

# Public international law assignment

Law



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international conventions, whether general or particular, establishing rules expressly recognized by the contesting states. ii. art. 38. b. international custom, as evidence of a general practice accepted as law. iii. art. 38. c. the general principles of law recognized by civilized nations. iv. art. 38. d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. b. Customary Int.

Law i. Evidence of a general practice accepted as law ii. Elements of custom: general practice and acceptance (or opinion juris ??? belief that a practice is required by law) 1. generality: 1. number of states that agree 2. duration: i. provided the consistency and generality of a practice, no particular duration is required. 3. uniformity, consistency of state practice: i. most actions of states constitute state practice ii. must be consistent practice across all states to generate rule iii.

North Sea Continental Shelf Cases: 1. Party that relies on custom must provide that it exists such it has become binding on the other party that it is uniform. a. ct. therefore refuses to accept 10-mile rule. iv. Nicaragua v United States 1. ICJ relaxed the rule of the North Sea Continental Shelf cases: practice need not be in absolute conformity with the rule 2. Practice of specially affected states is significant (regional practice). v. Regional practice: 1. Rights of passage over Indian Territory 2.

Long held practice between 2 states 3. Asylum case (Colombia v Peru): limitations on the doctrine. a. inconsistency in the succession of conventions on asylum, accepted by some, rejected by others b. unable to identify

uniformity of diplomatic asylum. 2. *Opinio Juris et necessitatis* 1. Circular rule  
 ??? need to believe practice is required by law so it can become law 2. North  
 Sea Continental Shelf cases: actors must be pursuant to a belief that the  
 practice is obligatory' i.

For a new customary rule to be formed, not only must the acts concerned ' amount to a settled practice' but they must be accompanied by the opinion  
*juris sive necessitatis*. 3. Distinction between legal obligation and moral  
 duty/tradition 4. Locating *Opinio Juris* i. Statements by states / literature 1.  
 Louts Case: a. Litt/ may only show that states abstained from instituting  
 criminal proceedings, and not that they recognized themselves as being  
 obliged to do so. b. If Litt/ indicates that there is a duty to abstain, can *opinio*  
*juris* be identified. i. Frontier Dispute case (Burkina Faso v Mali) iii. GA voting  
 pattern iii. Persistent Objector 1. in the state of formation of customary  
 international law, a state may contract out of the custom. 2. Northern  
 Fisheries: 1. Norway had consistently and unequivocally manifested a refusal  
 to accept certain rules. 3. " tacit consent" ??? if found silent, that state is  
 excluded. iv. Subsequent objector 1. is a state that dissents from a  
 customary rule after it has been formed. Objection must be clear and there is  
 likely a rebuttable presumption against it. 2. f a new custom is to form, a  
 substantial number of states is needed. c. General Principles of Law i.  
 Temple of Preah Vihear (Cambodia v Thailand) ii. General principles of law  
 recognized by civilized nations iii. What is civilized nation? iv. States =  
 Nations? No v. Example: equity. vi. In the practice of tribunals 1. arbitral  
 tribunals Brownlie 17 2. international court of justice and its predecessor  
 Brownlie 17 d. Judicial Decisions: i. ICJ Art. 59: decisions of ICJ do not have

effect other than as between the states involved in the case 1. Rationale is state consent . ICJ follows own decisions 3. Unofficial doctrine of precedent.

ii. International Tribunals: 1. ECJ, European Court of Human Rights, WTO DSB, UN HR committee, National Courts. iii. Decisions of international tribunals Brownlie 19 – 23 1. not strictly a formal source ??? authoritative evidence of the state of law. 2. art. 38(1)(d): ‘ subsidiary means’ not to be exaggerated e. Publicists i. International law academic community ii. Gives prominence to academic scholars iii. Used by ICJ regularly iv. International Law Commission comprises elected lawyers from many nations. . Resolutions of International Organizations i. Not in ICJ Art. 38 ii. GA, SC, ECOSOC, WB, WTO, iii. Regional: EU, OAS iv. Powers derived from constituent treaties v. GA Resolutions: 1. Texaco Overseas Petroleum v Libya 2. significant but not binding 3. Nicaragua case: evidence of opinion juris. g. Unilateral Acts: i. Nuclear Test case (Australia v France; 1974) 1. Advisory Opinion on nuclear weapons have “ normative value” h. Soft Law i. Kyoto: non-legally binding obligation to develop a legally binding one. 3. The Law of Treaties a. Vienna Convention on the Law of Treaties 1969 b.

Vienna Convention on the Succession of States in Respect of Treaties, 1978 c. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986 d. Purpose i. Creation of international organisations ii. Law making treaties (such as the Vienna Convention on the law of Treaties) iii. Human Rights Protection iv. Environment regulation v. International trading agreements (contracts) e. What is a treaty? i. Agreement between states ii. Article 2 1. Contractual agreement ??? not law but can be law making 1.

