reservation relates do not apply as b/t the two States to the extent of the reservation

- Note: many treaties exclude the possibility of reservations; sometimes this is a reflection of compromise (represents a deal); if reservations are allowed, a treaty can stipulate criteria for reservations; in such circumstances, it is not permissible to lodge objections since the treaty-outlined the procedure
- ***Reservations to the Genocide Convention*** (ICJ – Advisory Opinion)
  - Issues: can a reserving State be regarded as being a party to the Genocide Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
    - If the answer is in the affirmative, what is the effect of the reservation as b/t the reserving State and: (a) the parties which object to the reservation; or (b) those which accept it?
    - What would be the legal effect if an objection to a reservation is made: (a) by a signatory which has not yet ratified; or (b) by a State entitled to sign or accede but which has not yet done so?
  - Recognizes a need for flexibility in the operation of multilateral conventions – an understanding was reached w/in the General Assembly on the faculty to make reservations to the Genocide Convention; it is permitted to conclude that States becoming parties to the Convention gave their assent thereto
    - The object and purpose of the Convention limit both the freedom of making reservations and that of objecting to them (as seen by looking at the general language in the Preamble and the desire to have as many states as possible become parties to the Convention)
    - However, on account of the abstract character of the issue, the ICJ cannot give an absolute answer; the appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case
    - Effect of reservations vis-à-vis objecting states and assenting states could be anything
    - Objections to reservations have no effect until the objecting party ratifies the Convention
  - Note: **the states themselves will determine if a reservation is legitimate**
- U.S. Reservations to the ICCPR – see document online
- Human Rights Committee, General Comment #24 on Reservations
  - Tackles the issue of the compatibility of reservations and human rights treaties – states that, b/c of the special character of a human rights treaty, the compatibility of a reservation w/the object and purpose

of the Covenant must be established objectively, by reference to legal principles, and that the Committee is particularly well placed to perform this task

- The Committee's role under the Covenant necessarily entails interpreting it and developing its jurisprudence; accordingly, a reservation that rejects the Committee's competence would also be contrary to the object and purpose of that treaty
- The absence of a prohibition on reservations does not mean that any reservation is permitted; the provisions of the Vienna Convention, specifically on the role of State objections in relation to reservations, are inappropriate to address the problem of reservations to human rights treaties, which concern the endowment of individuals w/rights; the principle of inter-State reciprocity has limited place; this explains why States seldom have a legal interest in or need to object
- Reservations that offend peremptory norms would not be compatible w/the object and purpose of the Covenant; accordingly, provisions that represent customary international law (especially when they have the character of peremptory norms) may not be the subject of reservations
- The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party; rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party w/o benefit of the reservation

- U.S. and UK Responses to the General Comment
  - Role of the Committee – disagrees w/the Committee's position that it has absolute right to interpretation and formulation of jurisprudence
  - Acceptability of reservations – supports that a state cannot attempt to exempt itself from a peremptory norm of international law by making a reservation; it is not clear that a state cannot choose to exclude one means of enforcement of particular norms; also, a liberal regime on reservations was intended
  - **Effect of invalidity of reservations** – disagrees w/the Committee's last statement regarding the effect of reservations; Vienna Convention provides, as a consequence of reservations and objections, two possibilities: (i) the remainder of the treaty comes into force b/t the parties in question or (ii) the treaty does not come into force at all b/t these parties; in accordance w/Article 20.4(c), the choice is left to the objecting party; the Convention does not contemplate that the full treaty might come into force for the reserving State
- Comment of Judge Rosalyn Higgins
  - How is cultural and religious diversity to be respected if universal human-rights standards are set? → the International Covenants were adopted w/general approval; and states of all the varying political and religious systems have had a free choice as to whether to become a party to the Covenants
    - If particular elements in the Covenant were really to be regarded as incompatible w/a profound religious tent or political point of departure, then the correct course of action was to enter a reservation as to those elements; however, reservations rarely go to these rather important points of religious and political philosophy
    - If it is not done, then sensitivity to political and cultural diversity does not require that a state be regarded as exempted from what it has undertaken

4. Derogations in Human Rights Treaties
   - ***Brogan v. UK*** (ECHR 1988) – Margin of Appreciation
     - Facts: individuals arrested and detained by British police for suspicion of participating in terrorism in Northern Ireland brought suit before the ECHR arguing that the detention for a period of days w/o being told of possible crimes and being brought before a judge violated their right to liberty as prescribed by the European Convention on Human Rights Articles 5-1(c) and 5-3
     - Decision: found no violation of Article 5-1(c) b/c nothing in the record indicates that the police acted in bad faith; found a violation of Article 5-3 b/c the detention was for an unreasonable period and the detained were not "promptly" brought before a court
     - Dissent: suggests that there was no breach of Art. 5-3, but finds that this view can be maintained only in so far as such exceptional conditions prevail in Northern Ireland

- Issue: **Article 15 Margin of Appreciation (Derogations)**
  - Some dissenters argued that that Article 5 was breached b/c the Convention does not afford a state any margin of appreciation; if the concept of a margin of appreciation were to be read into Article 5, it would subject the provision to executive policy
  - Others argued that Court has consistently recognized that States must, in assessing the compatibility of their laws and practices w/the requirements of the Convention, be permitted a margin of appreciation and that inherent in the whole Convention is the search for a fair balance b/t the demands of the general interest of the community and the protection of the individual's fundamental rights → "the right to liberty and security of person is an important right, but it does not belong to that small nucleus of rights from which no derogation is permitted"

- The Human Rights Acts 1998 – Order 2001
  - UK gave notice that they would be derogating from the European Convention on Human Rights Article 5 in reaction to the *Brogan* decision and the enactment of an anti-terrorism law after 9-11
- Notes: Human Rights community has not accepted the margin of appreciation standard as acceptable; why should a regional grouping such as the European Convention, which is fairly homogenous, do so when global conventions do not allow for the margin of appreciation?
  - Global margin would be very large compared to a smaller margin in developed nations; there is a strong pull w/in the European Convention to adhere to the agreement (internally from public interest groups and regionally – i.e., Turkey's violations are outside the margin)
  - Human Rights Committee does not issue judgments; the dominant view is that these *are* legally binding or effective; governments often comply w/them, but less so than the European Court
  - ICCPR provides for derogations as well
  - The U.S. has not filed notice of derogation; possible explanations include the fact that the U.S. does not want to concede that it has violated the ICCPR; this may reflect interpretation given by the dissenters; also, the ICCPR is not self-executing in the U.S. so there is no reason to file notice

5. Interpreting Human Rights Instruments
   - ***Toonen v. Australia*** (UNHRC 1994)
     - Facts: Tasmanian challenged Tasmanian criminal laws that criminalized same-sex sexual intercourse under the ICCPR Article 17 and the Optional Protocol; Tasmania claimed that there were public health (HIV/AIDS) and moral grounds for the laws, even though they were not enforced; Australia offered evidence why the law should not stand!
     - Issues: whether the complainant was subjected to unlawful or arbitrary interference w/his privacy, contrary to Article 17(1), and whether he was discriminated against in his right to equal protection of the law, contrary to Article 26
     - Decision: Committee interprets the requirement of reasonableness to imply that any interference w/privacy must be proportional to the end sought and be necessary in the circumstances of any given case; the Committee cannot accept either that moral issues are exclusively a matter of domestic concern, as this would open the door to w/drawing from the Committee's scrutiny a potentially large number of statutes interfering w/privacy; the Committee concludes that the provisions do not meet the "reasonableness" test and that they arbitrarily interfere w/rights under Article 17(1)
     - Significant side note: Australia sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of Articles 26 or 2(1) of the Covenant → the Committee noted, in its view, the reference to "sex" is to be taken as including sexual orientation
     - Significance:
       - **Two Level Game** – Australia could not force Tasmania to change its laws to reflect the federal backdrop; Toonen had exhausted all local remedies; Australia used the international system to force change in Tasmania by getting a decision against the federal government
       - The interpretation given to the treaty is not stuck in the time period that it was negotiated and ratified; the interpretation given was relevant to the its context (Australia), but the Committee did

not look at the context of global interpretation of the provision; use of "arbitrary" as a means of finding the Tasmanian law unlawful was tailored for this context and did not to directly address the actual interpretation of the word "privacy" → the international obligation is against Australia

- ***Bankovic v. Belgium et al.*** (ECHR 2001)
  - Facts: Serb families brought suit against members of NATO under the European Convention, alleging that the death of their relatives, victims in the Kosovo bombing campaign, was contrary to the Convention's provisions regarding the rights to life, effective remedy and freedom of expression
  - Issue: whether the applicants and their deceased relatives came w/in the "jurisdiction" of the respondent States w/in the meaning of Article 1 of the Convention
  - Decision: Article 1 of the Convention: "The High Contracting Parties shall secure to everyone w/in their jurisdiction the rights and freedoms defined in Section I of [the] Convention"
    - Under applicable rules of interpretation (Vienna Convention), finds that, while international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States → therefore, Article 1 must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case
    - Finds support for this conclusion in State practice in the application of the Convention since ratification and in the *travaux préparatoire*
    - Could the acts be considered extra-territorial and accommodate the notion of "jurisdiction" – does not find that Article 1 can accommodate a definition of "jurisdiction" that includes areas under "effective control" (as used in the Turkey case concerning Northern Cyprus); must consider that the purpose of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role
  - Comments by Hurst Hannum – suggests that the decision should be understood in reference to the events of 9-11 and the war on terrorism; also, notes that the decision proscribes an accessible, legal forum for innocent victims of extra-territorial use of force
  - Comments by Tom Farer – suggests that human rights tribunals can interpret their operating conventions in such a way as to reach results that further human rights goals (i.e., Inter-American Court's decision to include Cuba w/in its jurisdiction long after Cuba ended its association)
- ***Refah Partisi v. Turkey***
  - Facts: complaint lodged by the Welfare Party (Refah) against Turkey for the dissolution of the Refah by the Turkish Constitutional Court and the suspension of political rights based on violations of Turkey's principles of secularism, which were enshrined in the Constitution; alleged that this violated Article 11 of the Convention
    - Articles 11(1) – "everyone has the right to freedom of peaceful assembly and to freedom of association…"; and 11(2) – "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…"
  - Decision: found that the dissolution amounted to an interference w/the rights prescribed in 11(1), but, considering the Constitutional Court's finding that Refah's plans were incompatible w/the concept of a "democratic society" and that the opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants may reasonably be considered to have met a "pressing social need" as defined in 11(2)
  - Notes: Islam and European values – conflict?

