Foundational Issues:
Function of International Law

* *The current state of international law*:
	+ Moved beyond states exercising sovereignty to maximize their interests
	+ Two functions:
		- Devise rules that allow pursuit of interest without infringing on the rights of others
		- Rules about rules: rules of recognition
* *The Liberal Worldview of the Intl Order:*
	+ States are autonomous agents in the world trying to maximize their national interest; the preservation of that autonomy and liberty is the purpose of the state
	+ The classical liberal worldview glorifies the individual (state) as an autonomous moral agent prompted by self-interest.
	+ Functions of international law in the liberal worldview:
		- Enable states to pursue their national interest without interfering with other states pursuing their national interest
		- Serve as rules about rules [about the Legal System]
		- Grease the wheels of international interaction (ostensibly value-neutral rules)
* *The Communitarian Worldview of the Intl Order:*
	+ Collaboration, not just for the sake of co-existence and coordination, but for the sake of greater strength and benefits
	+ We can’t expect altruism from states, but it is a form of enlightened self-interest to say that in some respects autonomy does not always correspond to national interest
	+ Manifestations of Communitarianism
		- Certain types of international institutions, international governing bodies
		- Certain international treaties, i.e. regarding Human Rights, environment, etc.
	+ Once we form an international community, we automatically have values that promote that community; therefore, **Communitarian Regimes are not necessarily more peaceable than Liberal Regimes, because they introduce conflicts about values**
	+ Basic functions of law in the communitarian worldview:
		- Promote common values for the good of all
		- Allow for positive-sum (win-win) interactions
		- Deal with collective action problems
* State-Centered nature of international law
	+ States are the primary actors; international law is both an instrument and a reflection of state power
	+ *See discussion of subjecthood*: To vindicate rights, individuals need diplomatic protection or representation from a state. Individuals do not make the law.
* Functionalist nature of international law & the rise of multilateral treaties. Caused by:
	+ Technological innovation
	+ Cold-war ideological cleavages that increases need for a legal order but makes the creation of customary law more difficult
	+ Proliferation of actors after decolonization
* Considerations of order and justice
	+ See these as the primary aims of international law
	+ Areas of tension
		- The evolution of customary law (status quo, dominated by rules favorable to the West, prevails until a new rule can come into being; *see Texaco arbitration*).
		- Sovereign equality vs. humanitarian intervention
		- State responsibility and the right to take countermeasures
* Making the law: protonormative action and the development of law
	+ States base their own actions and policies in part on their effects on the development of international law
		- Conduct in treaty-preparation
		- Decisions to protest or abstain from protest
		- Diplomatic statements
	+ States’ actions may fall into three categories:
		- Acting in accordance with recognized law
		- Acting protonormatively to change the rule
		- (Acting as a persistent objector to a recognized rule)
		- Breaking the law

Sources:

Custom & Treaty Entanglement

# Analytical framework for discussing sources:

* What is the nature/basis of obligation the source creates?
* What are the constituent elements of the source?
* What are the valid manifestations of each element?
* Where do you find these things?

# Article 38(1) of the ICJ Statute: Defining Sources

* International Conventions
* International Custom
* General Principles of Law
* “Subsidiary means”:
	+ Judicial decisions
	+ Teachings of the most highly qualified publicists of the various nations

# Hierarchy of Sources

* The general hierarchy of sources in international law is fuzzy, partially because there is no formal organization of courts

## Jus Cogens

* Substantive rules that manifest a communitarian vision
* Generally:
	+ Mandatory or peremptory norm of international law: accepted by the international community as a norm from which no derogation is permitted
	+ Can be modified only by a later norm of the same character
* Test:
	+ Universal acceptance of the rule [Weiler: not exactly universal]; and
	+ Overwhelming majority recognize as *jus cogens*.
	+ *Note*: Rule must be based on treaty or custom; many states are hostile to the idea that general principles may be an independent basis.
* *Effects of* jus cogens:
	+ *Relationship with treaties*: An agreement that violates a peremptory norm is void *ab initio*.
	+ Violations my preclude state immunity
	+ *Even* Security Council resolutions may not violate *jus cogens*
* *Basis*: acceptance of fund’l & superior values w/in the system; reflects influence of natural law
* *Examples*: Genocide, slavery, aggression, apartheid, torture, respect for the right of self-determination

## *Erga omnes* obligations

* Question of scope. Binding on everyone
* *Note*: It appears all *jus cogens* rules will be obligations *erga omnes*, but the reverse is certainly not true.

## Treaty & Custom:

* *General rules*:
	+ Later customs and treaties trump earlier ones
	+ Specific rules trump general rules (*lex specialis*)
	+ Where a rule is enshrined in both treaty & custom, the two coexist
* *See ‘Development of Customary Law,’* and *Treaties* below

## General Principles of Law:

* These are seen as complimenting treaties and custom, and therefore remain in third place
* Three views on general principles:
	+ These are general principles of municipal law
	+ General principles of international law
	+ *Middle position*: Rules that are inherent in any legal system
		- *Pacta sunt servanda*
		- Non-retroactive application of the law
		- The principles of natural justice: neutrality & opportunity to be heard
		- *This would not include* principles such as sovereignty, which is less inherent to a legal order and whose content is in dispute.
	+ *Note*: Whatever position taken, principles derived from international law will be the most contested (*e.g.*, sovereignty). The least contested and most applied will be principles close to the judicial process.
* *Generally*: As in municipal law, where there is no clear statute or precedent, a judge will deduce general rules by analogy from existing rules or directly from generally shared principles
	+ *Note*: Such general principles are often raised by a judge, as opposed to treaty or custom, which will be raised by the states themselves
* *Function*: To fill gaps in the international legal system
* *Examples*: *pacta sunt servanda*, *res judicata*, estoppel, full compensation w/o prejudice, good faith (probably the most important) (Shaw).
* Equity as a general principle:
	+ Equity: Adapting law to particular areas by choosing between different interpretations
	+ Gap-filling
	+ Note ICJ Statute, 38(2).

## Judicial decisions:

* As noted by the ICJ statute, decisions are subsidiary sources, but they are highly influential.
* Some writers attempt to formulate judicial decisions as law-verifying, not formulating, but international judges do seem to formulate law.
* International Court of Justice:
	+ ICJ decisions have no binding force except as between the parties (Art. 59)
	+ However, courts tend to follow its judgments, and within the ICJ, previous cases will be the court’s starting point
	+ *Examples* of binding doctrine inspired by the ICJ:
		- *Anglo-Norwegian Fisheries*: Boundaries
		- *Reparations for Injury*: Legal personality of international institutions
		- *Genocide*: Reservations to treaties
		- *Nottebohm*: Nationality
* International arbitrations and international criminal tribunals also offer sources
* National courts may evidence custom, state practice.

# Development of Customary Law

* *Fundamental notion*: States in and by their international practice may implicitly consent to the creation and application of IL rules.
	+ Represents a dynamic source of law, necessary in light of the nature of the international legal system and its lack of centralized organs
	+ The basis of obligation is *consent* to the general mechanism by which binding custom is determined. *Not a single state has professed dissent to this secondary rule*.
		- This is not a majority rule system
		- I consent to the system, but I reserve the right to object (*persistent objector status*)
* Two elements:
	+ General practice (“state practice”)
	+ Acceptance of law (*opinio juris*)
		- Evidence of a belief that practice is rendered obligatory by existence of a rule of law requiring it
		- *Opinio Juris vel Necessitas*: The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. *North Sea Cases*.
* Two perspectives associated with custom
	+ *Positivism*: Weight should be given to the *opinio juris*, even if the practice is rarely performed by states
	+ *Kelsen*: *Opinio juris* is impossible to prove. After showing material fact, courts should supply the subjective element.
* Fundamental problem with Article 38: Making the law
	+ For something to be accepted as law, it must be law. For something to be law, it must be accepted as law. This is apparently tautological.
	+ Solution: you need a challenge, and to gauge the result of that challenge

## State practice — a question of material fact

* *Factors*: Duration, consistency, repetition, generality
* ***Duration***: A factor of relatively low importance; a wide range of acceptable duration.
* ***Continuity & repetition*:**
	+ *Asylum* case (ICJ 1950): Customary rule must comport with consistent and uniform usage by states in question. Uncertain and contradictory practices may fail (*case dealt with specific regional custom*)
	+ *North Sea Continental Shelf* (ICJ):
		- The practice of *interested* states must be
			* Consistent; and
			* virtually uniform.
		- *Note*: This case dealt with developing customary law out of a treaty, so that non-signatories could be bound
	+ *Nicaragua* case (ICJ 1986):
		- Practice *need not* be in absolute rigorous conformity with the customary rule
		- Threshold for custom
			* General consistency
			* Inconsistent activity is treated as breach
	+ “Instant” custom
		- In some cases, clear *opinio juris* can establish custom even when there is no repetition
		- *Example*: The extension of sovereignty to airspace
		- *Test*:
			* Consider the strength of the rule about to be overthrown
			* Relevant factors:
				+ Newness of the situation
				+ Lack of contrary rules
				+ Necessity to preserve a sense of regulation
* ***Generality*:**
	+ How much practice is enough
	+ *Unequal influence*: States may have a disproportionate influence on custom according to:
		- Power/wealth. Relevant divisions:
			* *Wealth*: Global North v. Global South
			* *Regional breakdown*
			* *Cultural Divisions*: Secular states, Islamic states, etc.
			* *There is a question about whether customary law can form if any major bloc objects*.
		- Special relationship to the subject matter
	+ The above fact is justified by c*onspicuousness*: Such factors make it easier for all states to discover the practice
* Significance of the ***failure to act*:**
	+ Abstention creates negative custom only if it is based on a *conscious duty to abstain* (*see Lotus*, PCIJ, 1927 — conscious of a duty to refrain from exercising jurisdiction).
	+ This includes a requirement of actual awareness
* Investigating state practice
	+ *Sources*: Historical record, memoirs of leaders, manuals on legal questions, state comments on ILC drafts, etc. Even internal law may be consulted (*Scotia* case, U.S. 1871).
	+ *Treaties*: These are often referred to, but remember that existence of treaties on a matter shows that the rule is not customary.
	+ A minority of commentators claim that such statements are no evidence of actual practice

## Opinio Juris

* ***General Rule***: *Opinio Juris* is always found in the context of the action
	+ Particularly probative when the rule goes against the interests of the specific state
	+ *Legality of Nuclear Weapons*: Look for times where they might be used, but a state chose not to use them.
* Discussion in ICJ
	+ *Lotus*: For abstention to be custom, need to be “conscious of a duty to abstain.”
	+ *North Sea Continental Shelf* (ICJ):
		- Must show a general recognition that the rule of law is involved
		- *Tanaka dissent*: Should infer opinio juris from the material fact of state actions
	+ *Nicaragua* (ICJ 1986): Reaffirming *NSCF*, requires *evidence* of *opinio juris* belief.
* **Proving *opinio juris***
	+ *Key*: Determine the attitude of the state concerned at the time of codification or adoption
	+ Look to General Assembly resolutions — the content and conditions of adoption
	+ Codification conventions
	+ *Paquette Habana* (U.S. S.Ct, 1900)
		- Establishes a custom that coastal fishing vessels are exempt from capture
		- Notes that, where law is broken, countries took effort to explain that they were merely taking advantage of certain exceptions. Implies a recognition of the general rule
		- *Note*: It’s always more probative when a party accepts something that is against its interests
	+ *North Sea Continental Shelf* cases: Cannot find *opinio juris* due to a lack of evidence. *Note* this does not mean that such *opinio juris* does not exist.\]
	+ *Lotus*: Failure of the French to protest suggests that France does not necessarily follow the rule it insists upon here. (*This is weak*: If there is no rule, then why protest? France actually loses the case on the *compromis*)
* ***Burden of Proof*:** This is always the most difficult hurdle in international law. The system is loaded in favor of the status quo (*See Texaco*).

