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INTERNATIONAL LAW
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1. INTRODUCTION TO INTERNATIONAL LAW

- IL is an entire legal system that exists outside of apart from national legal systems
- It comprises a set of formal rules and customary practices that together define the rights and obligations, and govern the interactions, of international legal subjects
- There is one universally applicable IL system regulating the entire international community
- The substantive scope of IL has grown since the mid-20th century to include many subject-areas that traditionally were considered to be of concern only to domestic legal systems.

Does international law exist? Obligatory norms or power politics?

Evidence For	*Evidence Against*
• Most states generally **comply** with IL (eg. the US) • There is a **body of rules** that is usually obeyed • States tend to **believe** it exists (eg. US provided a legal justification for the Iraq invasion) • **Abundance of treaties**—why draft them if international law *per se* does not exist? • States comply with treaties even when it is against their interest (eg. air treaties – doing otherwise would make international commerce impossible; consider also globalization – China, Myanmar) • Even if there is not perfect compliance (eg. human rights & enviro) states appear to **want** to comply. • "**What goes around comes around**"—perhaps **compliance is a matter of choice rather than from fear of sanctions.** • A reasonable being recognizes that **order & not chaos** is the governing principle under which we have to live.	• **Decentralized**; **non-hierarchal** organization • **No** formal or written **constitution** • **No legislature**—the UN does not make law • No requirement for states to participate in independent 3rd party adjudication of disputes • **No regular system of enforcement** (no IL police) • **Not many sanctions**: but see *Damrosch* below. • To enter into a treaty is mostly a political decision made out of **self-interest** (Kyoto – treaty provided for withdrawal; Canada did to avoid violation) • **Boiling point issues**, eg. in humanitarian crises—but is this just focusing in when things go wrong? Does the breach of the law imply the law is not there?
Upshot: *even if IL does not have effective sanctions for breach—sanctions are not the main reason why law is obeyed in any legal system. Rather, the question is: "is there a usually obeyed body of rules*?"	

How do you understand the binding nature of IL?

- **Consent School**: IL is consent-based and binding to the extent that countries consent. McD regards this view as 'hopelessly wrong'—a new state such as South Sudan is subject to the whole IL system and has neither the capacity nor the consent to say otherwise. While treaties are consent-based, CIL is binding whether consented to or not.
- **Consequential School**: "what goes around comes around"—predictability, stability, & good faith interactions between states promotes peace & prosperity, which states desire.
- **Positivist School**: is, not ought: IL is a unified system of rules that emanates from the states' will; only hard law, no soft.

McDorman, "An Essay on Martime Peace in SE Asia: Int. Law@ Work?"	• "It is the compliance with international law by States, despite there being no regular process for enforcement and adjudication, which befuddles the non-international lawyer who is most often conditioned to the view that without a threat of force or sanction laws will not be obeyed."
Brierly, *The Law of Nations*, 1963	• "...the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity, IL seems on the whole to satisfy these conditions"; • "**Its spiritual cohesion is [...] weak**, and as long as that is so the weakness will inevitably be reflected in a weak and primitive system of law" • "The difficulty of formulating the rules of IL with precision is a necessary consequence of the kinds of evidence upon which we have to rely in order to establish them" • "IL is performing a useful and indeed a necessary function in international life in enabling states to carry on their day-to-day intercourse along orderly and predictable lines. [...] If we are dissatisfied with this role, if we believe that it can and should be used, as national law has begun to be used, as an instrument for promoting the general welfare in positive ways, and even more if we believe that it ought to be a powerful means of maintaining international peace, then we shall have to admit that it has so far failed. But it is only fair to remember that these have not been the purposes for which states have so far chosen to use it."

Damrosch, "Enforcing International Law Through Non-Forcible Measures"	**Evidence of enforcement:** 1. More *voluntary compliance* than critics would acknowledge—"almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Lous Henkin) 2. More sanctions than generally realized—public opinion and shame—which are soft but non-trivial enforcement mechanisms 3. More coercive sanctions than generally realized, including economic sanctions and countermeasures 4. Non-forcible remedies available in national courts, such as Alien Tort Claims Act, and Canada's recent amendment to Sovereign Immunities Act, providing an exception for states that support terrorism 5. Forcible measures such as a legal right to self-defence 6. Embryonic centralized enforcement mechanisms—e.g. UNSC resolutions 7. Centralized organs for the enforcement of criminal law against individuals, such as *ad hoc* International Criminal Tribunals and the International Criminal Court, the latter of which has been attempting to exercise its universal jurisdiction. **The Compliance Pull** • "Thomas Franck justifies his emphasis on "compliance pull" rather than on coercive enforcement, by explaining that the international system, rather than necessarily developing the kinds of coercive institutions characteristic of domestic legal systems, is evolving more and more sophisticated normative structures for compliance without enforcement." • The Chayeses argue that the emphasis "should be on discerning the reasons for non-compliance with international legal rules and identifying non-coercing strategies to encourage compliance. Such strategies could include a "managerial approach" to treaty compliance, under which the focus would be on procedural techniques for supervising observance of complex regulatory norms, rather than on compulsion." • However, compliance strategies will not always work, particularly in cases of high moral concern—aggression and genocide—capacity-building regulatory strategies unlikely suffice.

Famine	Feast
• Many areas where there is a need for international law but there is none—e.g. refugee law is in need of being updated; humanitarian intervention; torture and human rights abuses—state's are unwilling or unable to adhere to their obligations fully.	• Increasing conflicts among treaties (trade+enviro) • Increasing institutions for settlement of disputes (ICJ, ICC, WTO, Law of Sea, *ad hoc*, ICSID, bi) • Increasing technicalities in treaties, which affect domestic law—constraining domestic action

Douglas M. Johnston—three models of international law	• **Litigational Model:** focuses on hard legal obligations—legally binding instruments of international law—the question is "is it binding?"—not only whether the treaty is binding but whether the wording of the treaty actually binds a subject and how (justiciaiblity). Reflects the practice that gov't lawyers do. • **Operational Model:** prevention (compliance) rather than remedy (enforcement); just because it is not legally binding, does not mean it is not important—thus declarations negotiated bilaterally and multilaterally may not constitute legal obligations but they create political expectation and processes—thus GA resolutions, guidelines, memoranda of understanding, are important operationally • **Societal Model:** removes states from the centre of the int. legal system and focuses on people

Canada supports the major architectural aspects of the IL community; member of the UN in good standing, WTO, ICC, LOS, WHO, ILO, and increasing international trade law participation. Also, IL protects our national sovereignty—NATO, NORAD, Boundary Waters Treaty, trans-boundary pollution issues, Ocean Law Conventions, Human rights treaties, etc. Canada is pulled in **2** directions: as a partner of the US or global playe.

Other Elements of the Increasing Role of IL and a Rejoinder Against "Spiritual Cohesion is Minimal."

1. Telecommunications and technology
2. International trade and commerce
3. Commonality of understanding of IL — states may have a different negotiation strategy, but they employ a similar vocabulary; foreign policy bureaucracy possesses a certain commonality because of intermingling —same schools.

2. SUBJECTS OF INTERNATIONAL LAW

A. INTRODUCTION

- States are the original, primary, and most prominent subjects of IL.
- States are subjects of IL by definition or as of right, whereas other legal subjects are "secondary" — subjects only to the extent and for the purposes permitted by its primary subjects, states.
- According to the advisory opinion of the ICJ in the *Reparations Case,* a subject of IL "is capable of possessing international rights and duties, ... and has the capacity to maintain its rights by bringing international claims."

B. STATES AND STATEHOOD

1. Montevideo Criteria

Montevideo criteria are largely irrelevant. Criterion that matters is the last: capacity to enter international relations, which is connected to the idea of state recognition. Recognition is a combination between a legal reality and a political choice.

Criteria for Statehood, as set out in Art. 1 of the *Montevideo Convention*:

1. **Permanent population**
   a. Some form of stable human community capable of supporting the state
   b. No requirement for any particular size, longevity, or ethnic homogeneity
   c. Population need only maintain a relatively permanent residence on defined territory
2. **Defined territory**
   a. Exclusive control of territory within fixed boundaries—control should be 'actual and effective'
   b. No requirement for size, continuity, or clear demarcation of borders
   c. The essential condition is that *some* territory be unquestionably under the control of the state, even if is precise extent is uncertain or varies over time
3. **Government**
   a. Some administrative structure capable of governing its population
   b. The required content of the government is relatively modest, requiring only a "principle of effectiveness"—to govern the population, control the territory, and carry on int. relations
   c. Nb: Somalia's statehood persists despite no effective central government since 1992
   d. International law does not generally inquire into the political or moral legitimacy of governments for the purpose of determining statehood
4. **Capacity to enter into relations with other states**
   a. "The most important criterion" (McDorman); "a decisive criterion" (Currie)
   b. Requires that a putative state is able to exercise its political, economic and legal will free from control by other states. But it merely requires that an entity have a will of its own to be exercised — not that it is uninfluenced by other states or bound by international law.
   c. Thus, the entity must represent the sole sovereign authority over a particular population and territory, subject only to the strictures imposed by international law itself.

2. Recognition

- Even if an entity satisfies the *Montevideo Criteria*, its status in IL still depends the willingness of other states to recognize it as a state and enter into international relations with it.
- **Test**: do other states take the view that the entity has the capacity to enter into IR with them as a state?
- While UN membership is (generally) regarded as conclusive evidence of statehood [*litmus test:* Israel, UN member = exception], the converse is not necessarily true given the highly politicized nature of UN membership.
- McD: "Recognition by an existing State of an entity as a State is a significant political/legal act."
- Granting or withholding recognition of statehood *per se* remains, essentially, a bilateral process, coming within the discretion of each individual state.

- **Two main theories of recognition** (neither of which is satisfactory):
  - **Constitutive theory** [political]: Recognition by other states is an essential prerequisite—5th criterion—of statehood. Problems—(1) how many states must recognize before statehood?;
    (2) is the entity's status only effective with respect to recognizing states?;.
  - **Declaratory theory** [legal]: recognition is not significant; only *Montevideo* criteria matter. Problem—absent a duly authorized body to determine statehood, the attitudes of individual states remain the ultimate and only definitive test of a new entity's international status as a state.

- **Kosovo**: Kosovo declared its independence from Serbia in 08. Kosovo has a gov't with control over a specific area, but is not (yet) a member of the UN. Kosovo's break from Serbia was considered by Serbia to be "unilateral" and "illegal." Many States (107) have recognized Kosovo as a state, separate from Serbia (incl. Canada & US); other States (most prominently the Russian Federation) have not recognized Kosovo as a state separate from Serbia. ICJ opinion. P. 15 notes.
- State recognition is always a sensitive issue for **Canada** because of **Quebec**.
- **Recognition of Governments**
  - Changes in government, even if unconstitutional, do not in general affect the IL personality of the state.
  - There is little if any international legal significance attached to the act of recognition of a new government, as opposed to a new state.
  - **McD**: "A handful of states recognize the Republic of China as opposed to the People's Republic of China. No state recognizes Taiwan as a State separate from the People's Republic of China."

3. Sovereign Equality of States

- The sovereign legal equality of states is a foundational aspect of the international legal system.
- The most important right of a state is its **sovereignty**, which means exclusive power or jurisdiction over its territory and population, fettered only by international law
- **Formal equality**
  - From the standpoint of int. law, every state has the same basic legal rights and obligations
  - Enshrined in the UN Charter and flows as a necessary consequence of multiple sovereign entities (otherwise one would be usurped by another).
  - Fosters the development of a rules-based system rather than a power-based system
- States also have a **right** to be **free from intervention in their domestic affairs**, most especially by other states, and a **duty** to refrain from intervening in the domestic affairs of other states.

Cassese, *International Law*	**Six Legal Attributes of Statehood** **1.** Power to wield authority over all of the individuals living in the territory (subject to IL human rights) **2.** Power to freely use & dispose of the territory under the State's jurisdiction & perform all activities deemed necessary or beneficial to its population, eg. economic development and environmental protection — subject to IL: foreign investors/nationals; using your land as a missile launching pad. **3.** Territorial integrity—the right that no other state intrude the state's territory, and the right to exclude others (*jus excludendi alios*); intervention scenarios: **a.** A formal declaration of war **b.** UN Charter approval of intervention in another country (Afghanistan; Iraq 1) **c.** Self-defence (Iraq 2 – US arguably used this argument) **d.** To protect nationals (Is this a legal justification for intervention? Canada sent vessels to Lebanon to collect Cdns; Lebanon consented; if it hadn't, McD says no right to go) **e.** Humanitarian intervention (used to be clear 'no', but now loosened, eg. Somalia, Rwanda — but who gets to decide when humanitarian intervention is justified?) — Canadian initiative of Responsibility to Protect, creating a threshold for mandatory intervention. The problem is that it is a principally a national, not international, decision to use force. **4.** Right to immunity for State representatives acting in their official capacity **5.** Right to immunity from the jurisdiction of foreign courts for acts performed by the State in its sovereign capacity (restricted) **6.** Right to respect for life & property of the State's nationals & State officials abroad **International Legal Reality of the Sovereign Legal Equality of States** • Smallest state has the same rights as the biggest state. • While legal hindrances may result from factual circumstances (landlocked)—legal constraints are valid only if accepted, in full freedom, by the State concerned.
UK, Statement on Intervention in Syria (29 August 2013)	*Syria was widely condemned for the alleged use of chemical weapons against its own citizens. Syria is not a party to the relevant conventions that restrict the use of chemical weapons except for a Red Cross Treaty which prohibits the use of chemical weapons in international situations, which was not the case within Syria.* • However, the breach was arguably one of CIL • UK, a strong, sober government, not prone to strange international commentary said there was an international legal right for intervention, which suggests UK has accepted humanitarian intervention
Sec Council Res 2118	"*Condemns* in the strongest terms any use of chemical weapons in the Syrian Arab Republic, in particular the attack on 21 August 2013, in violation of international law"

- **The THIRD legal attribute of Statehood — territorial integrity — raises question about whether there exists any international legal justification for the physical intervention by one State (or group of States) into another State.**
- For example: **(1)** Does Canada have an international legal right to intervene into State A where it is clear that a Canadian citizen is being held in State A (whether by State A itself or perhaps by individuals unassociated with State A) and State A has not granted an authority for Canada to do so? **(2)** Sudan commits significant human rights abuses; does Canada have an **international legal right** to intervene into Sudan to alleviate and or prevent the continuation of abuse?
- While one might be able to quickly articulate the desirability of Canada taking direct physical action in both scenarios, what are the potential problems? Think about this in international legal systemic terms specifically as regards:
    - the "sovereign equality of States";
    - the proposition that States are the primary participants in the international legal system; and
    - the purposes of the international legal system.

C. Federal States

To what extent, if any, are provinces/states (sub-State units) a subject of international law?
To what extent can sub-State units enter into treaties? [see also: Treaty-Making in Canada]

- There is nothing in IL *per se* that expressly prohibits a sub-unit state from entering into international treaty relations, having international relations all over the world, and otherwise having the rights and duties of states.
- However, the political reality is different in terms of what states customarily recognize as subjects of IL.

Williams and De Mestral, *An Intro to Int. Law*	• In the absence of a clear treaty rule, customary law governs, and at present, CIL does not regard constituent units as fully-fledged states. • However, it does allow them some limit treaty-making capacity. • While the government of Canada denies in principle the capacity of the provinces to conclude treaties binding in international law, measures have been taken to facilitate contracts between provincial governments and foreign governments, especially Quebec. • In practice, Ks exist between provincial and foreign governments at many levels.
Van Ert, *Using Int. Law in Canadian Courts*	• The vast majority of transactions between Canada and foreign states are conducted by federal ministries; however, some provincial governments have permanent departments dedicated to international affairs and missions abroad. • All routinely make agreements between their governments and the governments of foreign states. However, they are often highly informal. • It is not entirely clear as a matter of law that the treaty-making power is an exclusive federal prerogative. • While it is clear, practically speaking, that the treaty power is exercised principally if not wholly by the Federal government, it is sometimes claimed that the true legal position in Canada is that the treaty power is shared — the federal government is competent to conclude treaties within Parliament's legislative jurisdiction, and the provincial governments may make treaties whose subject matters fall within provincial legislative competence. • But the debate comes to a draw. While provincial treaty-making competence seems correct as a matter of pure constitutional law, the reality is that in terms of constitutional practice and international recognition, the treaty-maker power is Federal, in spite of Quebec's persistent objections. • With the exception of France, no other state recognizes Canadian provinces as competent to conclude treaties.

D. PEOPLE'S RIGHT OF SELF-DETERMINATION

- In light of substantial state and UN practice lending at least a qualified support to the principle, most commentators accept that a right of self-determination of peoples exists as a matter of IL.
- However, the issue is in determining whether such a legal right exists—"not every group which claims the legal right has the legal right." It is IL, and not the mere declaration of a particular group, that determines whether a right to self-determination is legally valid.