Unit V: Limits of National Criminal Jurisdiction

A Does International Law Set Limits on the Exercise of Criminal Jurisdiction?

1. Framework for national jurisdiction:
   - **Jurisdiction** refers to the powers exercised by a state over persons, property or events; it is an ambiguous term and can refer to: 1) legislative or prescriptive jurisdiction; 2) judicial or adjudicative jurisdiction; and 3) administrative or enforcement jurisdiction
   - Criminal jurisdiction of national courts – international law does not seem to impose any restrictions on jurisdiction on courts in *civil* cases; it restricts jurisdiction only in criminal cases; the bases for criminal jurisdiction most frequently invoked by states include:
     - **Territorial principle**
       - Every state claims jurisdiction over crimes committed in its own territory, even by foreigners; if the criminal act begins in one state and is completed in another, both states may claim jurisdiction based on *subjective* territorial principle (place where the act or omission itself occurs) and *objective* territorial principle – or the effects doctrine – (place where the injurious effect occurs)
       - An interesting example of this dynamic is in American anti-trust jurisdiction: other countries have expressed concern w/the professed ability of U.S. courts to request documents relating to anti-trust litigation; some have passed "blocking legislation" that makes it a crime to cooperate w/the U.S. courts, which provides the Δ in U.S. court to plead "foreign sovereign compulsion"
     - **Nationality principle**
       - It is universally accepted that a state may prosecute its nationals for crimes committed anywhere in the world – *active* nationality principle (i.e., the UK limits jurisdiction to certain crimes and the U.S. will only try a person for violation of U.S. laws)
       - Some states apply a *passive* nationality principle, allowing jurisdiction for crimes committed abroad by an alien and affecting a national; the U.S. has begun applying this principle in cases of terrorism; there are two arguments against this method: 1) domestic courts may be prejudiced against foreign nationals (although the reverse is why the practice developed in the first place); and 2) a foreign national could be unexpectedly exposed to jurisdiction
     - **Protective principle**
       - Protective of the state's interests – this allows a state to punish acts prejudicial to its security, even when they are committed by foreigners abroad; this principle must not be read too broadly and should not be confused w/diplomatic protection, which refers the right of a state to intervene diplomatically or to raise international claims on behalf of its nationals against another state; it is most often applied in cases of espionage, counterfeiting and terrorism
     - **Universality principle**
       - Some states claim jurisdiction over all crimes, including those committed by foreigners abroad; this form of jurisdiction developed under the rubric of crimes committed on the high seas (piracy)
       - English-speaking countries consider wide parameters to such jurisdiction as normally forbidden by international law; most countries accept that universality is less objectionable when it is applied to acts that are regarded as crimes in all countries or are a part of customary international law, such as war crimes, piracy, hijacking and various forms of international terrorism
       - Conventional law: additional offenses may be subject to universal jurisdiction on the basis of international agreements, but such agreements only apply b/t the states that are parties to them, unless it can be shown that customary law has also come to accept these offenses
       - Human rights violations – there is a recent tendency in some states to claim universal jurisdiction over such crimes; one must be clear in the distinction b/t criminal law and civil law jurisdiction

- Conflicts of jurisdiction (Conflict of Laws) – concurrent jurisdiction poses problems for determining where a criminal should be prosecuted; a conviction or acquittal in a foreign country is treated as a bar to a subsequent prosecution in some countries, but not in all; international law is silent on this point
- **Extradition** – an example of cooperation b/t states in civil, criminal and administrative matters based upon multi- and bilateral treaties; there is no duty to extradite in the absence of a treaty (sometimes said that the right of a state to grant asylum ends where the demands of extradition begins); on the other hand, there is no rule of international law which prevents a state from extraditing in the absence of a treaty
  - *Soering v. UK* (ECHR) – found that extradition of a German national to Virginia to face death row violated Art. 3 of the European Convention of Human Rights based on the conditions of death row in the U.S., but found that he could be tried in Germany where he would not face the death penalty; the U.S. accepted a condition of not seeking the death penalty in order to gain garner extradition
  - SOFAs – U.S. agreements w/states where military bases are stationed that provide for American law to be applicable to offenses by American soldiers; these states are increasingly requesting that certain offenses be tried in domestic courts or are requiring that the U.S. do not use the death penalty
- Different approaches by various states:
  - In civil jurisdiction, European states have been more categorical in supporting the jurisdiction of a particular state; the U.S. has supported a balancing approach
  - In criminal jurisdiction, the U.S. has been more categorical; however, in the *Alvarez-Machain* case, we see that the balancing approach does play some role in criminal cases

2. ***France v. Turkey – The "Lotus"*** (PCIJ 1927)
   - Facts: French and Turkish ships collide on the high seas; France would have had jurisdiction on the basis that it was its ship that the accused was on, but Turkey asserted that it would have concurrent jurisdiction on the basis of the events; Turkey had recently joined the ranks of "modern states"
   - Issues: 1) the collision took place on the high seas: the territorial jurisdiction of any State other than France and Turkey therefore does not enter into account; 2) the violation of the principles of international law concern the fact of the Turkish Courts exercising criminal jurisdiction; 3) it is therefore a case of prosecution for involuntary manslaughter; and 4) the prosecution was instituted in pursuance of Turkish legislation and may conflict w/an agreement w/France
   - Decision:
     - If a guilty act committed on the high seas produces effects on a vessel flying another flag or in foreign territory, the principle must be applied as if the territories of two different States were concerned; the conclusion must be drawn that there is no rule of international law prohibiting the State to which the *affected* flagship belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the $\Delta \rightarrow$ this could only be overcome if it were shown that there was a rule of customary international law which established the exclusive jurisdiction of the other State
     - Treaty stated that "all questions of jurisdiction shall… be decided in accordance w/the principles of international law" – this creates a presumption in favor of Turkey based on the principle established above; though France brought up three theories to counter this presumption, the court concludes that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively w/in the jurisdiction of the offending flagships' State
   - Note: it is no longer kosher to consider a ship to be an extension of territorial jurisdiction; Treaties on the Law of the Sea have determined that jurisdiction resides w/the state whose flag is flown on the ship

B Jurisdiction to Adjudicate and to Enforce Criminal Law: Issues of Extraterritoriality

1. *Male Captus, Ben Detentus* – U.S. Law Enforcement Abroad
   - ***Ker v. Illinois*** (U.S. 1886) – *male captus, bene detentus*
     - Facts: Kerr was kidnapped in Peru by a private individual (Pinkerton agent hired by the bank) and brought to Illinois to stand trial for larceny and embezzlement
     - Decision: held that a fugitive from the U.S. could be captured w/in a foreign country on terms outside

the authority of an extradition treaty and have no recourse on that treaty; acknowledged that the Δ and Peru would have actionable claims against the *agent* → concluded that the treaty, when it had not even been applied, gave no rights to an individual

- ***United States v. Rauscher*** (U.S. 1886)
  - Facts: Rauscher had been extradited from Britain, pursuant to an extradition treaty, on a charge of murder of a crew member on the high seas, but had subsequently been tried on a charge of assault and infliction of cruel and unusual punishment
  - Decision: held that the accused could not lawfully be tried for any offense other than the one for which he was extradited – **Doctrine of Specialty** → a treaty is the law of the land, and individuals can invoke a treaty's protections
  - Dissent: an issue that arises under the treaty b/t states is a matter for diplomatic concern; it is a matter entirely for adjustment b/t the two countries, and can in no way benefit the accused except through the instrumentality of the government that had been induced to give him up (would the offended state agree to take up the claim of an accused and risk alienating the other state? – no!)
- ***Frisbie v. Collins*** (U.S. 1952)
  - Facts: Δ challenged conviction, asserting that he had been kidnapped in Chicago by the Michigan police and taken to Michigan for trial in violation of the Federal Kidnapping Act, adopted since *Ker*
  - Decision: rejected that there were persuasive reasons to depart from the rule announced in *Ker*; nothing in the Constitution requires a court to permit a guilty person rightfully convicted to escape justice b/c he was brought to trial against his will; Federal Kidnapping Act cannot fairly be construed so as to bar a state from prosecuting persons wrongfully brought to it by its officers

