International Law Outline – Weiler – Spring 2009

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Overall Outline

I. Observational Standpoint
    A. Litigation/Law-Finding
    B. Legislation/Law-Making
II. Order vs. Justice Dichotomy
III. Liberal/Libertarian vs. Communitarian Worldview
IV. Subjects vs. Objects of International Law
    A. Subjects: entities that have rights that can be vindicated or that can act to vindicate their own rights OR can make law
    B. Objects: entities recognized by international law but that cannot have rights to be vindicated
    C. Example from Domestic Law:
        1. People are Subjects → they have rights and can sue to vindicate them
        2. Trees are Objects → there are laws about them (e.g. logging permit laws) but they don't have independent rights
V. Burden of Proof Paradox
    A. Those assigned the burden of proof in international law typically lose their cases.
        1. Once you have to show that your opponent violated the law, you're probably sunk
VI. Weiler's Life Lessons
    A. Hermeneutic Sensibility
VII. Methodological Principles For Looking at a Case
    A. What are the edges of the decision?
    B. What are the exceptions to the rule(s) articulated in the case?
    C. What are the principles underlying the rationale?
    D. Greatest way to change a court is to show change over time

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Theories of International Law

VIII. Positive Law
IX. Natural Law
X. Behavioralism
    A. p. 55 on
XI. Liberal vs. Communitarian View
XII.

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Sources of International Law

XIII. Sources in General

A. ICJ Article 38

1. Text

a) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states

(2) international custom, as evidence of a general practice accepted as law

(a) Weiler shit-fit: this phrasing is backwards. General practice is evidence of international custom, not the other way around

(3) the general principles of law recognized by civilized nations

(4) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

(a) FIND ARTICLE 59

b) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto

(1) ***ex aequo et bono***. According to what is equitable and good.

(a) A decision-maker (esp. in international law) who is authorized to decide ex aequo et bono is not bound by legal rules and may instead follow equitable principles.

2. Significance

a) Almost all states have signed on to the

B. Analytical Framework for Sources

1. What is the basis of obligation?

a) Is it binding?

b) What is the nature of the obligation?

c) If consent, what are the manifestations of consent?

2. Define the constituent elements of the source

3. Define the valid manifestations of the element

a) Essentially, what counts as evidence?

4. Where do you look to find the evidence?

a) E.g. which archives in the library?

5. Is the source legitimate?

C. Hierarchy of Sources

1. Treaties

2. Custom

XIV. Customary Law

A. General Notes

1. Custom is “evidence of general practice accepted as law”

2. Customary law is a response to the lack of a unified legislature, so we need rules about how to make rules.

B. Two Constituent Elements

1. State Practice

a) What states actually did

b) Empirical inquiry, using whatever sources necessary (correspondence, treaties, newspaper articles, statements, etc.)

(1) Just show what states actually did.

c) Three kinds

(1) Affirmative actions

(2) Affirmative assertions

(3) Silence or non/objection

d) Who speaks for the state?

(1) What do we do if different parts of the state behave in contrary or incoherent ways?

2. *Opinio Juris*

a) The belief of a state that its actions arise out of a legal obligation

b) Evidence of Opinio Juris

(1) Statement of the belief that something arises from a legal obligation

(a) Often in a protest; lots of state practice, broken by state A, state B protests saying 'we thought that was law!'; other states reactions become probative.

(2) Accepting something as law against your own interests is especially probative of opinio juris and thus the existence of a CIL

(3) Examples

(a) *Paquette Habana*: during the long chain of state practice of not seizing fishing vessels during war, the United Kingdom felt the need to publicly justify its deviation from the practice

(b) *Continental Shelf*: ???

(c) *S.S. Lotus*: Absence of protest by affected States

(d) *Legality of Nuclear Weapons:* reference to 'making new law' in UNGA resolutions against nukes

C. Deviations from a Possible Customary International Law

1. 3 possible outcomes for one state that is deviating from a widely followed practice:

a) <u>Law-Breaker:</u> A customary law exists and the state is breaking it.

b) <u>Persistent Objector:</u> consistent objector who carves out exception to the law by virtue of non-consent and consistent protest

c) <u>Law-Maker:</u> Trying to create new law

D. Making Customary Law

1. Typical Process

a) Claim by one state

b) Absence of Protest by states interested in the matter at hand
    (1) Flexibility is required in understanding the lack of protest. Could be:
        (a) Lack of awareness
        (b) Political decision not to protest
        (c) Legal decision not to protest
c) Acquiescence by other states
    (1) *Gulf of Maine Case* (ICJ, 1984): acquiescence is "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent."
    (2) Typically inferred by lack of protest

E. Regional or Bilateral Customary Law
1. It is possible for customary law to develop that is specific to regions, or even between two states.
2. *The Asylum Case* (ICJ, 1950): Colombian claim that a regional custom existed was rejected because of uncertain and contradictory evidence. "The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party."
3. *Right of Passage Over Indian Territory* (ICJ, 1960): Local custom between two states is permissible. There was a consistent and uniform practice that allowed for free passage from treaty ports to concessions in India's interior. The "practice was accepted as law by the parties and has given rise to a right and a correlative obligation."

F. Methodologies
1. Two-step process
2. Generality
    a) Range of States Required for Custom – Which States Matter
        (1) States with proximity and relevant to dispute – e.g. coastal states in fisheries cases
        (2) Powerful states
        (3) Politically Relevant Groupings of States
            (a) Muslim Countries
            (b) Capital Exporting Countries
            (c) Former Colonial Countries
            (d) Etc.
    b) Need not be a meaningful distinction in relation to the rule.

G. Major Cases!
1. *The Paquette Habana* (SCOTUS, 1900): In seizing a fishing vessel during the blockade of Cuba, the United States violated international customary law. There was a near unbroken chain of state practice of leaving fishing vessels alone, going back to the 15th century. That practice had been respected by the United States.

2. *The SS Lotus Case* (PCIJ 1927): Everything is permitted, except that which international law specifically prohibits. Therefore, the burden of proof is on the party trying to demonstrate law breaking.
3. *Legality of Nuclear Weapons Case* (ICJ, 1996):
    a) Restriction of relevant state practice – when might nukes have been used? what was policy towards them – to prevent odd situation of incentivizing periodic use to preserve customary int'l law allowing use.
    b) Also, UNGA resolutions – adopted with many objectors in politically relevant groups – referenced making new law not codifying existing custom.

XV. Treaties – **ADD CHAPTER 16 FROM SHAW TO THIS SECTION!!!!**

A. Treaties Generally

1. Treaty: "written agreement whereby the states participating bind themselves legally to act in a par ticular way or to set up particular relations between themselves."
2. *Pacta Sunt Servanda:* principle that agreements must be observed
    a) Also a general principle of international law?
3. Two Types
    a) Law-making treaties
        (1) universal or general relevance
        (2) require the participation of a large number of states
        (3) may universal rules binding beyond signatories
            (a) transformation of treaty into custom
                (i)
    b) Regime Treaty
        (1) attempt to make binding on non-signatories
        (2) e.g. UN Charter § 2(6): "the organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."
        (3) **SEE SG-2 NOTES**
    c) Treaty-contracts
        (1) between two or a small number of states
            (a) often for unique circumstances
        (2) not norm-creating
            (a) may provide evidence of customary rules
                (i) approach this principle with caution!
                (ii) e.g. a series of bilateral treaties with a similar rule indicates state practice

B. Treaties Giving Rise to Customary Law

1. Norm-creating treaties, may infuse meaning into the state-practice element of customary international law

2. Three Ways a treaty can give rise to customary law: codification, generation and crystallization

3. <u>Codification</u>

a) Evidence of codification:

(1) Look into leg. history – did states say they were codifying?

(2) IF YES TO A, look at state's reactions

(a) Agree → it is probative that it is a codification

(b) Protest → probative that it's not codification

(i) No action is probative for agreement, because the issue is on the state's radar by virtue of being a participant at the conference

4. **<u>Generation</u>**

a) <u>Step 1</u>: Does the treaty have a norm-creating character?

(1) Yes → probative for generation

(a) What is the role of silence here; has a state acted by being in a position to sign the treaty and declining? Need a state protest?

(2) No → probative for non-generation

(a) NOT dispositive

(i) it's not impossible for non-norm creating treaty to become custom, but it's harder

(b) reservations allowed → especially probative for non-generation

(c)

b) <u>Step 2</u>: What is the practice of states not bound by the treaty?

(1) Look to the principle applied by states not bound by the treaty during disputes relevant to the treaty

5. **<u>Crystallization</u>**

a) Customary international law exists, but evidence of *opinio juris* is lacking

b) Process of making the treaty supplies evidence

(1) E.g. states say they believe they are codifying customary international law

c) Example: Texaco

(1) Libya refers to non-binding UNGA resolutions that it claims crystallized international law

d) Non-binding provision can become binding if its an authoritative interpretation of a treaty

6. Cases

a) <u>Nicaragua (ICJ, 1986):</u> Court rejected argument that UN Charter had replaced customary law of self-defense, holding that "customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content."

b) Continental Shelf: It is possible for treaties to serve as the basis for customary law. Regional convention on the continental shelf 10 years prior had not risen to the level of customary law for the following reasons:
(1) Rule did not exist at the signing of the convention, because there was no mention of codifying customary law
(2) Treaty mentioned purpose of effecting delimitation by agreement
(3) Reservations are possible
(4) Treaty hasn't been ratified by other interested nations
(a) Yes, non-ratification can be for reasons other than active disapproval, but the burden of proof is on those who wish to show a law.
(5) Sporadic, non-uniform state practice

C. Advantages of Treaty over Customary Law
1. Ideologically split world since Communist Revolution in 1917
a) In the absence of a consensus, you still need rules; treaties are easier to make than customary law
2. The world is 'moving faster' and in constant flux
3. Customary Law is backward looking
a) Bases the law on what we've already done
4. There are many more global actors today

XVI. General Principles
A. Rationale for Usage and General Notes
1. *Non Liquet* Problem
a) Few cases + no legislature → we need something to avoid *non liquet* problem
b) ***Non Liquet*:** Lack of relevant law leads to a non-decision by a court.
c) Result: every international situation can be resolved as a matter of law
2. Theoretical Approaches
a) Natural Law: general principles is an affirmation of the existence of natural law
b) Positivism:
(1) Sub-heading under treaty and custom.
(2) Adds nothing if not consented to by states
3. Where does it come from?
a) National law: e.g.
b) Derived from the nature of international community
c) Principles inherent in notions every legal system
(1) Accepted b/c they go to the judicial process itself
(a) E.g. judges should be impartial

B. Leading Cases!
1. *Chorzow Factory* (PCIJ, 1928): Poland seized a nitrate factory in Upper Silesia.

a) Principle 1: every violation of an engagement involves an obligation to make reparation
b) Principle 2: reparation may be an indemnity corresponding to the damage caused

2. *German Settlers in Poland* (PCIJ, ???): private rights acquired under existing law do not cease on a change of sovereignty.
3. *Corfu Channel Case* (ICJ, 1949):
    a) Circumstantial evidence is admitted
4. *Administrative Tribunal Case* (ICJ, 1954): Res judicata applies in international law
5. *Right of Passage Case:*
6. **PICK UP AT SHAW P. 102 AND MOVE ON TO NOTES FROM CLASS 7**

XVII. Judicial Decisions

XVIII. Writers

XIX. Jus Cogens

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Subjects of International Law

XX. Personality Generally

A. Participation + Community Acceptance → International Personality

XXI. States

A. Creation

1. General Formulation – Montevideo Convention on Rights and Duties of States
    a) States must possess:
        (1) Permanent population
            (a) No specified minimum number of inhabitants
            (b) Minimums might affect self-determination issues
        (2) Defined territory
            (a) Consistent band of territory undeniably controlled by the state
            (b) Provided the above condition is satisfied, border disputes don't matter
        (3) Government
            (a) Indication of a coherent political structure
            (b) Need not be sophisticated
            (c) Might be balanced by recognition and UN admission
            (d) Failed states: collapse of government within existing state doesn't destroy it
            (e) Cases
                (i) *Aaland Islands* (1920): Difficult to tell when Finland emerged as an independent state, because the

public authorities didn't have control w/o using foreign troops for a while.