## Changing Custom

* Establishing new customary law:
	+ Claim
	+ Absence of protest from interested states
	+ Acquiescence from other states
* *Anglo-Norwegian Fisheries* case suggests that a state is not bound by custom when it acts contrary to that custom and other states acquiesce. But in this case, Norway had long objected to the rule at issue.
* *Acquiescence*
	+ *Defined*: Tacit recognition, manifested in unilateral conduct, that the other party may interpret as consent (*Gulf of Maine*, ICJ, 1984)
	+ *Two views*:
		- *Permissive perspective*: Silence is considered to be consent. Protest is required to break rule-formulation
		- *Lotus*: Only if lack of protest comes from “conscious” duty to abstain.
	+ Principles of good faith apply to these determinations
* *Problem of protest*: States may protest or acquiesce for many nonlegal reasons
* *Persistent objectors*
	+ Constant protest by a minority may create an exception
	+ A state is not bound by a custom it has protested since the rule’s inception
	+ It is extremely difficult to maintain this status
* *The Problem of New States*:
	+ *Traditional View*: New states are bound by all existing customs
	+ *Opposing view*: Allow states to choose
	+ *Generally accepted pragmatic view*: Entering into relations with existing states signifies acceptance of the totality of customary law

## Regional or local custom

* *Generally* has a higher standard of proof
* Test (*Right of Passage over Indian Territory*):
	+ Activity by one state
	+ Accepted by the other
	+ Other sees expression of legal obligation or right
* Therefore, requires *positive* acceptance of both parties. Simple acquiescence is not enough

## Soft Law & Lawmaking Treaties

* The mingling of treaty and custom evident in soft law and lawmaking treaties is a response to the needs of the post-WWII international order: allows law to be generated faster, but in a way that does not necessarily require every state to ratify an instrument.
* Soft law is not yet law itself, but is important to its development; includes non-binding instruments, *e.g.*, recommendations, guidelines, codes of practice
	+ General Assembly resolutions
		- *Nicaragua* case: *Opinio juris* may be derived from adoption and approval of GA resolutions
		- Near-unanimous approval of GA res. may be probative of custom
	+ International Law Commission
	+ Specialized bodies
* Unilateral acts by states also may create legal obligations
	+ Must be accompanied by *opinio juris*
	+ Publicity & notoriety of such acts are also relevant
* Three methods to claim a non-binding treaty (or a soft-law instrument, General Assembly resolution) has evolved into binding custom (*North Sea Continental Shelf* cases, ICJ)
	+ Provision **codifies** customary law
		- Look to the legislative history: If the treaties were proposed because they reflect customary law.
		- The issue has been brought to the states’ attention, so they can’t really argue that their silence was due to ignorance
	+ Provision **generated** customary law
		- *Step One*: Does the provision have a norm-creating character?
			* If the provision is an alternative to a default rule, it is likely not norm-creating
			* If it is not a sharp rule of law, it is probably not norm-creating
			* *Note*: If the answer is no, a treaty still may generate custom; it will simply be harder to prove.
		- *Step Two*: Look to practice of unbound states
			* *Question*: What principle is applied by states that are not bound by the treaty when they are faced with this dispute?
			* *Note*: Where the provision is not norm-creating (say, an alternative to a default rule), a court might require more widespread practice. This is because a state might not realize the need to protest a non-norm-creating provision, so silence is less useful here.
	+ Provision **crystallizes** customary law
		- There is sufficient practice at the time of the treaty’s conclusion, and the treaty itself provides the necessary *opinio juris*.
		- The process may provide this missing *oj*: speeches, debate, discussion, negotiation.
* A provision of a GA resolution may also be binding if it represents an authoritative interpretation of the UN Charter. This can also be done in the context of other treaties that provide for a means of authoritative interpretation, such as the WTO.

# Move from custom to treaty

* *Conditions that spur movement away from custom*:
	+ Increasing number of actors
	+ More pressing problems, technological change
	+ Ideological cleavage
* Benefits of treaties
	+ Treaties will appeal as an effective way to “contract out” of custom
	+ Custom is backward-looking; treaties allow a look to the future
	+ Brings more voices to the table
	+ Formalized decisionmaking empowers the weak states
* Custom, however, remains important
	+ Treaties are not always fast, sometimes can take 30 years or more
	+ States can always refuse to accept a treaty, even on the basis of just a few articles.

Treaties:

Development and interpretation

* 1969 Vienna Convention on the Law of Treaties
	+ Rules on interpretation, material breach and fundamental change of circumstances reflect customary international law
	+ *Note*: Does *not* cover agreements between a state and an international organization, or agreements, such as commercial accords, governed by municipal law.
* Test:
	+ *Definition*: International agreement between two states in written form and governed by international law
	+ *General rule*: To be a treaty, the agreement must create a legal relation, right or obligation, rather than merely state common principles or objectives. (*Qatar v. Bahrain*)
	+ *Note*: Though such statements of principle may not be treaties, they may have considerable effect
* *Pacta sunt servanda* is the fundamental principle; perhaps the oldest in international law.

# Making treaties (Shaw, 907)

* No prescribed form or procedure
* *Full Powers doctrine*: A person must have “full powers” to be accepted as capable of representing their country in a treaty-making convention. Heads of state, etc., are presumed to have full powers
* *Consent*: A treaty must be consented to in order to be binding
	+ An international conference adopts a treaty with a 2/3 vote (VCLT, art. 9).
	+ Methods of consent: determined by a treaty provision, by other expression by voting states, or where the state in question intended to be bound.
		- Consent by signature: defined in Art. 12.
		- Consent by exchange of instruments: Art. 13. Acceptable when the instruments or both states have agreed that this exchange would be binding.
		- Consent by ratification- Art. 14: Originally by the sovereign, now often subject to constitutional control (according to internal law). Advantages are mostly internal: More time for consideration, more democratic. Ratifications for multilateral treaties often deposited w/ UN Secretary General.
		- Consent by accession- Art 15: Where a state becomes a party after the deadline for signature has passed, or where it can’t sign.

# Reservations to treaties (Shaw, 913)

* *Definition*: A unilateral statement while signing/ratifying a treaty, whereby a state purports to exclude or modify the legal effect of certain provisions in their application to the state.
* Often, because these reservations can create problems, they are disallowed from the beginning. Many treaties contain a “no reservations” clause.
* Deciding whether a statement is a reservation: Interpret the statement in good faith, according to the ordinary meaning of its terms, in the context of the treaty in question. (917-18).
* Rules governing reservations:
	+ *Traditional Rule*: Reservations may be made only with the consent of all other parties
		- Purpose is to preserve unity and minimize deviations
		- More likely to apply where there are fewer parties (art. 20(2)).
	+ *Modern rule*: May be made when signing, ratifying, etc., but not where prohibited, or where the reservation is outside the “object & purpose” of the treaty. (article 19).
	+ Reservation can similarly be exercised by the party who accepts it, with respect to the reserving state. (Art. 21).
	+ When a state rejects a reservation, it does not render the whole treaty inapplicable between the two parties, just the provision reserved. (Art. 21(3)).
	+ *Unresolved question*: What is the effect of an impermissible reservation?
* Justifications:
	+ Reflects the principles of sovereignty
	+ Can encourage more states to join
* Problems:
	+ They can jeopardize the negotiation
	+ Should be distinguished from other statements that are not meant to have legal effect. But note the *Belios* case (p. 916): Swiss made “interpretive declarations” to treaties that prohibit reservations. The court interpreted the declaration to be a reservation, then discounted it because no reservations were allowed.

# Entry into force (Shaw, 925)

* Usually provided for, but generally happens when consent to be bound is established by all negotiating states (VCLT, art. 20(5)).
* After entry into force, treaty should be transmitted to the UN Secretariat for registration and publication (effort to end practice of secret treaties) (art. 80).

# Application of treaties (926)

* Treaties do not operate retroactively, absent a contrary intention
* *Default*: binding within a state’s entire territory
* Problem of successive treaties on the same subject provided for in Art 30 (927)
* Third States: Application upon non-parties (928)
	+ Gen’l rule (Art 34): only binds parties (fund’l principle of sov’ty & ind of st’s).
	+ Major exception: where the prov’ns of the treaty in question have entered into customary law 🡪 all states bound.
		- Ex: laws on warfare (orig’ly Hague Cnv).
		- Provided for in Art 2(6) of UN Charter
	+ Art 35: 3rd st’s can consent to a specific treaty obligation/term in writing, w/o being party to the treaty.
	+ Art 36: Rights created for non-parties by consent of the parties.
* Some treaties may create obligations or rights *erga omnes*. Ex: high seas.

# Amendment & Modification of Treaties: (930)

* Amendments: Formal alteration of treaty provisions, affecting all parties.
	+ All parties must be notified.
	+ Multilateral treaties usually lay down specific conditions for amendment.
	+ NOT binding on states who do not become party to amended agreements.
* Modifications: relate to variations of certain treaty terms b/t particular parties only.
	+ Possible only where not prohibited by the treaty and as long as it doesn’t affect the rights or obligations of other parties.
	+ Not possible where the modification is incompatible w/ the effective execution of the object & purpose of the treaty.
	+ May also be modified by a later agreement, or by establishment of a rule *jus cogens*.

# Treaty Interpretation (932)

* 3 basic approaches:
	+ *Objective approach*: focuses on actual text, analyzing wds used.
	+ *Subjective approach*: Intent of the parties to resolve ambig prov’ns.
	+ *Teleological school*: emphasizes the object & purpose of the treaty (big role for judge/arbitrator).
* Art’s 31-33: Incorporate all 3 doctrines
	+ **Art 31**: Reflects customary law; lays down fundamental rules of interpretation, like interpretation “in good faith in accordance with the ordinary meaning … and in their context in light of object & purpose.”
		- Principle of Contemporaneity (according to circumstances prevailing when treaty was concluded).
	+ Art 32: Where interpretation according to Art 31 is ambig, obscure, or manifestly absurd.
		- Turn to preparatory works (travaux préparatoires)
		- Remember, text still has primacy
		- Principle of effectiveness
			* cannot be used to attribute an opposing meaning (*Interpretation of Peace Treaties* case)
			* CAN be used, however, to give effect to provisions in accordance w/ parties’ intent.
			* Where the treaty is a constitutional document for an IGO, a more flexible method of interpretation is justified, since subsequent practice is especially relevant here (UN Charter)
			* HRs Treaties, especially ECHR: more purpose-oriented method of interpretation adopted, emphasizing its status as a living instrument.
			* *Licensing of Journalists*: The rule most favorable to the individual must prevail.
	+ Art 33: Where more than one language, and in the event of a difference of meaning that normal processes of interpretation can’t resolve, use the meaning which best reconciles the texts in light of the object & purpose of the treaty.

# Invalidity, Termination, & Suspension of Treaties (939)

* VCLT adopts a cautious approach to the separability of treaties.
	+ Art 44: States may withdraw from or suspend treaties only in respect of the treaty as a whole, not of particular parts of it, unless otherwise stipulated.
* Invalidity:
	+ A state can’t plead a breach of municipal law as an excuse for condemning an agreement.
		- Art 46: Few exceptions. Related to the general principle of international that a state may not invoke internal law as a justification for failure to carry out an int’l obligation.
	+ Error: Unlike in K law, scope of error’s invalidating consent is limited. (Art 48)
	+ Art 49 & 50: fraud & corruption always invalidates consent. (949)
	+ Coercion: Art 51: Invalidates consent. Art 52, In line with Art 2(4) of the UN Charter, invalidates treaties procured through use or threat of force.
	+ Jus Cogens: Art 53: Treaty void if, at time of conclusion, conflicts with peremptory norm of IL.
		- Art 64: if a new peremptory norm emerges, existing treaties in conflict with it are terminated as void. Parties expected to bring mutual relations into conformity.
* Consequences of invalidity: Though invalid treaties lack legal force, if acts performed in reliance, restitution might be in order (in so far as possible between the parties).
* Methods of Termination of Treaties
	+ In accordance with specific provisions, where parties intended to admit such a possibility, or where the right is implied by the nature of the treaty.
	+ HRs Treaties generally have no right of termination or denunciation.
	+ May terminate if purposes or object are fulfilled, or if limited by time.
	+ Just as parties can modify, so they can suspend between themselves under Art 58, if such possibility provided for by treaty.
* Material Breach (947): If one state violates an important provision, the agreement is considered ended by it (in effect, this is a reprisal or countermeasure).
	+ But breach must be material (Art 60(3)): either an unpermitted repudiation of the treaty, or a violation of a provision essential to object and purpose.
	+ Material breach in multilateral treaties: Art 60(2) (949)
* Supervening Impossibility (949): very high standard, similar to *force majeure*. Where temporary, can only suspend.
* Fundamental Change in Circumstances: *Rebus sic stantibus*
	+ Principle of customary IL where a party may withdraw or terminate.
	+ Modern approach severely restricts scope: only if change results in radical transformation of obligations imposed, rendering performance essentially different. Art 62 codifies this custom (951).
* **Dispute Settlement:** Art 66: If involves jus cogens, parties may submit application to ICJ. Not much guidance otherwise…

Statehood, Recognition,
and Self-Determination

# The International Juridical Concept of a State

* What are the criteria that must be met for an entity to be a state? There are different explanations for statehood, which may both have some role to play.

## The *Montevideo* Criteria

* *Four Elements*:Territory (fixed/controlled), Permanent Population, Government, Capacity to enter into legal relations with other states
* *Note*: These factors are related to the **birth of states**. Once the state is established, these are certainly no longer necessary at any given time to maintain statehood.
* Problematizing the *Montevideo* Convention:
	+ Territory
		- States often have boundary disputes
		- *More problematic*: A state may be born without any fixed territory, merely a “core territory,” and even this may be difficult to establish at the outset (*e.g.*, Israel).
		- There is probably a sliding scale relating to territory
	+ Population: How substantial must this be? Can it be a mixed population?
	+ Government
		- There can be competing governments (*e.g.* Congo)
		- There can be no government at all, as in some former colonial territories
		- Changing application (Shaw):
			* Old tendency to require “civilization”: Finland, *e.g.*, did not become a state until a *stable political organization* was created, and until authorities could assert themselves *throughout the territories without foreign assistance* (*Aaland Islands*, 1920).
			* Case of Croatia and Bosnia & Herzegovina shows a newer tendency to *balance* the factors: these countries were admitted to the UN and recognized by the EC while nongovernmental forces controlled large parts of territory.
	+ Capacity:
		- *Defined*: Has the competence to enter into international relations, is sovereign and is not beholden to another’s command
		- Problems
			* This becomes problematic when some states accept the state in question as a legal entity, and some do not
			* Also seems tautological: to be a state is to have this capacity
		- Varying application:
			* Some states have argued for *actual* independence (*e.g.* denial of statehood to the Bantustans of South Africa).
			* Elsewhere, see a less-than-independent territory, *e.g.* Kosovo, being recognized as a state.
* Need another explanation: It’s clear that some states emerge without meeting one or more of these criteria (Congo), so all factors are clearly not necessary. Moreover, it’s not clear how any of them are supposed to be satisfied.