2. The *Alvarez-Machain* Case
   - Facts:
     - Alvarez-Machain was taken by force from his home in Guadalajara, Mexico, by four men in civilian clothes identifying themselves as "security agents" and flown to El Paso, Texas, where he was met by agents of the U.S. DEA, immediately arrested, and given the Miranda warnings; he was accused in participating the torture and murder of a DEA agent
     - Mexico accused the U.S. Government of arranging the abduction of the Δ; the U.S. argued that, even if the Δ had been kidnapped, it was irrelevant to the ability of the courts to go forward w/the charges against him (*Ker-Frisbie* doctrine); however, Mexico filed several formal protests and demanded his return on the grounds that his abduction had violated Mexico's sovereignty; the U.S. countered this w/the testimony of a DEA agent who implicated the Mexican government in a deal to exchange the Δ for a Mexican national living in California
   - ***United States v. Alvarez-Machain*** (U.S. 1992)
     - Claims: Δ claimed that the prosecution violated the implied terms of a valid extradition treaty (lawyers determined that the nationality of the Δ was irrelevant); customary international law suggests that international abductions are "so clearly prohibited in international law" that there was no reason to include such a clause in the Treaty itself
       - U.S. argued that *Rauscher* is an "exception" to the *Ker* rule only when an extradition treaty is invoked and the terms of the treaty provide that its breach will limit the jurisdiction of a court
     - Decision (CJ. Rehnquist):
       - Court did not spend much time on the issue of consent by Mexico to the seizure of the Δ; instead, the Court focused on whether or not there was a violation of the Treaty
       - In construing a treaty must first look to its terms to determine its meaning → the Treaty says nothing about the obligations of the U.S. and Mexico to refrain from forcible abductions from the territory of the other, or the consequences if an abduction occurs; history of negotiation and practice under the Treaty also fails to show that such abductions constitute a violation
       - To infer from the Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice; general principles

of international law fail to persuade the Court that the Treaty should contain an implied term prohibiting international abductions

- Decision of whether Δ should be returned to Mexico is a matter for the Executive Branch; concludes that Δ's abduction was not in violation of the Extradition Treaty, and that the rule of *Ker v. Illinois* is fully applicable

- Dissent (J. Stevens):
  - Points out that this case is unique in that it involves the U.S.'s abduction of another country's citizen and involves a violation of the territorial integrity of that country, w/which this country has signed an extradition treaty
  - A fair reading of the treaty in light of our decision in *Rauscher* suggests that the Treaty was designed to cover the entire subject of extradition; the claim that the Treaty is not exclusive, but permits forcible governmental kidnapping, would transform its provisions into little more than verbiage; "the manifest scope and object of the treaty itself" (*Rauscher*) implies a mutual undertaking to respect the territorial integrity of the other contracting party
  - Applicable principles of international law suggest that international opinion condemns one Nation's violation of the territorial integrity of a friendly neighbor; majority opinion fails to differentiate b/t the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch, which unquestionably constitutes a flagrant violation of international law and constitutes a breach of treaty obligations → objection is that the government lacks power to seize since it had imposed a territorial limitation upon its own authority by entering into the Treaty
  - **Reciprocity concerns** (cites apartheid era South African Court of Appeals decision) → "courts throughout the civilized world" will be deeply disturbed by the Court's decision ; for every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character

- Dénouement in the District Court – determined that there was insufficient proof to reach the jury on the charges of murder, kidnapping, torture and aiding and abetting the cartel conspiracy
- Mexico-U.S. Agreement re Cross-Border Kidnapping
  - Press release from the Mexican Foreign Affairs Department – strict respect of international law, and in particular to the sovereignty of States is the only means to strengthen the cooperation necessary in the fight against international drug trafficking and the administration of justice
  - Letter from Pres. Clinton to Mexican counterpart – assured that the administration would not conduct, encourage or condone illegal trans-border abductions in Mexico
- Alvarez-Machain's Civil Suit
  - Claims: District Court dismissed portions of π's complaint but left many claims intact; 9th Circuit affirmed most of the District Court's ruling
    - Torture Victim Protection Act of 1991 is retroactive and held that π could pursue TVPA claims against his Mexican kidnappers (who were currently in the Federal Witness Protection Program)
    - π was entitled to equitable tolling of the SOL for his Federal Tort Claims Act claims
  - Decision: held in favor of π on claims against Δ Sosa for kidnapping and arbitrary detention under the ATCA – both state-sponsored, trans-border abductions and arbitrary detentions violated customary international law; determined damage award according to federal common law; and in favor of π's FTCA claims and remanded to the lower court
- Notes: Extradition practice in the U.S.
  - Supreme Court was concerned w/the interpretation of the Treaty b/c, if it self-executing, it would probably create a private right; by upholding the *Ker* Doctrine and *Rauscher* (Specialty Doctrine), the Court provided a means for the state to circumvent the implications of an extradition treaty
  - Rule of Non-Inquiry – part of U.S. practice that requires that Secretary of State *not* look into the law of the country requesting extradition

- Legal limit on extradition, rendition (transfer of a person w/the consent of the countries involved) and deportation should be based on the 1951 and 1967 Refugee Conventions (should not send individuals to countries where they may be subject to persecution) and the 1984 Convention against Torture

3. An English View: ***R v. Horseferry Road Magistrates' Court, Ex parte Bennett***
   - Facts: Δ, a citizen of New Zealand who was alleged to have committed criminal offences in England, was traced to South Africa by the English police and forcibly returned to England; there was no extradition treaty b/t the two countries; although special arrangements could be made for extradition, no such proceedings were taken; Δ claimed that he had been kidnapped from South Africa as a result of collusion b/t South African and British police
   - Held: where a Δ in a criminal matter has been brought back to the UK in disregard of available extradition process and in breach of international law *and* the laws of the state where the Δ had been found, the courts in the UK should *take cognizance* of those circumstances and, if satisfied that there had been a disregard of extradition procedures, *may* stay the prosecution as an abuse of process and order the release of the Δ
   - Rationale:
     - Must never allow it to be sufficient to consider that the end has justified the means; issues raised are basic to the whole concept of freedom in society and reciprocity in law enforcement
     - Distinguished *Ker* Doctrine as being an issue surrounding the ability of a Δ to acquire a constitutional defense to the jurisdiction of the U.S. and not the question whether the court can *refuse* jurisdiction
     - If the court is to have the power to interfere w/the prosecution in such circumstances, it must be b/c the judiciary accepts responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law → abuse of process
     - International law does not prescribe that release is required; national practice has established that national courts should take the circumstances of capture into consideration, especially when extradition is an option → "inherent judicial discretion" as to whether the case should be dismissed
4. ***U.S. v. Yunis*** (D.D.C. 1988)
   - Issue: whether the U.S. has the authority to extend its prosecutorial arm over crimes allegedly committed by a non-resident alien on foreign soil
   - Claims: Δ – based on the absence of any nexus to U.S. territory, Δ moved to dismiss the indictment, arguing that no U.S. federal court had jurisdiction to prosecute a foreign national for crimes committed in foreign airspace and on foreign soil; further claims that the presence of American nationals on board the aircraft is an insufficient basis for exercising jurisdiction under principles of international law
   - Jurisdiction over prosecution of foreign nationals under international law jurisdiction principles:
     - **Universal jurisdiction** – recognizes that certain offenses are so heinous and so widely condemned that any state, if it captures the offender, may prosecute and punish that person on behalf of the world community regardless of the nationality of the offender or victim or where the crime was committed
       - Crucial question is whether aircraft piracy and hostage taking can be called "heinous" → both offenses are subject to international agreements (Tokyo, Hague and Montreal Conventions) which demonstrate the international community's strong commitment to punish aircraft hijackers and hostage taking irrespective of where the crimes occur
     - **Passive personal jurisdiction** – most controversial of the sources of jurisdiction, but recognized as legitimate by the international community; moreover, it is explicitly approved of in asserting jurisdiction over those accused of crimes universally condemned (heinous crimes)
   - Jurisdiction under the Hostage Taking Act – Congress has the power to legislate overseas and to define and punish offenses committed on foreign soil (Const. Art. I, §8, Cl. 11 – power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations); plain language of the statute coupled w/its legislative history and purpose clearly support a finding that Congress intended to assert extraterritorial jurisdiction

- Jurisdiction under Destruction of Aircraft Act – extends jurisdiction over alleged saboteur who commits offences against aircraft located in foreign airspace and has no nexus to U.S. other than that he is later found in U.S.
    - When another government harbors international terrorists or is unable to enforce international law, it is left to the world community to respond and prosecute the alleged terrorists; as long as governments which step into this enforcement role act w/in the constraints imposed by international and domestic law, their efforts to combat terrorism should be praised

5. ***Hamdi v. Rumsfeld*** (4th Cir. 2003)
    - Issue: father of military detainee (American citizen captured as an alleged enemy combatant during military operations in Afghanistan) petitioned for writ of *habeas corpus*; government appealed order to produce material regarding detainee's status; detainee challenged constitutionality of his detention
    - Holding:
        - Detention was authorized by Congress
            - Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons"
        - Detainee did not have right under Geneva Convention to formal hearing to determine his status as enemy belligerent; finds that the Geneva Convention is not self-executing since it does not provide a private right of action
        - District Court's order impermissibly conflicted w/constitutional war-making powers:
            - Importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme → war powers only exist in Articles I and II of the Constitution; trespassing upon the exercise of the war-making powers by the judicial branch would be an infringement of the right to self-determination and self-governance in crisis
            - However, the duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict → suggests that the detention of American citizens must be subject to judicial review
            - **Enemy Combatant** – limits context to the detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied w/enemy forces; shows deference to the executive's determination of Hamdi as an enemy combatant and a "recognition that government has no more profound responsibility" than the protection of American citizens from further terrorist attacks → judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II;
        - Government's affidavit was sufficient to establish that detention conformed w/legitimate exercise of the President's war powers – makes a distinction b/t review of the affidavit under the executive's law enforcement powers and review under the executive's war powers; the latter requires a higher deference due to the separation of powers
        - Δ's citizenship rightfully entitles him to file petition to challenge detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant (*Quirin Principle*)