(ii) Croatia/Bosnia: recognized and admitted to UN even though non-governmental forces controlled significant swaths of territory

(4) Capacity to enter into relations with other states

(a) Formal Statement of 3 elements

(i) State is subject to no other sovereignty

(ii) Unaffected by factual dependence on another state

(iii) Unaffected by submission to the rules of international law

(a) WHAT DOES THIS MEAN??? – p. 202

B. Self-Determination

1. Lower Level of Control/Government necessary for recognition in cases of decolonization
2. May be relevant as a criterion for statehood

a) Rhodesia (1965)

(1) International community worked to prevent recognition because of denial of self-determination

b) Former Yugoslavia (1991)

(1) Europe published guidelines for recognition of new states requiring:

(a) Rule of law

(b) Democracy

(c) Respect for human rights

(d) Guarantees of minority rights

3. Declaration of Friendly Relations Between Peoples

a) Be sure to note the section 1/section 7 tension in class notes

b) Also the 2/8 conflict

(1) Basically limit the ability of other intervening states to work to try and bring the offender state back into compliance with the principles of the declaration WITHOUT dismembering the state at all

4. Secession of Quebec

C. Recognition

1. Two Theories:

a) Constitutive Theory: Only through recognition does a state come into being under international law.

b) Declaratory Theory: once the factual criteria have been satisfied, a new state exists as an international legal person and recognition is a political act, not a legal one

2. Are States Bound by Legal Criteria in Recognition?

a) Governed by customary law

(1) "some rules" violated means you shouldn't recognize

(a) Ex: UNSC resolution
(b) Possible emerging customary law requiring that a state be a democracy for recognition

(2) Exercising right of self-determination → you should recognize

b) Critical mass of states recognize → entity becomes a state

(1) Need from all major state groupings
(2) Split security council → non-state
(a) Only one objector, it'll depend on the capital put into it
(3) Politically cognizable group of resisters → non-state
(a) Ex: No states w/ secessionist groups have recognized Kosovo so that would prevent it from becoming a state

c) **<u>MEMBERSHIP IN THE UN IS DISPOSITIVE!!!</u>**

d) Remember that all this is crude: you know it when you see it

D. Extinction of Statehood

1. Four Methods for Extinction
a) Merger
b) Absorbtion
c) Dismemberment
d) Annexation (historical)
2. Legal Extinction
a) Dissolution through consent
(1) Yugoslav Arbitration Commission Opinion No. 8 → Refer to FORMER Socialist Federal Republic of Yugoslavia
(a) All of the constituent parts had been recognized as new states
(b) Serbia and Montenegro adopted a new constitution for the Federal Republic of Yugoslavia
(c) UN Resolutions referred to the Former SFRY
(d) Federal Republics can be compromised if their federations all declare independence and go their separate ways
3. Illegal Extinction
a) Illegal use of force
b) Consequence of internal upheavals

E. Rights of States

1. Independence
a) <u>Definition</u>: the capacity of a state to provide for its own well-being and development free from the domination of other states, providing it does not impair or violate their legitimate rights.
(1) Declaration on the Rights and Duties of States (1949)
b) Rights
(1) Exercise jurisdiction over its territory
(2) Engage in an act of self-defense

c) Duties
(1) Don't intervene in the internal affairs of other states
(a) Includes assistance or aid to subversive elements aiming at the violent overthrow of the government
d) Cases!
(1) *Austro-German Customs Union* (PCIJ, 1931): restrictions on a state's freedom to act don't affect a state's independence unless they place the state under the legal authority of another state.
(2) *Lotus* (PCIJ, 1927): "restrictions upon the independence of states cannot be presumed.

2. Equality
a) 1970 Declaration of Principles in International Law
(1) States are juridically equal
(2) States enjoy rights inherent in full sovereignty
(3) Territorial integrity and political indepdendnce are inviolable
(4) Can feely choose/develop its political/social/economic/cultural systems

3. Peaceful Co-Existence

F. Protectorates
1. Definition: entity enters into relationship with a state that results in separate international personality, but NOT statehood
a) Unlike protected state where two states enter into a treaty relationship that may give one state the right to act on another's territory

G. Federal States
1. Federal Control: "Existence of the state implies that federal organs represent the components of the federation and wield effective power."
2. Easier to dissolve
a) Existence of a state is compromised when majority of the federated entities decide they're sovereign
b) No right of self-determination applicable to independent (e.g. non-colonial) states that would justify a resort to forceful secession.
(1) Exception, as always, for recognition in fact

H. Territory
1. Definition: "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state." (*Island of Palmas Case*)
2. Title
a) The factual and legal conditions under which territory is deemed to belong to one entity or another
b) In international law: relative, not absolute – whoever has the best argument wins

(1) Essentially a sub-point that international law is less formal than domestic law and lacks the
(2) In domestic law, you go and look at the documents for whomever has title but

c) Possible bases for claims (depending on the context)
(1) Occupation
(2) Prescription
(3) Self-determination
(4) Geographical contiguity
(5) Historical demands
(6) Economic factors

3. Doctrine of Domestic Jurisdiction
a) Legal prohibition on the interference with internal mechanisms of another entity
b) A state is supreme within its own frontiers

4. Territorial Acquisition – Methods of Acquiring Territory
a) Occupation of *terra nullius*
(1) 3 elements
(a) By a state
(b) Effective
(c) Intended as claim of sovereignty
(2) SEE NOTES FROM LECTURERE
b) Prescription – transfer of a title over time
(1) Critical determination: absence of protest from prior sovereign
(2) Done in illegal circumstances or where legality cannot be demonstrated
(3) "legitimization of fact"
c) Cession – voluntary transfer of territory
(1) Basis lies in intent of sovereign to transfer territory
d) Accretion – change in physical circumstances
(1) E.g. movement of a river (avulsion)
(2)
e) Subjugation – does not in and of itself transfer sovereignty even if the conquest is both legal and effective
(1) Illegal use of force can lead to acquisition of territory by virtue of recognition
(2) Two elements: Effective control + no reasonable chance of old sovereign regaining control
f) Boundary Treaties
(1) Special treaties that create an *erga omnes* regime
(2) Boundary continues to be valid even if the treaty ceases to apply
(3) In dispute, treated like contracts: seek the will of the parties

(a) Adjudication is binding on all, notwithstanding protest

5. Intertemporal Rule: apply the law at the time of the conduct in question.
6. *Uti Possidetis:* new state has the boundaries of a predecessor entity
7. Sovereign Activities (Effectivités)
    a) To have legal consequence, activities MUST be performed
        (1) By a state exercising its sovereign powers (*à titre de souvrain*)
        (2) By individual whose conduct is subsequently ratified by a state
        (3) By a corporation chartered by a state
    b) Subsequent Conduct:
        (1) Three reasons for Relevance
            (a) Determine true interpretation of relevant boundary instrument
            (b) Resolves an uncertain situation
            (c) Method of modification of an instrument
        (2) Types of Subsequent Conduct
            (a) Acquiescence: protest is called for and does not happen
            (b) Estoppel: a party's consent cannot be revoked
                (i) Silence may create estoppel but it's unclear
                (ii) Relevant factors:
                    (a) Notoriety
                    (b) Length of silence
                    (c) Type of conduct deemed reasonable to safeguard legal interests at the time
            (c) Recognition: a positive act accepting a situation
8. ISLAND OF PALMAS
    a) Huber vs. Weiler approach
    b) Huber: critical date method (but dumb)
9. Who owns the west bank
    a) Doctrine of the Missinger Version
        (1) 1948 war: Jordan became illegal occupier in the West Bank
        (2) 1967: Israel became an occupier of the West Bank; title wasn't transferred
    b) Armistice Lines
        (1) Mandate for local population and jews
        (2) 1948: Israeli F.M. announces desire for state btw it and Jordan
            (a) Israel sued for peace based on the armistice line
    c) UNSC Resolution 242
        (1) Israel has to return "occupied" territories
            (a) See territory/title and use force
            (b) Hague regulations of 1907
10. **FINISH GOING THROUGH BOOK ON THIS!!!**

XXII. Individuals

A. Nationality: "the link between the individual and his or her state as regards particular benefits and obligations"
    1. Individuals obtain benefits and protections under international law through the actions of their states
    2. Nationality is a function of the law of the state invoking a claim in its name
        a) Hague Convention on Conflict of Nationality Laws (1930)
        b) Two common bases for state recognizing nationality under domestic law
            (1) *Ius sanguinis*: acquiring nationality by virtue of parents being nationals.
            (2) *Ius soli*: acquiring nationality by virtue of being born on the soil
    3. Dual citizenship → test is effectiveness; whichever state has a more effective connection may enforce the claim

B. Duties of Individuals
    1. Crimes of *Hostis Humanis Generis* (enemies against all mankind)
        a) Examples
            (1) Piracy
            (2) Nuremberg Crimes (Set forth in 1942 London Charter)
                (a) Crimes Against Peace: planning, preparing for and initiating a war of aggression
                (b) War Crimes: Violations of the laws or customs of war
                (c) Crimes Against Humanity: murder, extermination, enslavement
            (3) Other Statutory Schemes
                (a) Aircraft sabotage/Hijacking
                (b) Attacks on diplomats and other protected persons
        b) Result: Universal Jurisdiction
            (1) 'Waiver rule': states waive sovereignty over criminals
                (a) Argument: individuals have become subjects in international law because any state can arrest, prosecute
            (2) *Ex dedere aux judicare*: hand over or prosecute
    2. International Criminal Court (1998 Rome Statute)
        a) Permanent staff designed to investigate Nuremberg crimes
        b) Jurisdiction is triggered if a nation is unwilling or unable to initiate prosecution against its own nationals

C. Rights of Individuals
    1. Diplomatic Protection: a nation asserts the right ('*espouses* the right) to protect the interests of a national against a state that has injured that person
    2. Draft Articles on Diplomatic Protection (2006)
        a) Definition of diplomatic protection: the invocation by a state … of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state…"

b) When a state makes a claim on behalf of a national, the state is the only party recognized under international law

(1) It is not a duty of the state to invoke a claim, nor is it a right of a national to demand it

D. *Mavromatis* Principle: You can do what you want with your own nationals, but nationals of another state must be treated according to some minimum international standards

1. "By taking a case of one of its subjects, a state is asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law"

E. Subjecthood in Economic Disputes

1. Investors can bring claims before an international tribunals
2. See WTO notes from SG day 4

F. *Notteboehm Case* (ICJ, 1955):

1. Hold: In the case of a civilian re-registering from Germany to Lichtenstein after WWII outbreak, another state need not recognize the citizenship under international law, because "nationality must correspond with the factual situation."
    a) Lichtenstein could do as it pleased in terms of setting domestic legal conditions for nationality, but other states need not recognize such a relationship unless it is cognizable at international law.
2. Holding is sometimes called the Doctrine of Genuine Connection.
    a) ILC has downplayed the Notteboehm case because the doctrine of genuine connection had previously to dual nationality
    b) Notteboehm extended the doctrine
3. Underlying Principle: granting of nationality gives rights in int'l law and int'l law wants to ensure that process is not abused

G. *Mergé* (

1.