- **Relation to Statehood**: if the right exists in a particular situation and is appropriately exercised, the intended result can be Statehood. The IL right of self-determination exists for a group ("peoples") that are not yet a State, hence a "peoples" can have an international legal right (limited as it may be) even though "peoples" is not a State. Thus, "peoples" for a limited purpose can be said to be a subject of international law with certain rights.
- **Scope:** The right has been tightly circumscribed—even if a right to self-determination exists, it does not necessarily provide the added right to break away from a state and establish another at will.

- **Internal:** "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state" (para 126 – *Quebec Secession reference*)
- **External:** the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." (para 126 – *Quebec*)

- Three questions arise: (1) Who qualifies as a **people**? (2) Under what **conditions** does a people's right to self-determination arise? (3) What are the **permissible consequences** of the exercise by a people of its right?

- **Who Qualifies As A People?** — unclear concept; determine by territory or ethno-cultural identity?
    - A portion of the population of an existing state; the inhabitants of a colonized or other non-self-governing territory
    - **Objectively**, probably requires a reasonable degree of homogeneity or some common characteristic that distinguishes it from the remainder of the population of the state, such *ethnicity*, *language*, *religion*, *cultural heritage*, or *history of persecution*
    - **Subjectively**, it is likely necessary that the people conceive of itself as a distinct group
- **What Conditions Give Rise to the Right?**
    - International instruments referring to the right to self-determination and ICJ jurisprudence have all "**clearly and unambiguously**" supported the right of "**colonial and other non-self-governing**" peoples to external self-determination.
    - However, the mere existence of minority does not necessarily provide an independent internationally legally recognized right of self-determination. There is more required.
    - Further, the content of the IL on self-determination is determined by states themselves and thus a legal right to external self-determination will be "extremely rare", cautiously recognized", and "narrowly construed"
    - **Territorial Integrity**: External self-determination is inconsistent with territorial integrity; the legal right of a state to exercise authority over its territories, including the peoples, and property on that territory.
        - By contrast, internal self-determination is not inconsistent with territorial integrity.
        - Encouraging groups to split from a state undermines the state itself; thus a foreign state encouraging the right to self-determination is effectively invading into the internal affairs of another state.
    - This right would also extend to situations of **foreign occupation** or **alien subjugation**, domination, or exploitation outside of the colonial context. This is because such a right restores sovereignty wrongly usurped—it is not about undermining the integrity of a state in favour of sub-national peoples, but about affirming the sovereignty of peoples who ought never to have been interfered with in the first place.
    - Beyond that context, such as the case with indigenous persons, the scope of their right appears in the *UN Declaration on the Rights of Indigenous Peoples* to be limited to "autonomy or self-government in matters relating to their internal or local affairs," suggesting only an internal right to self-determination.
    - **Is it possible to infer a general rule that any people effectively denied the meaningful exercise of their right of internal self-determination has, as a last resort, a right of external self-determination?** Denial of internal self-determination may be sufficiently analogous to alien subjugation or colonization; external self-determination might thus be considered an international legal remedy for total frustration or denial of a people's right of internal self-determination. However, this awaits confirmation through **state practice**.

- **Permissible Consequences**—even if a people succeed in have their right recognized and coming within the relatively narrow set of conditions where self-determination may arise, the consequences of this right might be:
    - Emergence as a sovereign, independent state;
    - Free association with an independent state;
    - Integration with an independent state.
- **Conclusion: only in extreme cases of the complete denial of internal self-determination, such as in the colonial or foreign occupation contexts, have peoples in fact succeeded in asserting and exercising an international legal right of external self-determination.**

Reference Re Succession of Quebec, 1998 SCC	• Case is a reference and thus is not technically binding as a matter of law; in practice however, reference decisions are accepted and followed in subsequent jurisprudence. Quebec did not consent to or appear before the SCC. • **Held**: existing IL does not support that Quebec has an external right of self-determination. • "A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity" (para 130). • The IL right to self-determination only generates, at best, a right to external self-determination in situations of (1) former colonies; where a people is (2) oppressed, eg. under foreign military occupation; or where (3) a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. o In all 3 situations, the people in question are entitled to external self-determination because they have been denied the ability to exert their internal self-determination. • Such exceptional circumstances do not apply to Quebec under existing conditions: o Quebecers not denied access to government—they occupy prominent positions within the Government of Canada. o Equitably represented in legislative, executive, and judicial institutions. o Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. o Quebecers are not constitutionally disadvantaged. • Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under IL, to secede unilaterally from Canada. • **The Effectivity Principle:** o One of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the de facto secession is, or was, being pursued. An emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. o While international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation, effectivity, as such, does not have any real applicability to whether a right to unilateral secession exists. o It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.
Construction of the Wall in the Occupied Palestinian Territory, ICJ 2004	• Case is an advisory opinion; not legally binding. Israel did not consent to or appear before the ICJ. • The Israeli Wall Case accepts as a starting point that the Palestinian people have a right to self-determination and proceeds to examine the extent to which the building of the "wall" by Israel interferes with that right and other rights/duties that exist. • **Held**: Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and IHR law.

E. INDIGENOUS PEOPLES

- To what extent are indigenous peoples subjects of IL?
- To what extent is this right separate from the states where they are located?

> - Art. 3: *Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
> - Art. 4: *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing autonomous rights.*
> - Art. 14(1) (for contextual purposes):
> - *Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.*

- There has been non-legal recognition of special entitlements for Indigenous peoples.
    - ILO treaties specially deal with indigenous peoples, providing them a distinct status.
    - International Whaling Convention, from 1946 – today, similarly extends a special recognition towards indigenous persons in the taking of whales that is separate and apart from state obligations with respect to whaling.
        - Canada does not sanction commercial whaling but permits an aboriginal right to whale
    - Arctic Council includes the permanent participation of a number of indigenous groups who sit apart from the Canadian delegation. They do not have *de jure* decision-making power, but they have *de facto* influence.
    - UN Declaration on the Rights of Indigenous Peoples
    - These agreements to do not elevate indigenous peoples to state-like status, but they do indicate a special treatment in international law.
- Are the "rights" noted in the *UN Declaration of the Rights of Indigenous Peoples* ones that indigenous peoples can exercise or claim on the IL level or are they rights that States in which indigenous peoples live are to adhere?
    - Mostly aspirational; likely CIL; opposed by Aus, NZ, Canada, US, as these countries worry that the Document would emerge as a human rights instrument and have already made available the legal right to litigate aboriginal rights claims. States supporting Declaration, by constrast, do not, or they don't recognize the existence of aboriginal peoples within their state.
- Is the Indigenous right of self-determination in the Declaration an internal or external right? It is Largely internal: land, resources, culture, decision-making (self-government)
- Most human rights set out in international treaties and other international instruments involve legal obligations on States to meet standards, but there are few direct avenues for individuals to complain at the international legal level respecting non-compliance with those standards.
- Concerning the "definition" issue noted in the excerpt below, Article 33 of the UN Declaration of the Rights of Indigenous Peoples provides: "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions."
- What is the international legal status of a UN General Assembly resolution? It is generally not internationally legally binding even if adopted unanimously (subject to CIL). This is the litigational law answer, but consider the operational law realm.

F. INTERNATIONAL ORGANIZATIONS

1. Legal Personality

- IOs are almost always established by treaty between various participating states. The issue is whether they acquire international legal personality distinct from their founding members.
- To what extent does an intergovernmental organization have international legal personality—as a subject of international law—and for what purposes? Can it enter into a treaty? Can it bring a legal claim against another international legal subject? Is it entitled to privilege and immunity?
    - Depends on the (1) **function** of the IO and its (2) **constitutive document**.
- Intergovernmental organizations as a general (even universal) rule have no authority over States that are not a member of the organization.
    - Hence when a "decision" or other type of instrument is adopted by an IO with the intention that it be legally binding, the instrument is *prima facie* not legally binding on a non-member, *subject to CIL*.

- ***Reparations Case*** *— apply if constitutive document is silent*
    - **Facts**: UN argued that, as a matter of CIL, it could bring a claim to Israel as a non-member. UN sought damages. UN Charter remained silent on the status of UN.
    - **Issue**: what is the international legal stuts of the UN?
    - **Held**: UN had significant state like status.
        - **Test:** a series of factors to guide the determination of whether an IO is subject of IL:
        - **(1) Function**: can the IO carry out its functions without a degree of international legal personality?
        - **(2) *Implied* powers**: where a treaty is silent, is it a reasonable assessment of the IO that it should have the power to ...
        - **(3) Independence**: is the IO sufficiently independent from its states? [Secretary-General is not at the beck and call of the states]
    - **Held**:
        - The UN was considered an international legal subject by virtue of the necessarily implied intent of its members, and it could bring a legal claim against Israel.
        - In determining whether international legal personality is conferred, a purposive or functional approach is adopted.
        - An international organization can have an "objective" international personality, as Israel was not a member of the UN. This is an exceptional holding and is probably limited to the UN.
- **Other Conditions for Legal Personality** (Currie)
    1. The organization must represent a permanent association of states and be equipped with permanent organs and institutions with international legal purposes or functions.
    2. There must be a distinction, express or necessarily implied, between the legal powers and capacities of the organization or its organs and those of its member states.
    3. The organization must have legal rights and duties that are exercisable in the international legal system (e.g. treaty-making, immunities), and not merely within the domestic legal system(s) of one or more of its member states.
- NATO would fail on (2) — as it is consensus-based, and is thus unlikely an international legal subject.

2. Authority/Importance

- *Is there such a thing as ultra vires respecting the authority of an IO?*
- *Is it only States that can be members of an intergovernmental organization?* (Yes, unless expressly permitted, eg. HK)
- *What is the legally binding effect of a COP/MOP (Conference/Meeting of the Parties)?*

Sands, *Principles of Environmental Law*	**Five Main Functions and Roles of International Organizations**—depends upon the powers granted to it by its constitutive instrument as subsequently interpreted and applied by the practice of the organization and the parties to it. 1. Provide a forum for cooperation and coordination 2. Provides Information 3. Contributes to the development of international legal obligations 4. Ensures implementation of and compliance with obligations 5. Settles disputes

MOPs / COPs

- Many multilateral treaties allow for the parties to review and expand upon the provisions of the treaty.
- A treaty Secretariat (generally not a separate IO) may coordinate periodic MOPs/COPs, which generally have a very restricted role.
- Through a MOP/COP, parties may adopt a "decision" on a particular interpretation of the treaty.
    - Normally, such decisions are not legally binding.
    - It does provide evidence of interpretive history.
    - However, the interpretive record is only relevant for parties that were in favour of the interpretive decision.
    - Some states oppose this; they prefer any substantive changes to a treaty (such as an interpretive decision) to be modified through a formal amendment to the treaty itself.
    - Europeans generally accept these changes, Americans generally oppose them, and Canadians generally accept these changes as relevant to only those who agreed to them.
    - Consider policy: world changes and treaties should change with it. But by what procedure?
- ***Ultra Vires***: ICJ held that WHO had taken action beyond its competence; thus international community can regard an IO as acting *ultra vires* and limit the international personality of certain subjects.
- **Tacit Amendment:** Shipping Conventions; parties agree that 'decisions' apply unless express opt-out

G. Non-Governmental Organizations

- NGOs, unlike IOs, are civil society organizations typically created to advance/represent particular interests.
- In general, they have no international legal personality. They have neither rights nor obligations under IL, but are governed by the rules of the domestic legal system in which they were established.
    - In terms of standing, Art 71 allows the UN ECOSOC to grant NGOs consultative status.
    - Similar status is informally granted during international or diplomatic conferences. This status permits NGOs to attend meetings and sometimes to present submissions or participate in discussions.
    - NGOs may also have status as a non-voting member in COP/MOPs, and treaty negotiations.
    - However, such status carries no significant legal entitlements in IL; does not even usually entail a right to vote.
- Contrast the litigational context with the operational context, where NGOs play an important role.
    - Important role in development, implementation, and sometimes enforcement of treaties.
    - Can be good for publicity. However, government can be distracted from issues that are important and highly complex to address something that the NGO makes public.
    - NGOs can bring technical knowledge to the table, which even states sometimes do not have. However, that knowledge can sometimes be narrow.
    - Important NGOs: (1) International Committee of the Red Cross (a Swiss corporate entity recognized in treaties, which Western states generally comply with — you rarely hear from them because they need to operate with the trust of governments and not intervene); (2) Traffic: monitors endangered species around the world and plays a notably involved role in enforcing the Endangered Species Convention; (3) Basil Convention: some NGOs monitor the movement of waste within & outside of Africa.

H. Corporations and Individuals

- The idea of a right in this context is the ability of an individual or corporation to bring a claim in IL against a State before an international body. [*What is not involved is an individual claim against a state in a domestic court court*.]

1. As International Legal Persons

State Espousal of Individual or Corporate Claims — *preserves control of states over international affairs*

- As a general rule, only states (and to a limited extent some IOs) have international legal personality.
- Although nationals of a state may suffer damages, they have no direct capacity to bring a IL claim.
- Just as a state may be held responsible for certain acts of private persons, so too may a state "espouse" the claim of a private person who would otherwise not have standing in IL to pursue a state that has wronged them.
- **The decision to espouse a claim is discretionary; however, 2 general requirements must be met [CIL]:**
    1. A *national link* between the claimant and the espousing state (*infra*)
    2. Claimant must have *exhausted local remedies* in the state against which the claim is brought (*infra*)
- Generally, State A decides if it wants to pursue the claim diplomatically or in an international forum against B.
- Compensation is paid to the state; there is IL rule that the state pay compensation to the individual or company.
- The state is also free to waive the claim or settle. But the individual can waive the claim as well.

2. Nationality

- In most cases, it is only the State of nationality that has a right or obligation in IL respecting the individual or corporation. Thus, the right of states to espouse claims rests almost exclusively on the existence of a link of nationality between the espousing state and the person whose claim is being adopted.
- There is no international standard for the granting of citizenship. Each country determines its own terms.
- **Each sovereign state**: (1) grants its own citizenship; (2) decides as a receiving state whether it will recognize the citizenship of the state that the person entering the country is asserting.

Nottebohm	*German living in Guatemala wishes to renounce German citizenship due to German-Guatemala war*; *gets citizenship in Lichtenstein, but Guatemala refuses to recognize citizenship upon return*. ICJ—Lichtenstein outraged their citizenship was not recognized, but Guatamala argued this was citizenship-by-convenience, and ICJ agreed.

- **Continuous Nationality**: As a general rule, the national link must exist both at the time of the acts or omissions giving rise to the claim and at the time the claim is made.
    - **Exception**: if the person's previous nationality was lost and current nationality acquired for reasons unconnected to the bringing of the claim.
    - **But**: a claim cannot be espoused against a former state of nationality if at the time of the injury the claimant had that former—but not the present—nationality.
- **Dual Nationality**: one state nationality against another: recent and widespread practice allows espousal in such a case as long as the nationality of the espousing state is "predominant" **both** at the date of the injury and at the date of making the claim. The nationality of the espousing state will be predominant if the claimant has stronger ties with it than with the state against which the claim is to be espoused.
- **Real and Substantial Connection**: IL bodies developed a test — it is citizenship that *matters.* But...
    - Syrian renounces citizenship and becomes Cdn; returns to Syria with Cdn passport, gov't arrests person (?)
    - Cdn/Iran dual citizen enters Iran with Iranian passport, and is tortured; her Cdn citizenship is likely irrelevant (?)
- **Exceptions**: The *Diplomatic Protection Articles* contemplate two exceptional circumstances in which a link of nationality will not be required as a condition of valid espousal of a claim:
    - Where a person has no nationality, the state in which the person is habitually resident at the time of injury and at the time of making the claim may espouse that person's claim
    - **Refugees** — UNLESS the claim is against the refugee's state of nationality
- **Corporations**: place of registration is generally regarded as the "bright line" of corporate nationality, but this can create all sorts of problems. Should it be where the "home office" is? Management and control?

3. Exhaustion of Local Remedies

- There can be no "injury" to the foreign national until local procedures have been pursued and have failed to provide redress. The extent of this requirement, however, depends upon the nature of the breach.
    - Obviously ineffective remedies, or appeals that would clearly be futile, need not be pursued.
    - Nor is there any requirement to pursue purely discretionary remedies, such as appeals for executive mercy, as these do not as a general rule represent legal entitlements.
    - If there is no effective legal system or if it does not provide for timely redress, a state may espouse its national's claim notwithstanding the national's failure to try to obtain redress.
- The *Diplomatic Protection Articles* provides for an exception if it would be **unreasonable** in the circumstances to expect a claimant to exhaust local remedies, as in the case where there is no relevant connection between the claimant and the offending state.
    - It is unclear whether this is a rule of CIL or a "progressive development" by the ILC.