C Universal Jurisdiction in Criminal Law: Recent National Developments

1. United Nations Convention Against Torture (1984)
    - Article 1 – defines "torture" – any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, as punishment or as intimidation/coercion, when such pain or suffering is inflicted by or at the instigation of or w/the consent or acquiescence of a public official or other person acting in an official capacity; *does not include* pain/suffering arising from, inherent in or incidental to lawful sanctions
    - Article 2 – creates an obligation for each state-party to prevent acts of torture w/in their jurisdiction

- Article 3 – general obligation not to expel someone to a country where they may be subject to torture: has implications for states that send individuals to countries that utilize torture; does this make the U.S. government complicit (*by consent or acquiescence*) in sending an individual to a country that utilizes torture, such as Syria, and are they in violation of domestic criminal law?
- Article 4 – each state-party must criminalize torture w/in its jurisdiction

2. ***Regina v. Bartle, ex. p. Pinochet*** (House of Lords, 1999)
   - The law – power to extradite from the UK for an "extradition crime" is contained in the 1989 Extradition Act; as required by the Torture Convention, torture, wherever committed world-wide, was made criminal w/in UK domestic law
     - The most important requirement is that the conduct must constitute a crime under the law of both Spain and of the UK – **Double Criminality Principle**
       - Applicability to the case – principle cannot be satisfied if the it requires the conduct to be criminal under UK law *at the date it was committed*; if, on the other hand, the rule only requires the conduct to be criminal under UK law *at the date of extradition*, the rule is satisfied
       - For some crimes, such as murder, they were not extraditable b/c there was no basis of jurisdiction
   - Torture – Extraditable Offence
     - Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth; traditional subjects of international law are states, not people; the international community subsequently came to recognize that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity; **torture**, and various other crimes against humanity previously linked to war, is now recognized as an international crime on its own
     - *Jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed; offences *jus cogens* may be punished by any state b/c the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution"
     - Torture Convention – not intended to create an international crime that had not previously existed, but to provide an international system under which the international criminal could find no safe haven by introducing the principle of "either you extradite or you punish"
   - Immunity – rationalized from the Vienna Convention on Diplomatic Relations
     - *Ratione personae* – immunity enjoyed by a head of state in power is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state
     - *Ratione materiae* – under Article 39(2) the state official enjoys immunity in relation to his official acts done while he was an official; this limited immunity contrasts w/immunity *ratione personae* which gave complete immunity to all activities whether public or private
     - Implementation of torture as defined by the Torture Convention cannot be a state function → as a matter of general customary international law, a head of state may be personally liable if there is sufficient evidence of authorization or perpetration of serious international crimes

3. Immunity vs. Human Rights: ***The Pinochet Case***
   - Appraisal of the *Pinochet Case* and it impact on municipal law:
     - Recourse to international law for interpreting domestic law – first noticeable feature of the case
     - Clearly asserted the principle that individuals may be held accountable for acts that are regarded as criminal in international law; whether individual responsibility may be enforced before foreign municipal courts would be determined *in casu*, depending on the nature of the crime and relevant international and municipal law provisions concerning enforcement
     - Distinguished b/t wrongful acts of state organs and acts that can be regarded as crimes of international law; different consequences are attached to the latter under international law, in particular, the permissibility of exercising extraterritorial jurisdiction over them and the inapplicability of immunity

ratione materiae before international tribunals and before foreign municipal courts

- Frequent reference to notions such as *jus cogens*, obligations *erga omnes* and crimes of international law attests to the fact that the emerging notion of an international public order based on the primacy of certain values and common interests is making its way into the legal culture and common practice of municipal courts

- **Immunity** –while current heads of state are immune *ratione personae* from the jurisdiction of foreign courts, both civil and criminal, a plea of immunity *ratione materiae* in criminal proceedings may be of no avail to former heads of state depending on the nature of the crime
  - Lord Philips – stated that *no rule* of international law requires immunity to be granted to individuals who have committed crimes of international law and that the very notion of immunity *ratione materiae* cannot coexist w/the idea that some crimes offend against the very foundation of the international legal system
- **Are municipal courts a proper forum for prosecuting individual crimes of international law**? Yes…
  - General debate exists on the suitability of municipal courts to enforce international law
    - Some argue that municipal courts can *substitute* for the scant number of enforcement mechanisms in international law
    - Others stress that the extent to which municipal courts can apply international law depends on how international law is *incorporated* into the state's domestic legal system
    - The individual judges' backgrounds in international law and legal culture are other factors relevant to explaining the more or less active role that municipal courts can play in enforcing international law in different jurisdictions
  - Are international tribunals a better mechanism than exercise of municipal jurisdiction?
    - On a practical level, the establishment of international criminal tribunals by way of Security Council resolutions can be an effective strategy of enforcement; though, consensus w/in the Security Council may be difficult to reach and the prosecution may be selective
    - However, it is unrealistic to expect that international criminal law can effectively be enforced only by international tribunals; they may play a strong symbolic role and are more likely to be perceived as an impartial forum, but prosecution by municipal courts will remain crucial
  - Are municipal courts capable of adjudicating individual crimes of international law?
    - The case for municipal courts to adjudicate cases involving individual crimes of international law seems compelling: very notion of crimes of international law suggests that they constitute an attack against the international community as a whole and any state is entitled to punish them
    - As the *Pinochet Case* shows, the interpretation of domestic statutes in light of contemporary standards of international law may, in principle, remedy domestic legislation ambiguities and correctly implement the principles and rules of international law which have a bearing on the case

4. ***The Yerodia Case*, *Democratic Rep. of Congo v. Belgium***, (ICJ 2002) – Universal Jurisdiction and Immunity
   - Issue: Congo instituted proceedings against Belgium regarding an international arrest warrant issued by a Belgian investigating judge against the Minister for Foreign Affairs of Congo
     - Congo contended that Belgium had violated 1) the principle that a State may not exercise its authority on the territory of another State, 2) sovereign equality among all Members of the United Nations and 3) the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State
   - Legal Arguments: Congo originally challenged the legality of the arrest warrant on two separate grounds: Belgium's claim to exercise universal jurisdiction; and the alleged violation of the immunities of the Minister for Foreign Affairs; however, in its submissions to the court, the Congo invoked only the latter
   - Decision:
     - **Immunity** – in international law (Vienna Conventions) it is firmly established that diplomatic and consular agents and certain holders of high-ranking office in a State enjoy immunities from both civil and criminal jurisdiction in other States; in customary international law, the immunities accorded to

Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States

- In this respect, no distinction can be drawn b/t acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, b/t acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office

- Belgium argues that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity
  - The ICJ examined State practice and was unable to deduce that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs
  - The rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction; although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs; these remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions
- *Immunity* from jurisdiction does not mean *impunity*:
  - First, such persons enjoy no criminal immunity under international law in their own countries
  - Secondly, they cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity
  - Thirdly, after a person ceases to hold the official office, he or she will no longer enjoy all of the immunities accorded by international law in other States
  - Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction

- Separate Opinion of President Guillaume: whether Belgium had jurisdiction to issue the arrest warrant
  - Surveys the historical development of universal jurisdiction in conventional international law and suggests that, over time, the obligation to prosecute was not longer conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible
    - None of the texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question – universal jurisdiction *in absentia* is unknown to international conventional law
  - Customary international law – finds that Belgium's justification relying on the practice of States and their *opinio juris* is misplaced; the national legislation and jurisprudence cited in the case file do not support the Belgian argument; each country that utilizes universal jurisdiction requires that an alleged perpetrator of genocide or torture be present in the territory of the country before the courts have jurisdiction; Israel "obviously constitutes a very special case"
  - Geneva Conventions, relating to serious war crimes, do not contain any provision on jurisdiction comparable to Article 4 of The Hague Convention (Torture); they cannot establish universal jurisdiction *in absentia*; thus Belgium could not confer such jurisdiction on its courts on such basis
- Joint Separate Opinion:
  - Reviewed and analyzed state practice – national legislation, cases, and international treaties – and concluded that international law is evolving to allow universal jurisdiction over crimes other than piracy, such as crimes against humanity and similarly heinous crimes
  - If a State chooses to exercise a universal criminal jurisdiction *in absentia*, it must ensure that certain safeguards are in place to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations b/t States

        - No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned
        - The State must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned
        - Such charges may only be laid by a prosecutor or *juge d'instruction* who acts in full independence, w/o links to or control by the government of that State
    - Immunity – finds that the immunity enjoyed by Foreign Ministers is not concurrent to those enjoyed by Heads of State; the immunities to which other high State officials (like Heads of Government and Foreign Ministers) are entitled have generally been considered in scholarship as merely functional
- **Effect in France**
    - France had a similar universal jurisdiction statute; cases against individuals in Congo-Brazzaville were under fire by the French government b/c there was concern for French oil interests
    - Congo-Brazzaville brought a case against France in the IJC, although there was no basis of jurisdiction; France *consented* to jurisdiction in order to have its universal jurisdiction statute overturned (and the judges utilizing it silenced) → this is an example of the use of an external court to overturn domestic courts (similar to *Toonen*)