## The Constitutive Theory of Recognition

* While the above criteria acknowledge that there is some *objective* criteria for statehood, this approach is purely *subjective*.
* Two theories of recognition
	+ Declaratory
		- The question of statehood is settled by the presence of the criteria listed above. The recognition by other states is considered to be very probative of the satisfaction of those conditions.
		- The lack of recognition, however, is much less probative of the nonexistence of statehood. (This is because non-recognition could be based on purely political grounds, rather than the criteria not being met).
	+ Constitutive
		- Recognition is itself constitutive of that entity’s statehood.
		- The *advantage* of this view is that it avoids the problem of accounting for the murkiness of the requirements—if other states accept an entity into the community of states, then it is a state.
		- The disadvantage is that it has all of the uncertainties of establishing a new customary law. How much recognition is enough? How representative must the recognizers be of the world’s legal systems? Etc.
		- Criteria:
			* No need for all states to positively recognize, but the amount is more crude, politically, than the emergence of a customary norm
			* Positive non-recognition is insufficient to ban statehood. (*E.g.,* all Arab states refused to recognize Israel.) No persistent objection to statehood.
			* *Practically*: If two permanent S.C. members object, forget it. If one objects, maybe. It depends on which objects, and how much capital the put into it.

## Evaluating the approaches

* ***Mixed theory:*** Probably some degree of the objective criteria must be met. But empirically, recognition at least has a constitutive element.
	+ *Example*:The sole difference between Bangladesh and Cyprus is that Bangladesh was recognized. In terms of the objective criteria, both were in the same position.
	+ Finally, the international community decides. The question is, **how much does recognition tip the balance** where the factors are met to a murky degree? Or conversely, **to what extent must the factors be met**?
* Recognition is so powerful that the objective characteristics of statehood are in some cases not only insufficient, but **not even necessary**, for attaining the juridical status of a state.

## Rules governing recognition

* Because recognition is so powerful, there are some ***rules*** governing when states can recognize:
	+ Some rules articulate when not to
		- *e.g*. the emerging rule that **new states shall be democracies**;
		- illegal use of **force**.
	+ Sometimes the S.C. will insist that no one recognizes an entity as a state
	+ Some rules articulate a duty to recognize (*e.g*. the right of **self-determination**)
	+ U.N. membership will be *dispositive*, but nonmembership is not.
* Political considerations: If some states recognize, it may be important to recognize as well. Otherwise, our nonrecognition will be remembered by the new state and by its established allies.
* *Important Note*:Often things are done illegally which cannot be legally undone. If an illegally born state is recognized, then that’s that. **The toothpaste is out of the tube**.

## Conclusion: When does a territory become a state?

* Widespread recognition means statehood
	+ It’s not totally arbitrary; there will be some obligations on states as to when they do and don’t recognize
	+ *Sufficient recognition* will be determined crudely and politically
* When, say, two members of the Security Council object, a territory cannot be a state

## Self-Determination

* The right of self-determination has lowered the standard for the exercise of authority
	+ *E.g.*, Congo in 1960 had two factions seeking control;
	+ Guinea-Bissau in 1972 was declared independent despite the fact that rebels controlled neither any major towns nor the majority of the population.
* The emergence of the right to self-determination: Declaration of Friendly Relations
	+ If the DFR is an interpretation of the UN Charter, then the right always existed. But no one recognized such a right prior to the declaration
	+ Perhaps the right of self-determination is customary law, *crystallized* at some point in the 1960s
	+ Note tension between ¶¶ 1-2 and ¶¶ 8-9:
		- No *terra nullius* is left, so the only way to vindicate the right to self-determination is to break up a state, which is prohibited by the latter paragraphs.
		- *Solution*: See mention of former colonial states in 2(b) as an exception to this rule. Paras. 8-9 represent these former colonial states trying to consolidate their power.
* How to deal with the right to self-determination:
	+ DFR, ¶ 7:
		- You have the right to national unity, so long as you act “in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people.”
		- *See also Reference re Secession of Qebec*
		- Construe paragraph 8 (“no state shall interfere”) to refer to third-party states
	+ Problem remains of defining “peoples”

# Extinction of states

* *Modes*: Merger, absorption, annexation, dismemberment, geological disappearance
* NB: This is *distinct* from the disappearance of government
* State succession

# Rights of states

* Rights are guaranteed *by virtue of the international legal order* (Question: Is this a secondary rule existing as a general principle?)

## Independence/Sovereignty

* *Starting point*: International law permits freedom
	+ *ILC Draft Declaration on the Rights and Duties of STates* (1949): Capacity to provide for itself free from domination
	+ *Lotus*: Restrictions cannot be presumed
* *Implied rights*: territorial jurisdiction, self defense
* *Implied duties*: Noninterference

## Equality

* Equality of rights and duties of states
* Views:
	+ *Natural law*: Equality is a natural condition
	+ *Positivism*: Rejected the formulation of a general rule generating rights and duties

## Peaceful coexistence

* Five principles (India & China, 1954):
	+ Mutual respect for territory
	+ Mutual respect for sovereignty
	+ Non-aggression
	+ Non-intervention
	+ Equality
* Soviets viewed this as the guiding principle of international law

Territory

* Territory is a crucial element of a state. It is also a key part of international relations disputes.
* Since 1945 the principle is that you **can no longer acquire title through conquest**. Belligerent occupation gives some rights, but not title.
* This process is much less sophisticated than national law (property). But it is, in some views, the most important thing in IL.
* The rudimentary nature of territory law shows that law is not what’s important, but peace. (in lecturer’s view). It therefore doesn’t resolve things permanently.

# Territorial Sovereignty

* One of the key principles of international law is that **a state has sovereignty over its territory**, and is not to be interfered with in its control of that territory. Thus one of the major elements of statehood is that it entails sovereignty over a given territory.
* As is evident in Huber’s discussion in *Palmas*, two states may claim sovereignty but one may have a better claim to effective sovereignty. On the other hand, one state may have a better claim to title.
	+ There may be a discontinuity between law and facts.
	+ the sociologist may say that the supposed title is inchoate and useless since the state is not effectively sovereign, while the lawyer may say that the “effective” controller is an illegal occupier
* **Conditions** of territorial sovereignty. Competing methodologies:
	+ *Island of Palmas* (1925)
		- **Title**: No intent is needed to obtain title. Territorial sovereignty is a question of facts, not intentions.
		- **Effective occupation**
			* Need “actual and continuous and peaceful display of state functions.”
			* Constructive knowledge: Conditions need be such that any power who claims right over the territory to visit and view a contrary situation
			* NB: A notice requirement, assess sovereignty on basis of reasonableness
		- Relationship to recognition: Title to the island is a matter of facts, which would lean toward a declaratory role for recognition
	+ *Legal Status of Eastern Greenland* (1931)
		- **Intention or will:** Norway’s claims are prevented by her acceptance of treaties with Denmark that proclaimed Danish claims to all of Greenland.
		- **Actual exercise:** This is *weak*. It is possible to satisfy a tribunal with very little in the way of actual exercise of rights
		- **Compare claims**
		- Relationship to recognition: Gives international recognition a high probative value.

# New states and title to territory

* *Birth of states*: Devolution, revolution, secession
	+ Devolution is relatively formalistic and determined by internal constitution. If both sides agree to a transfer of title, then international law will not get in the way
	+ Revolution and secession are more problematic
* The problem of revolution
	+ A state may hold all three elements and others may recognize. Under traditional international law, however, we may not talk of a right to territory until one is a state
	+ Three solutions:
		- Pragmatic approach: Accept the reality of possession upon revolution
			* *Problem*: How to deal with claims over areas that are not possessed
			* This offers no legal explanation of territorial sovereignty
		- Constitutive Theory of Recognition:
			* Recognition gives the right to title
			* *Problem*: Many states do not accept this theory
		- Abandon the traditional rule: People may acquire sovereignty over a territory, pending establishment of a state
* New territorial lines are drawn according to *uti possidetis* (below).

## *Uti Possidetis*

* A principle of *effective control*.
	+ Originally applied to conquest, when fighting was over the new borders were drawn according to control. Now conquest is banned, but the principle has been applied to **decolonization—the borders of the emergent state are what they control.**
	+ ICJ, Burkina-Faso v. Republic of Mali (1986)(applying the principle to decolonization: “[Uti possidetis] is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”)
* *NB:* control was much more important in the *Palmas* case than in *Greenland*, but there is always some kind of need for it.

# Loss and acquisition of partial territory

* Accretion: Changed physical circumstances; no change in title
* Cession: Voluntary transfer. A state may only cede rights in their possession *at the time of transfer*.
* Occupation: Level of control that is less than possession or settlement
	+ *Classical Law*: There had to be an “act of discovery” and a claim in addition to a manifestation of sovereignty
	+ This interpretation is dead today. *See Western Sahara* (ICJ 1975). The nomadic tribes in the area were acting as sovereigns, and therefore the area was not *terra nullius*.
* Prescription: Transfer of title over time that is not based on discovery. Critical is the lack of protest by prior sovereign
* Conquest: Almost all commentators say that conquest, even if legal and effective, is not enough to transfer title. It is difficult, however, to find positive law backing this up.

# Determining competing claims

* Intertemporal rule: A general principle (of international law?) that the legality of conduct should be determined by the law in effect at the time of the conduct in question.
	+ *Problem*: Applying the law in this way can be uncomfortable at times (*e.g.* the slave trade)
	+ *Jus cogens* can trump the intertemporal rule
* Recognition
	+ Can retroactively determine the territorial claims of a state
	+ Rule of thumb: the more controversial the case, the more important international recognition becomes
* Acquiescence: When a state should have but did not protest

## Critical Dates: Following a title over time

* *Island of Palmas* (Huber) (1925)
	+ Approach to title
		- Find the **critical date** where the rights in dispute are realized.
		- Determine the relevant law at the time.
		- Assess the legal claims to the title
	+ Finding critical date can be tricky. This was an easy case because U.S. was claiming transfer of title from Spain in Treaty of Paris, 1898.
* Weiler’s method
	+ Look for T1, **identify the last time everyone agreed on Title**;
	+ **Track every “title event”** through all critical dates;
	+ Remember the intertemporal rule: assess the law of title at the time the title is passed;
	+ Assess the claim in light of the above factors.
	+ *NB*: this is contrast to Huber’s approach in the Palmas case (assuming a critical date, and determining who has since exercised effective sovereignty. Law, for him, is about facts and sovereignty must be exercised effectively).

Legal Personality:

States, Int’l Organizations, Other Actors

* *Defined*: Legal personality is the **capacity to have rights and perform duties**
	+ *International Personality*: Defined by participation and acceptance
	+ Acceptance depends on various factors, including the type of personality in question
* Participation in international law does not mean international legal personality
	+ International law has many participants—states, IOs, NGOs, regional org’s, public companies, private companies, individuals, and other associations. But being a participant is not enough. Something must make an entity into more than a mere object of international law, even though objects can participate in the workings of international law and even affect its form in some ways.
* Shaw: personality is a “relative phenomenon.” Consider a range of factors
	+ Personality involves certain concepts: **status**, **capacity**, **competence**, and the nature and extent of particular **rights and duties**. “The status of a particular entity may well be determinative of certain powers and obligations, while capacity will link together the status of a person with particular rights and duties.” [196]
		- In other words, “International law necessitates the consideration of the interrelationship between rights and duties afforded under the international system and **capacity to enforce claims**.” [196]
		- Without legal personality, an individual or entity cannot maintain and enforce claims. (at least not directly).
	+ In international law, personality also entails some form of “community acceptance” [197](not necessarily the same as recognition, for it may mean acceptance of the personality not of the particular entity but of the class to which it belongs)
* Weiler: The **essential feature of international legal personality is the ability to bring a claim**. (See Reparations for Injuries, ¶3).
* NB: Also note the role of **authorship of the law**. A limited right to bring a claim but no right of authorship may not be subjecthood in any relevant way.

# Conceptual framework

* What is decisive for subjecthood in international law?
	+ **Objects have rights, though presumably not duties**. What differentiates subjects from objects? Is it the capacity to enforce their own rights? Or perhaps their authorial role in norm creation?
	+ **States possess both of these elements**. ***They are the plenary subjects***. But a case can be made that individuals have some growing, though still very limited, capacity to enforce their own claims. Also corporations have a very limited role to play in norm-creation, as for example through making “international contracts” and thereby shaping state practice. But obviously they are playing the subsidiary role here, and the analogy is very stretched.
* In domestic law, an entity is an object of law if there are laws pertaining to it. An entity is a subject if in some way it is an author of the law.