Malanczuk	• **Only if a *treaty* grants an international legal right to individuals or corporations does an international legal right arise** • Even when a treat expressly says that individuals and companies shall enjoy certain rights, one has to read the treaty very carefully to ascertain whether the rights exist directly under international law, or whether the states party to the treaty are merely under an obligation to grant municipal law rights to the individuals/corps concerned. • IL personality of individuals and companies is still comparatively rare and limited.

	• IL personality of individuals and companies is also **derivative**—it can only be conferred by states. Only states make treaties and adopt CIL. • Consequently, when some states say that individuals are subjects of IL, and when other states disagree, both sides may be right; if states in the first group confer international rights on individuals, then individuals are subjects of IL as far as those states are concerned; states in the second group can, for practical purposes, prevent individuals from acquiring international personality, by refraining from giving them any rights which are valid under IL.
McCorquodale in Evans	• Within IHRL, a number of treaties permit individuals to bring claims against a State, alleging violations of their human rights before both international and regional bodies. • UN ECOSOC allows individuals to bring complaints to a UN Sub-Commission about any State party to the UN Charter, as do procedures of UNESCO and OSCE • State is still an intermediary, or directly involved in, international claims by individuals. • Nevertheless, there are some aspects to these individual claims that show, in practice, some independent ability for individuals to bring international claims in this area: **1.** An increasing expectation that State parties to some human rights treaties will allow individuals to bring claims no matter what the State may wish **2.** The link between nationality and the ability to bring claims is no longer essential. The link is now jurisdiction. **3.** Treaties give individuals the procedural capacity to bring international claims; while restricted and dependent upon state consent, this capacity has significant practical effects, and states often respond to the claim in some way. **4.** The conclusions reached by IHR bodies about individual claims can have practical effects on a state through the adoption of those conclusions by national courts and other international bodies whose decisions are legally binding upon the state. The latter approach has been by the ECJ.
Office of UNHCHR	*Which States may be subject to inquiries?* • Inquiries may only be undertaken with respect to States parties who have recognized the competence of the relevant Committee in this regard
Ahani v. Canada, ONCA 2002, SCC leave for appeal refused	• **Facts:** Iranian citizen/refugee ordered deported as a terrorist/security threat; challenged deportation because torture and filed a "communication" with the UNHR Committee for relief under the *Optional Protocol to the ICCPR*, which Canada ratified but did not implement. Committee made interim measures request for Canada to stay order until committee considered comm; Canada says request is non-binding and proceeded to deport. • **Issue:** (1) whether s. 7 PFJs guarantees a stay until Committee considers communication; (2) whether legitimate expectation exists for stay • **Held:** the communication is not legally binding, and that Ahani exhausted his remedies in Canada, where he was afforded full procedural fairness under s.7 • "If the court grants relief that in effect turns a non-binding provision in an international treaty into a constitutional obligation enforceable in a Canadian court, Canada may be wary of signing a similar human rights instrument in the future." • **Dissent** (Rosenberg): "the federal government agreed to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". This is a binding obligation. The federal government has undertaken to perform this Covenant in good faith. It has also undertaken not to invoke the provisions of its internal law as justification for failure to perform. No Canadian court is competent to pass upon the question of whether our procedure comports with the obligations set out in the Covenant. That is the role of the Committee.
***Contrast Ahani with: Sandra Lovelace* (~1970)**	• First nations women married a non-status Indian and had her rights stripped; claim made before the HR Committee, which "took the view" that the legislation was inconsistent with the *Int. Covenant on Civil and Political Rights.* Canada almost immediately amended its legislation to bring it into compliance.
***But See* Waldman (1991)**	• Individual complained about Ontario school funding — HR Committee found that funding for Ontario schools (split between public and Roman Catholic) was a violation of equality rights. Canadian gov't did nothing, as this was really a provincial matter.

McD	• Such committees are essentially "advocates" for their treaty (and often not lawyers); however the ICH has recently been putting some weigh on their interpretation; HOWEVER, just because a Committee says it does not mean it is law.

4. Individual Accountability for War Crimes

McCorquodale in Evans	• **Individuals**, even when acting as part of the organs of the state and under orders from the state, are independently responsible within the international legal system for certain actions. • Even though it was necessary for States to agree to the decisions or treaties that created recent international criminal tribunals and courts, the individual responsibility under international law still existed independently of these agreements. • The responsibility arose through CIL and no one State now has the ability to limit this responsibility, at least with regard to acts such as piracy and genocide. • The importance of establishing responsibility of individuals for international crimes is that it demonstrates that there are some actions by individuals that lead to direct international responsibility on an individual. • The individual is responsible without any need to link the individual with the state.
McD	• War crime defined under the ICC — can be held directly accountable for a breach of IL — it is thus one situation where the individual is the same as a state. • International enforcement has been set up with institutions such as the ICC, established under the Rome Statute. • The ICC has limited universal jurisdiction upon recommendation of the UNSC. • *Complaints*: legitimacy; prosecuting people mainly from Africa.

Other Questions:

- *When does a State commit an international legal wrong?*
- *Must there be an agent of the State as opposed to someone unconnected with the State apparatus?*
- *What constitutes an international legal wrong?*

3. LAW CREATION AND ASCERTAINMENT

A. INTRODUCTION

Art. 38 of the ICJ Statute

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules *expressly recognized* by the contesting states;
   (b) international custom, as evidence of a general practice *accepted* as law;
   (c) the general principles of law r*ecognized* by civilized nations;
   (d) subject to Art 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

- Examples of interactions between treaty and CIL: treaty may supplant CIL; treaties will trump CIL most of the time; treaty provision may not only be a treaty obligation but a CIL obligation.
- It remains a point of contention if the enumeration of sources in Art 38(1) was intended to be exhaustive.

B. CUSTOMARY INTERNATIONAL LAW – ALWAYS CONSIDER – WHAT ARE THE STATES *DOING*?

- Legal obligations on a State that arise from the wide-scale practice of States.
  - "For a rule of CIL to exist, it must be manifested in the general practice of States" (Lowe)
  - Unlike treaties, which depend for their binding force upon states' agreement, CIL arises simply from the sustained conduct of states which they themselves believe to be legally required.
- **Universally binding**: Unlike treaties, CIL is *universally* binding [unless persistent objector].
- **Conservative**: being law derived from patterns of state conduct = ill adapted to the need for rapid change in the law.
- **Inductive**: Unlike treaty law where there is a text and clear rules of its application to a State party, CIL is flexible and amorphous. CIL does not always produce precise or finely tuned rules to govern intricate situations, and its content at any point in time can the subject of profound disagreement.

TEST

- **First**, **objective evidence of the material practice of states**
  - **Generality**:
    - *How many* states practice this custom? *How broad* is it practiced?
      - Contrast global with regional; consider different UN voting blocks.
    - Consider: what are the states that are the most directly affected doing?
      - What are states with *capacity* doing? (Bolivia and space law; Swiss and whaling)
    - Objectors: the more countries that object, the less likely it will be CIL.
  - **Uniformity of State Practice** — needn't be all of the time
    - **Repetition and Consistency**: is the custom sufficiently repetitive and consistent?
    - **Duration**: how long has the custom been followed?
      - CIL could be established in short and quick duration in rare cases.
- **Second**, **the subjective element** (***opinio juris***)
  - A state's practice is only legally significant if the state subjective believes it has an obligation to do so
  - Does the state feel obliged to follow the custom, or is it just a creature of habit—following the custom because it is the path of least resistance, because it does not matter?
  - The subjective standard is said to be high.
  - It is very difficult to get evidence for the subjective element. But sometimes the proof is in the pudding.
    - It often depends upon the nature of the custom—i.e. the right to *sit* in a particular position in the UN building is a privilege or a courtesy, but it is probably not important enough to be CIL.
    - Eg. because most ports allow vessels to enter its port, is there a CIL of right of port entry? McDorman thinks that this a courtesy issue even though it is fairly consistent. A state does not believe it is obliged.
    - Deference when a state says something is CIL.
- **Evidence:** policy statements; statements made by PMs, FMs, (backbencher MPs do not count, legislation, national judicial decisions, diplomatic correspondence, protest notes, treaties (can be strong evidence)

North Sea Continental Shelf Cases	How should continental shelf be delimited? Danes and Dutch part of treaty, but Germany was not. Danes and Dutch argued that: **1.** Equidistance — as provided in art 6 — was a codification of then existing CIL • A provision in a treaty is only binding on its parties, unless the provision is CIL. But the negotiators recognized that equidistance was largely experimental. **(1) No reservation:** Art 6 allowed for a reservation. Court held that if Article 6 was CIL, it would not allow the reservation. **(2)** Provision not *intended* to be a codification of CIL, unlike other provisions. **(3)** Wording was not of "**norm-creating character**" — references "special circumstances", which makes the concept unclear. The concept is so well qualified that it is impossible for it to become binding in international law. **2.** Equidistance since emerged as CIL • But this is unsupported by state practice, which treats equidistance and as a starting point and states do not feel obliged to follow it.
Triggs, International Law: Contemporary Principles & Practices	The geopolitical order challenges the concept of CIL: **1.** Consistent state practice or consensus is unlikely **2.** It is increasingly difficult for international tribunals to take the practices of most interested states into account when determining whether a customary norm has been established; and **3.** CIL is seen by most developing states as reflecting an essentially Western approach to the rule of law; ignores other cultural, religious, and ethical values. • Identifies problem that many states do not make publically available their state practices and views on CIL. This partly explains the bias towards reference to European and North American sources and evidence as CIL. • Votes taken in the GA provide an objective intention of each state on the relevant subject. While a vote on a resolution, and a resolution itself, may not reflect custom, resolutions play an increasingly influential role in CIL.

Protest Note

- Where a state asserts a new right at international law, its legal validity as custom will depend largely upon the reactions of other states. Protest against the purported right can prevent it from coming into existence (*Triggs*)
- The legal effect of the protest notes in this situation is to indicate that neither State is acquiescing or accepting the claim made by the other State. It is thus a legal protection of a state's position.

McDorman, Canada's Aggressive Fisheries Actions	• Canada attempts to abide by international law and practice, partly because it does not have the power to enforce its actions against a world that rejects international law. • Canada thus benefits from international law, as it restrains the actions of the powerful. • Thus, Canada cannot dismiss international law where convenient. • While important constraints exist on Canada taking aggressive international oceans action, there are opportunities for boldness because of the nature of the international law-making process, Canada's position as an ocean power, and the historic willingness of the US to avoid direct confrontation with Canada. • The dynamism of international law creation can be exploited in Canada particularly in ocean matters since Canada is perceived as a leader in the protection and enhancement of coastal state rights. **International law and practice is most heavily influenced by those countries with the largest stake in the particular issue.** • Canada has tried to push CIL — such as with respect to fisheries enforcement. Often it is a matter of rolling the dice and seeing what happens.

C. INTERNATIONAL TREATIES

1. Introduction

- Treaties are the "workhorse" of international law — there has been an increasing proliferation of them.
- There are many international instruments out there but not all of them are international treaties.
- The distinction is that an international treaty creates internationally legally binding obligations (and rights) for States that are Party to the treaty [nb: litigational/operational]
- **Advantages**: speed & clarity with which the law may be created or advanced, and influence on CIL
- **Disadvantages**: they bind only the parties to them; binding force drawn from consent unless CIL

2. Source of Law

Vienna Convention on the Law of Treaties	▪ State A argues there is a legally binding agreement; State B argues it is merely a political arrangement. ▪ Treaties can include the following terms (but sometimes these terms do not imply a treaty): "agreement, exchange of letters, Convention, Protocol, etc."
Is it a treaty?	VCLOT, generally considered to be CIL, sets out rules on treaties (Art. 2(1)(a)): **1. An international agreement** **2. Between subjects of international law** **3. Formed with intent to create binding legal obligations** — key for McD a. Ordinary practice of parties is key to discerning an intent to be bound b. Circumstantial evidence of the usual meaning attributed to state acts c. Departure from the usual formalities may be taken as lack of intent d. Mutual intent is primary; form of the intent is a 2nd evidentiary matter e. McD: Form matters, to a point; process matters, to a point; the wording used in the document matters, to a point; the manner of negotiation (who/when/where) matters to a point. **4. Governed by international law** (Distinguishes treaties from domestic law K)

- **Pacta Sunt Servanda** (Art. 26): Fundamental to international treaties is the idea that they are binding and that States are to fulfill their obligations in good faith.
  - Unconditional consent, even though unilaterally given, cannot unilaterally be withdrawn.
  - *Pacta sunt servanda* is considered a rule of *jus cogens*—no derogation is permissible.
  - Usually entails executive or legislative action by each party within its won domestic legal or constitutional system to either ensure the party is able to perform the obligations under the treaty or to give the treaty domestic legal effect.
  - Domestic legal impediments to implementation or performance provide no escape from Art. 26.
  - If a state chooses to respect its domestic law and breach a treaty obligation, it will be internationally responsible to toher parties to the treaty for its breach.
- **Temporal and Territorial Application**
  - **Temporal**—presumed to apply prospectively and not to affect past relations or obligations; thus retroactive effect should be expressly set out in the treaty.
  - **Territorial**—art 29 of VLOCT — presumed to apply to the entire territory of each of the parties to it; absent any clear indications to the contrary, applies and binds the entire federal state as a single international legal subject and not merely some of its constituent federal units. Curious question for colonial possessions. Consider: is it the particular state's practice to expressly include 'a weird dangly bit' in its treaty? (Whaling Convention not binding on Fare Islands, even though it is part of Greenland, because where Greenland intends to include it, it does so expressly).

3. Relationship with Customary International Law

- A treaty is a snapshot of what states think the law should be at a given time between them, whereas CIL evolves organically. Thus, a treaty can set the terms of the law in a given period. Lawyers may argue that the treaty law has emerged as CIL, binding on all states, or that CIL has evolved differently from the old treaty. The old treaty normally continues to govern as between states.
- The relationship between a treaty (or a particular provision thereof) and customary international law becomes interesting regarding these questions:
  - What "law" applies between a party and a non-party where there is a difference between CIL and a treaty provision?
  - What "law" applies between the parties to a treaty where there is a difference between a treaty provision and CIL?

Thirlway, Sources of Int Law	• Where CIL is replaced by a multilateral treaty, CIL continues to exist, not only for non-parties, but also for parties, 'behind' the treaty as it were. • *North Sea Continental Shelf* case, IJC identified three situations in which the existence or creation of a rule of CIL might be related to treaty provisions: o A treaty may embody already established rules of CIL o The process of negotiation and adoption of a treaty may be regarded as having a 'crystallizing' effect on the nascent CIL rules. o After the treaty has come into force, States other than the parties to it find it convenient to apply the convention rules in their mutual relations, and this may constitute State practice leading to the development of CIL. • **Hierarchy of Sources**: where there exists more than one rule applicable to a given situation, the special rule overrides the general rule [***lex specialis derogate generali***] and the later rule overrides the earlier rule [***lex posterior derogate priori***] o Normally, a treaty is *lex specialis*, and as such prevails over any inconsistent rules of CIL, or at least as existed at the time of the conclusion of the treaty. It is to be presumed that the parties to the treaty were aware of the existing CIL, and decided to provide otherwise in their treaty precisely to exclude CIL. • More difficult is the question whether a custom which arises subsequently to the conclusion of a treaty, and which might be regarded as *lex specialis*, has the effect of overriding the treaty, or such party of it as is inconsistent with CIL. o The real question is whether the new CIL can be asserted against those of the parties to the treaty that have not participated or assented to it. o One view of the matter is that the very existence of the distinction between *jus cogens* and *jus dispositivum* implies that a newly developed CIL which is not *jus cogens* does not affect the operation of a pre-existing treaty; but the point must probably be regarded as unsettled.