5. Mexico Supreme Court: Extradition of Miguel Cavallo to Spain
    - Mexican courts avoided the issue of universal jurisdiction; it was decided that extradition did not require an investigation into the jurisdiction of the state requesting extradition → <u>for purposes of extradition, the court determined that the applicable law is the situs of the country extraditing the individual</u> (Mexico)
6. Spanish Supreme Court: Guatemalan Genocide Case
    - Tribunal Supremo held that Spanish courts could exercise jurisdiction only over the crime of torture committed against <u>Spanish citizens</u> and declined to exercise jurisdiction over the claims alleging acts of genocide, torture and terrorism committed against the Guatemalan population
        - For Spanish tribunals to exercise jurisdiction the existence of a link b/t the crime and a national interest is necessary (the only national interest found was the Spanish victims of torture); thus, the decision was based not on the principle of universal jurisdiction, but on *passive personality*
    - Tribunal Supremo sustained that no State can unilaterally use its penal law to maintain international order; the **principle of subsidiarity** would be inappropriately applied since it is not found in the Genocide Convention, which neither established nor excluded the principle of universal jurisdiction
    - **Effect** – the decision, together w/recent changes in the Belgian law on universal jurisdiction, are effectively limiting the possibility for the exercise of universal jurisdiction and the fight against impunity
7. 2003 Amendments to Belgium's Law
    - First amendment abolished procedure where anyone could bring a suit; now, the federal prosecutor (part of the judicial branch) must approve it; in addition, the Minister of Justice can intervene and force the prosecutor to drop the case (this implies a problem w/Belgian separation of powers?)
    - Amendments abolished the progressive elements of the law; there is still universal jurisdiction, but only in line w/conventional and customary international law and requires that the individual be present in Belgium and that there is a formal request for extradition

Unit VI: Enforcement of International Criminal Law

General Notes:

- Establishment of international criminal tribunals and the ICC is, in part, an international recognition of the limitations of national courts to operate as tribunals for international crimes
- Precedent for international criminal tribunals come from the attempts to try the Kaiser after WWI and the Nazi perpetrators of the atrocities of WWII
  - The Allies were determined to do something: the British wanted to kill the Nazi perpetrators b/c they were uncertain which principles of international law were actually abrogated (where is the line drawn in war b/t crimes and acts of necessity) and there was concern that a tribunal would be used as a soapbox for the war criminals; the Americans wanted to usher in a new era of international legal order; the Soviet were uneasy by this proposal b/c there had been massacres and forced deportations in Soviet controlled territory (moreover, the Soviet system was not a rule of law system)
    - The Allies settled on establishing the Nuremberg and Tokyo Tribunals, for the most responsible German and Japanese transgressors, in addition to "national" courts in the occupied territories

A The International Criminal Tribunal for the Former Yugoslavia

1. Establishment of the ICTY
   - The General Assembly realized that a treaty would be unfeasible as a means of establishing a tribunal for the alleged crimes in the former Yugoslavia; instead, the tribunal was adopted by a Security Council Resolution under Chapter VII of the UN Charter
     - Article 39 gives the SC the power to act where there is: threat to the peace; breach of the peace; or an act of aggression
     - The alternative, use of Article 43 – sending forces to another state – requires that the state invite UN forces; this has never been done; in effect, the Security Council cannot force the UN to send forces to a state to bring back order
   - The first issue before the Appellate Chamber of the ICTY was whether Chapter VII actually provided the Security Council w/authorization to establish the tribunal
2. ***Prosecutor v. Tadic*** (ICTY 1995) – Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction
   - **Argument against jurisdiction** – to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council under Chapter VII of the UN Charter:
     - Article 39 – the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance w/Articles 41 and 42, to maintain or restore international peace and security
       - In relation to the Security Council, the Charter speaks of specific powers, not absolute fiat
   - **Measures envisaged under Chapter VII** – once the Security Council determines the existence of a particular situation, it enjoys a wide margin of discretion in choosing the course of action
     - Establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, particularly in Articles 41 and 42
     - *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force"; although the examples focus upon economic and political measures and do not in any way suggest judicial measures, these *examples* were intended as such
       - If the Security Council has the authority to authorize war, then it must have lesser powers; the counterargument is that the Security Council is limited in its functions and can only act w/in its "enumerated" powers → the ICTY interpretation is bolstered by the ***Reparations Case***, in which the ICJ determined that UN has an implied power to raise claims for reparations (legal identity); this can be extrapolated to the Security Council as having implied powers

- It is not surprising that the ICTY would support this interpretation, given that they are supportive of the development of an international rule of law

- **General principle that courts be "established by law"** – an *ad hoc* tribunal is not in contravention of ICCPR Article 14, ECHR Article 6(1) and the American Convention on Human Rights Article 8(1)
  - In the ICCPR, "established by law" was adopted instead of "pre-established by law"; this signifies that the drafters of the ICCPR recognized that the use of ad hoc tribunals might be necessary; thus, "established by law" implies establishment must be in accordance w/the rule of law
- **Primacy of the Tribunal over competent domestic courts** – established by Article 9 of the ICTY Statute → it would be inconsistent w/justice if the concept of State sovereignty be allowed to be raised successfully against human rights; borders should not be considered as a shield against the reach of law
- **Subject Matter Jurisdiction**
  - In the light of the intent of the Security Council, the interpretation of Article 3 (jurisdictional crimes) and customary international law, concludes that the Tribunal has jurisdiction over the acts, regardless of whether they occurred w/in an *internal* or an *international* armed conflict
    - Article 5 – crimes against humanity – international practice since the Nuremberg trials has made obsolete the requirement of a nexus b/t crimes against humanity and an armed conflict; it is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict or any conflict

3. Can the ICTY *review* the legitimacy of Security Council decisions?
   - The dicta could support such a conclusion and this may be utilized by tribunals in the future to support such a condition; is it a good idea to allow international courts to review "executive" decision-making?
     - Should not analogize national systems w/an international system in the context of judicial review
     - Review of SC decisions might abrogate the foreign-office model of international decision-making
   - ***ICJ-Lockerbie Case*** (*Libya v. U.S./UK*) – Libya brought a case against the U.S. and UK for imposing sanctions and against the Security Council for maintaining them through resolutions; the ICJ never issued a decision, possibly b/c the parties were in negotiations; Libya eventually settled w/the U.S., but the sanctions were maintained until Libya agreed to increase the settlement for the French
     - Libya complained that the sanctions were illegal b/c the relevant law of aircraft destruction (Montreal Convention) provides that the relevant authorities can hold jurisdiction (complementarity?), as Libya claimed that it did; the ICJ indicated that it may revisit the issue
   - Perhaps the role of an international tribunal is to create dialogue b/t the Security Council and other bodies of the UN so that they can properly respond to the concerns of individual states?
4. Was the Tribunal set up as formal "inaction"?
   - Some commentators thought that the ICTY would be abandoned after awhile and taken over by an international security regime set up by the Security Council; this did not happen b/c the Tribunal took on a life of its own and was aggressive in pursuing its mandate → it became almost politically impossible for the ICTY to back away from the Tribunal
   - Lesson for the UN → cannot expect to step away from these bodies or to reach treaties on amnesty

B The International Criminal Tribunal for Rwanda (and a Critique of Global Intervention)

1. National Security Archives: Genocide
   - Legal Analysis prepared for the Secretary of State concerning the public use of the term "genocide" to describe events in Rwanda
     - 1948 Genocide Convention defines "genocide" as being committed when three criteria are met:
       - Specified acts are committed (killing, causing serious bodily or mental harm, deliberately inflicting conditions of like calculated to bring about physical destruction in whole or in part, imposing measures intended to prevent births or forcibly transferring children to another group)
       - These acts are committed against members of a national, ethnic, racial or religious group

        - They are committed w/the intent to destroy, in whole or in part, the group as such
    - Conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also offenses under the convention

2. Intervention as a political choice (Stephen Holmes)
    - Powerful nations, in the face of atrocities, looks first to its economic and strategic interests, embarking on missions of mercy only rarely and unreliably → responses to injustice are selective; the factual distinction between *them* and *us* overshadows the moral distinction between *just* and *unjust*
    - Homicidal rulers are sometimes toppled, but rarely by good Samaritans; "Unless another country acts for self-interested reasons, as was the case when Vietnam invaded Cambodia in 1979, or armed members of the victim group manage to fight back and win, as Tutsi rebels did in Rwanda in 1994, the perpetrators of genocide have usually retained power"; the decision of the U.S. and its allies to intervene belatedly in Bosnia and, more rapidly, in Kosovo are the exceptions that prove the rule
        - Eventual decision to intervene militarily in the Balkans group politics, not universal morality, and a desire not to appear weak (NATO's dread of losing its raison d'être and Europe's refugee anxieties)
        - Moral conscience had been demanding intervention for several years, but only when political pressure built up simultaneously on several fronts did forcible intervention occur
3. Critique of the Genocide Convention and Crimes against Humanity (Stephen Holmes)
    - The Genocide Convention defines mass murder from a unique and even morally contestable point of view (when the Russians suggested condemning 'crimes against Christianity', it seemed too parochial, and the phrase 'crimes against humanity and civilization' was chosen instead); the change in wording did not signal a shift in attitudes → whatever international law stipulates, crimes against whites and Christians receives greater attention from Western powers than crimes against nonwhites and non-Christians
    - It is one-sided not merely in its selective implementation, but also in its very conception:
        - First, it excludes from the definition of genocide mass murder for *political* reasons; b/c victims may be of mixed ethnicity, their killings would add up to mass murder, but not to genocide
        - Genocide, as legally defined, refers only to the massacre of certain communities; it is a crime committed not against members of ethnically or racially or religiously diverse groups but only against members of ethnically or racially or religiously homogeneous groups → working papers of the Convention: "If the perpetrator did not target a national, ethnic, or religious group as such, then killings would constitute mass homicide, not genocide"; this is problematic since it treats culture as a collective unit and does not give genocide a more proper intellectual foundation
    - Crimes against humanity is a problematic concept b/c it attempts to define a community (humanity) in a void of context; the international community risks arrogance in that it stipulates "what is humanity", "what is a crime against humanity", and "who is a criminal" in such a context
        - There are a lot of issues left at the margin (i.e., firebombing of Dresden and Tokyo)
4. Critique of "blanket" interventionism (Stephen Holmes)
    - The failure to think through, in advance, cogent answers to questions of what happens after the intervention (i.e., the structure of the new government, calculations about scarce resources, etc.) is part of the dubious legacy bequeathed by genuinely well-meaning humanitarian interventionists to the considerably less well-meaning, non-humanitarian interventionists (Bush and co.)
        - This failure is also indicative of the current use of the concept of "regime change" – destroying a wicked system, full stop, rather than replacing a rotten government w/a moderately better one that has a reasonable chance to endure
        - The attitude that American interventionists need not know more about the rest of the world is untenable in real world situations where that knowledge is indispensable to achieving results