## Theories of Subjecthood

* “Legal”/“Legalistic” view: a subject of international law is an entity with a certain degree of “personality,” i.e. with rights and duties, and **capable of making claims** and have claims brought against him.
	+ Subjecthood is based on an accumulation of rights and duties and remedies (i.e. capacity to bring claims).
	+ The path to Subjecthood under this model is accruing more and more rights, duties, and remedies.
	+ [Under this conception, individuals really are getting subjecthood].
* “Political” view: a subject is an entity who is to some extent **“author” of the laws** granting his rights/duties/remedies.
	+ The rights and duties of a subject are inherent in him or her, but are not given to him. The bearer of rights and duties is relevant in authoring the rules that grant him rights/duties/remedies.
	+ [By this vision, individuals will become subjects only when some way is found to replicate the domestic democratic legitimacy. Real subjecthood is not made through rights, but through power.]
	+ Weiler seems to favor this view on subjecthood, (≈ Rousseauean)
* These two theories are based on two competing visions of IL. Both of them are very important
* Partial Subjecthood:
	+ Under either conception of subjecthood, it is possible to conceive of a partial subject.
	+ Under the “capacity” theory, something can just have a certain degree of capacity, without reaching the plenary subjecthood enjoyed by states.
	+ Under the “authorial” theory, some entities may have limited capacity to participate in authoring international law, *E.g.*:
		- In limited branches of law, like human rights law (see G.A.)
		- Among a limited group of states (e.g. the WTO can author laws binding upon its members).

## Methodological approach

* If we want to understand whether an entity has subjecthood, **it must be compared to the plenary subject: the state**.
	+ **Q1:** Does the entity have international legal personality?
		- **Q1a**: what does state practice say?
		- In cases of IO’s, we look to the charter and ask whether states intend to give it international personality? There may be room for subsequent understanding/practice in the analysis.
	+ **Q2:** What is the **scope** of its personality? (the scope of its rights/duties, and capacity).
		- Same kind of analysis as Q1, though there is perhaps more room for analysis of subsequent practice.
	+ **Q3:** **To whom** do these rights/duties or capacities apply?
		- Just states who have granted them explicitly, or to other states as well? (*e.g.* the members of an organization who have given it certain rights and duties, or non-members as well?)
		- Q3 is always the most difficult
* *Fundamental Question*: has there developed a rule of public international law saying that this kind of entity can have rights/duties opposable on all states?

# Subjecthood of States

* States are the **plenary** units of international law. They are both the exemplary legal persons, and subjects of international law. They are full persons, and full subjects (if it is possible to possess partial personality, or partial subjecthood).
	+ See *supra* for a close analysis of the legal criteria in the international juridical concept of a state.
* The question of whether any of the following entities possess subjecthood (full or partial) must be posed in comparison to states, the plenary subjects.

# Subjecthood of International Organizations

* General:
	+ IO’s certainly can have international legal personality.
	+ Certain IO’s, like the UN, may have limited subjecthood
* *Any* international organization can vindicate rights prescribed in its constituent instrument (*e.g.*, if member states refuse to pay dues, UN can sue). (*Reparations for Injury*, ¶¶ 3–5).
* An IO can vindicate rights under *general international law* **only if** it has a personality distinct from its members. (*Id.* ¶ 6).

## Roadmap: Existence, scope and opposability of IO’s legal personality

* Applying the methodology, *supra*.
* **Existence**
	+ Ask **what the parties intended**. The question always turns on whether states want to give the org. int’l personality, just as the next Q turns on what scope of personality they want grant the org. In other words, state practice must be consulted.
	+ Examine the **founding document**, and see if it is explicit. Intent may also be implied.
	+ In *Reparations* the court found that though the UN Charter says nothing explicit, the UN must itself be able to bring claims on behalf of its agents if it is to fulfill its manifold explicit functions.
* **Scope**
	+ How many rights and duties does it have? How much in the way of remedies?
	+ A state has plenary personality. Organizations do not. For organizations, the content of their rights, duties, and remedies, is:
		- **derived from express constitutional document**
		- **implied** (by various tests)
		- implied by subsequent practice.
	+ NB Legal Realist point: if you’ve expressly granted int’l personality you cannot later say the body has no capacity to bring a claim, though you can argue that it has no capacity to bring this particular claim.
* **Opposability: Do these apply to non-members?** (*see below*)
	+ Do the duties and rights exist between the organization and members, or between the IO and non-members as well? It is much more problematic to argue the latter.
	+ **Q3(a):** has there developed a rule of public international law saying states can create organizations with personality vis-à-vis non-members? (You must look to state practice).
* **Domestic Personality**
	+ Art. 104 gives the UN domestic personality within the territory of members states
	+ In monist systems (*e.g.* United States), an organization has domestic personality if it has international personality
	+ In dualist systems (*e.g.* UK), DP requires express incorporation:
		- Incorporation of treaty by Parliament
		- Explicit recognition by executive
		- Order in Council
		- Comity (entities incorporated into domestic law of a recognized foreign state have domestic legal personality in UK) [Arab Monetary Fund v. Hashim (No. 3) (UK 1991)].

## The founding document

* Dual nature: Multilateral agreements *AND* constitutional documents
	+ Implication: Subject to constant practice and interpretation;
	+ Interpretation governed by VCOLT art. 31–32, BUT compared to other treaties, institutional documents trigger purpose-based method of interpretation (more weight given to parties’ intent, org’s purpose, sometimes subsequent practice)
* Power of interpretation generally vested in organs of institution, special tribunal, or member states
	+ EU treaties are interpreted by ECJ
	+ SC and GA (and sometimes other agencies) may request advisory opinion from ICJ to interpret constituent instruments

## Objective v. Subjective personality of International Organizations

* An organization’s ability to exercise its subjecthood vis-à-vis non-members is referred to as “objective” personality.
* **1) ≈ Recognition argument:**
	+ One way of reasoning is on basis of recognition.
	+ *Reparations* ¶27: “50 states, representing the vast majority of members of the international community … have the power to bring into being an entity possessing objective international legal personality.”
	+ However, there is no institution of recognition of IOs (unlike states). You must wait a few years to look at their dealings with other states (state practice toward recognition).
	+ This is the more political argument, akin to emergence of states.
* **2)** Argument for emergence of a **customary rule**
	+ Maybe, with the plethora of international organizations who assert their int’l personality with respect to their competencies, a rule of customary international law has grown up that functioning international organizations can have international personality.
	+ This is the depoliticized argument, about emergent rules of law.
	+ Can an IO bring an international claim on behalf of its agents? (does it have an analog for Diplomatic Protection?)
* ICJ in *Reparations for Injuries*: an unlawful act upon an agent of an IO does injury to the IO itself.
	+ Not only can the UN bring a claim against a member, but the ICJ holds that the **UN can bring a claim against a non-member state**. (this is highly probative of international legal personality and maybe a less limited subjecthood, but it is controversial and not well demonstrated at all in the decision).
	+ The ICJ decision indicates that at least in some limited capacity **certain IO’s have available a remedy somewhat akin to diplomatic protection—the capacity to bring derivative claims on behalf of their members**.
	+ Affiliation required: It’s a **functionalist test** — Since an individual can’t be a national of an int’l org, the requisite affiliation is the fact that he was ***acting on its behalf*** and ***exercising one of its functions***. (*Reparations for Injury*).
* Note: UN Security Council’s broad discretion to respond to breaches of the peace (*Tadic*, ICTY 1995)
	+ Establishment of a criminal tribunal is legal under Ch. 7, though not enumerated
	+ SC has broad discretion, though not unlimited.
	+ *Reasoning here seems incomplete*.

## Advocacy methods

* Assume states create an organization, and are silent as to whether they give it personality. When arguing before a court, it is important to get a sense of its hermeneutic sensibility.
	+ *E.g.* The ICJ has a functionalist sensibility. “Between two interpretations, I will choose the rule that corresponds to the needs of the international community.” WTO is more textual
* *The following are derived from Reparations for Injury* (ICJ 1949)
* **Arguing existence of international legal personality**
	+ **1) Functionalist argument:**
		- states created an organization, and gave it functions. Those functions require the attribution of int’l personality (either because they cannot be fulfilled without it, or cannot most efficiently without it).
		- Next ask if subsequent practice implies this argument.
	+ **2) Super-functionalist argument**
		- Having personality is the most effective way for UN to fulfill its functions. Assumes that states intended UN to be functional, effective.
		- IMPORTANT: This assumption is supported empirically by state practice.
	+ **3) Institutional argument:**
		- The organization has an institutional setup distinct from the sum of its members.
		- Proof: permanence / majority voting (as opposed to consensus).
* **Scope:** Personality includes the right to bring claims
	+ **Institutional:** If UN has *any* rights or duties, it must be able to vindicate them effectively.
	+ **Functionalist arguments:**
		- LOYALTY: UN officers would refuse to enter risky situations but for assurance that UN could bring claims on their behalf.
		- INDEPENDENCE: If UN couldn’t bring claims, officer would be dependent on his state of nationality to do so. But that state wouldn’t necessarily bring a claim. Suppose the officer was a national of the state that harmed him.
* **Opposability:** Personality is *objective*.
	+ Arguing subjective personality is easy: members have consented to cession of certain rights
	+ **Recognition:** Subjective recognition of UN by vast majority of states has converged into objective personality (*Reparations* ¶ 27). *Note*: This method is highly political.
	+ **Positive rue of customary international law:** Not in *Reparations*, but it could be that practice and *opinio juris* is such that states may create organizations with international personality without overwhelming recognition.
		- It’s definitely arguable that this norm has developed since the 1950s, as a plethora of organizations have developed and asserted objective personality without protest
		- This method would be depoliticized, because all states have a role in the creation of custom
	+ Case study. Russia and Denmark have a fishing dispute. Denmark is part of EC, which has established exclusive competence over member states’ fisheries negotiations. But Russia refuses to deal w EC; insists on negotiating w Denmark. How would you advise Russia?
		- **Recognition**: Check whether other non-members have recognized personality of EC.
		- **Positive rule of CIL:** Check whether a rule of CIL has developed that allows establishment of int’l orgs whose personality must be accepted by non-members.

## Responsibility of International Organizations

* Int’l org can be held responsible for injury to state, arising from breach of int’l obligation under treaty or CIL.
* Rules of responsibility are analogized from SR:
	+ **Attribution**: Even ultra vires conduct of organs/agents is attributable.
	+ **Aiding/assisting** breach by a state: Responsibility attaches if org knows of circumstances making the act wrongful, and act would be wrongful if committed by org.
	+ **Circumstances precluding wrongfulness**: Consent, self-defense, etc.
	+ If responsibility is triggered, int’l org must **cease**, offer assurances of **non-repetition**, and make **reparations**.
* Note ongoing ILC project on the issue.

## Liability of member states

* **RULE:** Acts of an int’l org *without* int’l personality are attributable to member states.
* *Contra* Int’l Tin Council (ITC) case study (1985–86)
	+ ITC established in 1956 by EEC members to regulate the tin market. Member states refused to guarantee its debts.
	+ In 1985 ITC had incurred massive debt.
	+ Creditors initiated suits directly against UK government in UK courts, arguing that member states were liable for ITC’s debts under int’l law.
	+ Court held that such a rule had not yet developed. Liability of member states could arise only through express provision in int’l organization’s constituent instrument or where org was under direct control of state.

# Subjecthood of individuals

* General:
	+ They have **limited legal personality**, and are basically objects, although in very limited circumstances this is changing.
	+ Particular branches of international law here are playing a crucial role, such as Human rights law, the law relating to armed conflicts, and international economic law are especially important in generating and reflecting increased participation and perhaps personality in international law. [Shaw 197].

## Development of the role of individuals in international law

* Historical development
	+ **Universal jurisdiction over pirates**
		- Waiver theory: States waived exclusivity over prosecution of their nationals.
		- Limited subjecthood theory (controversial): Int’l duties accorded to individuals.
	+ **Humanitarian law of armed conflict** (IHL)
		- Waiver theory: States voluntarily agreed to rules limiting instruments of force.
		- Limited subjecthood theory (controversial): Establishment of ICC conferred duties on individuals to abide by IHL.
	+ **Intervention under the *Mavrommatis* principle**
		- NOT subjecthood.
		- **Int’l minimum standards apply only to treatment of aliens**. States face no restrictions on treatment of their own nationals. Moreover, **aliens have no autonomy to vindicate their rights**; must rely on ***diplomatic protection***.
	+ **Int’l human rights (IHR)**
		- IHR norms (conventional and customary) removed violation of any individual’s human rights from *domaine réservé* (areas of substantive law reserved for states’ internal law).
		- NOT subjecthood. Individuals now have rights under int’l law, but **no remedy**. *Duty to respect human rights is owed to other states, not individuals*.
	+ **Investment treaties and conventions** (BITs, ICSID)
		- Still not quite subjecthood. Individuals now have rights and remedies (can bring claim against offending state before ICSID). BUT the rights are not inherent in the individuals (e.g., 2 slave states allow slaves to sue if worked 16+ hrs/day).
		- Implication: Subjecthood comes not from rights and duties, but from power to control the norms. (Remember legal v. political views of subjecthood, *supra*).
	+ **Democratization of int’l law**: [Weiler’s path to individual subjecthood]
		- Open diplomacy and intergovernmental conferences (e.g., Durban) to participation by individuals, NGOs
		- *BUT* democratization of int’l law only makes sense in areas approximating governance. State-centricity is preferable in other areas, where democratization can be achieved through domestic influence over foreign policy.
* **Conclusions**
	+ Individuals still have *rights* in international law. But they have **no direct legal remedies** to vindicate them (either through self-help, or through capacity to bring legal claims). The problem is: who is competent to vindicate the rights of individuals (and corporations?) (see “Diplomatic Protection”)
	+ [NB: some argue that to an extent, BITs create a class “investor” with limited subjecthood in international law. Individuals can be such investors. This is only subjecthood by the “Legal” vision and not the “Political” vision.]