4. Treaty-Making

- The formalities of treaty-making are highly variable and depend ultimately on the will of the intended parties.
- A number of formalities may be required by the parties' domestic legal or constitutional systems before the treaty will be considered to have domestic legal effect, but these have no direct effect upon the *international* legal validity of the treaty or of the procedures adopted to bring it into force internationally.
- **Full Powers:** a historical requirement; expression of consent by certain state officials now suffices.
- **Adoption:** legal effect is generally to signal close of negotiations; multilaterally, does not express binding consent; method, requirements, and legal significance of adoption are fully dependent upon the will of the parties participating in the treaty negotiation process.
- **Signature/Authentication:** signals that a given text is definitive, correct, and corresponds to the treaty to be adopted; a signature or initials generally suffices, though again the requirements are variable; little legal effect.
- **Consent to Binding Effect:** *most significant stage*; state binds itself to perform obligations in good faith
  - **Signature as Consent to be Bound:** a signature is only evidence of intent to be bound if the parties have agreed or the treaty itself provides that it is to have that effect; if does not, then a signature has some legal effect, but very little — it a statement of intention, and agreement of the treaty's contents, but not an intention to be bound *per se.*
  - **Ratification:** a formalized process whereby a state becomes a party to a treaty through formal and final expression of consent. If a party signs but does not ratify, it is merely a 'signatory'
  - **Accession**: some treaties allow non-negotiating parties to join later.
- **Entry Into Force:** treaties enter into force in accordance with the intent of the parties
  - **Coming into Force:** determined by the treaty or otherwise manifested; often deferred until a triggering event or a date
  - **Obligations Pending Entry Into Force:** no positive obligations of performance of a treaty arise with respect to a state signatory, which has not yet expressed its consent to be bound**,** or with respect to a state party, which while expressing its intent to be bound to a treaty, the treaty has not yet entered into force.
  - **Registration:** registration with the UN Secretariat is said to avoid "secret treaties which might undermine international stability and order" or merely to "smooth administration of international relations"; the penalty for failing to register is the inability to rely upon the treaty before any UN organ, including the ICJ; however, ICJ observes that this does not undermine the essential validity of the treaty or relieve a party of its obligations under a treaty.

(i) Treaty-Making In Canada

- The treaty-making power is in the Royal Prerogative — that is, solely within the prerogative of the Governor-General, meaning it is a Cabinet decision.
    - **Treaty-making authority**: exercised by the federal executive (sign, ratify, and bind under IL)
    - **Treaty consultation**: there may be consultation with the provinces, aboriginal groups, industry stakeholders, or other experts depending upon the subject matter of the treaty.
    - **Ratification**: governor-in-council; however now Cabinet has a tabling policy where it will table a treaty in the House of Commons prior to formal ratification. While the process quite clearly leaves ratification powers with Cabinet, it provides Parliamentarians and the public some transparency (though the text is rarely available). Parliamentarians cannot block ratification, btu they can delay it.
    - **Implementation:** legislatures have the capacity to implement a treaty into domestic law
        - If a treaty requires legislation, Canada will not ratify until the legislation is in place.

VCLOT

- *Art 27 — Internal law and observance of treaties* — A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.
- *Art 46 — Provisions of internal law regarding competence to conclude treaties*

  1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
  2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

- While there is plenty of domestic legislation seemingly in violation of international obligations, this is within the sovereign authority of the State; there is nothing in the Canadian constitutional structure that indicates this cannot be done; however, it cannot be used as a *justification* for reneging on international obligations.

(ii) Federal State Clauses

- Even though the feds have the capacity to enter into treatie,. this does not mean that they have the constitutional authority to enact any legislation (or otherwise implement a treaty) required by the treaty where the subject matter of the treaty is an area within the constitutional authority of provinces.
- This needs to be coupled with Art 29 of the Vienna Convention on the Law of Treaties (VCLOT) which directs that *prima facie* a treaty applies to all of the territory of a State and Art 27 of the VCLOT which provides that a State cannot avoid obligations in treaties by pleading the obligation is inconsistent with domestic law.
- Altogether, this means that for some treaties federal governments (not just that of Canada) may be wary of becoming a party since the feds may not have the constitutional capacity to ensure compliance with the treaty.
- To overcome this there is the **federal state clause**.
- Such a clause essentially allows a federal government to become a party to treaty without committing the central authority to implement the treaty obligations where it does not have the authority.
- In order to limit Canada's liability where a treaty concerns an area of provincial legislative jurisdiction, some treaties contain a "federal state clause." To varying degrees, depending on the purpose of the treaty and the wording of its articles, the clause informs all the parties that the Government of Canada may have certain difficulties in implementing the treaty because to do so it will have to secure the cooperation of the Canadian provinces.
- By including this clause the government commits itself to performing only those international obligations that come within federal jurisdiction, and to make best efforts ['**reasonable measures**'] to get provincial compliance.
- By contrast, some provinces have implemented legislation specifically intended to give some international treaties effect in provincial law.
- See e.g. NAFTA Art 105 — Extent of Obligations — "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."

5. Law Regarding Treaties: Selected Aspects

(i) Reservations

- Where State A makes a reservation and State B does not accept the state as a party to the treaty because of the reservation – then what? What "law" applies? Who is bound by the treaty from whose perspective?
- What if a reservation is incompatible with the object of purposes of the treaty and related to this, who gets to decide that a reservation is incompatible? Clearly other State parties to the treaty have this capacity? Then what? Does the depositary have this capacity? [What/who is a treaty depositary?]

Aust, *Modern Treaty Law and Practice*	• A reservation is a "unilateral statement, however phrased or name, made by a State, when signing, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (Art 2(1)(d)). • **Bilateral treaties:** reservations are not possible given their nature; all of the terms must be agreed upon before it can bind the parties; a reservation in a bilateral treaty thus amounts to a modification; it is not binding until the other party accepts. • **Reservations generally *not* prohibited:** Art 19 states the basic rule that a state *may* formulate a reservation *unless*: o The reservation is prohibited by the treaty; o The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or o The reservation is incompatible with the object and purpose of the treaty [the compatibility test]

(ii) Interpretation

- How can/does treaty interpretation "apply" when the wording of a treaty was intentionally left by the negotiators as ambiguous or vague?
- The only entities that have an authoritative interpretation of a treaty are the:
  (1) individual states that are parties to that treaty, and if they refer an interpretive dispute, then:
  (2) international tribunal, which can offer an authoritative interpretation binding between them
- A committee established pursuant to a Convention is important but not authoritative.

McDorman, et al, *Marine Envir. & the Caracas Convention.*	**Two Fundamental Approaches** • "**Genuine Shared Expectations**" of the party: consider the full "context" of the agreement; regards the actual text of the treaty as "simply the formal embodiment of the parties shared intentions" and is thus only one numerous factor of many to determine the obligations and effects of a treaty. The intention of the parties governs. • "**Textual approach**": focuses on the words of the treaty, thereby relegating intended meaning to a secondary role; only where ambiguity occurs are secondary methods acceptable. • VCLOT adopted and incorporated the textual approach; however, the contextual approach is not inappropriate, particularly where the wording of a treaty is obscure or complicated.

Art 31: General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   c. Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Art 32: *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(*a*) leaves the meaning ambiguous or obscure; or
(*b*) leads to a result which is manifestly absurd or unreasonable.

- Seven factors have been identified as relevant:
  - (i) good faith; (ii) context; (iii) object and purpose; (iv) subsequent agreements; (v) subsequent practice; (vi) relevant rules of international law; (vii) any special meaning of a term.
- Context in 31(2) is to be restricted to the text, preamble, and annexes, and not to be considered as allowing for a review of a wider range of factors.
- The object and purpose permits the consideration of extrinsic evidence, but the purpose is not to be considered the same as the intentions or expectations of the parties.

- **Distinguish:** treaty interpretation from the perspective of the impartial tribunal versus the state; with respect to the latter, the textual approach may yield greater uniformity since "the text of the treaty is the common core of the agreement, where the context is more naturally susceptible to self-serving and self-deceiving perception and manipulation."
- **Restrictive Interpretation:** state sovereignty provides a state with the ability to unilaterally interpret treaties, and treaties should be interpret to inhibit states as little as possible—*contrast* with the approach of interpretation to maximize a treaty's effect.
- **Problems** of interpretation become difficult when the negotiators are obligated to achieve formal agreement by the use of ambiguous terms when there is no genuine agreement. The question becomes one of whether obligations that are general or vague should be interpreted to be a state obligation where the intent was to preserve freedom of action. To effect to such clauses, consider the purpose of the treaty as a whole. Otherwise, states may be undesirably permitted to avoid obligations.

(iii) Non-Operation of Treaties: Invalidity and Termination

Step One: does the treaty contain a clause with respect to termination or invalidity? This governs. If not ...

Invalidity—the most serious grounds for invalidity are those that touch on state consent; grounds of invalidity are narrow in scope and strict in application in order to preserve *pacta sunt servanda.* Further, the bases of invalidity in the VCLOT are regarded as exhaustive.

- **Bases for Invalidity**
  - **Domestic Legal Competence to Conclude Treaties:** Art 46 VCLOT—a state may not rely upon the fact that its consent to be bound by a treaty was expressed in violation of its domestic law, except in specific circumstances — i.e. where the violation was "manifest" and of "fundamental importance"; or where the state representative did not have authority. Both of these exceptions are *narrow.*
  - **Mistake of Fact:** The most widely accepted basis for invalidating a state's consent to be bound by a treaty; generally recognized in CIL and in Art 48; a state's mistaken belief in a fact at the time of consent to be bound may invalidate the treaty, but only where that fact was an essential basis of its consent.
  - **Fraud:** where a state has been induced to enter into a treaty by the fraud of another party, the state can invalidate its consent to be bound.
  - **Bribery:** can invalidate a treaty if causal relationship between the bribe and the consent.
  - **Coercion of State Representatives:** blackmail and other personal threats made against a state representative vitiates the free consent of the state
  - **Coercion of State:** a treaty by the threat or use of force is void
  - **Conflict with *Jus Cogens*:** treaties cannot conflict with a preemptory norm of int. law
- **Consequences of Invalidity**—depending upon the seriousness of the violation, a treaty may be void or voidable—a State party may nonetheless consent to be bound notwithstanding a less serious violation; however, serious violations, such as *jus cogens* are void *ab initio*

Termination

- **Bases for Suspension and Termination**—the grounds for suspending or terminating treaty obligations are subject to strict constraints. Vienne Convention permits termination where there have been:
  - **Consent of the Parties:** through express provision in the treaty or subsequent treaty providing for termination, withdrawal, or suspension; in a multilateral treaty, two parties may extinguish their obligations towards one another, but their obligations remain in effect otherwise.
  - **Material Breach:** where one or more parties repudiates the treaty or violates one of its essential provisions, other party may suspend/terminate; however, this is subject to requirements outline on pages 180-181 of Currie.
  - **Supervening Impossibility of Performance:** permanent disappearance of object fundamental to the treaty; treaty about lake and lake disappears. *Danube Dam*: it may have been expensive, but the river was still there!
  - **Fundamental Change of Circumstances:** *Danube Dam*: ICJ rejected "new environmental norms, environmental costs out of contrll, political change" as *not* fundamental bases to the agreemen.
  - **Conflict with New Norm of *Jus Cogens*:** a treaty incompatible with a new norm of *jus cogens* is automatically terminated by definition of the law of *jus cogens*.
- **Consequences of Suspense or Termination:** Art 70; absent agreement between the parties to the contrary, the termination of treaty relations releases parties form further performance but does not otherwise affect the positions of the parties resulting from prior performance; in other words, there is no obligation for any party to return another party to the position it occupied prior to entry.

Triggs, *Int. Law Contemp. Principles & Practices*	• Unilateral grounds for termination (impossibility, fundamental change, material breach) applied narrowly to balance the need for stability in IR and providing an injured party with the opportunity to withdraw.
	• ***Gabcikovo-Nagymaros*** *(Danube Dam)* case—ICJ sets a **high standard** for invalidity/termination (McD but not so high that it cannot be met)
	  ○ Treaty still existed when Slovakia stepped in; *doctrine of necessity:* does excessive cost and ecological damage justify a breach? Maybe, but it doesn't mean the treaty is no longer there—necessity is not a recognized ground in VCLOT.
	  ○ Rejected arguments of "impossibility" & "fundamental change of circumstances", *supra*.

(iv) Treaties and Third Parties

- It a fundamental principle that treaties create neither rights nor obligations for non-parties.
- **Exceptions**: **(1)** treaty becomes CIL; **(2)** Art 2(6) of the UN Charter imposes a duty on members to ensure non-members respect the principles of the UN insofar as necessary to maintain international peace & security; **(3)** treaties *may* create enforceable rights, if not obligations, for non-parties, but requires consent.

(v) Successive (Conflicting) Treaties

- Generally, nothing prevents parties to one treaty from concluding a subsequent treaty dealing with similar or same subject matter as the original treaty.
- The later treaty governs the earlier, but only with respect to relations between the parties to the later treaty.
- However, non-parties to the treaty continue to be governed by the terms of the prior treaty.
- As between one party to the prior treaty which has consented to be bound by the later treaty, and another party to the treaty which has not, the prior treaty's terms will continue to govern.
- Consequently, the effect depends upon:
  1. identity of the parties of the treaty to it in relation to the identity of the parties to the original treaty;
  2. the degree of overlap between the two parties;
  3. the compatibility or incompatibility of the overlapping provisions of the two treaties; and
  4. any express or implied terms of the treaties addressing the potential for such overlap

McDorman, "A Note on Potential Conflicting Treaty Rights" (2013).	• Art. 30 VCLOT: First, where there is a conflict in two treaties and the parties to the treaties are the same, the more recent convention prevails. ... Second, where there is a conflict in two treaties and one State is a party to both and another State is a party only to one of the treaties, the treaty common to both prevails. • The above provisions of VCLOT are residual rules that only come into play where the treaties in collision are silent. Treaties often contain relationship clauses, sometimes called conflict or savings clauses, which seek to provide how treaties / provisions with similar subject matter are to interrelate. • Such a clause is of limited effect where there is only one of the conflicting treaties common to both States. • The "meaning or effect" of relationship clauses can "sometimes be obscure."

(v) State Succession to Treaties

- What happens to treaties entered into by State A when State A breaks up into component parts? Is Quebec *bound* by Canada's treaties? Can it assert rights under the treaties? Chaotic area of the law; political.
- **Territorial Treaties**: rights over territory run with the land; treaties that deal with territorial issues & boundaries are unaffected by changes in state configures. Such treaties are binding on the new state. Issue: St. Lawrence seaway agreements with US — involves rights over the territory in a *particular* way, does *that* run with the land?
    - ***Gabčíkovo-Nagymaros Project***—Czechoslovakia, which subsequently became Slovakia, and Hungary—Danube Dam—**ICJ**: particular territorial regime ran with the land; Slovakia was bound, and treaty continued to exist even if Hungary didn't want it to exist
    - **Thus with respect to territorial treaties, international law prefers the status quo / state practice**
- **Non-Territorial Treaties**
    - *The Vienna Convention on Succession of States in respect of Treaties* was promulgated in 1978 and provides that newly independent post-colonial states are subject to a "clean slate" rule, meaning that the new state does not inherit the treaty obligations of the colonial power (art 16) — applied to East Timor.
    - **Controversy**: distinguishes between "newly independent states" (former colonies) and "cases of separation of parts of a state" (all other new states). Art 34(1) states that "all other new states" remain bound by the treaty obligations of the state from which they separated. Art 17 states that "newly independent states" may join multilateral treaties to which their former colonizers were a party without the consent of the other parties in most circumstances, whereas Art 9 states that "all other new states" may only join multilateral treaties to which their predecessor states were a part with the consent of the other parties.
    - 37 signatories and 22 state parties have ratified, including Ukr, but not including US or Canada.
    - Unlikely CIL given lack of support; a "one-size fits all" approach is not suitable
    - Gives undue prominence to the "clean slate" rule, and not enough weight to the abundant State practice of concluding devolution agreements or making declarations of succession.
- States may view the new states as successor states (as is the case of Czech and Slovakia, treaties survive).
    - But Scotland likely wouldn't step into the shoes of the UK; would have to apply separately into the EU
- **Quebec**
    - From the perspective of states, Quebec seceding would mean that other states now have two entities with respect to international relations where there was once only one.
    - Quebec would probably not want to step into Canada's shoes — does Que take Labrador?
    - Quebec would not automatically be entitled to NAFTA, though other parties may consent to include it.
- **Ukraine and Crimea** – issues of recognition
    - Debt which is contracted by a territorial public authority which has a separate legal personality, such as a province, city or public enterprise, should go with the local authority. Very often debt contracted by the state itself but which is linked to a particular territory eg where it is secured on assets or fiscal resources there, or is earmarked for territorial use there, goes with the territory as localised debt.
    - When we get to the national debt of a state which is not related to any particular territory or asset and is charged to general revenue account, we get problems. In practice, if there is a breakaway of a small part of a territory and the surviving state remains substantially intact, there is probably a presumption that the surviving state is responsible for the national debt even though its economic ability to service its foreign debt may be reduced. On the other hand, if a state completely breaks up, then state practice is to arrive at an equitable apportionment of the debt, based upon such matters as tax ratio, productivity, extent of territory, population, value of assets, etc.