H. Statelessness

1.

I. Weiler Principle: **REAL SUBJECTHOOD IS NOT THROUGH RIGHTS BUT THROUGH POWER**

XXIII. Corporations

A. Basic Rule: The nationality of a corporation is the state where it is incorporated.

1. Draft Articles on Diplomatic Protection §9 (2006)
2. Affirmed in *Barcelona Traction*
3. International personality of transnational corporations remains an open issue

B. *Barcelona Traction* (ICJ, 1970)

1. Hold: Nationality of corporation is at the place of incorporation under domestic law, not the residence of the shareholders.
2. Chinks
    a) Paragraph 76: Had Canada never exercised diplomatic protection for Barcelona traction, the ICJ might have recognized the shareholders' right to bring a claim

(1) "this was not a case where diplomatic protection was refused or remained in the sphere of fiction."

b) Paragraph 38: international law will respect the law of corporations

c) Paragraph 71:

C. OUTLINE 817 TO 819 VERY CAREFULLY

XXIV. Multilateral Organizations

A. Personality Under International Law

1. Distinct from personality under domestic law
2. Must be stated or inferred from the instrument establishing the organization
    a) *Reparation for Injuries Case* (ICJ, 1949): The United Nations had personality because it was indispensible to achieve the purposes and the principles specified in the charter.
        (1) "states… representing the vast majority of the international community, had the power in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone"
3. Objective personality → enforceable against non-parties to the instrument
4. Consequences of Personality of Internaitonal Org?
    a) Varies depending on the circumstances
    b) Not all international organizations will have the same capacities

B. Constituent Instruments

1. Multilateral treaties, but must possess a "special character" since they are creating subjects under international law\
2. Interpreted According to Articles 31 and 32 of the Vienna Convention on the Law of Treaties
    a) **FIND THIS INSTRUMENT!!!**
3. Be sure to look to subsequent practice as a sign of interpretation
    a) These are 'living instruments' making practice especially important
4. *Legality of Nuclear Weapons Case* (ICJ, 1996): WHO's constitution did not grant it competence to address the legality of nuclear weapons, because the competence of the WHO to deal with the effects of use did not depend on the weapons' legality.

C. Responsibility of Organizations

1. Once the organization has personality, it functions as all other entities do (including states) in invoking state responsibility for a breach of the obligations to it
    a) The substance of the obligations may be different, however
2. Attribution to the international organization of actions of entities with dual jurisdiction – esp. a nation's peacekeeping forces – will depend on the facts of the intervention
    a) Korea (1950) and Kuwait (1990) were NOT attributable ot the UN
3. Joint and Several Liability: Default liability of members of an international organization is joint and several, but can be contracted around in the founding instrument

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State Responsibility

XXV. Articles of State Responsibility

A. Chapter III: Breach of an International Obligation

1. General Commentary

a) Definition of Breach: conduct attributed to a state as a subject of international law amounts to a failure by that state to comply with an international obligation (Chap. III cmt. 1)

b) Chapter III plays an "ancillary" role in the substantive question of whether an obligation has been breached (Chap. III cmt. 2)

c) Chapter III is irrelevant to questions of evidence and proof of a breach. (Chap. III cmt. 4)

2. Article 12: Existence of a Breach

a) Basic Rule: Act of a state not in conformity with requirements of an obligation → breach of that obligation

b) Breach = disconformity between requirements of law and facts of the matter (Art. 12 cmt. 1)

(1) Language indicating breach in ICJ

(a) incompatibility with the obligations

(b) Contrary to/ inconsistent with a rule

(c) Not in conformity with requirements

(i) Allows for breach if act is only partly contrary to a requirement

c) Source of Obligation Mostly Doesn't Matter

(1) Articles apply to *all* obligations, regardless of origin (Art. 12 cmt. 3)\

(2) 'A rule is a rule is a rule': Origin makes no difference in leading to the conclusion that responsibility is entailed (Art. 12 cmt. 4)

(3) No distinction in State Responsibility between breach of treaty or of some other rule. (Art. 12 cmt. 5)

(4) Peremptory norms: violation may entail a stricter regime of responsibility b/c such norms affect the interests of the international community as a whole (Art. 12 cmt. 7)

(5) Doesn't matter if the obligation is an obligation of conduct or an obligation of result. (Art. 12 cmt. 11)

d) *Prima Facie* violations: incompatible legislation (Art. 12 cmt. 12)

(1) "Some obligations may be breached by the mere passage of incompatible legislation"

(a) Ex: Uniform Law Treaty

(2) Depends on facts, though – not a hard and fast rule

3. Article 13: Intertemporal Rule Applies!

a) Basic Rule: Breach ONLY IF obligation exists at the time of the act.
b) *Enterprize Case* (USA-UK Mixed Comm'n, 1855): British seizures of American slave ships took place at different times, so the court had to figure out whether slavery was "contrary to the law of nations" at the time of each seizure. (Art. 13 cmt. 2)
c) Peremptory Norms: the inter-temporal rule still applies, and there is no "retrospective assumption of responsibility." (Art. 13 cmt. 5)
d) Intertemporal Rule is General: "It is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application" (Art. 13 cmt. 6)
e) Once breach occurs, it does not matter if the obligation later ceases to exist; the breach still exists, though it would cease at the end of the obligation (Art. 13 cmt. 7)
    (1) Ex: Treaty breached, then expires 2 months later. Suit can still be brought for breach of obligation at the time of the breach.
f) Facts occurring *before* the creation of a particular obligation may be brought in if relevant (Art. 13 cmt. 9)
    (1) Ex: speedy trial obligation; length of detentions in breaching country before the existence of the international obligation can be brought in, but no compensation could be awarded.

4. Article 14: Length of Breach; When Does a Breach Occur?
    a) Basic Rule
        (1) Breach of non-continuing character → time of breach is the moment the act is performed
            (a) Doesn't matter if effects continue
        (2) Continuing breach → breach continues throughout time when act:
            (a) Continues
            (b) Remains not in conformity with obligation
        (3) Obligation of prevention → begins when event occurs, extends while:
            (a) Event continues
            (b) Event remains not in conformity with the obligation
    b) Paragraph 2, above, requires that the state be bound by the obligation during the whole period in question. (Art. 14 cmt. 3)
    c) Completed vs. Continuing Acts?
        (1) Depends on circumstances and primary obligation (Art. 14 cmt. 4)
            (a) Ex: forced/involuntary disappearance is continuing, for as long as the person is unaccounted for (Art. 14 cmt. 4)
                (i) Inter-American Court of Human Rights *Blake* Decision (1998)

(2) "In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time." (Art. 14 cmt. 5)
(3) Continuing effects do NOT necessarily imply a continuing act. (Art. 14 cmt. 6)
(a) E.g. psychological effects of torture may continue after person is freed, but that doesn't make torture a continuing crime
(b) Might be relevant to damages, though

d) Jurisdiction: Continuing wrongful act where jurisdiction of a court is established in the middle of the act can examine the act as a wrong from the start of the court's jurisdiction. (Art. 14 cmt. 11)
(1) *Lovelace v. Canada* (UN Human Rights Commission, 1981)

e) Preparatory Conduct: "Preparatory conduct does not amount ot a breach if it does not 'predetermine the final decision to be taken'" (Art. 14 cmt. 13)

f) Prevention Obligations in Paragraph 3
(1) Usually best efforts obligation (Art. 14 cmt. 14)
(2) "If the obligation was only to prevent the act happening in the first place (as distinct from its continuation) there will be no continuing wrongful act." (Art. 14 cmt. 14)

5. Article 15: Breach of Composite Acts
a) Composite Act: series of actions or omissions defined in aggregate as wrongful
b) Basic Rule
(1) Breach of composite act occurs when the actions taken are sufficient to constitute the wrongful act
(2) BUT: when wrongful acts rise to the level sufficient to constitute a composite act, the breach then extends backwards in time to cover the first act that is part of the composite act.
c) Examples of Composite Acts (Art. 15 cmt. 2)
(1) Genocide
(2) Apartheid
(3) Crimes against humanity
(4) Systematic racial discrimination
d) Genocide: "Genocide is not committed until there has been an accumulation of acts of killing … once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide." (Art. 15 cmt. 3)
e) Be sure to distinguish composite obligations from simple obligations breached by a composite act.

(1) EX: the fact that genocide is a composite act doesn't mean that each individual killing wasn't unlawful under another international obligation (Art. 15 cmt. 9)

(2) *Ireland v. United Kingdom* (Eur. Ct. Hum. Rights, 1978): Ireland was entitled to complain about individual wrongs under the genocide convention (in this case, detention and torture) that did not of themselves amount to genocide; "a practice does not of itself constitute a violation separate from such breaches."

f) Discrimination: not necessarily a composite act, but to prove it you may have to produce evidence of a practice amounting to such an act. (Art. 15 cmt. 6)

(1) WME: I think this only makes sense if you acknowledge two wrongs: discrimination and systematic discrimination. Discrimination requires several actions as the *actus reus*, and systematic discrimination is presumably the composite wrong of many acts of discrimination.

g) Policy Justification for Para. 2: enhance the effectiveness of the prohibition (Art. 15 cmt. 10)

(1) Note that the word "remain" in the 'graph makes it consistent with the intertemporal rule. (Art. 15 cmt. 11)

B. Part II Ch. 3 (Violation of Peremptory Norms)

1. General Commentary

a) Subject of Chapter: Two Criteria (Pt. II Ch.3 cmt. 1)

(1) Violation of peremptory norm

(2) Breaches are serious in scale or character

b) Policy for Distinction of Peremp. Norms (Pt. II Ch.3 cmt. 2)

(1) for the purposes of State responsibility, the importance of the rights involved give all States a legal interest in vindication

(2) *Barcelona Traction*, p. 32

c) No Crimes of State

(1) Initial approach of crimes of state was rejected (Pt. II Ch.3 cmt. 5)

(2) Instead, there has been a focus on *individual* criminal responsibility for serious violations of peremptory norms (Pt. II Ch.3 cmt. 6-7)

(a) ICTY

(b) ICTR

(c) ICC

d) Difference Between Peremptory and *Erga Omnes*? (Pt. II Ch.3 cmt. 7)

(1) Only in emphasis; there is "substantial overlap"

(a) Peremptory: "focus on the scope and priority to be given to a certain number of fundamental obligations

(b) *Erga Omnes*: emphasis on the legal interest of all states in compliance.