# Corporations

* Weiler punted here. Answer is, probably like individuals, except in that *they are capable of contracting with states and providing for arbitration etc. in the contracts* (see *Texaco*). In essence, they may be capable of authoring private international law.
* [NB: some argue that to an extent, BITs create a class “investor” with limited subjecthood in international law. Corporations can be such investors. This probably is only subjecthood by the “Legal” vision and not the “Political” vision.]
* There is more here. See *Injury to Aliens*, *infra*.

On both individuals and corporations, see further “Diplomatic Protection and the Nationality of Claims,” *infra*.

Diplomatic Protection

& Nationality of Claims

## Diplomatic Protection

* *Defined*: “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.” (ILC Draft Arts. on DP, 2006)
	+ DP may not extend to the adoption of claims of foreign subjects.
	+ BUT a rule may be emerging that allows state to bring DP claim on behalf of stateless person who has been habitual resident of that state at the time of injury and presentation of claim.
* Scope of diplomatic protection has expanded from protecting int’l minimum standards for treatment of aliens (*Mavrommatis*) to protecting IHR.
* **State is *not obligated* to exercise DP on behalf of national**. [*Barcelona Traction*]
	+ “By taking up the case of one of its subjects … a state is in reality asserting its own rights.” [*Mavrommatis* case (PCIJ 1924)]
	+ DP is not recognized as human right. [*Kaunda v. Pres of South Africa*]
	+ BUT UK court has recognized right to judicial review in the “extreme case” where the UK government refuses to even consider making a DP claim on behalf of a subject whose fundamental rights were violated.

## Determining Nationality

* ***Nottebohm* case** (ICJ 1955): **An obsolete rule?**
	+ Established the **effective nationality principle:** In order to trigger the obligation to recognize DP claims, nationality must be based on —
		- “Genuine connection” (factually meaningful nexus); or
		- *Possibly* birth.
	+ Protection against abuses of int’l implications of granting nationality
		- *Note*: This principle is without prejudice to states’ power to grant nationality at their discretion for domestic purposes.
		- Rule of thumb: Int’l law **abhors statelessness**. Even if Nottebohm’s only connection to Germany was birth (i.e., no “genuine connection”), Guatemala would probably have to accept Germany’s DP claim. Otherwise Nottebohm would have no recourse
	+ Signs that this case has been overturned:
		- ILC Draft Articles on Diplomatic Protection (2006): do not require “genuine connection” to establish nationality and argue the Nottebohm should be limited to its facts.
		- *Sui generis* argument: this case was particular to the political climate of the second World War.
* **Mergé case** (Italian–US Conciliation Comm’n 1955): **Relative Effective Nationality**
	+ Where two “parent” states are parties to a dispute over injury to a dual national, the state with ***predominant nationality*** (here, Italy) may exercise DP against the other state. Otherwise, DP is precluded by the principle of sovereign equality.
	+ This rule persists in the Articles on Diplomatic Protection (art. 7).
	+ The facts, however, would be decided differently, placing more weight on the individual’s *volition* rather than *circumstances of life*.

## Nationality & Protection of Corporations

* ***Barcelona Traction* (ICJ 1970): Diplomatic Protection of Corporations**
	+ **Holding:** Only national state of a corporation may exercise diplomatic protection. Unlawful act against a corporation does not constitute independent injury to shareholders.
	+ **Rationale:** Considerations of *Order*. Allowing the exercise of DP on behalf of shareholders would result in wild proliferation of claims by many different national states.
	+ **Method for obtaining a different result:**
		- Identify holding/*ratio decidendi* of Barcelona Traction.
		- Identify chinks in the *ratio*.
		- Extrapolate the theory behind those chinks.
		- Construct a different outcome based on that theory.
	+ **Example 1:** ¶ 76: Court recognizes that **had Canada *systematically* refused to exercise DP on behalf of BT, Belgium’s claims might have been admitted**. The rationale here is equity. DP cannot be allowed to become a fiction. **Argue that claim by Belgium is the only way for corporation to have a remedy**.
	+ **Example 2:** ¶ 38: **Int’l law incorporates internal law**. **Maybe today the relevant internal law would “pierce the corporate veil”** and recognize rights of shareholders as distinct from the corporation. If Spain’s acts gave rights to shareholders under Belgian law, maybe shareholders would also have rights under int’l law.
	+ **Example 3:** ¶ 71: Court doesn’t rely on the formality that BT incorporated in Canada, but tries to lay out a theory of *justice* by showing that shareholders got concrete benefits (e.g., tax advantages) for their choice of incorporation. *BUT* today’s world is different. With high turnover of share, **shareholders no longer have a say in the place of incorporation, so there’s no justice in the fiction of shareholder choice**. The people who make the choice (founders) aren’t the same ones who are injured.
	+ **Example 4:** ¶ 96: Attack the *order* rationale. Giving rights to shareholders would breed confusion. BUT there’s a **countervailing interest in accountability**.
* **Where a state may exercise DP for injury to shareholders**
	+ Proliferation of BITs after Barcelona Traction was decided contributed to the need to protect shareholders
	+ ILC Draft Arts. on DP (2006), art. 9:
		- A corp.’s national **state is the state of incorporation.**
		- *Exception* (*need all three*):
			* Corporation is **controlled by another state’s nationals**,
			* Corporation does **no substantial business** in state of incorporation; and
			* Corporation has its **nerve center** in a different state
			* *In this case*, nerve center state is the national state.
	+ ILC Draft Arts. on DP (2006), art. 11 (codifies *Barcelona Traction*):
		- **Injury to corp. does not present separate injury to shareholders**
		- *Exception* (*need all three*):
			* corp. has ceased to exist under internal law of state of incorporation for a reason unrelated to the injury;
			* corp. bore the nationality of the state that caused the injury; and
			* incorporation was a prerequisite for doing business in that state.
	+ ***Diallo* case** (ICJ 2007)
		- Whether a company has legal personality distinct from shareholders is determined by “relevant” internal law.
			* *Gene*: What does relevant mean? Possibilities: (1) internal law of state of incorporation, (2) internal law of shareholders’ state, (3) internal law of corp’s national state (however nationality is decided).
		- If internal law determines that independent injury to shareholders has occurred, national state of shareholders may pursue DP in the usual way.
	+ UK has asserted the **right to exercise DP on behalf of shareholders** (on facts similar to Barcelona Traction) ***where the company is defunct*** (seen as exceptional instance).
	+ *Lex specialis*: Law of the Sea (LOTS) Convention dictates that only the flag state of a ship has the right to exercise DP on behalf of all property and persons on the ship

State Responsibility

* *Conceptual Framework*: State Responsibility represents a system of second-order (or secondary) norms that flow from a breach of a substantive rule of international law. (See Shaw, p. 778).
* *Caution*:
	+ These articles are not always intuitive, and common sense often will not work as well as it does in substantive rules of international law
	+ There is no issue that will not involve state responsibility in some fashion
* *Regime of State Responsibility*: SR is **customary international law**, according to the *“Rainbow Warrior”* arbitration. (Shaw, 778). Weiler: The articles of state responsibility eliminate the need for a treaty on the subject (not everyone agrees with this position).
* *General Policy*
	+ International law’s reliance on self-help for executive and adjudicatory functions creates both threats to order and threats to justice:
		- Threat to order: Escalation. Self-help works both ways
		- Threat to Justice: The most powerful State will always have its say.
	+ State responsibility evolves primarily as a response to this second problem. Uniform obligations for all wrongdoing states. Also a secondary effect to:
	+ *Contain Escalation*: Because it allows self-help, the regime of state-responsibility does not prevent escalation, but it does limit escalation by *proceduralizing* the conflict.

# General Principles of State Responsibility

* *General rule*: An internationally wrongful act of a State entails the international responsibility of that state. (Art. 1).
* There is an internationally wrongful act where conduct consisting of act/omission
is (Art. 2):
	+ **Attributable**; and
	+ Constitutes a **breach** of an international obligation of the State.
* Irrelevance of internal law (Art. 3).

# Breach and accomplice liability

* **Conformity**: Breach exists whenever the conduct of a State is not in conformity with what is required by the obligation. (Art. 12).
	+ **Intertemporal principle** (Art. 13).
	+ Breaches of *continuing character* (Art. 14).
* Principles of **accomplice liability** (Arts. 16-18 — **assistance**, **control**, **coercion**).

## The Question of Fault

* *Strict Liability*
	+ The majority of cases and writers tend to agree with this approach. (Shaw, p. 783).
	+ Draft Articles appear to take a strict liability approach to State Responsibility, in the absence of a specific requirement for a mental state. (Art. 2, comment 10). However, Shaw (p. 785) notes that standards would vary with the primary obligation.
	+ Cases: *Neer* claim (1926); *Caire* claim (1929)
* Alternate “*fault theory*”:
	+ Requires intent or negligence
	+ Cases: *Corfu Channel* (ICJ, 1949); *Home Missionary Society* claim (1920) (with respect to the acts of rebels). (Shaw, 783-84).

# Imputability/attribution

* Policy (p. 785):
	+ Encourage States to exercise greater control over its various departments
	+ Stimulate compliance with objective standards of conduct
* General rule: Attribution depends on the link between the State and the persons committing the unlawful act or omission. A legal fiction. (Shaw, p. 786).

## Standard Methods of attribution (pp. 786-88):

* State organs (article 4):
	+ Regardless of function that the person or entity exercises.
	+ This approach represents *customary international law*. See *Difference Relating to Immunity* case (ICJ 1999); *Genocide Convention* case (ICJ 2007). (Shaw, p. 786).
* Entity empowered by the law of the State (article 5):
	+ Recognizes “proliferation” of parastatal entities: privatized corporations, security firms, state-owned airlines.
	+ Also situations where a State and an international entity exercise joint control over the organ in question. See *Behrami v. France* (ECJ 2007) (question of KFOR troops).
* Organs placed at the disposal of another State (article 6).

## Exceptional cases of attribution (pp. 788-91):

* *Ultra vires* acts (article 7; pp. 788-89):
	+ Officials acting beyond authority or against instructions
	+ Article 7 appears **not limited** by reference to apparent exercise of authority. But does require that officials act in their ***capacity***.
	+ *For more* ***limited approach****, see Caire* case: Provided they have acted at least to all appearances as competent officials or organs, or that they used powers/methods appropriate.
	+ *Other cases*: *Mosse* case (1953); *Youman’s* claim (1926); *Union Bridge Co.* (1924); *Sandline* case.
* Instructions, direction or control (article 8; pp. 789-91):
	+ Attribution of elements acting “on instructions” is uncontroversial.
	+ “Direction or control,” two approaches:
		- ***Effective control* of the operation** in which the violation occurred. *See Nicaragua* case (ICJ 1986), *reaffirmed in Genocide Convention* (ICJ 2007).
		- *Overall control*. *See Tadic* case (ICTY, 1999).
	+ ***Effective control***test is adopted by ILC and represents **customary law**.
	+ *Note*: Situation may be different where the state responsible exercised clear, effective control of the territory in which the violation occurred. *See Namibia* case (ICJ 1971); *Loizidou v. Turkey* (ECtHR, 1995).
* Exercise of authority in default of the official authorities (article 9).

## Mob violence, insurrections, and civil wars (pp. 791-93):

* ***General rule***: Where authorities act with good faith and due diligence, and without negligence, they are generally not liable for actions of rioters and rebels.
* Two methods of establishing responsibility:
	+ Where a insurrectional group becomes the new government, it will be liable for prior actions (article 10).
		- *Short v. Islamic Republic of Iran*
		- *Yeager v. Islamic Republic of Iran*
		- *Rankin v. Islamic Republic of Iran*
	+ Acknowledgment and adoption (article 11).
		- *Iranian Hostages* (ICJ, 1980)
* *Note*: Special provisions apply to diplomatic and consular personnel.