D. OTHER SOURCES

1. General Principles // Judicial Decisions and Scholarly Writings

General Principles

- The dominant view is that these are general principles of *domestic* law.
- If a sufficient number of legal systems disclose rules or institutions with broadly similar underlying policies and principles, such can be considered sufficiently "general" to form a general principle of law.
- Something approaching universality may be necessary.
- The source may appear to be inferior to treaties and CIL—as a stop-gap where there is a failure to find a rule in the previous two sources. However, general principles of law can be important.
    - Eg: natural justice, estoppel, etc. This ensures that the ICJ still functions like a court.
    - The ICJ frequently relies on general principles in its judicial reasoning, but it rarely makes this process explicit.

Judicial Decisions and Scholarly Writings

- May serve as an aid to understanding or discovering the content of IL, but do not in themselves "create" law.
- Judicial decisions may have enormous normative weight, but they are not binding as *stare decisis* proper, except as between the parties and in respect of that particular dispute (Art 59). States will rely on cases when making arguments, however.
- Nothing limits judicial decisions to international decisions, though domestic decisions carry less weight
- Scholarly writers may propose or catalyze developments in the law—this is not inconstant with consent theory as states ultimately must adopt the proposal through treaty or CIL.

2. UN General Assembly Resolutions

- When rules declared in resolutions have been relied on in international litigation, the resolutions have been judicially assessed as no more than declaratory of customary law, or at most as evidence of the existence of the *opinio juris*." (Thirlway, "The Sources of Int. Law")
- In the case of *Military and Paramilitary Activities in and against Nicaragua*, the International Court declared that "the mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as part of CIL, and as applicable as such to those States."
- GA is predominantly a political body; resolutions must become law through a formal procedure (treaty; CIL)
- May nonetheless be important operationally, even if it is not legally binding litigationally speaking.

3. UN Security Council Resolutions

- UNSC has recently begun adopting binding resolutions requiring states to take legislative steps within their domestic legal systems to address; eg. terrorist financing and proliferation of WMDs.
- They can be binding on all members of the UN, but it depends on how they are written.

Malanczuk, *Akehurst's Modern Intro. To Int. Law*	• Art. 24(1) of the UN Charter confers upon the UNSC "primary responsibility for the maintenance of international peace and security"; this ensures "prompt and effect action by the UN" and authorizes the UNSC to act on behalf of the UN member states. • Principal function of the UNSC is to make recommendations for the peaceful settlement of disputes and take enforcement action to deal with threats to the peace and aggression. • Art. 25 provides that UN members "agree to accept and carry out the decisions of the UNSC", which thus confers upon the UNSC the power to take binding decisions that UN member states are under a legal obligation to obey.
Shaw, *Int. Law*	• The scope of the UNSC has expanded in recent times, extending to determinations beyond international peace and security, including binding determinations on boundaries, destruction of weaponry, liability, compensation, and debt. • **Role of the UN Charter**: despite its political character, SC is legally bound by Charter. • **Status in IL**: binding decisions of the UNSC can override the legal rights of states. • **Limitations**: inherent notions of good faith and non-abuse. What would happen if the ICJ issued an Advisory Opinion declaring a binding UNSC resolution invalid?
UN SC Resolution 1441	• "*Recalls*, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;" (used as a legal justification for entry of US troops into Iraq).

4. Acts of Other International Organizations

- Acts of IOs are generally only binding on the parties to or members of the intergovernmental organization.

Sands, *Principles of Int. Environ. Law*	• Acts of international organizations, sometimes referred to as secondary legislation, may be (1) **legally binding *per se***, or they may (2) **authoritatively interpret treaty obligations**.
	• Since binding acts of international organizations derive their legal authority from the treaty on which they were based, they can be considered as part of treaty law.
	• The legal effect of an act of an international organization depends upon the treaty basis of the organization. Usually, the treaty will specify the intended legal effect.
	  ○ Eg. Art. 25, UN Charter states GA resolutions are only recommendatory, whereas UNSC resolutions are binding 'on all states'
	  ○ Eg. Regulations, Directives, and Decisions of the EU are legally binding on member states and can create rights and obligations which are directly enforceable in the national legal systems of the member states.
	• **Conference Declarations**: decisions, statements, or other non-binding acts may contribute to the development of the law (see 'soft law' below); other declarations have led to acts of international organizations which are then followed by the adoption of a new treaty rule incorporating in binding terms the original declaration.

5. "Soft Law" (*lex ferenda*)

- In some respects, soft law is operational law rather than litigational law — not technically legally binding.
- Tied to CIL and treaty law in that what is soft law today may become CIL or treaty law tomorrow. It may 'harden'
- However, just because a proposition arrives in an international treaty does not make it legally binding—it depends upon the wording of the treaty.
- Soft law is not law at all but rather a category of potentially significant legal developments or materials; however, to become law it must go through one or more of the formal law-creating processes.

Birne & Boyle, *International Law and the Environment*	• In the environmental context, increasing use has been made of 'half-way' stages of the law-making process, including codes of practice, recommendations, guidelines, resolutions, declarations of principles, standards—often in the context of umbrella treaties • These instruments are clearly not law but they do not lack all authority • Despite their non-binding, non-treaty form, the careful negotiating and drafting suggests an intention that they have some normative significance • May create a good faith commitment or expectation of adherence • May provide evidence of *opinion juris* • **Recorded**: Soft law is by its nature the articulation of a 'norm' in **written** form, which can include both legal and non-legal instruments • **Discretionary:** how and when to conform to the requirements of the norm is left to the participants; this allows states to take on obligations they otherwise may not • **Advantage**: despite the fact that states retain control over the degree of commitment, the very existence of such an instrument encourages the trend towards hardening the international legal order (not all 'soft' instruments necessarily themselves become 'hard' law nor is there an inherent aim of each one; but several have) • 'Soft law' may become **enforceable**—if properly adopted within a treaty or if CIL

4. APPLICATION OF INTERNATIONAL LAW IN CANADA

A. INTRODUCTION

- *Prima facie* domestic courts only apply domestic law.
    - International law *per se* must thus be incorporated, received, or recognized domestically.
    - But there is no global uniformity on how this is affected; each state, as a result of its constitutional structure, legal system, and institutional heritage, have their own practice.
    - While one domestic system might deem a conflicting rule of international law to be subordinate to the domestic legal rule, another might yield entirely to the international rule.
    - The answer to "how will legal systems A [eg. international] and B [eg. domestic] interact?" will depend on whether one is asking the question from within the framework of legal system A — complete with its rules governing interactions with other legal systems — or from within the framework of legal system B —with its own set of rules.
    - The nature of the relationship between international and domestic legal systems will thus depend on whether one is considering the issue from the perspective of international or domestic law.

- The precise extent to which the interface between international and domestic law is dualist or monist depends upon each domestic legal system's chosen approach to the "**reception**" of international law.

- **Dualism** — McD's traditional view of IL
    - In its purest form
        - Dualism emphasizes that international and domestic law govern distinct, subjects, regulate discrete subject matter, and emanate from different sources.
        - International and domestic legal systems exist in complete legal isolation from on another.
        - In the event of a conflict, the resolution depends solely upon which legal system happens to govern the forum in which the conflict is being considered.
    - In its less rigid form
        - Dualism admits that rules from international law might indeed make their way into the other, but only through a process known as "transformation"—the receiving legal system would have to transform the outside (international) rule into one of its own domestic rules.
- **Monism** — HR; trade
    - There either is or should be no essential dichotomy between international and domestic law.
    - They are rather part of one and the same continuous legal system.
    - International legal rules should thus have automatic direct legal effect within domestic law.
    - However, in the event of a conflict, the international legal rule should generally take precedence, even within a domestic forum — e.g. human rights law — int. environmental law imposing domestic legal obligations.
    - This brings about a gradual harmonization of all domestic legal systems within international law.

- **Canada**
    - Maintains a dualistic a rigidly dualistic stance in order to insulate and preserve its domestic sovereignty. This flows from the sovereign independence of states, captures traditional isolationism, and treats the international and domestic legal systems as separate. However, recent countervailing influences are tending toward a more monistic integration, including multilateral 'law-making' treaties, which can have direct effect on domestic law. Also BITs.
    - Canada's approach is rooted in its historical relationship with Westminster-style democracy and the governmental structure of England. There is no strong constitutional support for transformationism; it is more historical custom.
    - **Transformationist**: distinctly dualist in nature—a rule of int. law cannot have effect domestically unless it has been "transformed" into a domestic legal rule by one of the domestic system's law-making processes.
        - This is usually interpreted as a requirement for legislation transforming or implementing the international rule domestically, although there is no reason why the same could not be achieved, at least in the common law provinces of Canada, by judicial pronouncement.
        - In other words, the international legal rule has no direct effect at all in the domestic legal system. Rather, the latter system creates a new legal rule of its own which mirrors the international legal rule, and it is that new, domestic, "transformed" legal rule which has effect.
    - **Adoptionist:** assumes that international legal rules are automatically part of the domestic legal order and form part of the fabric of legal rules that have direct legal effect for sub-national actors, including individuals and corporations. Changes to international law automatically entail modifications to domestic law.
- **When it comes to CIL, Canada takes an adoptionist stance, whereas in the case of treaty law, Canada takes a distinct and clear transformationist approach.**

B. TREATIES IN CANADA – *Transformantionist*

- International treaties and conventions are not part of Canadian law and have no domestic legal consequences unless they have been implemented by statute (*Baker*; *Ahani*)
- This applies to treaties that have been signed and ratified. While they may bind Canada internationally, they have no formal direct legal effect of their own within the Canadian legal system.
- The reason for this is almost by historical accident—from a domestic constitutional concern to preserve the fundamental separation of powers between the executive and legislative branches of government.

Labour Conventions Case, PC 1936	• The treaty-making power rests exclusively with the federal executive. • However, jurisdiction to implement treaties will sometimes rest in the federal Parliament, sometimes in the provincial legislatures and sometimes with both, depending on the range of subject matter in the treaty. *Currie*: the consequence of overruling the *Labour Conventions* case would likely be devastating to federalism as we know it. Many concerns are addressed by: **1.** Consultation and cooperation with provinces prior to the conclusion of treaties, which can minimize situations where provincial legislatures refuse to implement; **2.** "Federal state clause," which commits a ratifying federal state to performance only of treaty obligations that fall within federal jurisdiction, along with a "best efforts" undertaking to secure provincial adherence. **3.** Federal gov't may ratify a treaty subject to a reservation in respect of treaty obligations falling within provincial spheres o implementing jurisdiction. • The SCC, while not reversing the *Labour Conventions Case*, has been occasionally willing to construe Parliament's s. 91 powers generously when considering the *vires* of federal statutes implementing some of Canada's international treaty obligations. • E.g. "national concern" aspect of POGG; "general trade and commerce" power • Contrast with watertight compartments aspect of *Labour Conventions Case*

- **Traditional Approach** [*Rigid*]: Cdn courts needn't take account of a treaty in the absence of clear domestic implementation.
- **Reconciling Treaty Obligations and Domestic Implementing Legislation**
  - SCC adopts a view that the **text** of the implementing legislation is where possible to be reconciled with the corresponding international treaty obligations (*National Corn*)
  - Resort to the treaty text is not limited to situations where the domestic legislation is ambiguous on its face; can refer to the treaty text at the outset to *reveal* an ambiguity in the domestic statute (*National Corn*; *Capital Cities Comm.*)
  - Legislature is **presumed** "not to intend to legislate in a manner that cannot be reconciled with the state's international obligations" (*Grecon Dimter inc.*).
  - Effectively places an onus on a legislature implementing a treaty to indicate explicitly and clearly any departures from the treaty provisions it intends to enact into domestic law. Increasingly, treaties have controlling effect.
  - **VCLOT**: the courts "must adopt an interpretation consistent with Canada's obligation under the Convention. The wording of the Convention and *the rules of treaty interpretation*" apply (*Pushpanathan*).
- **Reconciling Unimplemented Treaty Obligations and Domestic Law**
  - Presumption of conformity, while not conferring domestic effect on unimplemented treaties, nevertheless clothes them with substantial *indirect* effect: wherever possible, domestic legislation will be interpreted so as to comply with them.
  - They provide "background interpretation", particularly in Charter cases.
- **Reconciling Unimplemented Treaty Obligations and the *Charter***
  - "...the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified (*Slaight Comm.*)
  - Obligations merely "inform" *Charter* interpretation as a general interpretive aid. They are helpful but not determinative.

- **Conclusions:** (1) it is presumed that implemented treaties conform to their international obligations and should be thusly interpreted; (2) the same arguably applies to ratified but not yet implemented treaties;
  (3) however, a clear and express conflict gives precedence to statute; (4) *Charter* is unclear (Currie, 262)

C. CUSTOMARY INTERNATIONAL LAW IN CANADA – *Adoptionist*

- It can be (cautiously) concluded that unless a statute or binding rule of precedent is expressly to the contrary effect, CIL is automatically part of the common law of Canada and has direct domestic legal effect as such.
- Thus, existing statue and common law that does not expressly override inconsistent CIL will generally be interpreted in such a way as to conform with the latter.
- Problem: who determines what CIL Is? How do the *courts* determine what CIL is? (CLHD wrong on CIL in *Baker*)
- **Case Law**
    - ***Foreign Legations Reference***: CIL is presumptively part of the Canadian common law; however, legislatures retain the power, as with any common law rule, to *expressly* override CIL—this preserves *both* the adoptionist approach to CIL as well as legislative supremacy
    - ***Quebec Secession Reference***: court gives implicit endorsement of the direct legal effect of CIL when it found that the CIL principles of the self-determination of peoples "must be addressed."
    - ***Bouzari*, ONCA 2004**: CIL is "directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation"

R v Hape, SCC 2007	• "...following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of CIL **should be** incorporated into domestic law in the absence of conflicting legislation." • "The automatic incorporation of [CIL] is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of sovereignty, Canada declares that its law is to the contrary" • "Parliamentary sovereignty dictates that a legislature may violate IL, but that it must do so expressly." • "Absent an express derogation, the courts may look to **prohibitive rules** of CIL to **aid in the interpretation** of Canadian law and the development of the common law." *Currie* • Use of the significantly less imperative "should be" seems to imply that a rule of CIL cannot safely be assumed to be part of Canadian law until a Canadian court says so. • Use of "aid in the interpretation" appears inconsistent with automatic, direct, and binding effect. • Limitation to prohibitive rules? Why not permissive rules? o DOJ's constitutional section has picked up on this and reads *Hape* exceptionally narrowly as only applying to **negative rights** ("thou shall not torture") **not** positive. Despite Currie's concerns, *Hape* likely endorses an adoptionist approach to CIL. The ambiguous comments may be *obiter*, and there is no indication that the court disagreed with prior jurisprudence affirming the adoptionist stance. This is most likely good law in Canada.

D. BEYOND THE BASICS

- Does the government of Canada (or a province) have the legislative capacity to violate international obligations (arising either from international treaties or customary international law)?
- Can a court order a Canadian government (federal/provincial) to take action to fulfill an international legal obligation (eg. to order the government of Canada to comply with an international treaty to which Canada is a party) or to desist in taking action that is inconsistent with an international obligation (eg. to order the gov't of Canada to stop doing something that a breach of an international treaty to which Canada is a party)?

Van Ert, Using International Law in Canadian Courts	• **Legislative Competence to Violate International Law:** o The doctrine of parliamentary sovereignty only accords legislatures the competence to violate international law; the doctrine does not extend this power to the executive or the judiciary. o The doctrines of judicial notice of international law, the presumption of conformity, and the incorporation of custom — all indicate the judiciary's proper role in the reception system is, in all but exceptional cases, to ensure domestic compliance with international law wherever possible. • **The Presumption of Conformity with International Law** o The radical implications of our legislatures' competence to violate international law are curbed, however, by an important practical qualification of parliamentary sovereignty, namely the presumption of conformity. This a rule of statutory interpretation—domestic law should be read, wherever possible, so as not to breach international law or comity.

5. JURISDICTION

- The reach of national law in three different contexts: **(1)** geographic – over what area (land, sea, air) does a State have jurisdiction and the extent of that jurisdiction (which activities and resources); **(2)** ships and aircraft (and space objects); **(3)** individuals (which can include corporations and similar entities – usually about non-citizens in a criminal context).
- The exclusive ability of a state to regulate activities occurring in its territory, subject only to the strictures of international law, is the ultimate hallmark of its independence and sovereign status in international law.
- IL also regulates jurisdictional competence of states over certain areas beyond their borders.