(2) Two Consequences of Different Emphasis

(a) Serious breaches of peremptory norms → additional consequences
(b) All states can invoke responsibility for *erga omnes* obligations

2. Article 40: When to Use Article 41 (Peremptory +Gross/Systemic)
   a) Basic Rule: (Gross OR Systemic failure to fulfill obligation) + Peremptory Norm → Use Article 41
      (1) Gross OR Systemic → serious breach
   b) Definition of Peremptory Norm: a norm "accepted and recognized" by the int'l community "as a whole as a norm from which no derogation is permitted and which can be modified only by" a subsequent peremptory norm. (Art. 40 cmt. 2; Vienna Conv. Art. 53)
      (1) Policy: Violation of such norms are intolerable "because of the threat it presents to the survival of states and their peoples and the most basic human values." (Art. 40 cmt. 3)
   c) Non-Exhaustive List of Peremptory Norms (Art. 40 cmt. 4-6)
      (1) Prohibition against aggression
      (2) Slavery/slave trade
      (3) Genocide
      (4) Racial discrimination
      (5) Apartheid
      (6) Torture [art. 26]
      (7) Crimes against humanity [art. 26]
      (8) Right to self determination [art. 26]
   d) 'Serious': "significies that a certain order of magnitude of violation is necessary in order not to trivialize the breach." (Art. 40 cmt. 7)
      (1) Does NOT mean that other violations are "somehow excusable"
   e) 'Systematic': carried out in an organized and deliberate way (Art. 40 cmt. 8)
   f) 'Gross': flagrant violation, "amounting to a direct and outright assault on the values protected by the rule (Art. 40 cmt. 8)
      (1) Factors
         (a) Intent to violate
         (b) Scope and number of individual violations
         (c) Gravity of consequences
      (2) Automatically Gross Violations
         (a) Violations "by their very nature require an intentional violation on a large scale"
            (i) Aggression
            (ii) Genocide
      (3) WME: Note the **LOOPHOLE** in this language; a provision may protect a number of underlying values, and this might allow a lawyer to

argue for one over the other thereby expanding or contracting this element

3. Article 41: Consequences of an Article 40 Breach
    a) Basic Rule: 3 Consequences
        (1) Positive duty to cooperate through lawful means to bring breach to an end
        (2) Prohibition on recognizing a serious breach as lawful
        (3) Prohibition on rendering aid/assistance in maintaining serious breach
    b) Without Prejudice
        (1) to other consequences under Part II
        (2) to additional consequences under international law
    c) Obligation of Cooperation
        (1) Formal or Ad Hoc: either through international organization (e.g. UN) or through non-institutionalized cooperation (Art. 41 cmt. 2)
        (2) 'No Politics Allowed': Doesn't matter whether state is affected by breach (Art. 41 cmt. 3)
        (3) Reflects a DEVELOPMENT in int'l law, not codification (Art. 41 cmt. 3)
    d) Obligation of Non-Recognition (Art. 41 cmt. 5)
        (1) Situation created by the breach (ex: sovereignty acquisition through denial of self-determination of peoples)
        (2) 'No Hinting': Prohibits acts that would even *imply* recognition
        (3) State Practice and Jurisprudence in Support (Art. 41 cmt. 6)
            (a) Manchuria, 1931
            (b) Nicaragua Case
            (c) UNSC and Kuwait, 1990
        (4) Applies to all states (Art. 41 cmt. 9)
            (a) Including state that committed the wrongful act
            (b) Including state that is being wronged, which might be coerced into recognition
        (5) LIMITATIONS on Obligation (Art. 41 cmt. 10)
            (a) States *should* recognize acts if non-recognition would harm the populace of the harmed entity
                (i) Ex: registration of births, deaths marriage
                (ii) *Namibia* case
    e) Obligation of Non-Assistance (Art. 41 cmt. 12)
        (1) Separate from non-recognition b/c acts of assistance might not be entirely covered by acts of recognition, prohibited above
    f) Without Prejudice Provisions (Art. 41 cmt. 13)
        (1) Purpose of provision
            (a) Makes clear that all the consequences listed elsewhere in the ASR still apply, e.g.:

(i) Cease wrong
(ii) Guarantee of non-repetition
(iii) Reparation

(b) Allows for further consequences
(i) Possibly under other provisions of international law
(ii) Possibly under future development of more elaborate scheme
(a) WME: this seems to be an effort to leave open the option of crimes of state, no?

C. Part III, Chapter 1 (Invocation of Responsibility)

1. Part III, Generally

a) State responsibility arises whether another state invokes it or not
(1) WME: similar to declaratory theory of recognition, I think

b) Organization
(1) Chapter 1: invocation of state responsibility
(2) Chapter 2: Countermeasures

2. Chapter I, Generally

a) Broad Scheme (Pt. III Ch.1 cmt. 1)
(1) Part One: identifies wrongful act as a breach
(2) Part Two: defines the consequences of an act as an obligation of the offending state
(3) Part Three [this part]: how do we implement state responsibility?

b) Injured State: "the state whose individual right ahs been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act."

c) Chapter Scheme
(1) Article 42: discusses injured state
(a) Read in light of:
(i) Article 46: possibility of multiple injured states
(ii) Article 48: one injured state can coexist with other states invoking responsibility
(2) Article 43: notice requirements
(3) Article 44: admissibility of claims
(4) Article 45: waiver
(5) Article 47: multiple wrongdoers

d) *Lex Specialis*: As noted in article 55, these are default rules that will bow to specific rules in treaties/international agreements, even (presumably) customary law

3. Article 42: Defining an Injured State; Basic Invocation

a) Basic Rule: A state "as an injured state" may invoke responsibility in three cases:
(1) Obligation is owed to that state individually [subparagraph a]

(2) Obligation owed to group/community + breach specially affects that state [subparagraph b(i)]
(3) Obligation owed to group/community +breach will "radically … change the position of all the other states to which the obligation is owed with respect to further performance…" [subparagraph b(ii)]

b) 'Injured State' (Art. 42 cmt. 1)
(1) Narrow definition
(2) Distinction: injury to individual/small number VS legal interests of several/all

c) Invocation (Art. 42 cmt. 2)
(1) Must be of Formal character
(a) Examples
(i) Raising/presenting a claim
(ii) Commencing proceedings in court/tribunal
(2) NOT Informal Diplomatic Contacts
(a) Criticizing
(b) Calling for observing
(c) Reserving rights
(d) Protesting
(3) Informal contacts → invocation ONLY IF "involve specific claims by the state concerned, such as for compensation for a breach affecting it"

d) "The purpose of article 42 is to define [an injured state]" (Art. 42 cmt. 2)
(1) Article 42 also distinguishes an injured state from another state that may invoke responsibility (Art. 42 cmt. 3)

e) Subparagraph a (Art. 42 cmt. 8)
(1) IndividuallY: in the circumstances, obligation was owed to that state
(a) Contrast: performance owed generally and not differentiated/individualized
(b) Requires interpretation of the primary rule to categorize the obligation
(2) Examples
(a) Bilateral treaty
(b) Binding unilateral act
(c) Treaty establishing obligations owed to a nonparty
(d) Binding judgemnt of an int'l court
(e) Performance owed under multilateral treaty/customary law to "one particular state"
(i) NOT all multilateral treaties, which usually establish frameworks applicable to all parties
(ii) Rather, treaty must give rise to "'bundles' of bilateral relations"

f) Subparagraph b(i) (Art. 42 cmt. 12)
    (1) "Specially affected": wrongful act has "particular adverse affects" on one state or group of states
        (a) Necessary for invoking b(i)
        (b) Ex: pollution in coastal waters
    (2) Does not define nature/extent of injuries
        (a) Factors to determine if sufficient
            (i) Object and purpose of obligation
            (ii) Facts of each case
    (3) REQUIRED: "affected by the breach in a way which distinguishes it from the generality of other states to which the obligation is owed."
g) Subparagraph b(ii): *Per Se* Effects (Art. 42 cmt. 13)
    (1) Breach affects per se every other state to which the obligation is owed
    (2) Examples
        (a) Disarmament treaty
        (b) Nuclear free zone treaty
        (c) Treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others
    (3) Usually arises under regime treaties but there is no logical reason why that need be considered a hard and fast restriction
    (4) **Limit**: ONLY injured under b(ii) IF breach "radically" affects enjoyment of rights/performance of the obligations of ALL the other states who are owed the obligation (Art. 42 cmt. 15)

4. Article 43 – Notice of Claim
a) Basic Rule: An injured state invoking responsibility against another state must give notice of its claim, including:
    (1) conduct necessary for ceasing the wrongful act, if it's ongoing
    (2) what reparations are necessary
b) Notice requirements apply to states invoking responsibility either individually (Article 42) or on behalf of another state (Article 48) (Art. 43 cmt. 1)
c) Form of Notice is Flexible (Art. 43 cmt. 2)
    (1) Examples
        (a) Unofficial/confidential reminders
        (b) Formal protest
        (c) Consultations
        (d) Etc.
    (2) May be raised at different levels of government, depending on the claim at issue (Art. 43 cmt. 4)
    (3) *Certain Phosphate Lands in Nauru Case* (ICJ, 1992): it was sufficient that a respondent state was aware of tehclaim, even though the

communication came from press reports of speeches and not diplomatic correspondence.

d) Steps for Ceasing Wrongful Act (Art. 43 cmt. 5)
    (1) Though it may be helpful to include this information in notice to resolve the dispute, these conditions are not binding on the respondent state
    (2) All that is required is that they bring themselves into compliance with their obligations somehow

e) Limits on the Form of Reparation (Art. 43 cmt. 6)
    (1) In some unresolved situations – usually involving obligations owed to a group of states/the entire community – injured states cannot specify the type of reparation, pocket it, and walk away
        (a) Rather, they must ensure resolution of the situation
    (2) Examples:
        (a) Life/liberty of individuals
        (b) Entitlement of a people to territory
        (c) Self-determination