# Circumstances Precluding Wrongfulness

* Consent (article 20)
* Self-defense in conformity with UN Charter (article 21)
	+ Includes self-defense as inherent customary right *and* self defense under UN Charter, article 51. (Shaw, 793).
	+ Humanitarian and human rights obligations remain, as does respect for the environment (*Nuclear Weapons* (ICJ, 1996)).
* Countermeasures (article 22) (*see below*)
* *Force majeure* (article 23): **irresistible** force or **unforeseen** event resulting in material impossibility
* Distress (article 24): focused on saving lives
* Necessity (article 25): should rarely be invoked

# Consequences of internationally wrongful acts

* **Cessation & non-repetition** (article 30)
* **Reparation** (articles 31, 34-39):
	+ *Primacy of restitution*: Goal is to “**wipe out all consequences**” of the internationally wrongful act. *Chorzow Factory* (ICJ, 1928).
	+ *“Material or moral”*: Obligation to make reparation covers **all types** of damage
	+ Types of reparation, in order of preference:
		- **Restitution in kind** (article 35)
			* to the extent it is not impossible;
			* to the extent it does not involve a burden out of all proportion to the benefit
			* In cases of ***expropriation***, note tension between *BP* case (no support for the principle of restitution in kind), and the *Texaco* case (restitution in kind is the normal sanction). Consider enforcement problems and potential violations of sovereignty relating to restitution in kind here. (Shaw, 803-04).
		- **Compensation** (article 36)
			* “Fair market value”
			* Loss of profits
			* Monetary compensation may be paid for *individual* pain and suffering (*I’m Alone* case, 1953).
* **Satisfaction**: apologies, punishment of guilty officials, acknowledgment of wrongfulness, assurances (article 37)

# Invocation of State Responsibility

* A State is an “injured State” that may invoke another’s responsibility if the obligation breached is owed to (article 42):
	+ That state; or
	+ A group of States including that State, or the international community, and:
		- The breach specifically affects that State; ***or***
		- Is of such a character as to radically change the position of all other states with respect to further performance.
* A non-injured State may invoke responsibility in some cases (article 48).
* Plurality of injured states (article 46): each State may invoke responsibility.
* Plurality of responsible States (article 47): each State’s responsibility may be invoked.
* Loss of right to invoke (article 45):
	+ **Waiver:** A clear and unequivocal waiver obviates the right to invoke responsibility.
	+ **Acquiescence**: A fact-specific inquiry into the State’s conduct.

# Countermeasures

* *Definition*: Reprisals for an internationally wrongful act that does not involve the use of force.
* Requirements of countermeasures (*See also Gabcikovo-Nagymaros Project*) (Shaw, 794):
	+ Must **directed** against a state responsible for an internationally wrongful act in order to **induce compliance** (article 49(1)).
	+ Must be taken **with a view toward resumption of performance** (article 49(3)).
	+ **Notice** requirements (article 52):
		- Injured State must have **called upon** State committing the wrongful act to cease and make reparation, and notify of its intent to take countermeasures (article 52);
		- *Note*: This does not affect the injured State’s right to take immediate countermeasures as necessary to preserve its rights (article 52(2)).
	+ Must be **proportionate** (article 51);
* Limitations on countermeasures:
	+ Limited to non-performance of international obligations toward the responsible State (article 49(2)).
	+ Shall not affect human rights obligations, compliance with UN Charter, *jus cogens* norms, etc. (article 50(1)).
	+ A State taking countermeasures must continue to fulfill (article 50(2)):
		- Obligations under any dispute settlement procedure applicable between it and the responsible State.
		- Obligation to respect inviolability of diplomatic or consular agents, premises, archives and documents.
* **Termination** of countermeasures: Countermeasures **should cease** as soon as the responsible State has complied with its obligations to cease and make reparation (article 53).
* *See Case Concerning the Air Services Agreement Between France and the United States*
	+ Proportionality of countermeasures
	+ Recourse to countermeasures in the face of judicial or arbitral proceedings

# Breaches of peremptory norms

* Debate over “international crimes”
	+ ILC Draft Articles of 1996 originally included the categorization of some acts by States as international crimes; was highly controversial and removed from final product
	+ *Argument*: Such a classification cannot be justified, and attempts to exact penalties would lead to instability
	+ *Support*: finds changes in international law since 1945
		- Development of *jus cogens*
		- Rise of individual criminal responsibility under international law
		- UN Charter and provision for enforcement against States which breach the peace
* Final articles (2001) simply deal with breaches of *jus cogens* (article 41):
	+ Impose duty on all States to cooperate to bring an end to such breaches;
	+ Require States not to recognize such situations as lawful.
* Weiler’s discussion on problems with international crimes & *jus cogens* breaches:
	+ If there are crimes of states, then there must be punishment. Who would punish the big states? How would punishment be meted out?
	+ If certain behavior is illegalized, to whom will restitution be owed?
		- Almost 200 states will be bringing countermeasures
		- A centralized system would be needed to impose these countermeasures, but States don’t want to go down this route.

# The Burden of Proof

* Burden of proof **lies with the party bringing the claim**. *Genocide Convention* case (ICJ, 2007) (Shaw, p. 780).
* Conflicting descriptions of the extent of the burden:
	+ “Clear and convincing evidence.” Eritrea-Ethiopia Claims Commission, 2003-04.
	+ Charges of exceptional gravity must be proved by evidence that is “fully conclusive.” *Genocide Convention* case.
* Draft Articles do not deal with burden of proof. (Article 19, Comment 8).

# Relationship with Substantive Obligations

* ***Law of Treaties*:**
	+ International law does not distinguish between contractual and tortious remedy, so any violation of any obligation gives rise to state responsibility, and the *duty of reparation*. (*“Rainbow Warrior*,” 1990).
	+ Determining whether a given treaty is in force, and whether or not it has been properly suspended, is a question for the law of treaties. But evaluating the extent to which an *unlawful* suspension involves the responsibility of a State is a question for State Responsibility. *Gabcikovo-Nagymaros Project* (ICJ, 1997)
* For relationship between state succession and state responsibility, *see* Arbitration Commission on Yugoslavia, Op. No. 13. (Shaw, pp. 779-80).

Use of Force

& the Right of Self-Defense

# Historical Background

* The Just War
	+ Use of Force ok if backed by divine will
	+ Rise of European nation-states puts strain on divine will
		- Requirement of serious attempts at peaceful conflict resolution
		- Challenges to order caused by war
* Post Westphalia, concept of Just War dies out: Legal consequences of war emerge
* League of Nations
	+ Requirement that major disputes be submitted to arbitration
	+ No prohibition on use of force—just a procedural system to limit the outbreak of war
* Kellogg-Briand Pact and the Prohibition on the Resort to War
	+ Never terminated
	+ Enshrined principle that resort to war was illegal
		- Reservations to treaty also established the legality of self-defense as another general principle of IL
* UN Charter
	+ Article 2(4)—prohibition on use of force and the threat of force
		- Definition of “force”—armed conflict only, or economic, social, political, etc?
		- “Against the territorial integrity or political independence of any state”
	+ Prohibition on interfering in the internal or external affairs of another state

# Categories of Force

* Retorsion
	+ The adoption by one state of an unfriendly and harmful act that is nonetheless legal
		- Severing diplomatic relations
		- Expulsion or restrictive controls on aliens
		- Economic or travel restrictions
* Reprisals
	+ Acts that are in themselves legal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state
	+ Reprisals must be proportionate to the prior illegal act
	+ Under Article 2(4), reprisals are divided into two groups:
		- Countermeasures—reprisals short of force, may be used legitimately
		- Reprisals using force—only legal in conformity with right to self-defense

# Right of Self-Defense

* Trad’l right of self-defense: instant, overwhelming need with no other options and no time for deliberation
* Article 51 of UN Charter—inherent right to self-defense
	+ Requires armed attack (victim state bears burden of proof)
* Self-defense against attacks by non-state entities?
	+ Post-9/11 use of force against Afghanistan
* Anticipatory or pre-emptive self-defense?
* Necessity and proportionality

## Variants on Self-Defense

* Protection of nationals abroad
	+ More controversial use of force after UN Charter
* Collective Self-Defense
	+ State practice suggests that this is the basis for regional security systems

# Intervention

* Non-intervention Respect of territorial sovereignty
* Civil Wars
	+ Treated as purely internal mattersduty of non-intervention
	+ Aid to the authorities of a state
		- Legitimate to do so if requested
	+ Aid to rebels
		- Contrary to int’l law (though state practice is murky)
* Humanitarian Intervention
	+ Permissible to intervene in certain humanitarian situations?

# Terrorism and International Law

* 13 UN Conventions on Terrorism
* Security Council and terrorism
* Post-9/11 increase in counter-terrorist activity

State Responsibility for Injury

to Aliens and Foreign Investors

* ***General norms*** (no special circumstances & absent contrary international agreement)
	+ A state has no obligation to:
		- Admit foreign nationals into its territory
		- Refrain from deporting foreign nationals
		- Refrain from imposing restrictions, such as on travel or activities
		- *Similar principles apply to corporations*
	+ A national generally becomes subject to the legal regime applicable to nationals
* Facts that may alter the status quo
	+ International agreements, *e.g.*, BITs, FCN treaties
	+ Customary international law under the principles of state responsibility
	+ Right of foreign nationals to seek diplomatic protection
	+ Right of states to:
		- Communicate with a national who is arrested or charged
		- To give assistance
		- To have a representative at trial
		- To intercede to protect its national’s human rights, personal safety, property, or other interests
* **Diplomatic Protection:**
	+ A state may assert, on a state-to-state level, a claim against an injuring state if:
		- the alien individual or entity has suffered an injury; and
		- the injury is result of a violation of a substantive rule of international law; and
		- the violation is attributable to the foreign state.
	+ **Exhaustion of local remedies rule:** Normally, the individual or entity must first exhaust remedies under the legal system of the foreign state.
	+ **Result:** The claim of the private party can be elevated to the international plane, as long as the state of which the private party is a national elects to assert a claim.
* **Cause of the Injury:**
	+ The injury may be caused directly by the action of the foreign state; or
	+ It may be caused by the failure of a state to provide redress for an injury inflicted by a private person
* **Relationship with Human Rights Law**
	+ The regimes developed separately, but there is a growing interrelationship between the two.
	+ Injury to Aliens law retains a distinct vitality in two respects:
		- Injuries to individual aliens that do not rise to the level of HR violations
		- Injuries against juridical entities, such as corporations

# Basic Principles: Conflicting Views

## International Minimum Standard and Principle of Equality

* Traditional standard espoused by US and many states (esp. Western):
	+ Aliens entitled to justice due to them according to accepted principles of “legally civilized” nations
	+ Hackworth: Where the alien receives the same benefits and protections as nationals, there is *no grounds for complaint*, unless the system or administration of law falls below an ***international minimum standard*** as recognized by the community of nations
	+ Describing this standard (Root):
		- “Very simple, very fundamental”
		- “General acceptance by all civilized countries as to form part of the international law of the world”
	+ Secretary Hull’s correspondence with Mexico, 1938:
		- *The “Hull formula”*: Under every rule of law … no government is entitled to expropriate private property, for whatever purpose, without provision for ***prompt, adequate, and effective payment therefor***.
		- Mexico’s response: International law offers no universally accepted rule for compensation for expropriation. The only principle is that of ***equality between nationals and foreigners***.
	+ Other states, usually developing nations, refused to recognize the international minimum standard on the basis of ***freedom from interference*** in internal affairs and the ***principal of equality*** among states. (*See* Mexico, *supra*).
	+ *Note on Human Rights*: It is accepted that, where a state violates the law of human rights, the concept of equality of treatment has no independent significance; an international human rights standard is the prescribed standard of justice.