- Four types of relationships between states and territory:
  1. **Sovereign state territory**
     a. Areas subject to the exclusive and plenary sovereign jurisdiction of a single state, subject only to limitations imposed by IL (eg. diplomatic immunity against adjudicative/enforcement jurisdiction)
     b. Includes land and islands, inland rivers & lakes, airspace, international coastal waters (territorial sea).
  2. **Res communis**:
     a. Not part, nor may be, incorporated into the sovereign territory of any state.
     b. Essentially open areas available for unilateral use and exploitation by all states, subject only to certain limits imposed by IL. See *high seas*, *infra*.
     c. Frequently referred to as the "global commons," includes the high seas and parts of space.
  3. **Res nullius**:
     a. Unclaimed land not currently under the sovereignty of any state; subject to potential state appropriation
     b. The concept has not been extended to outer space or celestial bodies
     c. Remains relevant with respect to the current legal effects of past acts occupation justified on the basis of *res nullius*, abandoned territory (reverts to *res nullius*), and Antarctica (see Class Notes at 63).
  4. **Common heritage of humankind**:
     a. New development, encouraged by developing states in the latter half of the 20th century
     b. Concept emerges in multilateral treaty regimes relating to the law of the sea, and the Moon
     c. Said to apply to areas which otherwise bear the essential characteristics of a *res communis*—areas not subject to appropriation by states as part of their sovereign territory—but with the additional feature that their resources are not open to unilateral use or exploitation by states for their own benefit. Proceeds of exploitation reserved for the community of nations as a whole.

A. OVER LAND AND SEA

1. Lands and Islands

- A state's sovereign jurisdiction extends beyond its land mass, encompassing islands, inland waterways (rivers, canals, and lakes), coastal waters ("internal waters"), the territorial sea, archipelagic waters.
- General presumption that the legal regime applicable to the surface of the territory also applies to whatever lies directly above or below—if a surface comes within the sovereign territory of a state, so too does the subsurface below (to a depth limited only by physical realities), as does the air column above it.
- The limits of air column are uncertain; certainly commercial airspace is covered, but what of geostationary orbit?

2. Ocean Areas

- Modern law of the sea has had to accommodate the increasing interests of coastal states in controlling resources and activities adjacent to their shores while also seeking to preserve the interests of maritime states in open-access to the oceans.
- The further one ventures from shore the less application domestic law has to ocean activities.
- The result is a multiplicity of zonal areas:

McDorman, *Int. Ocean Law; Salt Water Neighbours*	• **Internal waters** – *no innocent passage* o As a matter of int. law, a coastal state enjoys full territorial sovereignty over its internal waters. o Within a coastal state's internal waters, there is generally no right of passage for foreign vessels o Foreign vessels thus have no right of access to a coastal State's internal waters. o Canada claims Northwest Passage are internal waters and thus subject to the complete control of Canada, US asserts they are not and thus allow for "innocent passageway"

- **12-n mile territorial sea** – *state has jurisdiction subject to innocent passage*
  - The ocean area up to 12 nautical miles from the base-lines
  - Within this area, the coastal State has **jurisdiction** over all the living and non-living resources and over vessel traffic, subject to a foreign vessel's right of **innocent passage**.
  - Article 19(1) of the LOS Convention provides "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with this Convention and with other rules of international law. Article 19(2) provides exceptions. It is unclear whether 19(2) is exhaustive or whether it is only "activities" that can make a vessel non-innocent (i.e. type of vessel or cargo being carried).
  - Where vessel passage is non-innocent, a coastal State "may take the necessary steps" to prevent the vessel passage. Even where vessel passage is innocent, a coastal State can enact laws regarding a vessel engaged in innocent passage and can, in some cases, enforce that law against a vessel engaged in innocent passage. A coastal State, however, is not to "hamper" innocent passage. More specifically, coastal States are not to "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."
  - As a matter of IL, Canada's immigration laws extend to the 12 NM territorial sea.
- **200-nm EEZ** : economic benefits within exclusive jurisdiction of coastal state; but free navigation exists (unless you're fishing)
  - The EEZ was originally intended for Law of the Sea Convention parties but it became part of CIL a few years after the arrival of the concept.
  - The EEZ is of a *sui generis* character "situated between the territorial sea and high seas."
  - Within its EEZ, a coastal state has national jurisdiction respecting exploring and exploitation of living and non-living resources and marine scientific research.
  - **Marine Pollution Prevention and Environmental Protection**:
    - There is a delicate balance in the LOS Convention between the authority of the state and the navigational freedom of vessels.
    - Non-coastal States have rights within the EEZ respecting navigating, overflight, and the laying of submarine cables and pipelines.
    - These rights are to be exercised with "due regard" to the rights of the coastal State.
  - For rights or jurisdiction regarding activities not explicitly allocated, each situation has to be evaluated on a case-by-case basis with the LOS Convention providing "no presumption in favour of either the coastal State or other States."
  - While the 200-EEZ adjacent to the US is American, as opposed to any other state, the legislative authority of the US to deal with resources and activities within the zone is not absolute (as if part of the US landmass) but **subject to what international law permits.**
- **the continental shelf beyond 200-nm** (where geography permits – recognized in LOS and CIL)
  - The current Canadian definition of the continental shelf is in the *Oceans Act*
  - Both the US and Canada have physical continental margin areas beyond 200-nm.
  - Clear that the 5 States with coasts on the central Arctic Ocean (Canada, Denmark/Greenland; Norway, Russia and the US will have areas of overlapping claims to continental shelves beyond 200-n. miles. Precise areas of overlap is not yet clear since, with the exception of Norway, no State has made it totally clear whether they believe their continental shelf areas extend.
  - 4 of the 5 States bordering the central Arctic Ocean are parties to the LOS Convention, with only the US not a party. There've been calls for a special international legal regime to be developed for the Arctic Ocean because of the unique nature and challenges of the area.
  - However, in the May 2008 Ilulissat Declaration, the 5 States bordering the central Arctic Ocean endorsed that: "*the law of the sea provides important rights and obligations concerning the delineation of the outer limits of the continental shelf*" and that the States were commitment to "*this legal framework and to the orderly settlement of any possible overlapping claims*."
  - In reference to the continental shelf, protection of the marine environment, freedom of navigation, marine research and other uses of the sea, the 5 States made it clear: they saw "*no need to develop a new comprehensive international legal regime to govern the Arctic Ocean*."
  - What "scramble" is taking place in the central Arctic Ocean amongst the bordering States has been to acquire scientific data respecting the geologic composition and other physical properties of the continental margin areas in the Arctic Ocean. Most of the offshore areas with the highest probability for the discovery of hydrocarbons (oil, natural gas) are well within the national jurisdiction of Arctic Ocean littoral States and the areas beyond 200-n miles in the Arctic Ocean Basin are not seen as having a high or even middling probability for recovering hydrocarbon resources.

- **the high seas**
  - *res communis* — not subject to appropriation by any state, but open to use/exploitation by all
  - Freedom of the High Seas (UNCLOS)
    - Freedom of navigation
    - Freedom of overflight
    - Freedom to law submarine cables and pipelines
    - Freedom to construct artificial islands and other installations
    - Freedom of fishing
    - Freedom of scientific research
  - Enjoyment of such rights should not reasonably interfere with the enjoyment of other states.
  - The principal difficulty with asserting such a liberal regime is the maintenance of order on the high seas.
  - Mechanism are required to ensure that the concept of freedom of the high seas does not lead to a state of lawlessness. This is achieved in international law through the imposition of a general state obligation to maintain certain standards of law and order on the high seas and cooperate in forcing respect for such standards by non-state actors.

3. Canada

- See continental shelf (above); McDorman (Vol. II 27-28); Currie 318-324

B. SHIPS, AIRCRAFT AND SPACE OBJECTS

- **Ships on the High Seas**
  - **Nationality:**
    - All vessels on the high seas generally have a "nationality"; however, according to McD, a ship is not obliged, as a matter of IL, to be registered as a ship anywhere.
    - Ships are deemed in IL to have the nationality of the state whose flag they fly or of the state in which they are registered. This allows the state to control the vessel.
    - There is a general requirement, as with nationality more generally, of a genuine link between the state and the ship. However, registration suffices for a genuine link. The genuine link requirement is not entirely consistent with the practice of flag-of-convenience for tax purposes.
  - **Jurisdiction:**
    - The "flag state" bears the responsibility for ensuring that ships sailing under its flag, and persons aboard such vessels, respect the general laws of the sea.
    - For such purposes, the flag state is clothed with criminal and civil jurisdiction over ships flying its flag while on the high seas.
    - Only the flag state may exercise its enforcement jurisdiction over a vessel and person aboard it while on the high seas — particularly rigid rule with respect to warships and non-commercial government vessel, which enjoy absolute immunity from foreign interference while on high seas.
    - "In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them" (*SS Lotus*)
  - **Exclusivity**: In order to prevent jurisdictional conflicts between states, the enforcement jurisdiction of the flag state is generally considered exclusive. Only the flag state has the right to board.
    - **Exception for Merchant Vessels**: However, the general rule of exclusive flag-state jurisdiction is subject to exceptions, particularly where the vessel is suspected of piracy—the vessel or persons aboard it are liable to seizure or arrest by government vessels of any state.
  - **Verification and Boarding**:
    - The government vessels of any state have a right to approach foreign vessels for purposes of verifying their nationality, and may also board them on grounds of suspicion of piracy, slave trading, illicit broadcasting, or statelessness.
    - Within territorial seas (12 NM), states have a IL right to board a vessel.
    - Within EEZ, states have a right to board fishing vessels in breach within this zone.
  - **Hot Pursuit**: the government vessels of a coastal state have a limited right to board, arrest, or seize a foreign vessel on the high seas following continuous "hot pursuit," undertaken within one of the coastal state's coastal zones in respect of a violation of the coastal state's laws.
  - **Stateless Vessels**: essentially without protection from boarding or seizure [McD argues they exist]

- **Aircraft**
  - Nationality of aircraft is governed by the state of registration (*CRAN*; *Chicago Convention*; Brownlie)
    - *Convention for the Regulation of Aerial Navigation* of 1919 (CRAN – now the *Paris Convention*) provides that aircraft must be registered to a state and they possess the nationality of the state in which they are registered. The *Chicago Convention* forbids dual registration. Neither Convention applied in time of war, and the *Chicago Convention* does not apply to state craft—'aircraft used in military, customs and police services'.
  - The *Tokyo Convention on Offences Committed on Board Aircraft* provides that the state of registration has jurisdiction over offences and acts committed on board.
  - Registration is itself a presumptively valid and genuine and connection of some importance for the purposes of 'nationality.'
- **Space Objects**
  - The *Space Treaty of 1967* does not employ the concept of nationality for objects launched into outer space.
  - Article VIII of the Treaty provides in part that the state of registration 'shall retrain jurisdiction and control over such object, and over any personnel thereof, while in our space or on a celestial body'
  - In the *Convention on Registration of Objects Launched into Outer Space*, the launching state shall maintain a register of space objects.
  - Each state of registry has a duty to furnish certain information to the UN Secretary General.

C. OVER INDIVIDUALS (*Prescription and Enforcement of the Criminal Law*)

1. Overview

- Jurisdiction for criminal law purposes: prescription and enforcement.
  - The lawful scope of a state's prescriptive jurisdiction may differ from the permissible extent of its enforcement jurisdiction, depending on the circumstances.
  - The international legal limitations on enforcement are somewhat clear; the international legal limitations (if any) on prescription is less than clear.
- The resulting potential for overlap between the sovereignty of different states, and hence for conflict between competing exercises of state jurisdiction, requires that there be requires delineating the permissible jurisdictional rule of each state.
- CIL provides generally applicable rules governing the allowable bases and extent of state jurisdiction.
  - These rules have been supplemented by either special treaty or customary regimes providing for particular jurisdictional rules that apply in specific locations or legal contexts.
- The customary rules governing jurisdiction do not always provide for absolute and exclusive jurisdictional rights in favour of one state only.
- **Piracy**: "true" piracy at IL (individuals taking over vessels for private gain on the high seas). Canadian Navy is part of an international flotilla of naval vessels trying to secure the sealanes and the safety of commercial vessels. What rights and responsibilities does Canada have vis-à-vis pirates and apprehended pirates?

The Steamship Lotus, 1927 PCIJ	• **Facts**: collision on the high seas; Turkish ship sank, killing 8 nationals; French national arrested and charged with involuntary manslaughter. Tried and convicted.
	• **Issue**: can Turkey criminally prosecute, under Turkish law, a French national for a crime committed on the high seas against Turkish citizens? [*no territoriality; nationality*] **Held**: Yes.
	• Does international law have to expressly provide jurisdiction to Turkey, or merely not preclude it?
	  ○ **Held**: Restrictions cannot be presumed; states have free will, expressed in CIL and treaty.
	• France argued IL does not provide jurisdiction simply by reason of the nationality of the victim, as the offence was committed on the French vessel, which France has exclusive jurisdiction over.
	  ○ **Held**: A state may exercise jurisdiction within its own territory for any act occurring abroad, although it may not exercise its power in the territory of another state — "It leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules."
	  ○ **"The offence produced its effects"** on the Turkish vessel.
	  ○ "What occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the flag State. If a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned; no rule of IL prohibits the State to which the ship on which the effects of the offence have taken place from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent."

- "This conclusion could only be overcome if it were shown that there was a rule of CIL which established the exclusive jurisdiction of the State whose flag was flown; In the Court's opinion the existence of such a rule has not been conclusively proved. ..."
- No special rule in regard to collision cases.
- "It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of **concurrent jurisdiction**."
  - Other Examples of Concurrent Jurisdiction: two Norwegians kill one another on a Norwegian ship in Victoria Harbour (criminal law applies in both Canada and Norway as it is inland); however, if the incident occurred within 12 NM (innocent passage); Canada would likely let them go

- (1) *SS Lotus* adopted a narrow approach to a state's enforcement jurisdiction, but Turkey had conducted itself within it—all enforcement measures occurred in Turkey;
  (2) but adopted a broad and permissive view of prescriptive jurisdiction (effects doctrine).

- The broadly permissive approach to prescriptive jurisdiction in *SS Lotus* case has been subsequently limited:
  1. First, states are under a general obligation not to interfere in one another's domestic affairs, which necessarily implies a general obligation not to seek to regulate foreign domestic activities.
  2. Second, states do not in general assert unlimited prescriptive jurisdiction, but rather confine such assertions to a limited and generally recognized set of jurisdictional principles.
  3. Third, the idea has gradually taken ahold in IL that, before a state may extend its prescriptive jurisdiction to a person or event, it must be some **genuine link** to that person or event.
- Accordingly, as a general matter, states are *prima facie* free to legislate or regulate with respect to persons or events beyond its territory, so long as doing so does not interfere with the jurisdictional rights of states that may have a closer connection to those persons or events.

2. Bases of Prescriptive Jurisdiction

- **Territorial Principle**: the soundest basis of prescriptive jurisdiction is that the subject matter of regulation is within the prescribing state's territory; a natural corollary of the rule that a state has sovereign jurisdiction within its borders.
  - **"Subjective" and "Objective" Territorial Principles** : *largely uncontroversial in IL*
    - **Subjective**: jurisdiction permitted for the state in which the activity **originates**.
    - **Objective**: jurisdiction permitted for the state in which the activity is **completed**.
    - While these principles would seem to provide for jurisdictional overlap, any conflicts generated tend to be resolved by the practical realities of the more restrictive enforcement jurisdiction. The state with enforcement jurisdiction (where the actor is located) will, practically, be in a position to enforce its laws.

  - **The "Effects" Doctrine** : [McD: there is a limitation on extraterritorial legislation] **see extraterritoriality, *below***
    - A variation of the objective territorial principle developed in the American jurisprudence in the 20th century, beginning with the 1945 decision of 2nd Circuit CoA — *Alcoa* — American antitrust legislation could be applied to anticompetitive conduct outside the US
    - It is a controversial doctrine in the international law on prescriptive jurisdiction, and has "proven particularly antagonistic to other states" — as American enforcement measures, designed to ensure compliance with American law, had the effect of modifying or curbing conduct acceptable under the law of the state in which it was occurring.
    - Many states responded with "blocking statutes" — which compelled corporations within their borders to observe local law and ignore any conflicting American law or court order.
    - In the face of this hostile response, American courts began to recognize that "at some point the interests of the US are two week and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."
    - A doctrine of international comity thus developed, requiring consideration of various factors before assuming jurisdiction over extraterritorial acts, including:
      - The degree of conflict with foreign law or policy;
      - The nationality or allegiance of the parties and the principal places of business;
      - The extent to which the enforcement by either state can be expected to achieve compliance;
      - The relative significance of effects on the US as compared to elsewhere;
      - The extent to which there is explicit purpose to harm or affect US commerce;
      - The foreseeability of such effect;
      - The relative important to the violations charged of conduct within the US as compared with conduct abroad.
    - Given the controversy of the effects doctrine, it is unlikely a valid basis in CIL for prescriptive jurisdiction over wholly extraterritorial acts, especially given SCOTUS' failure to endorse the doctrine.