5. Article 44 – When May Responsibility NOT Be Invoked?
    a) Basic Rule: Responsibility may NOT be invoked if:
        (1) Claim is not in accordance with any applicable rule relating to nationality of claims
        (2) Claim requires exhaustion of local remedies AND local remedies have not been exhausted.
    b) You must follow the nationality of claims rule… but we don't know what it is (Art. 44 cmt. 2)
        (1) Dealt with in detail in "work of the Commission on diplomatic protection"
        (2) *Mavromatis Palestine Concessions* (PCIJ, 1924): A state is entitled to protect its subjects when the subjects can't obtain satisfaction of their claims from the wrongful state through normal channels.
    c) Exhaustion of Local Remedies (Art. 44 cmt. 4-5)
        (1) Principle of customary international law
        (2) *ELSI Case* (ICJ, 1989): "for an international claim [on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."
    d) Limitations on Requirement
        (1) Local remedies must be available and effective
        (2) No need to use a remedy that offers no possibility of redressing the situation

6. Article 45 – When Is the Right to Invoke Responsibility LOST?

a) Basic Rule: responsibility CANNOT be invoked IF:
    (1) Injured state has validly waived the claim
    (2) Through conduct, injured state has acquiesced in lapse of claim
b) Waiver
    (1) May apply to only one aspect of the legal relationship between states (Art. 45 cmt. 3)
        (a) *Russian Indemnity Case* (UNRIAA, 1912): by consistently demanding a return of the principal of a loan, Russia waived the right to demand interest and late fees.
    (2) Valid Waiver (Art. 45 cmt. 4)
        (a) Leaves to the applicable law what constitutes a waiver under the circumstances
        (b) Peremptory Norm: conduct or acquiescence of the injured state does NOT invalidate the interest of the international community, which may still act to ensure a settlement in conformity with international law.
    (3) Inferred Waivers: conduct leading to inference must be unequivocal. (Art. 45 cmt. 5)
c) Acquiescence
    (1) Mere loss of time is not enough, especially if a state does everything it can to maintain a claim. (Art. 45 cmt. 6)
    (2) Policy: additional difficulties to the respondent state, such as collection and presentation of evidence.
    (3) After notification to respondent state, delay in prosecution is NOT acquiescence
        (a) *Tagliafarro Case* (UNRIAA, 1903): 30 year lapse in claim was not acquiescence because the respondent state was notified immediately after the injury occurred.
    (4) Delay → NO acquiescence UNLESS
        (a) Circumstances show that injured state has acquiesced
        (b) Respondent state has been seriously disadvantaged
        (c) Decisive Factor: has the respondent state suffered any prejudice?

7. Article 46 – Many Injured States
a) Basic Policy: many injured states → EACH state can separately invoke responsibility
b) Article 46 vs. Article 48
    (1) No worries if it's not clear whether a state is invoking responsibility as an injured state or on behalf of the whole community; as long as it falls into either Article 46 or 48, it's fine. (Art. 46 cmt. 2)
    (2) Compensation of multiple injured states is limited to damage actually suffered (Art. 46 cmt. 2)

(3) Incoherent Remedies (Art. 46 cmt. 2)

(a) If A claims restitution and B claims compensation AND B's claim is valid, you may need to compensate both states.

(4) States should coordinate claims to avoid double recovery

8. Article 47 – Many Responsible States

a) Basic Policy: if there are several responsible states responsibility of each state may be invoked.

(1) LIMITATIONS:

(a) No injured state may recover more damage than it has suffered

(b) Without prejudice to any right of recourse against other responsible states

b) Examples of applicability (Art. 47 cmt. 2)

(1) Two states combine to commit an IWA where they act jointly w/ respect to whole act

(2) Two states act through a common organ

(3) One state directs/controls another

c) General principle: each state is separately responsible for conduct attributable to it. (Art. 47 cmt. 3)

(1) Beware of joint and several liability analogies

d) *Certain Phosphate Lands in Nauru* (ICJ, 1992): claim is admissible even if brought against one of three responsible states. The decision of admissibility does NOT mean that the respondent state will be solely responsible for damages.

(1) (Art. 47 cmt. 4)

e) Treaty Law and Joint and Several Liability

(1) Convention on International Liability for Damage Caused by Space Objects creates a regime of joint and several liability

(a) Damage apportioned between states to the extent they were at fault

(b) Equal damage split if fault can't be determined

(c) No prejudice against injured state seeking whole compensation from one of the states

f) Sometimes, separate acts lead to one wrong (Art. 47 cmt. 8)

(1) E.g. polluting a river.

g) Policy of Exception 1: protect liable states (Art. 47 cmt. 9)

h) Exception 2: "merely provides that the [main rule] is without prejudice to any right of recourse which one responsible state may have against any other responsible state." (Art. 47 cmt. 10)

9. Article 48: Invocation of Responsibility by Non-Injured State

a) Operative Text

(1) Basic Rule: non-injured state may invoke responsibility in TWO scenarios
    (a) Scenario 1
        (i) Obligation breached is:
            (a) Owed to group of states including that state
            (b) Obligation is established for the protection of a collective interest of the group
    (b) Scenario 2: obligation owed to community as a whole
(2) What may be demanded?
    (a) Cessation of IWA
    (b) Assurances and guarantees of non-repetition
        (i) See Art. 30!
    (c) Performance of reparation in the interest of the injured state or of the beneficiaries of the breached obligation
(3) Articles 43 (notice), 44 (barrier of invocation), and 45 (waiver) ALL APPLY

b) Commentary
(1) Basis for Article 48: *Barcelona Traction*
(2) "any state" → no need for states to act together or in unision (Art. 48 cmt. 4)
    (a) Entitlement to invoke responsibility will **coincide** with the injured state
(3) Source of obligation doesn't matter for Art. 48. (Art. 48 cmt. 6)
(4) obligations in Para. 1 must be in "collective intrest" (Art. 48 cmt. 7)
    (a) Examples
        (i) Environmental treaty
        (ii) Regional security treaty
(5) Limitations: (Art. 48 cmt. 7)
    (a) "must transcent the sphere of bilateral relations"
    (b) "principal purpose will be to foster a common interest, over and above any interests of the states concerned individually.
(6) List of claims to be made (cessation, assurances, reparation) are **exhaustive** (Art. 48 cmt. 11)
    (a) Progressive development of the law (Art. 48 cmt. 12)
(7) Article 48 does NOT allow a state to demand reparations if the injured state could not do so. (Art. 48 cmt. 13)

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Use of Force

XXVI. ABC

A.

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Expropriation

XXVII. Expropriation Generally

A. Background Policy: Absent an agreement to the contrary, a state can decide which aliens to admit, and how to restrict them if at all.

1. Generally: subject to same regime as nationals
2. Corporations: regulate, whether domestic or alien corporation

B. Restriction: Customary Intarnational Law of Diplomatic Protection

1. Alien wronged → right (not duty) of alien's state to assert a claim
    a) PROVIDED:
        (1) local remedies are exhausted
        (2) act/omission is wrongful under international law
2. Liability in this case is between states

C. Overlap of Expropriation w/ Human Rights Law

1. Distinction: expropriation law provides protections for violations that don't rise to the level of human rights violations

XXVIII. Basic Principles of Expropriation

A. Definitions

1. **expropriation**, n. A governmental taking or modification of an individual's property rights, esp. by eminent domain [Blacks]
2. **nationalization**, n. The act of bringing an industry under governmental control or ownership. [Blacks]

B. International Minimum Standard of Justice

1. Western/Developed Views
2. Generally, local justice suffices
    a) EXCEPTION: non-working judicial system
        (1) The local remedies rule "presupposes the existence in the state of orderly judicial and administrative processes." (5 Hackworth 471)
            (a) **WHO THE FUCK IS HACKWORTH?**
3. BUT: injuries must be redressed
    a) "In theory, an unredressed injury to an alien constitutes an injury to his state giving rise to international responsibility." (5 Hackworth 471)
    b) Elihu Root: "If any country's system of law … does not conform [to international minimum standards] … no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of its citizens."
4. Caselaw Supporting
    a) Existence of Minimum Standard: Clear
        (1) The propriety of governmental acts should be put to the test of international standards [*Neer Case*, 1926]

(2) Common/generally accepted international law about treatement of aliens trumps municipal law [*Upper Silesia Case*, 1926]

(3) International standard for the taking of Human Life [*Garcia Case*, 1926]

b) Content of Minimum Standard: Unclear

(1) Wrongful treatment of alien "should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency" [*Neer Case*, 1926]

(2) Lillich: process of decision with referral to all the circumstances of a particular case

(a) Often called <u>denial of justice</u>

C. Developing World Views

1. Latin America: Calvo Objection to the Customary Law

a) <u>Doctrine of National Treatment</u>: Two principles

(1) Sovereign states are entitled to non-interference because of the principle of equality

(2) Aliens are entitled to no greater protection than that of nationals

b) Content of proposed new customary law

(1) National treatment must be accorded to aliens

(2) National law governs aliens

(3) National courts have exclusive jurisdiction

(4) Diplomatic protection may not be invoked

(5) International adjudication of these questions is inadmissible

c) **Calvo doctrine**. The rule that resident aliens have the same rights to protection as citizens, but no more.

(1) This doctrine, which sought to establish a minimum international standard for the treatment of aliens, was developed by the Argentinian jurist Carlos Calvo in his treatise Le droit international théorique et pratique (5th ed. 1896).

(2) The doctrine was intended to prevent aliens from abusing their right of diplomatic protection.

(3) It was rejected by many states on the ground that the doctrine sought to deprive states of their right to protect their citizens in countries when the rights of the general population fell below the minimum international standards.

2. Socialist States

a) Practice:

(1) Pay compensation for expropriated property

(2) <u>Deny obligation</u> under customary international law

D. Attempt to Synthesize International Minimum Standard with Third World Sovereigntism

1. Garcia-Aamador: Essential Rights of Man (Human Rights based approach)
    a) Aliens had to enjoy same rights and guarantees as nationals
    b) Nationals cannot be treated less than universal human rights
    c) Only violation of fundamental human rights triggered responsibility
2. The ILC didn't like it.