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C The International Criminal Court

1. Summary of Key Provisions by Human Rights Watch
   - HRW identified seven benchmarks to be met "if the ICC is to be an independent, fair and effective judicial institution": 1) a jurisdictional regime free of any state consent requirement; 2) independence from the Security Council; 3) an ex officio prosecutor; 4) qualified deference to state claims of jurisdiction (complementarity); 5) authority over war crimes whether committed in international or non-international conflicts; 6) clear legal obligation for state parties to comply w/court requests for judicial cooperation; and 7) the highest standards of international justice respecting the rights of the accused and appropriate protection for witnesses
   - ICC is a formal institution of the international community; but it is an independent body not answerable to any legislative system; it is deliberately insulated from the influence of outside states
2. The ICC Statute and its Provisions
   - Subject-matter jurisdiction (the crimes) of the ICC
     - Article 5 – jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole (genocide, crimes against humanity, war crimes, the crime of aggression – to be defined); Articles 6-8 define genocide, crimes against humanity and war crimes
     - The issue during 1993, when the ICTY was established, was whether these crimes were actually considered international crimes; the legal payoff of the Tribunals set up after WWII served as precedent for the concept of international criminal law
   - The preconditions for jurisdiction and admissibility and the Complementarity Principle
     - Articles 11-19 (temporal jurisdiction, preconditions for the exercise of jurisdiction, exercise of jurisdiction, and admissibility – including complementarity)
       - Article 12 – jurisdiction is determined by a) the nationality of the accused or b) the place where the crime was committed (the state must be a party to the statute)
       - Articles 13-15 – stipulates the means by which a case can be initiated
       - Article 18 – Prosecutor must notify all states that may have jurisdiction of the proceedings; a state may, in turn, inform the ICC that it will exercise jurisdiction, which must be deferred to by the Prosecutor, though there are safeguards to insure that a state is actually taking jurisdiction
       - The ICTY has **primacy** in jurisdiction over the crimes under its statute; this is inapposite to the ICC's jurisdiction of complimentarity
   - The applicable law, and the role of general principles of criminal law – Article 21
   - The composition of the Court (responsibilities, qualifications, election of judges) – Articles 34-36
   - The role of the Prosecutor, the arrangements for supervision and review of the their decisions and their duties and powers w/respect to investigations – Articles 42, 54
   - The role of the UN Security Council vis-a-vis the Court
     - The ICC is not established by the Security Council → cannot count on the Security Council for political backing of criminal prosecutions (states may be able to circumvent the ICC more easily)
     - Article 16 – although the ICC does not need Security Council approval to initiate an action (*propio motu* or "own power"), the Security Council can pass resolutions to pull a case out of its jurisdiction; one permanent member cannot do so along; it requires consensus
     - On the other hand, the ICTY and ICTR are established under the Chapter VII powers of the Security Council → this suggests that the Security Council could push for certain individuals to be prosecuted
   - The role of member states
     - Articles 86-90 – sets out the obligations to cooperate w/the ICC, including the provision of procedures under national law, and to surrender persons to ICC
     - Article 120 – provides that no reservations to ICC Statute may be made

- Article 123 – provides for review of the Statute every 7 years and for a mechanism for amendment
- Article 124 – provides a 7 year transitional period for new parties to Statute

- The rights of accused persons, defenses, appeal, and sentencing arrangements – Articles 55, 59-67
- The provisions for protection of and respect for the interests of victims and others – Article 68

3. Problems w/the ICC Statute as adopted: Theodor Meron, The Court We Want (Oct. 13, 1998)
   - Provides that the ICC is to have jurisdiction only when it is accepted by the state where the crimes have been committed or by the nation state of the accused
     - This provision makes the court largely ineffective in dealing w/rogue regimes, except when the Security Council exercises its Chapter VII authority to extend jurisdiction to them
   - A state where alleged atrocities are committed could accept jurisdiction to complain against another state that resorted, even w/Security Council authorization, to a humanitarian intervention
   - The statute overreaches in extending the ICC's sway over states that choose not to ratify the statute; the proposed treaty imposes more obligations on non-parties than on party states; the latter may opt out of the provisions dealing w/war crimes and crimes to be added to the court's jurisdiction; the former may not
4. U.S. objections to the ICC
   - Concern about efforts to find responsibility for command level decisions (such investigations would not be limited to U.S. military forces, but would also includes CIA operatives and non-U.S. nationals)
   - Concern about the Prosecutor and the influence of NGOs – since the U.S. is outside the system, it may be tempting to bring a suit against a U.S. national in order to prove that the U.S. is subordinate to the international system; however, the crimes of w/in the ICC's jurisdiction are fairly heinous and it would be unlikely that the U.S. would defend such criminal liability (in addition to the concept of complementarity)
   - Anti-terrorism – realist in Washington are, puzzlingly, suggesting that the U.S. should be more involved in the international system; even France and Britain want the U.S. to have a more active role; the administration is currently split on the role of the U.S. in the UN

Unit VII: Immunity and Act of State in National Courts

A The Development of Sovereign Immunity Law in the United States

1. A Historical Introduction

- There is not, as yet, an international claims court for civil suits; therefore, it may be necessary for national courts to entertain such suits in its absence; in national courts, the central issues are jurisdiction, choice of law, procedural issues, restitution, etc.; these are guiding issues for private international law, and cut into public international as well
- There are certain classes of persons under international law that are immune from the jurisdiction of the forum state; the two principal categories are foreign states (**sovereign immunity**) and diplomatic agents (**diplomatic immunity**); another category of growing importance is the immunity of IGOs (i.e., UN)
- Law of state immunity refers to the legal rules and principles determining the condition under which a foreign state may claim freedom from the jurisdiction (legislative, judicial and administrative powers) of the forum state → since states are independent and legally equal, no state may exercise jurisdiction over another state w/o its *consent*
  - First level concerns the immunity of the foreign state from the *jurisdiction* of municipal courts
  - Second level concerns the exemption of a foreign state from *enforcement* against its property
- The classical view – **Absolute Immunity** – foreign states have absolute immunity unless waived by the foreign state; although this was the big picture in international law, it was never the absolute rule
  - U.S. law, following an understanding of international law and a view that the dignity of the sovereign must not be degraded, held that public property of the sovereign was immune from the jurisdiction of a friendly sovereign state; this understanding was made w/o reference to foreign policy; eventually, the courts began to follow the opinion of the State Department in determining immunity
    - Reflected the opinion that recognition of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our international interests and for recognition by other nations
  - Exceptions to the rule included: property owned by the foreign state kept in the forum state; the dispersal of inherited property; the use of foreign-owned ships involved in commercial activity
    - These exceptions became problematic w/the development of the Cold War (Communism!); the trade of socialist states relied upon state-owned ships and commercial activity; the concern was that an ordinary commercial dispute would be outside dispute settlement
- **The Tate Letter 1952** – adopted **Restrictive Immunity** as the response of the U.S.; the idea was that the foreign states could not have immunity if they engaged in commercial activity; the letter acknowledged that U.S. courts were deferring to governmental interest for fear of disrupting international relations
  - The Tate Letter in Practice – U.S. courts delegated the whole business of determining if an act was a commercial act to the State Department, these ad hoc determinations were imbued w/foreign policy concerns; πs were irate at this structure
  - The Tate Letter did not and could not really succeed in establishing a workable and effective law governing claims against foreign states:
    - First, it made no attempt to define the distinction between the **activity *jure imperii*** (governmental acts) and **activity *jure gestionis*** (commercial acts)
    - Second, it did not determine who should make the difficult determination stated above; such a determination would appear to be a judicial finding, relying on the facts of the case, but it was often imbued w/geo-political ramifications
    - Third, even where the activity on which the claim was based was clearly one not entitled to immunity under the restrictive theory, it was not clear how a suit against a foreign sovereign was to be initiated (service, *quasi in rem* jurisdiction, ability to attach foreign-owned property, etc.)