- **The Nationality Principle** — allows Canadian criminal jurisdiction to extend beyond its borders by virtue of nationality (eg. treason, bigamy)
    - A connection of nationality between a state and a person is also generally recognized, in the practice of states, and hence, in CIL, as a valid basis for extending prescriptive jurisdiction.
    - This applies regardless of the location of the person at the time of the relevant activity.
    - States are generally free to determine the basis upon which they confer their nationality on individuals, subject to the general requirement of a "genuine and effective link" between the individual and the state.
        - Birth within the state's territory (*jus soli*)
        - Nationality of one or both the individual's parents (*jus sanguinis*)
        - Corporate entitles — presumption of place of registration
    - The nationality principle is a useful doctrine in cases where:
        - the relevant activity has no clear territorial link to any particular state;
        - the territorial state displays no interest in prosecuting the person or activity;
        - in cases of serious crimes, it is preferable to assert several prescriptive jurisdictional bases rather than risk having the actor escape the reach of the national laws of any state.
- **Other Bases** — the permissible bases of prescriptive jurisdiction are not rigidly confined to either the territorial or nationality principles:
    - **Passive Personality Principle**: acts committed abroad by foreign nationals that have injurious effects on the prescribing state's **nationals**; not widely invoked; met with strong condemnation by states; exceptions, established in multilateral treaties, eg. *hostage-taking*; attacks against internationally protected persons (diplomats); However, invocations base their legality on an underlying treaty regime.
    - **Protective Principle**: acts committed abroad by foreign nationals that have detrimental effect on the **state** purporting to exercise jurisdiction; because it is not confined to direct effects on state nationals, the principle is confined to serious acts that strike at the state's security or territorial integrity, such as espionage, fraudulent passports, counterfeiting. Canada can be hostile to this principle.
    - **The Universal Jurisdiction Principle** (*see below*).

3. Enforcement

- Given that states are territorially-defined, the starting point for their enforcement jurisdiction is naturally territorial. As a corollary, the enforcement jurisdiction of a state is in fact *limited* to its territory absent some special rule of IL or other basis permitting the exercise of such jurisdiction abroad.
- **Obtaining Custody**: once the object of enforcement is in the enforcing state's territory, the international legal jurisdictional barrier to enforcement no longer exists. Enforcement jurisdiction is established.
- **Jurisdiction even if illegally obtained:** applies even if the object's presence in the territory was obtained through illegal means. (However, there may be other consequences in the form of state responsibility.)
- **Extradition**: *each treaty is different and has its own wording, but the basic structure is the same*
    - In criminal matters, where the state in whose territory a suspect is located exercises its territorial enforcement jurisdiction to surrender the suspect to the state wishing to obtain custody (and hence enforcement jurisdiction).
    - MLATs: extend to evidence gathering, etc. But to actually move people you need *extradition.*
    - **Consent**: extradition is purely consensual; there is no obligation to extradite in CIL
    - The existence of the obligation to either extradite or prosecution thus attaches to the consent of the territorial state to the relevant extradition regime, and hence to its sovereignty over enforcement matters within its borders.
    - Applies to breaches of the criminal law of both states; not political times; no death penalty (s. 44 of *EA*); dip. assure.

4. Extraterritoriality — see "the effects doctrine", *above*

- Effects Doctrine: State A enacting laws that may make an activity criminal that takes place in State B even though the activity is legal in State B. This is the most extreme situation of extraterritoriality.
    - The general idea is legislation from State A (even though only really enforceable in State A) may interfere in the internal sovereignty and national independence of State B. This sensitivity was noted in *Hape*.
- Extraterritoriality—making criminal an activity that takes place in another State—has an appeal in many situations.
    - The US sometimes applies its pollution prevention laws to cruise ships (which are never U.S.-flagged vessels) while they are in port for activities that occurred far from US waters (e.g., sewage discharge). Applause perhaps, but was the discharge actually "illegal" under the domestic law of the vessel or where the discharge took place and does it encourage the US to have their law apply "everywhere?."
    - Particularly sensitive as between the United States and Canada since we are at a significant disadvantage when it comes to U.S. "long-arm" legislation effecting and influencing Canadian activities.
- ***Hape***: where an issue involves extraterritoriality, which necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's IL obligations and the principle of the comity of nations.

5. Canadian Cases on Territoriality

State of Romania v Cheng, 1997	• 7 Taiwanese accused of throwing 3 Romanian stowaways overboard outside of Canadian waters. • Can Canada extradite them as "fugitives" pursuant to Romania-Canada BET? • **Held:** No. "in order to be "fugitives" under the *EA*, the Detainees must have committed crimes "within the jurisdiction of a foreign state"; i.e. the geographical boundaries of Romania. Based on expert evidence of IL—detainees not "fugitives" under the *EA;* no jurisdiction to extradite.
***Libman** v The Queen*, SCC 1985 Genuine & Effective link	• Defrauding purchasers of gold mine shares in Costa Rica. • **Issue:** Does Canada have prescriptive jurisdiction? Libman argues crimes were completed in the US or Costa Rica (where fraud money was mailed and received). • Territorial principle in criminal law responds to two practical considerations: **first**, a country has generally little direct concern for the actions of malefactors abroad; **second**, other states may legitimately take offence if a country attempts to regulate matters taking place wholly or substantially within their territories. The courts thus adopted a presumption against the application of laws beyond the realm, a presumption later codified in s. 5(2) of the *Criminal Code*. • Canada has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here. The protection of the public in this country is widely acknowledged to be a legitimate purpose of criminal law, and one moreover that another nation could not easily say offends the dictates of comity. • All that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As put by modern academics, there must be a "**real and substantial link**" between an offence and Canada. o "Just what may constitute a real and substantial link in a particular case, I need not explore. <u>The outer limits of the test may ... well be coterminous with the requirements of international comity</u>." o Must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting ... then consider whether there is anything that offends comity. • "We should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers."
R v Hape, SCC 2007	• Whether *Charter* applies to extraterritorial search and seizure by Canadian police. • **Held:** Since extraterritorial enforcement of the *Charter* is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible. • Where the question of application involves extraterritoriality, and thereby necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's <u>obligations under international law</u> and <u>the principle of the comity of nations</u>. o While extraterritorial jurisdiction—prescriptive, enforcement, adjudicative—exists under IL, it is subject to strict limits based on sovereign equality, non-intervention and the territoriality principle. • **Concurrent Jurisdiction**: Even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question. Where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a **real and substantial link** to the event. • **Extraterritorial Enforcement**: The most contentious claims for jurisdiction are those involving extraterritorial *enforcement* of a state's laws, even where they are being enforced only against the state's own nationals, but in another country. o **Principle of Non-Intervention**: states must refrain from exercising extraterritorial enforcement jurisdiction over matters which another state has, by virtue of territorial sovereignty, the authority to decide freely & autonomously. Any attempt to dictate how those activities are to be performed in a foreign state's territory without that state's consent would infringe the principle of non-intervention. o **Consent Required**: it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under IL. • **Legislative Authority**: Parliament has clear constitutional authority to pass extraterritorial legislation. By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with the principles of non-intervention, but in so doing it would violate IL and offend the comity of nations.

- **Relationship to Prescriptive Jurisdiction:** That a state has exercised extraterritorial prescriptive jurisdiction by enacting legislation in respect of a foreign event is necessary, but not in itself sufficient, to justify the state's exercise of enforcement jurisdiction abroad.
- **Limits of Legislative Authority**: However, in light of the jurisdictional principles of CIL, the prohibition on interference with the sovereignty and domestic affairs of other states, Canadian law can be enforced in another country **only** with the consent of the host state.

- **Exception for Human Rights**: only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its IHR obligations (eg. *Khadr*?).
- **Exception for Consent to Enforcement Jurisdiction**: *Charter* can apply to the activities of Canadian officers in foreign investigations where the host state consents to extraterritorial enforcement jurisdiction. Cases may be rare.
- **Spirit of the Charter**: Cdn police should strive to conduct investigations outside Canada in the letter and spirit of the *Charter*, even when its guarantees don't apply directly.

Argument Against: One possible response to the problem of enforcement outside Canada is that *ex post facto* scrutiny of the investigation by a Canadian court in a Canadian trial that might result in the exclusion of evidence gathered in breach of the *Charter* would not interfere with the sovereignty of the foreign state, since this would merely constitute an exercise of extraterritorial adjudicative jurisdiction. However, while it is true that foreign sovereignty is not engaged by a criminal process in Canada that excludes evidence by scrutinizing the manner in which it was obtained for compliance with the *Charter*, the purpose of the *Charter* is not simply to serve as a basis for an *ex post facto* review of government action. The *Charter*'s primary role is to limit the exercise of government and legislative authority in advance, so that breaches are stopped before they occur. Canadian officers need to know what they are required to do as the investigation unfolds, so as to ensure that the evidence gathered will be admitted at trial. When a trial judge is considering a possible breach of the *Charter* by state actors, the ability of the state actors to comply with their *Charter* obligations must be relevant. The fact that the *Charter* could not be complied with during the investigation because the relevant state action was being carried out in a foreign jurisdiction strongly intimates that the *Charter* does not apply in the circumstances. In any event, if the concern is really about the *ex post facto* review of investigations, that function is performed by ss. 7 and 11(*d*) of the *Charter*, pursuant to which evidence may be excluded to preserve trial fairness. The inquiry under those provisions relates to the court's responsibility to control its own process and is fundamentally different from asking at trial whether the Canadian officer's conduct amounted to the violation of a particular *Charter* right.

- **Summary**: **(1)** determine whether the activity in question falls under s. 32(1) (the *Charter* applies).
  (1)(a) is the conduct at issue that of a Canadian state actor?
  (1)(b) if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor. In most cases, there will be none and the *Charter* will not apply.
  (2) determine whether evidence obtained through the foreign investigation ought to be excluded because its admission would be unfair.

6. Universal / Treaty Based Jurisdiction

- Certain acts, regardless of the location of the offence or the nationality of the offender or victim, may be regarded as providing universal prescriptive jurisdiction by the domestic criminal laws of any state.
  - Any state with enforcement jurisdiction, in virtue of the offender being in their territory, may (but is not necessarily under an obligation) to prosecute the offender under domestic law.
  - Oceans treaty, however, obligates prosecution and extradition upon request.
- Universal jurisdiction has typically been confined to only the most serious acts, "which by their nature are considered to jeopardize the international public order" (*Currie*).
  - The clearest cases to which universal jurisdiction applies as a matter of both treaty and CIL are piracy and war crimes; controversy remains with respect to universal jurisdiction as a matter of CIL include genocide, crimes against humanity, torture, slavery, terrorism, aerial hijacking, international drug trafficking, etc.
  - Determining whether these latter crimes provide universal prescriptive jurisdiction is complicated by the fact that certain bases of jurisdiction are provided to state party to multilateral treaties, such as where offenders of such crimes are present in the territory of a state party.

6. STATE IMMUNITIES

- **State Immunity**: the immunity of a state, and its officials and agents, from the jurisdiction of another state.
- **Diplomatic immunity**: attaches to aspects (eg. persons, property, and premises) of a diplomatic mission, and in the case of diplomatic agents amounts to almost total immunity from jurisdiction – criminal and civil.

A. SOVEREIGN IMMUNITY (OF IMMUNITY FROM SUIT IN THE COURTS OF ANOTHER STATE)

- Sovereign immunity is a long-established and universally recognized doctrine of CIL, providing a procedural bar to a state court exercising its jurisdiction over foreign states.
    - It only applies to domestic courts; it does not apply to international fora.
    - *But see* ICJ: "Jurisdiction does not imply absence of immunity; absence of immunity does not imply jurisdiction."
- **Status in IL: Varies from State to State** *— Absolute & Restricted*
    - In 2004 the UN GA adopted the *UN Convention on Jurisdictional Immunities of States and Their Property*. This Convention has not yet received a sufficient number of State parties to enter into force. The Convention was the product of the UN ILC and can be expected to influence State practice respecting sovereign immunity. The Convention adopts a restricted sovereignty approach. Canada has not signed or ratified this Convention.
    - Thus, state immunity is not governed by a treaty of universal application, and so the extent varies from state to state.
    - In most western States, the immunity available from a national court action that was once absolute has become a more restricted (though still robust) immunity. However, many States still adhere to the concept of absolute immunity such that foreign States are never subject to suit or criminal action from a local court.
    - Canada's practice may or may not be consistent with prevailing IL views respecting sovereign immunity.
- **Justifications** *— why does sovereign immunity exist?*
    - **(1)** state immunity flows as a necessary corollary of the principle of the sovereign equality of states **— (1)** states would cease to be equal, and **(2)** cease to be sovereign **—** if a state was not immune in the courts of another.
    - **(3)** the sum of these principles (equality + sovereignty/independence) = **dignity**; immunity respects dignity.
    - **(4)** the immunity fosters friendly relations between states; a failure to respect sovereign immunity may imperil bilateral relations; affects reciprocity as well. [*political and operational reality*]

SIA	*Hand-out; Complete code; tracks Convention; exceptions for waiver, commercial, tort, terrorism.*

- ***Ratione Personae and Ratione Materiae***
    - ***Personae*:** attaches <u>personal immunity</u> to the persons of key representatives of a foreign state (head of state; foreign minister; perhaps other senior members); **only** while they hold office; <u>policy</u>: ensures key actors are unimpeded.
    - ***Materiae*:** attaches to <u>official acts</u> of the foreign state; if an act/transaction is official, immunity attaches in respect of that act/transaction; applies even if carried out by a low-ranking representative or *ad hoc* agent.

- **Absolute vs. Restrictive State Immunity**
    - ***Absolute*:** clearly prevailed in CIL until well into the 20th century; as long as the party to the transaction is a foreign state, immunity applies, even if the act is commercial.
        - **Problems:** (1) places foreign governments at an unfair economic advantage as they can escape enforcement of Ks with relative impunity; (2) introduces uncertainty into the marketplace and undermines rule of law necessary for stable economic relations; (3) makes commercial actors unwilling to deal with gov'ts.
    - ***Restrictive***: acts of a commercial or "private character" (*jure gestionis*) no longer attract *ratione materiae* immunity, but acts essentially sovereign or governmental (*jus imperii*) continue to be immune.
        - **Problems:** (1) reluctance of states to relinquish immunity they previously enjoyed at CIL; (2) the effects of the restrictive approach are not felt evenly, such as by centralized economies and many developing states; (3) difficult to define 'private'
    - <u>It can cautiously be stated that the restrictive theory, at least as a concept, has emerged as the new CIL</u>.

- **Gross Violations of Human Rights and Humanitarian Law**
    - **Pursued Because**: (1) jurisdiction of int. crim tribunals is limited in various ways**;** (2) int. crim tribunals focus on individuals rather than states or civil remedies for victims; (3) restrictive theory of immunity has not collapsed international relations, so human rights exception might not as well.
    - **Success**: extremely limited; suggests a restriction to state immunity for such acts has not yet become CIL.
    - Such exceptions have <u>not</u> been codified into the Convention, indicating that such exceptions were not CIL at the time.
    - ***Distinguish Pinochet*:** exception to state immunity because Chile had ratified CAT – thus treaty & criminal (waiver?)
    - ***Germany v Italy* (2012):** court upheld state immunity for tort claims brought by an Italian citizen in an Italian court against the German government for forced labour as a breach of human rights. Court rejected argument that a serious human rights violation, even if a substantive breach of *jus cogens*, displaced state immunity as a procedural right; while Germany might still owe Italy reparations diplomatically, this does eliminate its immunity in Italian domestic courts.