E. Application to Alien Owned Property
1. Relevant Instruments
    a) UNGA Res 1803 (1962, 87-2-12abst)
        (1) Alien owners shall be paid "appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law
            (a) See: 49 ABAJ 463 (p. 750 in book)
    b) Trade and Development Board
        (1) **PICK UP HERE!!!**

F. Status of Customary Law?
1. 1938 US/Mexico Dispute (pp. 746-748)
    a) US: Settled international law requires payment for expropriated property
    b) MX: Two points
        (1) No rule requires what you say. Owning property in south american countries is at your own risk
        (2) Doctrine of sovereign equality means I get to enforce my domestic laws as I please
    c) US: Doctrine of sovereign equality has never been applied that way!
    d) Result: Settlement of claims whereby US companies received $24 million for their lands, which they estimated were worth $260 million.
2. Post Cold War
    a) Debate is less rancorous
        (1) Communism collapsed
        (2) Developing world trying to attract capital
        (3) Customary law set aside in favor of specific agreements
            (a) Cf: Legal Implications of Financail Sector Reform in Emergin Capital Markets (13 Am U. Int'l L. Rev. 705)

G. Relevant Principles of International Law
1. Resolutions and other soft law instruments
    a) UNGA Res 1803 (Permanent Sov. Over Nat. Res., 1962):
        (1) nationalization → "appropriate compensation [to aliens] in accordance" with domestic law AND international law
            (a) US: "appropriate" means prompt, adequate and effective
        (2) foreign investment treaties shall be observed in good faith
    b) UN Conf. on Trade and Development Res. 88:

(1) nationalization to recover resources is "the expresson of a sovereign power"
(2) for each state to fix amount/procedure of compensation
(3) sole jurisdiction in domestic courts
(4) w/o prejudice to 1803

c) UNGA Res. 3171 (Perm. Sov. Over Nat. Res., 1973):
(1) Each state is entitled to determine the amount of compensation + the mode of payment
(2) Disputes are settled in accordance with national legislation
(3) Votes: 109-1-17 abst. (most developed countries abstained)

d) UNGA Res. 3281 (Charter of Economic Rights/Duties of States, 1974):
(1) States have the right to:
(a) Nationalize
(i) Subject to appropriate compensation
(ii) Taking into account relevant laws and regulations and all circumstances that the state considers pertinent
(b) Controversy → settled under domestic law
(i) EXCEPTION: free and mutual agreement by all states concerned
(2) Vote: 104-16-6 abst. (US + developed states against)

2. Policy Arguments about Developing World Resolutions
a) Lillich: Developing states want foreign capital, but also want freedom of action violate the property rights
(1) WME: Flawed. If too risky, capital won't invest
(2) [Lillich, 1976, packet p. 751]
b) Schachter: Not likely to make a huge difference in practice, b/c states have their own interest in maintaining confidence of foreign investors.
(1) Schachter, Colum. J. Transnat. Law, 1976

3. State Practice of Developing Nations in Mid- 1970s (packet p. 752)
a) Maintain doctrinal positions
b) Encourage foreign investment by providing improved legal protection
c) Lots of bilateral treaties for investment

XXIX. Procedure of Claiming State Resp for Expropriation

A. General Issues
1. Payouts: If an award is made, the receiving state has full discretion over what to do with the money; it need not necessarily be paid to the wronged citizen. [*Admin. Decision 5, US v. Germany Mixed Claims Cmm'n, 1924*]
2. Exhaust Local Remedies
3. State vs. Indiv: Reparations typically aren't for an injury to the state itself, though this can happen on occasion.
4. Sources for Customary Law:

a) claims practice by states
(1) lump sums for outstanding claims through negotiation
(2) submission to a court:
(a) ICJ
(b) Multilateral arbitration tribunal
(c) Ad hoc tribunal (e.g. Iran-US)
b) negotiations
c) agreements

5. *The Diallo Case – Guinea v. DRC* (ICJ,1998): Guinea claimed that the DRC treatment of one of its citizens (imprisonment, expropriation) violated "fundamental human rights" including:
a) Foreign nationals treated to a minimum standard of civilization
b) Obligation to respect foreign nationals' freedom and property
c) Right to fair trial

B. Exhaustion of Local Remedies
1. Policy basis: give the wrongful state a full opportunity to remedy before internationalizing the case
2. *Case Concerning ELSI – US v. Italy* (ICJ, 1989):
a) Facts: Italian company owned by Raytheon had a plant requisitioned which lead to bankruptcy in Italian courts; Raytheon received nothing.
b) Proc.: There was a 1948 Friendship, Commerce and Navigation treaty in force, and the action was brought under that treaty, which contained no reference to exhaustion of local remedies
c) Hold: For such an important principle of customary law to be derogated, the treaty must say so outright. Burden was on Italy to show that local remedies had not been exhausted.
(1) "For an international Claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."
3. Exceptions
a) No way to win under domestic law [*Finnish Shipowners*; *P-S Railway Case*]
b) State is asserting its own separate and preponderant claim for direct injury in the same wrongful conduct [*Interhandel Case*; Restatement §208]
c) State Waiver of Rule
(1) Example: US-Mexico Convention establishing a claims commission
d) Cases!
(1) *Finnish Shipowners Case – Finland v. Great Britain* (Arbitration, 1939): No need to exhaust local remedies if ti is established that such resort would be futile or that such remedies are non-existent.

(a) This case: no appeal on findings of fact and there was no way to win under domestic law, given the facts that the trial court found

(2) *Panevezys-Saldutiskis Railway Case – Estonia v. Lithuania* (PCIJ, 1939): highest court precedent precludes domestic success → no need to exhaust local remedies

C. Individual Waiver of Exhaustion of Local Remedies Rule (p. 761)

1. Affirmative Defense: waiver or settlement by wronged national, not made under duress.
2. Calvo Clause: as condition of doing business, the contractee must renounce all diplomatic protection claims by their host state
3. Calvo clauses are not enforceable [*Mexican Union Railway Case*]
   a) *North American Dredging Case* (US-Mexico Gen. Claims Cmm'n, 1927): contractor hadn't waived protection if not connected to "fulfillment, execution, or enforcement" of the contract.
   b) *Mexican Union Railway Case* (Mexico-GB Gen. Claims Cmm'n, 1930): No person can deprive a government of a right to apply international remedies to violations of international law because such an action is *res inter alios acta* (a contract between A + B prejudicing the rights of C)
      (1) **res inter alios acta**. [Latin "a thing done between others"] The common-law doctrine holding that a contract cannot unfavorably affect the rights of a person who is not a party to the contract.
4. Waiver or settlement after claim before intercession → defeat state claim.
5. International Convention on the Settlement of Investment Disputes: parties agreed not to espouse diplomaticailly claims in respect to disputes submitted to arbitrartion under the convetion.

D. Nationality of Claimant

1. Basic Rule: Espousal ONLY IF injured party is national of claimant state.
2. Refusal by wronging state → permissible IF
   a) Injured person is also a national of wronging state
   b) National of 3rd state + respondent treats person as its national "for the purposes of the conduct causing the injury"
   c) EXCEPTION (to the exception)
      (1) Nationality of claimaint state is "dominant"
3. State Dept. Legal Advisor, 1960
   a) Proper claim → 3 factors:
      (1) national of espousing govt.
      (2) had status at time of claim
      (3) continuous possession of nationality through date of presentation
   b) can be excepted through agreement

E. Attribution of Conduct (p. 764)

1. De Jure Agents → attributable
    a) Includes minor officials [*William T. Way Claim*]
    b) US Practice: accept responsibility for acts/omissions of political subdivisions and require reciprocity from foreign states
2. De Facto Agents
    a) *Yeager and Iran* (US-Iran Clms Cmm'n): american businessman working in Tehran was expelled by local revolutionary committee that eventually became the revolutionary guards. "Attribution of acts to the state is not limited to acts of organx formally recognized under internal law."

F. Preclusion of Wrongful Act
1. Standard State Responsibility [which article]
2. Devaluation of currency → not violation [R2IL §198]
3. Requirement that foreign funds be surrendered against payment in local currency at official exchange rate → not violation [R2IL §198]

XXX. Substantive Bases of Responsibility (p. 767)

A. General
1. Basic Rule: 3 ways for state responsibility to be triggered if state violates obligation by harming national of another state [R3IL §711]
    a) Violation of human right
        (1) Typically: denial of access to courts or procedural fairness
        (2) Violation of rights due to everyone under state's authority
        (3) International Covenant on Civil and Political Rights → customary law even for non-parties w/ respect to treatment of aliens
            (a) Binding on parties even for treatment of "any human being subject to its jurisdiction"
    b) Personal right that state is obligated to respect for foreigners
        (1) Right due only to foreigners under CIL
    c) Property or other economic interest that state is obligated to respect for natural or juridical persons of foreign nationality
        (1) See also §712.
        (2) Right due to foreigners and foreign corporations, but NOT nationals
2. Note: b +c are wrongs that probably do not rise to the level of a human rights violation
3. Reminder: treaty can change these rights
    a) Not peremptory norms, so level can rise or fall as the case may be

B. Denial of Procedural Justice (p. 771)
1. Examples from Restatement reporters [R3IL § 711 n.2]
    a) Denial of due process in criminal proceedings
    b) Arbitrary/unreasonable use of force by governmental representatives
    c) Violation of Universal Declaration of Human Rights rights?
        (1) might be acceptable
        (2) possible limitations

(a) only for resident

2. Denials of Justice short of human rights violations → unlawful under CIL
    a) Denial of access to domestic courts
    b) Injustice must be egregious
    c) NOT violations:
        (1) Error in decision
        (2) Minor procedural violations, e.g.:
            (a) Failure of witness to take an oath
            (b) Good faith misapplication or misinterpretation of the law
            (c) Improper dismissal for lack of jurisdiction if another forum is available
                (i) Source: R3IL §711 n. 2(b)

C. Failure to Protect Aliens or Apprehend Wrongdoers

1. Basic Policy: non-attributable conduct + injury to person/property of alien → responsibility IF: Element 1 + Element 2 [R2IL §183]
    a) Element 1
        (1) Criminal under law of state OR
        (2) Genereally recognized as criminal under developed legal systems
        (3) Offense against public order
    b) Element 2: failure to take reasonable steps to:
        (1) Protect OR
        (2) Detect, prosecute and impose penalty if criminal under law of state
2. Prevention Duty
    a) Lillich and Paxman article (p. 773)
    b) Duty: prevent whenever possible injuries to aliens by individuals OR terrorists
    c) "Due diligence" standard
        (1) Means: standard assumes that the state has the means to do so
            (a) No means/no way to provide protection → no resp.
        (2) Opportunity: State must hafve had some form of opportunity to prevent the act
            (a) Terrorism: some form of prior notice
        (3) Attempts to Avert: wahat if anything was donoe to prevent the danger?
            (a) Judges on a reasonableness standard
    d) Failure to extradite terrorists NOT (yet) a basis for international liability
    e) Lillich and Paxman states and terrorism → 3 ways for s. resp (non-exclusive)
        (1) Subsidizing/supporting terrorists
        (2) Complicity with terrorists
        (3) Encouraging/creating opportunity for terrorists
        (4) Failing to use due diligence to prevent terrorism
        (5) Failure to apprehend/punish terrorists

D. Injury to Economic Interests of Aliens

1. Non-Commercial Risks
    a) Definition: risks that are a function of politics, not business
    b) Examples
        (1) Expropriation without compensation
        (2) Violation of a concession or other agreement
        (3) Foreign exchange restrictions that prevent remittance of profits
        (4) Creeping expropriation: subtle measures employed by government to interfere with business operations/impair investor rights
            (a) Examples
                (i) Delay in essential permits
                (ii) Taxes discriminating in substance
                (iii) Price controls restrincting profits
                (iv) Government sponsored competition
                (v) Local governmental interference
2. Developing Countries' Efforts to Protect Investors
    a) Ad hoc: concession or guarantee agreements
    b) Investment encouragement programs
        (1) Including tax holidays and other programs that go beyond issues of non-commercial risk

XXXI. Expropriation

A. Expropriation Generally

1. **expropriation**, n. A governmental taking or modification of an individual's property rights, esp. by eminent domain
    a) Also termed (in England) compulsory purchase; (in Scotland) compulsory surrender.
2. Doctrinal splits (Calvo/Lat am States vs. socialist states vs. capital exporters)→ no way to create broad-ranging scheme for protection of investors
3. Result: GO LOCAL, BABY!!!