- **Modern international practice** – no real consensus, but some argue that a forum state is only obliged to grant a foreign state immunity from jurisdiction if the claim is based on the foreign state's conduct *de jure imperii* and immunity from execution against real property if the property serves a public purpose; w/regard to conduct or property *de jure gestionis*, states are free to, but not obliged to, grant immunity
  - Distinction b/t commercial and non-commercial activity can be a complicated matter; some states base the distinction on the **nature of the act** (**objective test**), others base it on the **purpose of the act** (**subjective test**); these test can come to different conclusions for the same act (i.e., purchase of boots for use in the army – objectively commercial, but subjectively non-commercial)
    - **Nature** and **purpose inquiries** are **conclusory**; there is an element of policy that is imbued in the analysis; nature is usually considered more narrow, whereas purpose is considered more broad
    - *Nelson v. Saudi Arabia* (U.S. 1992) – American was hired by the Saudi government to be the safety engineer for the hospital system; upon complaints of abuse of security, he claims, he was beaten by the Saudi police; in the suit, the Court determined that the action would be considered an exercise of the state's police power and granted immunity

2. The Foreign Sovereign Immunities Act of 1976
   - FSIA – congressional act shifted the question of immunity from the State Department back to the courts
     - Development of the FSIA was concurrent to the U.S. acquiescence to jurisdiction in U.S. courts (waiving its own immunity) as can be seen in the Federal Tort Claims Act of 1976
   - An Overview of the Act
     - Essentially codifies the American view of the restrictive theory of immunity; sets forth rules and procedures for adjudicating claims against foreign states and instrumentalities in U.S. courts, including procedures for service of initiating process; and provides for enforcement of judgments against foreign states in certain cases
   - Jurisdiction of the Federal Courts: *Amerada Hess v. Argentina* – Supreme Court determined that a foreign state can only be sued through the FSIA structure
     - **§1330** – confers jurisdiction on the federal district courts over state and federal causes of action, w/o regard to the amount in controversy, of any civil action against a foreign state based on any claim as to which the state (or state instrumentality) is not entitled to immunity; if the action is initiated in state court, it can be removed to federal court
     - §1604 provides that a foreign state is immune except as provided in §§ 1605-1607
       - §1605 (general exceptions) and §1606 (extent of liability) set forth the circumstances in which the state is not immune; no role is provided for any component of the political branches → it is clear that Congress sought to take decisions concerning sovereign immunity out of the political arena
     - **Personal jurisdiction** – §1330(a) confers subject matter jurisdiction, w/o regard to personal jurisdiction; §1330(b) then provides that personal jurisdiction shall exist as to every claim over which there is subject matter jurisdiction, once service as prescribed in §1608 has been carried out
       - §§1605-07, particularly §§1605(a)(2) and (a)(5), look like a long arm statute, which one normally thinks of in connection w/personal jurisdiction; this is an oddity in procedural law
     - **Counterclaims** – §1607(b) – confers jurisdiction over a *related* counterclaim w/o limit on recovery if a foreign state or instrumentality is the original π, even if the counterclaim, standing alone, would have been subject to the defense of immunity
       - Unrelated counterclaims are subject §1607(c) – exclusion from immunity only applies to a setoff limit (counterclaimant can only recover up to that point, no affirmative recovery)
       - If the foreign state is the Δ, it must condition a counterclaim upon immunity
   - Immunity and Exclusion from Jurisdiction – FSIA §1604 assumes immunity unless…
     - §1605 – determines immunity from jurisdiction (as opposed to immunity from enforcement)
     - §1605(a)(1) – **waiver of immunity**, must be either explicit or through implication; the former often happens through contractual obligations; the latter often forces a court to determine how far it should

go (i.e., should a violation of *ius cogens* be considered a waiver? – currently the consensus in case law is against this proposition, but a dissenting opinion in *Prinz v. Germany* in the D.C. Cir. suggests that this is not necessarily so)

- Waiver of immunity from suit is not necessarily a waiver of immunity from enforcement

- §1605(a)(2) – **commercial activity** – foreign state does not have immunity where
  - **General jurisdiction** – the action is based upon a commercial activity carried on in the U.S. by the foreign state
  - **Specific jurisdiction** – upon an act performed in the U.S. in connection w/a commercial activity of the foreign state elsewhere
  - **Effects jurisdiction** – upon an act outside the territory of the U.S. in connection w/a commercial activity of the foreign state elsewhere and that act causes a direct effect in the U.S.
- §1605(a)(3) – *in rem* jurisdiction – when property, taken in violation of international law, is present in the U.S. in connection w/a commercial activity carried on by the foreign state, *or* that property is owned or operated by an instrumentality of the foreign state and is engaged in a commercial activity
- §1605(a)(5) – **non-commercial tortious activity** – death, damage or damage to property that occurs w/in the U.S. and caused by a foreign state or its officials while acting in the scope of official activity; does not include discretionary activity or non-physical injury
- §1605(a)(7) – **torture, extra-judicial killing, aircraft sabotage, hostage killing, or material support for these activities** (amendment to original FSIA) – applicable against a foreign state or an official, employee or agent acting w/in the scope of that position
  - Exceptions: can only sue terrorist-supporting designated states (lobbying from other states cut down the statute to terrorist sponsors); suit must be initiated by a U.S. citizen; and the act would have to have happened in the foreign state (unless that state offered sufficient due process)
  - Definitions: look at §1605(e) for definitions to this section

3. Defining Commercial Activity
   - ***Republic of Argentina v. Weltover*** (U.S. 1992)
     - Facts: Argentina issued bonds to bail itself out of financial crisis; when they decided to reschedule the bonds, most creditors decided to accept the rescheduling; however, three small player, who bought the bonds at a lower price, tried to collect
     - Issue: on the one hand, Argentina was trying to solve a national crisis; on the other hand, Argentina was engaging in normal commercial activity; how should the Court approach this situation?
     - Decision: the three prongs of §1605(1) – THIRD PRONG – first determined that when a foreign government acts, not as regulator of a market, but in the manner of a private player w/in it, the foreign sovereign's actions are "commercial" w/in the meaning of the FSIA; then determined that there was a direct effect in the U.S. – reasonable expectations would be for payment to occur in NY (other cases say that if the place of payment is not explicitly determined, its not enough for jurisdiction)
   - Chapter 11? – it is an odd to analogize from the standpoint of a corporation when looking at how financial default should be approached for sovereign governments; one suggestion is to follow the path of Chapter 11 for countries in the IMF (this is not politically viable and would only be able to work if the IMF model could terminate domestic court jurisdiction over foreign sovereign debt)
     - Foreign sovereign debt is being restructured using Exit-Consent agreements – the creditors agree to cancel previous bonds and to create new bonds; this requires that a supermajority convince minorities to support these efforts; national law differs on this approach – it is easier to structure these deals in the UK and Japan, but not in the U.S.
4. Resolving Outstanding Judgments Under the Terrorism Exception to the FSIA
   - One of the purposes of allowing individuals to have a private right of action against terrorist states is to limit those states' ability to function on the global market w/fewer places for them to do business
   - Negatives to the FSIA model:

- This has the negative side of creating a class of individuals whose only interest is to be recompensed and who will not have the interest, as in the usual diplomacy model, to negotiate broader results
  - Each U.S. court that hears a case arising under the terrorism exception determines a level of punitive damages that would be sufficient to deter *all* future acts of terrorism by that country; this becomes excessive and may become a deterrent from rapprochement
- Default judgments result even though the district courts do not have the benefits of an adverse process to determine the validity of a claim, even under the statute (i.e., claims against Iraq)
- Use of this system also prevents victims w/in the "terror-designated" state to have access to those resources for their own judgments; in addition, these judgments are inherited by the state after transitioning, which tends to prevent these states from paying the burden of reconstruction, etc. and may be a burden to normalization of relations
- Another fault w/this model (the FSIA) is that the designation of being a terrorist state may not be consistent throughout the world and may not include states that should be on the list

- Possible Solution: outstanding judgments under the terrorism exception ought to be terminated and resubmitted as claims to *ad hoc* tribunals; although πs whose judgments are abrogated can bring takings claims, those claims should be surmountable through a sensible application of takings jurisprudence
  - Efforts to normalize relations may be facilitated if the outstanding judgments and pending suits under the terrorism exception are terminated and remitted to an ad hoc international tribunal
- Challenges to personal jurisdiction under the terrorism exception – Libya has argued that it is not subject to U.S. court jurisdiction b/c it lack sufficient minimum contacts to satisfy modern due process requirements; however, no court has yet to find that it lacked personal jurisdiction b/c the FSIA exception for terrorism turns on the substantive requirements of the FSIA
  - *Texas Trading* – determined that exercise of jurisdiction under the FSIA is constrained by the Due Process Clause; question then becomes, can states be considered persons for due process considerations? → *Flatow* court held that nation-states could meet this requirement since all states, as a matter of necessity, have substantial sovereign contacts w/each other
- Are Iraq's Assets Shielded from Enforcement?
  - See *Smith v. Federal Reserve Bank of New York* (S.D.N.Y. 2003) in **Class Documents**

5. How much does the U.S. FSIA reflect customary or international law?
   - The absolute immunity rule has eroded over the last century and, at some point, stopped being customary international law; the new rule grants immunity over certain non-commercial acts (a state committing a tort in the U.S. is not entitled to immunity under international law); some state, however, continue to give absolute immunity
   - FSIA roughly reflects customary international law, but there is the question of §1605(a)(7) (terrorism exception); this may be litigated in front of the ICJ if a transitioning government brings a suit

B Enforcement Problems in Suing Foreign Governments and Instrumentalities

1. Issues w/enforcement and attachment for execution
   - When Congress took the Executive Branch out of the decision-making process, it did not at the same time de-nationalize the issue of how claims against foreign states are treated in the courts of the U.S.
   - **Limitations on execution** – issue must be determined by each forum state individually since there is no longer a rule of international law granting absolute immunity from execution on foreign state property
     - Property used solely for sovereign purposes, including bank accounts of embassies, remains immune from execution; the interpretation of "property... used for a commercial activity" may be broader in the U.S. than in Germany; it is fair to suggest that *Birch Shipping* was wrongly decided
   - Pre-judgment attachment
     - §1610 – exceptions to immunity from attachment or execution
       - §1610(a)(2) – property of the foreign state itself – immunity is granted unless the property is used

in the U.S. for a commercial activity upon which the claim is based

- §1610(b) – property of an agency or instrumentality of the foreign state – less immunity than the property of the foreign state; no immunity for any of its property used commercially in the U.S.