- **General Principles of State Immunity**
  - **Basic Presumption of and Duty to Respect Immunity:** Art 5: states enjoy immunity from the jurisdiction of the courts of other states; Art 6: states have a duty to respect state immunity and to take necessary steps to ensure their domestic courts do so as well.
  - **Exceptions Based on Consent: Express or Implied Waiver:**
    - Art 7: express waiver may include a treaty declaration, private law K, or directly before the foreign court.
    - Implied waiver includes the foreign state invoking its right to sue or intervening other than to assert immunity.
  - **Subject-Matter Exceptions:**
    - (1) **commercial transactions**
      - Applies (unless both parties are states, in which case the dispute should be resolved on a state-to-state basis in an international forum);
      - **Test for Commercial**: consider the "nature of the transaction" (restrictive) *or* consider the "purpose of the state's involvement in the transaction" (more state-friendly)
      - "The court must consider the whole context" and decide whether the acts or transactions be "considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the state has chosen to engage" or whether the acts are "within the sphere of governmental or sovereign activity" (Lord Wilberforce, H of L, *I Congreso del Partido*)
      - The test for whether an activity is commercial remains controversial.
      - The ILC, in the JI Convention, defines commercial transactions at Currie 387-88
    - (2) **employment contracts**, unless employee's function includes the exercise of governmental authority or the proceeding relates to recruitment, renewal, or reinstatement.
    - (3) **personal injury or property damage** occurring wholly or in part in the forum state.
    - (4) state participating in **corporate** or other collective body (**partnership**)
  - **Defining the "State"**: Currie 388; includes political subdivisions "to the extent they are entitled to perform and are actually performing acts in the sovereign authority of the State"; see also *Trendex*
  - **Immunity from Execution**: Currie 389; waiver from execution is stronger.
- **Canada's State Immunity Act**
  - **Background**: restrictive immunity approach; implements CIL (does it freeze CIL in time? See Currie 393)
  - **General Framework**: defines state broadly, including any sovereign, head of state, political subunit, govt, dept, agency
    - "Agency of a foreign state" means any legal entity that is an organ of the state but separate from it
    - **Test for Organ**: the (i) amount of control over the org; (ii) whether it can sue or be sued in its own name; (3) whether it is a separate legal (corporate) entity (Currie 394 – *Ferguson v Arctic Transport* SCC)
  - **Restrictions on State Immunity** — states enjoy general immunity from the jurisdiction of Canadian courts from virtually all forms of attachment, execution, or enforcement juris, except:
    - **Waiver:** s. 4: waiver must be "clear in the fact of the court"
      - *Scweiber*: extradition request does not amount to a waiver, as the request goes to the executive not the court; the DOJ goes to court on behalf of the German gov't
    - **Commercial Activity:** *Re Canada Labour Code*
    - **Death, Injury, and Property Damage:** emotional damage does not suffice (*Schweiber*); dip may still apply.
    - **Maritime Matters**
    - **Property in Canada:** no immunity for property interest in Canada by way of succession/gift
  - **Additional Immunities from Attachment or Execution**: immunities of enforcement are more absolute than restricted
    - Injunctions, Specific Performance, Recovery of Land or Property, Attachment and Execution
  - **Other Procedural Provisions:** Service of Original Documents; Default Judgement

Trendtex *v Central Bank of* ***Nigeria***, 1977	• Central Bank of Nigeria claims they can't be sued in England on a letter of credit because of sovereign immunity. Trendtex argues this is an ordinary commercial transaction and SI doesn't apply. • **Held:** No immunity — a straightforward commercial transaction; letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. • **Alter ego**: A foreign department of state ought not to lose its immunity simply because it conducts, some of-its activities by means of a separate legal entity. However, if a government department goes into the market places of the world and buys boots, or cement — as a commercial transaction — that government department should be subject to all the rules of the market place. • The seller is not concerned with the purpose to which the purchaser intends to put the goods. • I can think of no satisfactory test except that of looking to the **functions and control of the organization**; whether the org was under gov't control and exercised governmental functions.

McD'S TEST	• **(1)** Alter-ego: Is this entity in front of you subject to sovereign immunity? (*Trendtex*) • **(2)** Once it has been established the entity is subject to sovereign immunity... (a) The starting point is absolute immunity — give theoretical justifications. (b) Consider any evidence of waiver. (c) Consider exceptions, interpreted narrowly, which act must fall squarely within.
Re Canada Labour Code, [1992] 2 SCR 50	• Canadian staff working on US military base sought certification with the Labour Relations Board; US claimed state immunity from the application for certification. • **Held** (LaForest, maj): upheld immunity; while commercial, the activity could not be divorced from its purpose and context. While a bare employment K is for the most part commercial and enforceable in Canadian courts, employment can have sovereign aspects of well. Collective bargaining goes "at the heart of the base operations and as such is sovereign in nature." A right to strike would threaten the military mission of the base & intrude into base affairs. o "It is regrettable that sovereign immunity deprives employees of their right to the protection of labour relations laws in this case. However, this result is a necessary consequence of Canada's commitment to policies of international comity and reciprocity." • To fall under the commercial activity exception, the entire context must be considered. • Dissent (Cory, Sopinka): "A Canadian worker, working on Canadian soil, should not be deprived of the benefits of Canadian law unless the foreign state is acting in a context which warrants immunity."
Bouzari *v Iran*, ONCA 2004 McD says they got the law right in this case.	• **Issue:** Whether Bouzari can sue Iran in Canada for damages from torture that took place in Iran, before Bouzari became a Canadian citizen. Bouzari had a minimal connection to Canada, unlike Kazemi, and Iran did not appear in this case. o Tort exception**:** *SIA* requires the physical breach of personal integrity take place in Canada. o Commercial activity exception**:** does not apply • ***SIA* is a Code:** the plain and ordinary meaning of s. 3 of the *SIA* suggests that the statute codifies the law of sovereign immunity. Unless prescribed exceptions clearly apply, sovereign immunity applies. • **Exceptions Beyond *SIA***: Bouzari argues *SIA* must be read in conformity with Canada's IL obligations. By both treaty and by peremptory norms of CIL, Canada is bound to permit a civil remedy against a foreign state for torture committed abroad; Canada's IL obligations thus require that the *SIA* be interpreted to provide an exception to state immunity for such a claim. o Where Canada has undertaken treaty obligations, it is bound by them as a matter of IL. Parliament is then presumed to legislate consistently with them. So far as possible, courts should interpret domestic legislation consistently with these treaty obligations. o Canada's obligations under CIL are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with them. This is even more so where the obligation is a peremptory norm of CIL. o Whether Canada's obligations arise pursuant to treaty or to CIL, it is open to Canada to legislate contrary to them. Such legislation would determine Canada's domestic law although it would put Canada in breach of its international obligations. • **Canada's treaty obligations** o Art 14: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation." o CAT simply requires Canada to provide a civil remedy for torture committed within its jurisdiction. o No state interprets Art 14 to require it to take civil jurisdiction over a foreign state for acts committed abroad. On ratifying the Convention, the US issued an interpretive declaration indicating it understood Art 14 to require a state to provide a private right of action for damages only for acts of torture committed within the jurisdiction of that state. • **CIL** o A peremptory norm of CIL (rule *of jus cogens*) is a higher form of CIL accepted by the international community of states as a norm from which no derogation is permitted. Not only does the rule *of jus cogens* override other rules of CIL in conflict with it, but, by VCLOT, a treaty obligation which conflicts with a rule *of jus cogens* is of no force or effect in IL. o Prohibition of torture is a rule of *jus cogens*. The question is the scope of that norm. Does it extend to a requirement to provide the right to a civil remedy for torture committed abroad by a foreign state?

	○ *Distinguished* Pinochet on the basis it denied state immunity in criminal rather than civil proceedings. ○ The appellant argues that the prohibition against torture constitutes a right to be free from torture and where there is a right there must be a remedy. ▪ First, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition. The criminal prosecution of individual torturers who commit their acts abroad (expressly sanctioned by the *CAT*) gives some effect to the prohibition without damaging the principle of state sovereignty. ▪ Second, as a matter of practice, states do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant. • Just as Canada's treaty obligations do not do so, the rules of CIL binding Canada do not accord the civil remedy. Both under CIL and treaty there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction. It would be inconsistent with this balance to provide a civil remedy against a foreign state for torture committed abroad. • In the future, perhaps as the international human rights movement gathers greater force, this balance may change, either through the domestic legislation of states or by international treaty. However, this is not a change to be effected by a domestic court adding an exception to the SIA that is not there, or seeing a widespread state practice that does not exist today.
Justice for Victims of Terrorism Act	• *Would the Bouzari Case have been decided differently under the amended legislation*? • Immunity does apply for damages connected to terrorism, if that states is designated to support it.
***Jones** v Saudi Arabia*, H of L, 2006	• **Issues: (1)** Whether the English court has jurisdiction to entertain Mr Jones's claim based on torture against audi Arabia; **(2)** whether it has jurisdiction against the individual perpetrators. • *Pinochet (No 1)* and *Pinochet (No 3)* held that acts of torture could not be functions of a head of state or governmental or official acts. ○ But the case was categorically different from the present, as it concerned criminal proceedings falling squarely within the universal criminal jurisdiction mandated by CAT; did not fall within UK 1978 SI Act. ○ The essential ratio of *Pinochet* was that IL could not without absurdity require criminal jurisdiction to be assumed and exercised where the CAT conditions were satisfied and, at the same time, require immunity to be granted to those properly charged. ○ CAT was the mainspring of the decision, and certain members of the House expressly accepted that the grant of immunity in civil proceedings was unaffected. **1. A breach of a *jus cogens* norm of international law does not suffice to confer jurisdiction**: "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement." **2.** Art 14 of the CAT does not provide for universal civil jurisdiction. **3.** The UN Immunity Convention of 2004 provides no exception from immunity where civil claims are made based on acts of torture. **4.** There is no evidence that states have recognised or given effect to an IL obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of IL, nor is there any consensus of judicial and learned opinion that they should. This is significant, since these are sources of IL. But this lack of evidence is not neutral: since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.
Kazemi	• Kazemi was a dual citizen traveling with an Iranian passport, which distinguishes this case from Bouzari; her estate and her son sought damages for pain and suffering, resulting from the torture, sexual assault, and death of Kazemi. No treaty or customary dispute process to resolve this claim. • Does Kazemi have a civil remedy avaible in Quebec? • Case must ultimately turn on the *Charter* — does barring her claim violate s. 7 of the *Charter*? • Contrast with "reciprocity" — what goes around, comes around.

B. DIPLOMATIC IMMUNITY — *USUALLY TRUMPS STATE*

- Broadly speaking, diplomatic immunity attaches to the diplomatic core operating in a foreign state.
- The law of diplomatic immunities is a well settled, mandatory, and largely uncontroversial area of CIL.
- The CIL on diplomatic immunities has been further clarified through a number of multilateral treaties, the most important of which is the 1969 *Vienna Convention on Diplomatic Relations*.
    - VCDR has been almost universally ratified and is thus generally regarded as authoritative.
    - Canada has ratified the Convention and implemented it in part in the *Foreign Missions & IO Act.*
    - VCDR addresses the rights and obligations of states with respect to the exchange of diplomatic personnel, including ambassadors, high commissioners, and other diplomatic representatives, as well as the establishment of diplomatic missions (embassies or high commissions) abroad.
    - Other Conventions cover consular relations, the privileges and immunities of the UN, privileges and immunities relating to other IOs, and the privileges and immunities of special missions.
- The basic rationale for diplomatic immunity is the same as for state immunity, although the **potency** of the two types of immunity is markedly different.
    - **Most Important Rationale**: permits diplomatic representatives of foreign states to devote themselves fully to their roles without interference or fear of constraint by a host state
    - Preamble of VCDR: "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states."
- **Consent** to a foreign diplomatic presence in one's territory necessarily entails consent to the protections afforded by CIL and VCDR as a corollary to that presence. Consent thus reconciles sovereignty with diplomatic immunity.
- Diplomatic immunity attaches to, e.g., individual diplomats; however, the *right* to invoke diplomatic immunity belongs the state. Canada *may* not choose to invoke it to protect diplomats in case of serious crimes.

- **General**
    - Foreign diplomatic personnel, premises and property are immune from the jurisdiction of the host state.
    - The scope of diplomatic immunities is thus much broader than state immunity, which is primarily confined to immunity from local judicial and enforcement processes.
    - Diplomatic immunities are also more potent—they are not subject to the many exceptions of state immunity.
    - To the extent that diplomatic personnel perform acts to which *ratione materiae* state immunity applies, there is overlap between dip immunity and state immunity; however, diplomatic personnel enjoy greater personal immunities, and diplomatic property is subject to even greater protections, than those provided by state immunity alone.
- **Inviolability**
    - While not defined in VCDR, the term "inviolability" implies immunity from any form of interference, arrest, or detention whatsoever, as well as a duty of protection by the host state.
    - The premises of the diplomatic mission, its documents, and communications are inviolable.
    - The host state thus cannot enter the premises, its communication, or means of transport in any way without consent, even if diplomatic relations are severed or in the outbreak of armed conflict between the two states.
    - The host state owes a special duty of protection to the missions premises, obliging it to take all appropriate steps to protect the premises of the mission and the private residence of a diplomatic agent. The obligation thus extends beyond non-interference to a positive requirement of due diligence, even with respect to the independent action of private third parties against the mission premises.
    - The persons of diplomatic agents and their families are inviolable — the principles of non-interference and due diligence of protection similarly apply.
    - Immunity can also attach to administrative & technical staff and their families.
    - Therefore, the host state is legally powerless to exercise any form of constraint against these persons, even if they are suspected of criminal or other illegal activity.
        - However, the sending state and its diplomatic personnel are under a duty to respect the laws of the receiving state & to limit their activities to legitimate diplomatic purposes; must not interfere with internal affairs.
        - If diplomat fails to honour these duties, host state is not without recourse; but inviolability remains in effect.
        - The host state may revoke the offending individual's diplomatic status and require the sending state to recall the individual or terminate his functions with the mission—thereby declaring the offending diplomatic envoy *persona non grata.*
        - If the individual is not recalled or relieved of duty within a **reasonable** period, the host state will cease to recognize the individual's diplomatic status and hence his or her inviolability. Jurisdiction can then be asserted, unless the individual remains within the premises — as inviolability continues to apply there.
        - The host state may also bring an international claim against the sending state.

- **Immunities form Local Jurisdiction**
  - Diplomatic agents are immune from all local criminal proceedings.
  - Diplomatic agents are immune from all local civil and administrative jurisdiction except in respect of actions relating to privately held real property, estates actions involving the diplomatic agent personally, and actions relating to private, professional, or commercial activities of the diplomatic agent performed in the host state.
  - Immunities premised on the assumption that the sending state retains criminal & civil jurisdiction over the dipl. agent.
  - In the event that a diplomatic agent commits a criminal act while in the host state, the assumption is that the sending state will prosecute the offence in its own courts.
  - These immunities exempt diplomatic agents from local legal proceedings, but not local law itself. Agents thus have a duty to respect local law even if they are immune from local proceedings seeking to enforce it.
  - **Waiver**: the sending state may waive immunity from local jurisdiction, and can apply local jurisdiction to the diplomatic agent. Unlike state immunity, waiver must generally be express, except insofar as the diplomatic agent initiates his or her own proceedings in the host court. In such a case, immunity is deemed waived in respect of counterclaims directly connected to the principal claim.
- **Limited Immunities from Local Laws**
  - Sending states are immune from the application of certain host state laws, mostly fiscal in nature; must still pay utilities.
  - Immune from property or other taxes relating to the mission premises and taxes for fees collected by the mission.
  - Diplomatic agents are immune from income taxation and social security levies, other than indirect taxes such as GST and taxes levied on privately held property or investments other than for mission purposes.
  - Exempt from all forms of service, including military.

T. Franck, *The Power of Legitimacy Among Nations*	• "Almost all" states "almost always" act in accordance with the universal rules of diplomatic immunity • While the rules sometimes seem to work an injustice, in general it operates to make diplomacy possible. • If the rule were violated once, it would weaken the rule's future utility, lessening the power of its compliance pull. • Obeying the rule to one's short-term disadvantage can help ensure its future availability to protect state diplomats and their families abroad. • The argument for deferring interest gratification only makes sense if there is a fairly clear understanding of what the rule covers — expectations of reciprocity are important — there must be some mutual understanding of its content. • If a norm is full of loopholes, there is little incentive voluntarily to impose on oneself compliant standards of conduct which one knows other can evade because of the rule's elasticity.
Vienna Convention on Diplomatic Relations	**a)** diplomats are exchanged by agreement (VCDR Article 2); **b)** expulsion of diplomats (VCDR Article 9); **c)** inviolability of the foreign mission (VCDR Article 22) – 1979 ICJ Iran Hostages Case (US v Iran) **d)** communications including the diplomatic bag (VCDR Article 27); **e)** immunities of diplomatic agents (VCDR Articles 29, 31, 32, 34, 39, 41 and 44); **f)** inviolability of residence of diplomatic agent (VCDR Article 29).
Shaw, *International Law*	• **Fire**: any justification pleaded by virtue of implied consent would be regarded as at best highly controversial. • **Positive duty**: SCOTUS upheld a statute which made it unlawful to congregate within 500 feet of diplomatic premises and refuse to disperse after having been so ordered by the police, finding that "the prohibited quantum of disturbance" is whether normal embassy activities have been or are about to be disrupted. • **Iran Hostages**: Iran violated its treaty obligations under the Diplomatic Immunity Convention (1963) and also its general IL obligations towards US in failing to protect the embassy, staffs, archives, their means of communication, and free movement. • **Congo** v **Uganda**: obligation to protect extends to armed militia groups. • Bombing of Chinese Embassy by US in 1999 in Belgrade and subsequent rioting in China, damaging US embassy. Both parties reached diplomatic solution through compensation.
McD	• Canada won't invoke diplomatic immunity for a serious crime.