B. Wrongful Taking of Property EVEN WITH payment

1. Violation of treaty → clear violation of the law
2. Taking not for a public purpose [R3IL §712(1)(a)]
    a) Might be the law; contested
3. Discrimination against aliens [R3IL §712(1)(b)]

C. Expropriation By Interference Short of Taking

1. Standard: "interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated" [*Starrett Housing Corporation v. Iran*]
    a) Act → expropriation was appointment of a manager by the government
        (1) Events before did NOT rise to the level of expropriation, though they included:
            (a) Armed incursion
            (b) Detention of personnel

(c) Intimidation/interference with supplies

2. Totality of the circumstances → cession of work = indirect expropriation [*Biloune v. Ghana Investment Centre*]
3. **BE PRECISE ABOUT DATE OF EXPROPRIATION!!!**
    a) It will matter for what compensation you are to get

D. State of the Customary Law

1. Basic Rule [R3IL §712]
    a) Injury by taking property of other state's national → State Responsibility IF
        (1) Not for public purpose OR
        (2) Discriminatory OR
        (3) Not accompanied by just compensation
            (a) Just compensation:
                (i) equivalent to value of property AND
                (ii) paid at time of taking or within reasonable time thereafter with interest AND
                (iii) in an economically useful form
2. Public purpose
    a) Rare challenge b/c of broad and undefined category
    b) Unwillingness to impose international standard b/c tribunals don't want to say what public needs of a nation are
    c) Examples:
        (1) Expropriation of BP property b/c Libya believed UK encouraged Iran to seize certain islands in the Persian Gulf → NOT public purpose [*BP Case*]
        (2) But: public utility principle is not a necessary requisite for the legality of a nationalization. [*Liamco Case*]
    d) Result: public purpose remains an open issue
3. Discrimination
    a) Really, unreasonable discrimination
4. Compensation
    a) Basis: UNGA Resolution 1803; US view; Texaco Arbitrator
    b) Critical view: Calvo, later resolutions relied on by Libya
    c) State Practice
        (1) Shift in recent years to bilateral treaties, entered into by over 80 states
        (2) Turn away from use of customary law to govern international investment disputes
    d) Just Compensation [R3IL §712 cmt. d]
        (1) Fair market value
        (2) Convertible currency without restriction on repatriation
        (3) Exceptional circumstances → permissible deviation from standard
            (a) National land reform program?

(i) Debated but never resolved

(b) Unwarranted deviations

(i) Seized property was used in enterprise specifically authorized/encouraged by state

(ii) Business taken for operation in the same way under state's management

(iii) Unequal preference for taking state's nationals

(iv) Otherwise wrongful under public purpose/discrimination provisions

e) Hull formula: compensation must be adequate, prompt and effective

(1) Standard US position

(2) How US reads "appropriate" compensation in UNGA Res. 1803

(3) Rejected by developing states and has not been adopted in multilateral agreements or declarations

(4) Never expressly invoked by tribunals, but the results have been in accordance with the principle

f) Just compensation → Appropriate compensation?

(1) Some favor shift to appropriate to better reflect a totality of the circumstances

(a) Appropriate includes "unjust enrichment" concepts

(2) Supported by capital importing countries

(3) May allow for factors that aren't included in 'just', like national capacities and needs

g) Guidelines for Treatment of FDI (World Bank/IMF, 1992):

(1) Significance: universal membership

(2) Expropriation

(3) "a state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects except where this is done:

(a) in accordance with applicable legal procedures

(b) without discrimination on the basis of nationality

(c) against the payment of appropriate compensation

(i) appropriate: adequate, effective and prompt

h) Loss of Future Profits

(1) Disagreement among arbiters

(2) Principle common to main systems of municipal law → general principle of law to be considered as a source for international law [*AMCO v. Indonesia*]

(3) Fair market value may include estimate of future profits subjected to discounted cash flow analysis UNLESS

(a) Enterprise hasn't operated for long time

(b) Enterprise has failed to make a profit

(c) Future profits cannot be used

5. Taking of Property
    a) Definition of property:
        (1) Harvard Draft Convention: "all movable and immovable property whether tangible or intangible, including industrial, literary and artistic property as well as rights and interests in property"
        (2) Can include concession rights as incorporeal property [*Liamco Case*]
    b) Includes: unreasonable interference with the use, enjoyment or disposal of property
    c) *French v. Banco Nacional de Cuba* (NY Ct. App., 1968): act of state doctrine dictates that the court may not enquire about the validity of another state's actions within its borders and a currency regulation which alters the value/character of money to be paid in a contract is not a confiscation or taking.
        (1) **act-of-state doctrine**. Int'l law. The principle that no nation can judge the legality of a foreign country's sovereign acts within its own territory.
    d) Effects Based Test [R3IL §712(1) cmt. g.]
        (1) Responsible for expropriation WHEN
            (a) Subjects alien property to taxation, regulation or toher action that is confiscatory
            (b) Prevents, unreasonably interferes with or unduly delays effective enjoyment of an alien's property or its removal from the state's territory
        (2) NOT responsible for expropriation
            (a) Loss/economic disadvantage from bone fide general taxation, regulation, forefeure for crime (or other police action)
                (i) PROVIDED: not discriminatory AND not designed to cause alien to abandon/sell at distress price
    e) *Harza v. Iran* (Iran-US Claims Tribunal, 1982): taking through dishonoring claimants check and frustrating attempts to authenticate signature → dismissed.
    f) *Computer Sciences Corp. v. Iran* (Iran-US Claims Tribunal, 1986): failure for an Iranian bank to seek central bank permission for transfer of funds from a bank constituted a taking.
    g) Takings and War [Harvard Research Draft Convention on Rights/Duties of Neutral States in Naval and Aerial War, 1939]
        (1) Article 21: belligerent may "in case of urgent necessity" requisition a neutral vessel privately owned and operated in own/occupied territory.

(2) Article 22: damage to a neutral vessel/property/persons + damage is incidental to act of war against armed forces of enemy + not in violation of war convention → NO duty to pay compensation

E. Breach of Contractual Understanding

1. Key Question: When does a breach of an undertaking by a state to an alien constitute a violation of international law?
2. Which Law Governs?
    a) Some law must govern, b/c "no contract can exist *in vacuo*, i.e., without being based on a legal system."
    b) Parties negotiating contracts are free to state which law
    c) Key issue: what presumption of controlling law?
        (1) Reference to international arbitration → rejection of municipal law of contracting state as controlling [*Sapphier-NIOC Arbitration*, 1964]
3. Breach as Violation of Law
    a) Key Question: When is the breach of a contractual obligation under the governing law ALSO a breach of international law
        (1) Treaty violation → IWA
        (2) Denial of procedural justice → IWA
    b) Contract repudiation/breach w/ national of other state→ responsibility IF
        (1) Repudiation/breach is discriminatory
        (2) No damages paid + motivated by non-commercial concerns
        (3) Not given adequate forum to determine claim
        (4) Not compensated for any repudiation/breach determined to have occurred
            (a) [R3IL §712(2)]
    c) Comment on responsibility [R3IL §712 cmt. f]
        (1) Responsibility if akin to an expropriation
            (a) Breached for governmental rather than commercial reasons and thate state is not prepared to pay damages
        (2) Breach IS NOT a violation if:
            (a) Based on a bona fide dispute about the obligation
            (b) Due to the state's inability to perform
            (c) Nonperformance is motivated by commercial considerations + the state is willing to pay damages/submit to adjudication
        (3) Examples leading to responsibility
            (a) Denies effective domestic forum to resolve the dispute AND has not agreed to another forum
            (b) Fails to honor commitment to special forum for settlement
            (c) Fails to carry out a judgment rendered by a forum
        (4) Creeping expropriation IF breach makes impossible to the continued operation of the project that is the subject of the contract
    d) World Bank conditions for non-commercial termination of contract:

(1) In accordance with applicable procedures
(2) Good faith pursuance of a public purpose
(3) Without discrimination on the basis fo nationality
(4) Against the payment of appropriate compensation

e) Stabilization clauses
(1) State cannot be bound b/c inconsistent with its sovereignty [*Saudi Arabia v. Aramco*]
(2) *Kuwait v.* Aminol: Stabilization clause for 60 year contract did not preclude nationalization w/o specific reference to nationalization, but reinforced requirements for proper indemnification.
(3) *LETCO v. Liberia* (1987): stabilization clause must be respected. "Otherwise the contracting state may easily avoid its contractual obligations by legislation."

F. Texaco v. Libyan Arab Republic (Int'l Arbitral Award, 1978)

1. General Holding
a) Deeds of concession were binding
b) Adopting measures of nationalization were a breach of obligations under Deeds of Concession
c) Libya was bound to perform
d) Remedy: *restitutio in integrum* is the normal sanction and is "inapplicable only to the extent that restoration of the *status quo ante* is impossible"

2. Choice of Law
a) Deeds of concession: "governed and interpreted in accordance with":
(1) the principles of the law of Libya common to the principles of international law
(2) in the absence of such common principles then by and in accordance with the general principles of law
(a) including law applied by int'l tribunals
b) All legal systems allow for choice of law in contract, so the provision is valid.