## State Responsibility for Injuries to Aliens as Customary IL

* Fundamentally different views on SR were the primary stumbling block for development of customary international law
* Views of the various regions (Report of the Centre on Transational Corporations, 1985)
	+ Latin America and **Calvo Doctrine**:
		- Guiding principles
			* Sovereign equality — no interference from any state
			* Aliens have same rights as nationals at municipal law
		- Following propositions:
			* International law requires giving national treatment to aliens
			* National law governs the rights and privileges of aliens
			* National courts have *exclusive jurisdiction* over aliens, who may not seek redress by recourse to diplomatic protection
			* International adjudication is inadmissible for the settlement of disputes with aliens
	+ Socialist Bloc:
		- rejection of int’l min standard
		- Regulation of alien property falls within exclusive jurisdiction of national law
		- International law is concerned only with the relations between states
	+ Newly independent (post-colonial) states
		- Assertion that the norms of international principles were developed *without their participation or consent.*
		- Principles of SR are unjust, inequitable and colonial in character
* Post-1991, developing, ex-communist states see need for comity with capital-exporting states and recognize common interest in attracting investment

## Conflicting Principles as Applied to Treatment of Alien-Owned Property

* Think *Texaco v. Libya*: dueling UN resolutions establish conflict in substantive and procedural principles of expropriation
	+ UN GA Res. 1803 (1962)
		- *Measure*: 87 votes, with 12 abstentions
		- Appropriate compensation in accordance with the rules in force in the state *and with international law*.
		- U.S. has unilaterally interpreted “appropriate” to mean the *Hull Formula*.
	+ UNCTAD Resolution 88 (1972)
		- Nationalization is the expression of sovereign power
		- Each state may fix the measure of and procedure for compensation
		- Disputes over nationalization is in the sole jurisdiction of the nationalizing state’s courts
	+ UN GA Res. 3171 (1973)
		- *Measure*: 109 in favor, 1 against (UK), 17 abstaining (U.S. and most developed countries)
		- Nationalization is an expression of sovereignty
		- State determines the amount and mode of compensation
		- Disputes are settled in accordance with national legislation
		- *Note*: There is not exclusive jurisdiction clause here
	+ UN GA Res. 3281, Charter of Economic Rights and Duties of States (1974)
		- Each state has the right to nationalize, expropriate, etc.
		- Appropriate compensation, *taking into account* the state’s relevant laws and regulations “and all circumstances the state considers pertinent.”
		- Controversies settled by law of nationalizing state
		- States get exclusive jurisdiction, absent agreement
* Lillich: This trend coincides with an assault on the norm of diplomatic protection, indicating that these states wish to be completely free from any international responsibility for their actions.
* In practice, these disputes may have had less of an effect than it seemed in the abstract
	+ Schachter: Issues of fair treatment and appropriate compensation are generally raised in negotiation or settlement framework
	+ Nationalizing governments are generally influenced by the principles followed in other countries, and claims are generally settled or submitted to arbitration
	+ Also, developing countries have shown *conforming practice* in venues such as BITs

# Assertion of a Claim of State Responsibility

## General Considerations

* States have **no duty to press claims** on behalf of injured nationals
* **Adoption of the claim:** From the time the state espouses the claim, it has exclusive control over the handling and disposition
	+ State has exclusive control over the payment of damage awards
	+ Private party will be bound by the withdrawal or compromise of a claim
	+ *Open question*: the scope of the executive’s settlement power
* **Circumstances precluding espousal:**
	+ Injured individual generally must exhaust local remedies (*infra*)
	+ The injured party has broad rights to settle before the state espouses the claim.
* Reparation does not generally encompass any injury to the state itself.
* Forms of settlement:
	+ *Negotiation*:Lump-sum settlement of all outstanding claims
	+ International Court of Justice
	+ Submission to arbitration under a multilateral treaty
	+ Establishment of an *ad hoc* tribunal
	+ Creation of a special bilateral regime of tribunals to hear specified claims

## Exhaustion of Local Remedies

* Generally, states can’t take up a national’s claim until local remedies have been exhausted
* ***Rationale*:** Give the allegedly responsible state an opportunity to remedy the wrong under its own domestic institutions.
* ***Burden of proof*:** On the party asserting that local remedies were not exhausted (*Elettronica Sicula*)
* **Basic requirement:** *Case Concerning Elettronica Sicula SPA (ELSI)* (*USA v. Italy*) (ICJ 1989)
	+ It is not, and cannot, be required that the case be presented before a municipal tribunal in a form and with arguments identical to the case before the international tribunal.
	+ It is sufficient that:
		- **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**.
* **Futility:** There is no need to exhaust local remedies if it is established that such resort would be **futile** or such remedies are **nonexistent**. (*Finnish Shipowners*, arbitral award, 1939).
	+ *In Finnish Shipowners*, UK had argued that they had not appealed. Arbitrator issued the above holding, noting that the appeals court allowed only points of law, not of fact, as this case concerned.
	+ If it can be established that the highest national court had already given an **authoritative ruling on the applicable point of law**, there is no need for appeal. (*Panevezys-Saldutiskis Ry. Case* (*Estonia v. Lithuania*) PCIJ, 1939).
* ***Caution*:** If local case loses due to, *e.g.*, a failure to call a key witness, the claim may be rejected in the international tribunal. (*Ambatielos* Claim, arbitral award, 1956).
* ***Exception*:** State is asserting on its own behalf a **separate and preponderant claim** for direct injury arising out of the **same wrongful conduct**. (R2FR § 208(c)).

## State Waiver of Exhaustion of Local Remedies

* State may waive the requirement for exhaustion
* Most commentators agree that an arbitration clause in a treaty between two states *does not* indicate waiver
	+ A treaty may not *tacitly* dismiss the rule (*Elettronica Sicula*): a dispute-resolution clause that contains no reference to the rule is not sufficient grounds to dispense with it.
	+ *But see* Garcia-Armador: It will always be necessary to ascertain the purpose of the treaty
* Situation may be different in a contract with an alien that contains an agreement to arbitrate future disputes
	+ Support for the position that there is generally implied waiver of the local remedies rule
	+ *Limitation*: A contracting state can require exhaustion as a condition of its consent to arbitration

## Waiver by Alien of Claim or Right to Diplomatic Protection

* If an alien waives or settles his claim, this constitutes a valid defense for the respondent state (as long as waiver not made under duress)
	+ *Note*: As noted *supra*, the result will be different where a state has espoused the claim, because the state will then have exclusive control.
* Advance waiver of the right to diplomatic protection poses problems
	+ ***Calvo Clause*:** Alien must agree to submit all disputes to the courts of the host state and renounce all claims to diplomatic intercession
	+ Tribunals tend to interpret these clauses *narrowly*:
		- *North American Dredging Co. Case* (*United States v. Mexico*) (General Claims Commission, 1926)
			* Though contract contained a *Calvo Clause*, contractor had not waived his right to matters not connected with the “fulfillment, execution, or enforcement” of the contract
			* Preserves right of U.S. to extend diplomatic protection against violations of international law.
		- *Mexican Union Ry. Ltd. Case* (*Great Britain v. Mexico*) (Mexico-G.B. Claims Comm., 1930): No person can deprive the government of his country of its undoubted right to apply international remedies to violations *of international law* committed to his hurt.
	+ *Problem*: These decisions seem to be based on the reasoning that the right of diplomatic protection is not the individual’s to waive. But this seems inconsistent with the right to resolve or settle a claim prior to a state’s espousal. *Me:* Maybe there is a presumption of duress or unconscionability in these clauses?
* It seems states may waive their right to assert diplomatic protection. *See* International Convention on the Settlement of Investment Disputes (1965).

## Nationality of Claimant

* A State may only assert a claim on behalf of a national (either physical or legal person)
* Problem of multiple nationalities:
	+ A respondent state may refuse a DP claim by another state if the injured person:
		- Is also a national of the respondent state; or
		- Is also a national of both a third state and the respondent state, ***and*** the respondent state treats the person as a national for purposes of the conduct associated with the claim.
	+ A claim ***may not*** be refused if the nationality of the claimant state is “dominant” (a question of the strength of the injured alien’s ties).
* Stateless persons: Generally, no state may assert a claim on behalf of a stateless person (except under human rights law). But remember, *supra*, international law abhors stateless persons, for fear of leaving a lack of redress.
* Where an injured person’s nationality changes: U.S. has longstanding practice of declining to espouse claims which have not been “continuously owned.” (1960).

## Attribution

* Injury must be attributable to state
* *De jure* and *de facto* agents
* *See* the articles of State Responsibility, *supra*.

## Circumstances precluding wrongfulness

* Special circumstances, such as force majeure, distress and necessity will preclude wrongfulness (*see* State Responsibility, *supra*).
* Special circumstances in the context of injury to aliens:
	+ Exercise of police power
	+ Power to regulate the state’s currency
	+ Conduct reasonably necessary to protect life or property in case of disaster
	+ *Note* that these circumstances seem to remain subject to the international minimum standard.

# Substantive Bases of Responsibility

* General rule: R3FR § 711
	+ A state is responsible under international law for injury to a national that violates:
		- A human right
		- A personal right that, under international law, a state is obligated to respect for foreigners
		- A right to property or other economic interest (includes rights of juridical persons)
	+ *International Human Rights as a minimum standard*: Whether pursuant to conventions or custom, aliens enjoy human rights equally with the state’s own nationals (cmt. b, c).
		- This includes the obligation to respect civil and political rights (see ICCPR)
		- Does not extent to the CPR that are recognized as human rights only in relation to the person’s country of citizenship
		- As regards foreign nationals, a state may be liable for even a single violation of some specified rights.
		- Question of Economic, Social, and Cultural Rights (ICESPR):
			* Traditional: Does not include the obligation to extend these rights
			* Remember the rule prohibiting unreasonable nondiscrimination: Distinctions between nationals and non-nationals with respect to some of these rights may not be unreasonable

## Denial of Procedural Justice

* **Two basic claims:**
	+ Denial of due process in criminal proceedings (arbitrary arrest, unlawful detention, unreasonably delayed trial)
	+ Arbitrary/unreasonable use of force by governmental representatives (torture, excessive force, inhuman treatment).
* **Other claims**
	+ Some are on shakier ground, and may apply only to resident aliens: freedom of speech, freedom of religion, freedom to travel, right to marry or divorce
	+ Some claims, such as social security or aid to indigent, may be denied on the ground that discrimination against non-nationals is permitted.
	+ *Note*: No record of a state objecting to imprisonment of its nationals for debt, although that is prohibited by art. 11 of the ICCPR. (Restatement).
* Denials of procedural justice **not rising to the level of HR violations**
	+ *E.g.*, denial of access to courts for civil proceedings to determine the alien’s rights
	+ International agreements generally provide for such access
* **General guidelines** for hard cases
	+ Injustice must be **egregious**
		- Minor procedural irregularities are not sufficient
		- *E.g.*, failure of a witness to take an oath, incorrect but good faith misapplication or misinterpretation of the law, improper dismissal of a case for lack of jx.
	+ “So obviously wrong that it cannot have been made **in good faith** and **with reasonable care**” or a clear “**serious miscarriage of justice**”

## Failure to Protect or to Apprehend and Prosecute

* R2FR § 183: A state is responsible for injury to an alien caused by conduct that is not itself attributable to the state if (*need both*):
	+ Conduct is (*need one*):
		- Criminal under the laws of the state;
		- Generally recognized as criminal;
		- An offense against the public order.
	+ *One of the following*:
		- Injury results from the failure of the state to take reasonable preventive measures
		- State fails to take reasonable steps to detect, prosecute, and impose an appropriate penalty upon the person(s) responsible.
* R3FR notes that these violations fall short of human rights violations. (§ 711, note 2(B)).
* Lillich & Paxman: **Terrorism and responsibility** (1977)
	+ Three relevant traditional bases for responsibility
		- Terrorist activities emanating directly from the government itself or indirectly from organizations receiving assistance or having close association
		- Failure to prevent and suppress armed hostile expeditions or attempts to commit common crimes
		- Accessory-after-the-fact liability by failing to take reasonable steps to apprehend and appropriately punish
	+ ***General duty of ‘due diligence’*:** States must take all reasonable measures under the circumstances to prevent terrorist attacks
	+ Two basic assumptions of this duty
		- Assumes the state has the means to provide protection
		- Assumes the state had the opportunity to prevent
			* Prior notice, or “alerted in good time”
	+ *Operative question*:What did the state do to avoid the danger, or could the danger have been avoided?
		- Where the state neglects or fails to take reasonable measures, responsibility will attach
		- Failure to extradite transnational terrorists has not been recognized as a basis
		- Failure to apprehend and punish has also **not** been recognized, despite the above principle

## Injury to Economic Interests of Aliens

### Non-Commercial Risks of International Business

* Survey of NCRs
	+ Obvious NCRs:
		- *E.g.*, unlawful expropriation, breach of contracts by government, impositions of foreign-exchange limits, import restrictions, etc.
		- Though catastrophic, these events may be easy to isolate and to protect against
	+ “Creeping expropriation”:
		- subtle measures that interfere with and impair the rights of the foreign investor, such as delayed labor permits, discriminatory taxes, price controls, or governmentally subsidized competition.
		- Difficult to define the violation and to evaluate the loss
	+ Where local governments are heavily involved in the market, some risks of substantial loss from interference cannot be protected against.
* Investment incentive programs
	+ Effort by developing countries to grant special assurances to foreign investors
	+ Basic features:
		- Often specific guarantees against expropriation without compensation
		- Guarantees with respect to remittance of profits and repatriation of capital
		- Assurances of availability of foreign exchange for principal and interest payments on loans
	+ Also may include an agreement to arbitration of disputes with investors

### *Expropriation* and nationalization of Alien-Owned Property

* Ideological problems and development of norms
	+ As discussed *supra*, persisting ideological differences have made it impossible to codify substantive rules on expropriation and economic injury
	+ Therefore, the focus has shifted to specific mechanisms that will increase the legal protection of investors
		- BITs
		- Compulsory arbitration of disputes between investors and states
		- Insurance of foreign investments against NCRs by bilateral and multilateral agencies
* ***Existing Substantive Rules***
	+ General rule of expropriation, as stated by the U.S.:
		- R3FR § 712(1) A state is responsible for injury resulting from a taking by the state of property of a foreign national that (*need one*):
			* is not for a public purpose;
			* is discriminatory;
			* is not accompanied by provision for just compensation.
		- **“Just compensation”** is defined in terms of the *Hull Formula*: amount equivalent to the value at the time of the taking (or with interest), paid within a reasonable time, in a form economically usable.
		- R3FR § 712(3) A state is also responsible for “other arbitrary or discriminatory” acts/omissions that impair property or other economic interests.
		- *Note*: A taking will also be unlawful where it violates a treaty (*Chorzow Factory*)
	+ Expanding the rule:
		- Public purpose: Challenges on this ground are rare, and it is thought to be broad
		- Discrimination: Implies “unreasonable distinction”; it is assumed that classifications based on state security or economic policies would be acceptable.
		- *Open question*: The use of “just compensation” by the U.S. is disputed. To what extent does international law impose a duty to pay compensation in the event of a lawful taking?
* Requirement of Compensation
	+ *Controversy*: Whether the issue of compensation is to be determined by international law
		- GA Res. 1803 reflects the proposition that compensation for expropriation *should* be determined under IL (*supra*). Also adopted by the R3FR
		- However, as noted above, subsequent resolutions reflect an effort to undermine this proposition
	+ *Texaco v. Libya* (1977): Res. 1803 constituted authoritative evidence of custom because it was supported by states representing all areas and economic systems.
	+ *Current state of the law*: States have accepted that these disputes may be governed by bilateral treaties.
		- **BITs** specifically provide for full compensation.
		- Arbitral bodies have consistently concluded that the issue **of compensation was to be determined under customary international law or by treaty**.
* Determining the Proper Measure of Compensation
	+ U.S. view: *Just Compensation* (R3FR § 712, cmt. d) — *the Hull formula*.
		- Elements (“not fixed or precise”)
			* Equivalent to the **value of the property**
				+ “Fair market value”
				+ Takes into account “going concern value”
				+ *Other generally recognized principles of valuation*
			* Paid **at the time of taking *or* with interest from that date**
			* **Economically useful form**
				+ Convertible currency, without restriction on repatriation
				+ Payment in bonds may satisfy the requirement if:

They bear interest at a reasonable rate

There is a market for them

* + - * + *Unacceptable forms*:

Nonconvertible currency

Payment in kind (as in investment in natural resources)

* + - Departure is impermissible if (*need only one*):
			* Property taken had been used in a business enterprise that was specifically authorized or encouraged by the state;
			* Enterprise taken for operation as a going concern by the state;
			* Taking program did not apply equally to nationals;
			* Taking was otherwise wrongful under § 711(a)-(b).
		- Deviation allowed: may include programs of agricultural land reform
	+ The “adequate, prompt and effective” standard has been rejected by many developing countries, and is absent from several multilateral agreements
	+ Evidence of the Hull formula’s persistence:
		- *Gann*: Arbitral tribunals persist in requiring the expropriating state to pay the **full market price**. (*Me*: what about prompt and effective?)
		- NAFTA: Though it does not use the *Hull* terms, it effectively adopts the standard
	+ *Just v. Appropriate Compensation* (Schacter, 1984):
		- *Argument*: Replace just compensation with appropriate
		- ***Effect***: Appropriate might allow weight to be given to the **needs and capabilities** of the expropriating state.
			* Allows consideration of **complex** factors
			* Introduces the principles of **unjust enrichment**
		- Appropriate compensation has the support of capital-importing countries
		- Justifications for “just”:
			* Used widely in domestic constitutional law (Fifth Amendment)
			* “Appropriate” would create uncertainty by replacing “just”
			* Considering the needs of the expropriating state could lead to injustice vis-à-vis the property owner
	+ IMF Guidelines on the Treatment of Foreign Investment
		- Presented as “progressive development”
		- *No expropriation except*:
			* In accordance with applicable legal procedures
			* In pursuance in good faith of a public purpose
			* Without discrimination on the basis of nationality
			* With payment of appropriate compensation
				+ Adequate (based on fair market value)
				+ Effective
				+ Prompt
* What Constitutes a Taking of Property?
	+ Unreasonable interference with the use, enjoyment, or disposal of property to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time. (Sohn & Baxter)
	+ The above may not constitute a taking if it constitutes a reasonable exercise of state power to regulate:
		- Matters of public order, safety, or health
		- Currency, foreign exchange resources, balance of payments or emergency situations
		- *E.g. French v. Banco Nacional de Cuba* (NY Ct. App. 1986): a U.S. court will not inquire into the validity of an “act of state”
	+ The line between “taking and regulation”
		- Restatement’s view:
			* A state is responsible for taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays effective enjoyment
			* ***Not*** responsible for loss of property or other economic disadvantage resulting from:
				+ Bona fide general taxation
				+ Regulation
				+ Forfeiture for crime or other act of police power
				+ *Provided*: the act is nondiscriminatory and is not designed to cause the alien to abandon the property or sell at a distress price
		- Arbitral tribunals
			* *Harza Engineering v. Iran*: dishonoring claimant’s check and frustrating attempts to authenticate its officer’s signature is not a taking
			* *Computer Sciences Corp*. *v. Iran*: Failure of bank to seek central bank permission for fund transfer is a taking
* Breach by a State of its Contractual Undertaking to an Alien
	+ When does a breach of an undertaking by a state to an alien constitute a breach of international law?
		- *Statist extreme*: Because only states have rights and obligations under international law, a state can limit its exercise of sovereignty only by agreement with other states, and not with individuals
		- *Other extreme*: The doctrine of *pacta sunt servanda* applies in the case of *any* agreement between a state and an alien relating to investment or concession
	+ Choice and Effect of Governing Law
		- Parties are generally free to designate the body of law that will govern the validity, interpretation, and performance of the agreement, and *international tribunals generally accept choice of law provisions as binding*
		- In the absence of explicit choice, the following questions arise:
			* Should there be a presumption in favor of the municipal law of the contracting state?
			* Should reference of a dispute to an int’l arbitral tribunal imply a choice as to governing law, or at least a rejection of municipal law as controlling?
		- **Stabilization clause**: the agreement will be governed throughout its term by the municipal law in force at the time the agreement is concluded
		- *Texaco v. Libya* (1978): “**Internationalizing**” a contract
			* *Clause on governing law*:Reference to the general principles of IL
				+ This alone is a sufficient criterion
				+ Need for the private party to be protected against abrupt and unilateral shifts in legislation
			* Submission to arbitration
				+ Also sufficient
				+ Certainly allows the “negative implication” that contract meant to reject the exclusive application of local law (*Sapphire International*)
			* Nature of economic development agreements
				+ Broad subject matter: the party contracted with is associated with the realization of economic and social progress of the host country
				+ The long duration of contracts implies close cooperation between the host country and the private party
				+ Contractual nature: intended to bring about an equilibrium between the general interest and the profitability.
				+ Evidenced by a stabilization clause which tends to remove the agreement form the internal law and provide for submission to *sui generis* rules.
			* *Scope* of internationalization: neither means that private party becomes like a state or that the contract becomes a treaty.
				+ *Limited subjecthood*: The private party gains the necessary degree of international personality and capacity to bring a claim
				+ *Relevant law*: Reference to Libyan law requires the tribunal to combine domestic and international law, and verify the conformity of the first with the second. In this case ***Libyan law recognizes the principle of the binding force of contracts***.
			* **A state’s right to exercise its sovereignty by nationalizing property is w/o prejudice to that state’s obligation to honor its internationalized Ks**. (¶ 71–73) Allowing a state to disregard an internationalized K in exercise of sovereignty would make the K imbalanced in violation of good faith principle. (Id., ¶ 91)
			* Application of international law
				+ *Contra*: Where a nationalizing state has concluded with a foreign company a contract that stems from the municipal law of that State and is completely governed by that law, the resolution will besubject to the provisions then in force
				+ But here, for reasons stated *supra*, the agreement is **internationalized**. From ¶ 62, it seems there are *two ways*:

A “stabilized” contract

Placed under the aegis of international law (arbitration, reference to general principles).

* + - * + In this latter case, the nationalizing measures carry **international legal consequences**.
		- Problematizing “internationalization” of Ks
			* **State practice suggests that “internationalization” may merely indicate the willingness of the host state to accept the exercise of DP by the investor’s national state for Ks of sufficient magnitude.**
			* Thus “internationalization” does not necessarily entail the applicability of general int’l law (as applies to treaties).
			* “Internationalization” does not alter the basic principles of SR applicable to injury to aliens resulting from breach of K (*articles of state responsibility say that a breach by an organ of a contracting state is not enough to breach international law*)
	+ Breach of Contract as a Violation of IL
		- Assuming that breach is determined under the law governing the agreement, when will the breach be considered a violation of international law?
		- **R3FR § 712(2)** – A state is responsible under IL for injury resulting from a repudiation/breach of contract w foreign national where:
			* repudiation/breach is (i) discriminatory OR (ii) motivated by non-commercial considerations and damages aren’t paid; OR
			* foreign national is denied adequate forum to recover for repudiation/breach OR is not paid comp.
		- *Comment 1*: Breach **may not violate IL** where it’s based on (i) good faith dispute over the obligation, (ii) inability to perform, OR (iii) commercial considerations and accompanied by compensation.
			* Supported by Guidelines on Treatment of FDI (1992)
		- Competing views on stabilization clauses and sovereignty
			* *Kuwait v. Aminol* (ILM 1982): Stabilization clause in 60-yr K was construed **not to preclude nationalization in the absence of an express guarantee, in order to protect Kuwait’s sovereignty**.
			* Prof. Dupuy: Acceding to contractual terms is in itself an exercise of sovereign and is binding on the state.

# Reparation

* ***Restitutio in integrum*:** “Reparation must, 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.” [*Chorzów Factory Case*]
* Reparation is typically measured by the injury to the foreign national proximately caused by the host state.
	+ Does not include monetary damages for injury to dignity/sovereign of national state except in exception circumstances.
	+ Where the state’s delinquency was a failure to apprehend a private person who injured a foreign national, some tribunals have imposed derivative liability for effectively condoning the injury or awarded damages for grief/mistrust/lack of safety.
	+ Personal injury
		- Includes medical expenses, loss of earnings, pain & suffering, mental anguish
		- Damages may be reduced where claimant has contributed to the injury
	+ Loss of property
		- Where expropriation would have been lawful if accompanied by fair comp., reparation = comp. (value at time of expropriation) + interest
		- Where expropriation would have been unlawful regardless of comp. (e.g., discriminatory, contra treaty) then
		reparation = comp. + expectation damages (incl. profits that are non-speculative and were w/in contemplation of parties)
	+ Costs of suit
		- Individual claimants typically get costs.
		- Governments typically cover cost of pursuing or defending their claims.

## Bilateral Treaties

1. Two main types of treaties govern protections of private parties
	1. **FCN Treaties** – *cover broad range of trade relations in addition to investor protection*
		1. US concluded 40 FCN agreements btw 1946 and 1966.
		2. e.g., US–Pakistan Treaty of Friendship and Commerce
			1. Each state must provide **national or most-favored-nation status** to citizens and companies of the other state.
			2. Prohibition against **discriminatory treatment**
			3. Prohibition against **expropriation w/o public purpose or just comp**.
				1. Intellectual property enjoys same protections as other property
			4. Prohibition against **exchange restrictions** except as needed to effect legit. monetary policy, and w reasonable provisions for withdrawal
			5. No express provisions governing states’ Ks w foreign nationals
			6. No arbitration clause, but ultimate recourse to ICJ
			7. **Terminable by either party on notice**
		3. **Sample bias complicates efforts to measure effectiveness of FCN treaties.** Countries who have FCN treaties w US are already more likely to have positive trade relations.
	2. **BITs** – *focus primarily on protecting investors from non-commercial risks (e.g., expropriation w/o comp., discriminatory treatment, breach/repudiation of K by state)*
		1. US BITs ensure free access of state’s investors to markets of the other state.
		2. e.g., US–Argentina BIT (1991) 🡺 **Death of the Calvo Doctrine?**
			1. Provides for **dispute settlement through binding arbitration (under ICSID or UNICTRAL)** (subject to 6-month waiting period and provided that the foreign national hasn’t submitted the dispute for resolution under domestic law 🡺 seems like ***disincentive* to exhaust local remedies**)
			2. Prohibits **direct and indirect (“creeping”) expropriation unless** (i) for public purpose; (i) non-discriminatory; and (iii) **accompanied by “prompt, adequate, and effective” comp.** *(Hull Formula)*
			3. Right to prompt review under host state’s internal law
			4. Most-favored-nation treatment w.r.t losses resulting from armed conflict, civil disturbance, etc.
			5. Prohibition against exchange restrictions w/o exemptions for bona fide monetary policy
		3. **BITS are *not* sufficiently widespread to create CIL on int’l investment**, but the process of negotiating bilateral treaties may lead to consensus around a multilateral regime similar to the WTO.

# Protection Under US Law for Int’l Trade and Investment

## Sovereign Immunity, Act-of-State Doctrine, 2nd Hickenlooper Amendment and the Helms-Burton Act

* Sovereign Immunity
	+ Under FSIA, of foreign states are not immune to US jurisdiction regarding their commercial activity as long as it occurs in or directly affects the US
* Act-of-State Doctrine
	+ ASD may bar relief if FSIA doesn’t preclude
	+ Based on questions of sovereign immunity, regards expropriations and other actions by a state
	+ Exception provided by 2nd Hickenlooper Amendment: precludes application of ASD when taking of property violated gen’l principles of IL
* Helms-Burton Act
	+ ASD doesn’t apply to claims seeking recovery of property of US nationals expropriated by Cuba after 1959
* Waiver of Immunity or Application of ASD
	+ Foreign states may implicitly or explicitly waive ASD
* Enforceability of Int’l Arbitration Award
	+ Many investors seek int’l arbitration clauses in their contracts with foreign states in order to get around these issues

## First Hickenlooper Amendment

* xxxy