- §1611 – restrictions on enforcement – cannot enforce against the military of another state or against the central bank of the foreign state (this is different than regulation under the SEC)

2. ***Birch Shipping Corp. v. Embassy of United Republic of Tanzania*** (D.D.C. 1980)
   - Tanzania agreed to arbitration and to judicial enforcement of any award; this is, at minimum, an implicit waiver of immunity; while an agreement to entry of judgment reinforces any waiver, an agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity
   - Property attached was "used for commercial activity" – legislative history makes it clear that it is irrelevant is the goods or services procured through a contract are to be used for a public purpose; it is the essentially commercial nature of an activity or transaction that is critical (**objective test**); such contracts are considered to be commercial contracts, even if their ultimate object is to further a public function
     - Multiple use property is inconsequential since this could be used as a tactic by the defending-state to avoid execution against property in the forum state
   - Notes: it is often the case that mixed-use bank accounts are attachable; in several other countries, it has been held that such accounts are immune from attachment (i.e., *Alcom v. Colombia* (H.L. 1984)); *Birch* is inconsistent w/customary international law
3. ***Letelier v. Republic of Chile*** (2nd Cir. 1984)
   - Background: πs received a verdict that implicated Chile, but did not have a verdict against LAN (bad lawyering: should have attempted to get an *executable* judgment against LAN)
   - Issue 1: whether LAN's separate juridical existence may be ignored, thereby making its assets property of a foreign state in the U.S. → in *Bancec*, the Supreme Court recognized that "government instrumentalities established as juridical entities distinct from their sovereign should normally be treated as such"; FSIA's legislative history provided support for that conclusion; *Bancec* rests primarily on two propositions:
     - Courts may use set-off as a unique, equitable remedy to prevent a foreign government from eluding liability for its own acts when it affirmatively seeks recovery in an American judicial proceeding
     - Broader message is that foreign states cannot avoid their obligations by engaging in abuses of corporate form; a foreign state instrumentality is answerable just as its sovereign parent would be
   - Holding 1: Found that LAN's activity in the assassination is not the sort of abuse that overcomes the presumption of separateness established in *Bancec*; joint participation in a tort is not the classic abuse of corporate form to which the Supreme Court referred (only demonstrates that the perpetrator was able to enlist the cooperation of certain LAN pilots and officials w/whom he had a pre-existing social relationship in pursuing his sinister goal) → declined to extend *Bancec*'s holding to this situation
   - Issue 2: whether LAN's activities would constitute commercial activities under §1605(a)(5) – the tortious activity exception, which is mutually exclusive from §1605(a)(2) – commercial activity exceptions; Chile was implicated as against §1605(a)(5), and not §1605(a)(2)
     - §1610(a)(2) requires that the property be used for the commercial activity which the claim is based; the lower court concluded that LAN's activities aided the assassination and constituted commercial activity → disagrees w/this determination; furthermore, it would be inconsistent to base the claim on the tort, and then base the execution on the commercial activity
       - Do the structures of §§ 1605 and 1610 have to be parallel?
   - Issue 3: **right w/o remedy**? → when drafting the FSIA, Congress took into account the international community's view of sovereign immunity; this strongly suggests that Congress intended to create a right w/o a remedy; Congress sharply restricted immunity from execution against the property of agencies and instrumentalities, but was more cautious when lifting immunity from execution against property owned by the foreign state itself (political terrorism was not the kind of commercial activity contemplated)

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C The Act of State Doctrine

1. Overview
   - Under the doctrine, acts of a state carried out w/in its own territory cannot be challenged in the courts of other states (for extreme versions, not even if the acts are contrary to international law)
   - The doctrine overlaps w/private international law (i.e., if Ruritania expropriates property situated in Ruritania, does the forum state accept the expropriation as legal b/c it is legal under the laws of the situs (private international law) or b/c it was carried out by a foreign state (act of state doctrine)); however…
     - Act of state doctrine is more broad than private international law in the sense that it covers acts performed by a foreign state w/in its own territory *which are contrary to its own law*
     - Act of state doctrine is more narrow than private international law in the sense that it covers only acts of a *state* and not private acts b/t individuals
   - Is the doctrine a rule of public international law? – consider the two situations in which it pops up most:
     - First situation – an individual is sued or prosecuted in the forum state's courts for acts which he or she performed as an agent of another state – in this situation, the act of state is a corollary to sovereign immunity and is a rule of public international law (proceedings would indirectly implead the state!)
       - Note – this doctrine cannot be pleaded as a defense to charges of war crimes, crimes against peace or crimes against humanity or in a situation like that of *Rainbow Warrior*
     - Second situation – a foreign state expropriates property situated w/in its territory and sells it to a private individual, who is then sued by the original owner in another state → this has developed in U.S. courts as an issue of constitutional law (separation of powers); the courts should not embarrass the executive in its conduct of foreign relations by questioning acts of foreign states
   - Act of state doctrine in practice:
     - Act of state doctrine can be pleaded whether or not the foreign state is before the court (i.e., the parties concerned are private individuals) and can be raised by the court itself
     - In effect, the doctrine works out as a choice of law issue – the domestic courts would be required to apply the foreign state's law, which would most likely find an expropriation legal
     - Treaty exception – if the violation is a breach of a treaty, this establishes an exception
2. The Locus Classicus: ***Banco Nacional de Cuba v. Sabbatino*** (U.S. 1964)
   - Issue: whether the act of state doctrine precludes the courts of the U.S. from inquiring into the validity of the public acts a recognized foreign sovereign power committed w/in its own territory
   - Facts: Cuban law gave the Cuban President and Prime Minister discretionary power to nationalize by forced expropriation property or enterprises in which American nationals had an interest; U.S. State Department described the Cuban law as manifestly in violation of the principles of international law (discriminatory, arbitrary and confiscatory); Cuba did so w/π's contract for sugar
   - Foundations of the doctrine:
     - Doctrine is not compelled either by the inherent nature of sovereign authority or by some principle of international law → if a transaction takes place in one jurisdiction and the forum is in another, the forum does not divest the first jurisdiction of its territorial sovereignty, it merely declines to adjudicate or makes applicable its own law to parties or property before it
     - **No international rule** – application of the doctrine is not universal; non-application of the doctrine does not result in a breach of international law; the nation-state character of international law dictates that national courts cannot appropriately apply the public law of other nations w/in domestic borders
     - **No constitutional rule** – doctrine does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state; it does, however, have 'constitutional' underpinnings
       - Separation of powers – arises out of the basic relationships b/t branches of government in a system of separation of powers and concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations

        - Federalism – *Erie* problems – rules of international law should not be left to divergent and perhaps parochial state interpretations

- Holding: the Judicial Branch will not examine the validity of a taking of property w/in its own territory by a foreign sovereign government, extant and recognized by the U.S. at the time of suit, in the absence of a treaty, *even if* the complaint alleges that the taking *violates customary international law*
    - Rationale – judicial determinations of invalidity of act can have only an occasional impact; whereas political determinations can have more direct impact on concerned parties
    - Note – reflects the divergence during the Cold War b/t capitalist and developed countries, on the one hand, and communist and developing countries, on the other, in paying *fair* or *appropriate* compensation; the Western/developed nations have won out on the determination that fair value must be compensated for expropriation; but is this customary international law (NAFTA spells it out)?

3. Aftermath of *Sabbatino* – Congress passed the Sabbatino Amendment to allow federal courts to hear cases against *Cuba*(?) even if the act of state doctrine would be applicable, unless the act is *not* contrary to international law or the President declares that the particular situation requires the doctrine to apply; courts have construed the Amendment very narrowly not to reach other developing countries
4. The Contemporary Approach: ***Kirkpatrick v. Environmental Tectonics*** (U.S. 1990)
    - Issue: whether the act of state doctrine bars a court in the U.S. from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign (Nigeria), but that does require imputing to foreign officials an unlawful *motivation* (the obtaining of bribes) in the performance of such an official act
    - Decision: factual predicate for application of the act of state doctrine does not exist:
        - In every case in which the Court held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the U.S. to declare *invalid* the official act of a foreign sovereign performed w/in its own territory
        - In the present case, neither the claim nor any asserted defense requires a determination that Nigeria's contract w/Kirkpatrick International was, or was not, effective; act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign
        - Takes note of possible exceptions to the act of state doctrine if it were to apply:
            - Acts of state that consist of commercial transactions, since neither modern international comity nor the position of the Executive Branch accorded sovereign immunity to such acts (J. White)
            - An exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals (J. Rehnquist)
    - Note: on balance, the U.S. government was prone to follow the doctrine b/c it was supportive of de-colonization in the rest of the developing world; though this was not so in relation to Cuba