3. Ways to internationalize a Contract
a) Reference in the instrument on governing law "to the general principles of law"→ internationalization
(1) ICJ Art. 38 refers to general principles of law
(2) This is a sufficient condition for internationalization
b) Inserting a clause providing for arbitration in the event of a dispute
(1) *Sapphire Internaitonal Petroleum* (1963): "If no positive implication can be made from the arbitral clause it is possible to find there a negative intention, namely to reject the exclusive application of Iranian law"
(2) Thus, reference to arbitration is sufficient to internationalize a contract
c) All Economic Development Agreements are internationalized

(1) Distinguishing features of such agreements
(a) Broad subject matter; not just about an isolated purschase or performance
(i) Result: major importance for development
(b) Long duration
(c) Purpose of cooperation → contractual nature reinforced
(2) Insertion of stabilization clause → remove from international law
(a) **NOTE: UNCLEAR IF STABILIZATION CLAUSE IS NECESSARY OR SUFFICIENT FOR INTERNATIONALIZATION!**

4. Consequences of Internationalization
a) Private person has sufficient personality (subjecthood) to invoke rights derived from the contract
b) Prof. Garcia Amador: "international personality and capacity of the individual [natural or fictitious] depend on the recognition granted to them by the state in the legal relations
c) "principles of Libyan law" → rely on the spirit of Libyan law, but not the letter
(1) Result: reference to Libyan law doesn't undercut nationalization, "it simply requires us to combine the two in verifying the conformity of the first with the second"

5. Exceptions to Internationalization
a) NOT possible to criticize:
(1) Nationalization measure concerning nationals
(2) Aliens where the state has made no particular commitment to guarantee and maintain their position
(a) BUT two ways to make commitment here as consideration for lots of investment
(i) Under Libyan law, but "stabilized" by certain clauses
(ii) Placed directly under the aegis of IL

6. Sovereignty
a) exercised by the very entering into these clauses
b) provided: freely committed through untainted consent
(1) **LITTLE HOLE HERE: DURESS → INVALIDATION OF CONTRACT**
c) Stabilization clause doesn't limit sovereignty of Libya

7. Nationalization and Good Faith
a) Recognition of right to nationalize does NOT confer a right to disregard obligations under IL
b) "nationalization cannot prevail over an internationalized contract containing stabilization clauses entered into between a state and a foreign private company"
c) The principle of good faith is included in UNGA Res. 1803 AND 3281

G. Notes on *Texaco*

1. Dupuy suggests that international development contracts may be 'internationalized' whether or not there is an international arbitration clause or a clause selecting as the governing law a body of law other than that of the contracting state
2. **<u>Be cautious in employing the phrase "internationalized" contracts</u>**
    a) Descriptive:
        (1) non-national governing law
        (2) non national arbitration
        (3) international economic/political significance
    b) DO NOT "infer from these features" above in a that they have been transposed into a different legal order or have become subject to international law in the same way as a treaty between two states
        (1) State resp still applies
        (2) Special features leading to internationalization do not alter basic principles of state responsibility
3. Texaco approach to internationalization is controversial and case-law is inconsistent
    a) Discriminatory expropriation → clear violation of international law

XXXII. Reparation

A. Content of reparations
    1. Standard state responsibility measures for violations of customary law
    2. Additional damages under a treaty
    3. Additional monetary damages for injury to claimant state
        a) Only in unusual circumstaqnces

B. Goals for Reparation "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed." [*Chorzow Factory Case*]

C. Compensation depends on nature of wrong
    1. IF fair compensation renders an expropriation lawful → value of property at time of taking + interest
    2. IF taking is itself wrongful even if compensation is paid →value that undertaking would have had at time of indemnification + losses sustained as result of expropriation
        a) Ex: treaty says no expropriation
        b) Second example: *Chorzow Factory*

D. Lost profits
    1. Permissible when violation:
        a) Tortious
        b) Results in loss or distretion of property
        c) Profits were reasonably certain
        d) Profits were not speculative
    2. IF *compromis* precludes lost profits, court may award interest in lieu of profits

E. Personal Claims

1. Measure is loss to individual claimant
2. Can include
    a) Medical expenses [*George Henry Clapham Claim*]
    b) Loss of earnings [*George Henry Clapham Claim*]
    c) Pain and suffering [Whitman]
    d) Mental anguish [*The Lusitania Cases*]
3. Reduction is permissible when the claimant contributed to the injury [*Lillie S. King Claim*]
4. Failure to apprehend a domestic offender → several routes to liability
    a) Measure by loss suffered by claimant
        (1) Non-apprehension → condoning → derivative liability for all damages
        (2) Grief, mistrust and alck of safety → damages [*Poggioli Case*]
5. Causation
    a) *Compromis* often refers to damages "resulting from" an event
    b) Tort ideas of causation are used to determine the scope of what resulted from what
6. Interest: generally awarded either from date of obligation to make reparation OR from date of award
7. Costs
    a) Individuals: cost of preparing claims
    b) Governments: bear their own costs

XXXIII. Bilateral Treaties

A. Friendship Commerce and Navigation (FCN Treaties)

1. FCN Generally
    a) Covers a wide range of trade relations in addition to covering non-commercial risks
    b) Obligate each contracting state to grant national/MFN status as minimum treatment to citizens and corporations
2. Example: US-Pakistan treaty (PT)
    a) Discrimination [PT § 6(3)]: no unreasonable or discriminatory measures that would impair legally acquired rights/interests
    b) Expropriation PT § 6(4): can't take property w/o public purpose, just compensation in "effectively realizable form"
    c) Exchange Controls PT §12:no party shall impose exchange restrictions except:
        (1) "to the extent necessary to prevent its monetary reserves from falling to a low level"
        (2) "to effect an increase in the reserves in order to bring them up to an adequate level"
        (3) No alteration of obligations to the IMF
3. FCN treaty may itself be indicative of favorable climate for US trade
4. All treaties are terminable by either party on notice

B. Bilateral Investment Treaties (BITs)

1. BITs Generally
    a) Focuses specifically on protecting foreign investors
    b) Signed by all major capital exporting countries with more than 80 developing countries
    c) Purpose: protect investment, ensure free access by investors to markets
2. Standards of treatement: nationals, or MFN, whichever is better
3. Expropriation
    a) Full compensation
    b) Usually invoke Hull formula, or equivalent
        (1) Go beyond FCN to cover indirect takings of property
    c) Example: US-Argentina § IV
        (1) No expropriation/nationalization (incl. indirect) EXCEPT
            (a) Public purpose
            (b) Non-discriminatory manner
            (c) Payment in accordance w/ Hull formula
            (d) In accordance w/ due process of law
        (2) Compensation: fair market value @ time of expropriation
        (3) "put the investor in a position no less favorable than the position in which he would have been had the compensation been paid immediately on the date of expropriation"
        (4) Right to prompt review
4. Transfers/Convertability
    a) Guarantee free transferability in convertible currency of "returns on investment"
        (1) Returns on Investment (ROI:
            (a) current payments (e.g. interest)
            (b) base capital
    b) Qualifications: flexibility to impose capital controls in order to protect the value of currency and the balance of payments
        (1) Not all treaties contain the capital controls exception (US-Argentina BITs does not)
5. Dispute Settlement
    a) Two mechanisms
        (1) <u>State vs Investor</u>: often resolution of disputes through International Centre for Settlement of Investment Disputes (ICSID)
        (2) <u>State vs. State</u>: typically no provision inserted into treaty
            (a) Textbook is unclear about how this mechanism operates
    b) Example of State vs. Investor (US-Argentina BIT)
        (1) Investment dispute → try consultation/negotiation for amicable resolution
        (2) If no amicable resolution possible, 3 options for national/company:

(a) Courts/tribunals of the state party
(b) Accordance with previously agreed dispute-settlement procedures
(c) Binding Arbitration through Multilateral Treaties
(i) Threshold requirements:
(a) No resolution under a or b above
(b) 6 months from time dispute arose
(ii) Available Remedies
(a) State a party → ICSID is an option
(b) Additional Facility of ICSID "if [ICSID] is not available
(i) Ambiguity: "not available" cover state not being a party to the treaty?
(c) In accordance with UN arbitration rules (UNCITRAL)
(d) Any other arbitration institution, by mutual consent

6. Significance of BITs
a) Salacuse: "part of an ongoing process to create a new international law of foreign investment to respond to the demands of the new global economy that has so rapidly emerged" in the late 1980s
b) BITs are probably not customary international law (as of 1990)

XXXIV. Protections Under US Law

A. Basic Principles
1. Methods to defeat claim by US national for "injury to property attributable to conduct of a foreign state"
a) Sovereign immunity
b) Act of state doctrine

B. Sovereign Immunity
1. CIL + Foreign Sovereign Immunities Act (FSIA, 1978): foreign states are not immune from US jurisdiction for commercial activities IF
a) Activities occur in/directly affect United Sattes
b) FSIA §1605(a)(3): Property takings: US jurisdiction is adequate IF property is
(1) in United States
(2) present in connection to commercial activity carried on by the taking state
(a) Attribution issue here: who is carrying on the commercial activity?

C. Act of State Doctrine
1. **act-of-state doctrine**. The principle that no nation can judge the legality of a foreign country's sovereign acts within its own territory.

a) Basic Statement: "The courts of one country will not sit in judgment on the acts of the government of another done within its own territory." [*Underhill v. Hernandez*, (SCOTUS, 1897)]
b) Act-of-state doctrine is compelled by neither international law nor the Constitution, but it has "institutional underpinnings." [*Banco Nacional de Cuba v. Sabbatino* (SCOTUS, 1964)]
(1) Hold: taking of property + recognized state + within own territory + alleged violation of controversial CIL → US courts can't question.
(a) Ambiguity: are those conditions necessary or sufficient?
(b) Lower courts have applied principle to breach of contract, but SCOTUS hasn't ruled on it.

2. Policy objectives of US Served → act of state defense can apply OVER objections [*Banco Nacional de Cuba v. Chemical Bank NY Trust* (2nd Cir., 1981)]
3. EXCEPTIONS to Act of State Defense
a) Second Hickenlooper Amendment: no application to act of state doctrine to a taking of property in violation of the principles of international law
(1) Includes First Hickenlooper Amendment
(2) Narrow scope
(a) Does not apply to claims for property NOT related to the taking, that the offending state may have in the US
(b) No application ot cases involving breach of contractual obligations
(c) Limited to actions asserting title to specific property within the United States
(i) After that gateway, though standard becomes more permissive: Property need not remain in US
(ii)
(3) Suit under FSIA: court must determine compliance with IL under CIL and Second Hickenlooper
b) Extra Jurisdictional Takings: Takings of property located outside taking state's jurisdiction → NO act of state defense [*Iraq v. First National City Bank* (SDNY, 1965)]
c) Commercial Activity in US: Property used in connection w/ commercial activity → NO act of state defense
(1) *Alfred Dunhill v. Republic of Cuba* (SCOTUS, 1976): Repudiation of tariff repayment obligation to US cigar importing company is not an act of state, b/c it's not an act of sovereignty.
(a) 4-1-4 split on whether commercial activity should also be an exception to the Act of State defense
d) Helms-Burton Act and Cuba

(1) Courts may not consider the act of state doctrine "in regard to claims seeking to recover the property of US nationals expropriate by Cuba since 1959."

(a) No limitations on location of property

e) Waiver of Act of State Defense

(1) 3 waivers under FSIA

(a) Immunity from jurisdiction → explicit/implicit

(b) Immunity with respect to execution → explicit/implicit

(c) Immunity from attachment → MUST be explicit

D. Enforceability of International Arbitration Award

1. Enforceable in US courts
2. Not affected by sovereign immunity nor act of state defense

E. First Hickenlooper Amendment

1. President shall suspend assistance toa government that:
   a) Nationalizes/expropriates citizen/corporation's property
      (1) Corp: 50% or more US ownership to qualify
   b) Repudiates or nullifies existing contract w/ citizen/corporation
   c) Imposed or enforced discriminatory taxes + (fails to take appropriate steps to discharge OR fails to take steps to give relief).
2. Request of president → Foreign Claims Settlement Cmm'n: determine full value of seized property, render advisory report to the president
3. Invoked a grand totle of once, against Ceylon in 1963
4. 1969: Nixon avoided invoking it by finding that Peruvian administrative remedies/ongoing negotiations were "appropriate steps"
5. 1973: National interest waiver was added

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Evidence and Reasonable Doubt

XXXV. DEF

A. Test1

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