VC. art. 2: “ treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” iii. Article 3: Other International Subjects 1. regarding agreements with other subjects of international law: 1. Art. 3. a: the legal force of the agreement is not affected. 2. Art. 3. b: the application of agreements in or outside of the convention is not affected 3. Art. 3. : does not affect agreements to which other international subjects are parties. iv. Both oral and written v. Intention to be legally bound: 1. Article 2. a: “ governed by international law” 2. Article 24: entry into force: 3. Article 26: pacta sunt servanda: “ every treaty in force is binding upon the parties to it and must be performed by them in good faith” vi. Unilateral declarations 1. can be binding in appropriate cases 2. similarities with estoppels. 3. Nuclear Test case (Australia v France; 1974) 4. Eastern Greenland Case f. Conclusion of Treaties . Processes: 1. Article 12: signature 1. where the signature is subject to ratification, acceptance, or approval, signature does not establish consent to be bound. 2. where the treaty is not subject to reatification, acceptance, or approval, signature creates the same obligation of good faith and establishes consent to be bound. 3. only authorized individuals who can bind the state to a treaty: ambassador, prime minister etc.. 4. unauthorized signatures have not effect (art. 7-8) 2. Article 13: instrument exchange 1. expression of consent to be bound. 3. Article 14: ratification . ratification is the act involving consent to be bound. 2. pre-ratification = opportunity to introduce treaty into legislation ??? some require parliamentary scrutiny, others do not. 4. Article 15: accession, acceptance, and approval. 1. occurs when a state which did not sign a treaty already signed by other states,

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formally accepts its provision. 2. may occur or before a treaty has entered into force. 3. after treaty comes into force, an outside state can accede to the already active treaty. ii. Entry into force, deposit, and registration 1. Article 24: date of entry into force . upon date provided 2. where provision lacks, when all parties agree to be bound 3. if consent of a State is established after the treaty has come into force, the treaty has only come into force on that date for the party. 4. all contained apply from the time of the adoption of the text. 2. UN Charter Art. 102 ??? recognition by UN 1. Treaties btw. Members of the UN register with Secretariat and have published 2. unless comply to Art 102. 1, cannot invoke treaty before the UN or organs. iii. Non-retroactive: 1.

Article 28: unless provided for in treaty provisions, the provisions apply forward from the date of entry into force. g. Articles 19-23: Reservations i. Used to maximize participation of states in multilateral treaties. ii. Made when signing or ratifying treaty. iii. Article 19: may make reservations unless 1) prohibited 2) specified reservations 3) reservations are incompatible. iv. Article 20: accepting reservations. v. Article 21: if 3rd state does not oppose reservation, the reservation is valid and the provision does not apply. vi. Article 22: withdrawing reservations. vii.

Belilos case viii. Genocide Convention Case (1951). h. Revision of Treaties: i. Articles 29 & 40 1. problem of modifications to multilateral treaties that are not universally accepted. ii. Article 41: treaty may be modified when some parties conclude an ‘inter se agreement’ altering the application of the treaty between themselves alone. iii. Concept of state consent is fundamental. i. Observance and Application of Treaties i. Interpretation 1.

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Article 31: 1. the primary rule: ordinary meaning in good faith in context and in light of object and purpose of the treaty. 2. Article 32: 1. refers to the ability to use preparatory work of the treaty and the circumstances of its conclusion. 2. Subsidiary means only if: i. the meaning of the treaty remains obscure and ambiguous ii. The resulting interpretation is manifestly absurd or unreasonable. ii. Performance of Treaties: 1. Article 26: pacta sunt servanda 1. interpret treaties in “ good faith” 2. no advantageous treaty interpretation 3. 3 schools: i. Intentions of parties ??? presumed intentions of the founding fathers ii.

Textual ??? ordinary meaning iii. Teleological ??? purpose of the treaty 2. Article 27: relation with internal law 1. may not invoke the provisions of its internal law as justification for its failure to perform a treaty 2. Article 46: exception i. unless that violation was manifest and concerned a rule of its internal law of fundamental importance. Termination of Treaties by circumstance 3. Article 53: Fundamental Change of Circumstance: 1. Cannot invoke circumstance as grounds for terminating unless 2.

Essential basis of the consent of the parties (earlier) 3. the circumstance changes the obligations to be performed. 4. Cannot use circumstance to terminate or withdraw if: i. treaty = boundary. ii. another party breaches. 5. if use circumstance, may invoke the change as a ground for suspending the operation of the treaty. 6. another party 7. Article 64: if a new peremptory norm of general international law emerges, any treaty, which is in conflict, becomes void and terminates. j. Article 46-53: Invalidity of Treaties: i.



Article 46: Cannot rely on international law to deny capacity of compliance unless concerned a fundamental law (observed by others). ii. Article 48: invalidate treaty if error found which if it was found earlier would affect the consent. iii. Article 49: fraud. iv. Article 50: corruption. v. Article 51: coercion. vi. Article 52: allows invalidity when threat or force. vii. Article 53: *Ius Cogens*

1. Void if at time of its conclusion, it conflicted with a peremptory norm of general international law.
2. No derogation from the norm is permitted.
1. prohibition against aggression, *pacta sunt servanda* etc.. .

Termination or Suspension of Treaties i. Articles 59-60: Breach of treaties

1. Article 59: replacing old treaty with a new
2. Article 60. 1: material breach of bilateral.
3. Article 60. 2: material breach of multilateral.

ii. Intrinsic: Article 54: intrinsic mechanisms.

1. if all agree.... terminate
2. if some want to terminate, the treaty doesn't terminate, parties can only withdraw unless provisions state otherwise.
3. request reasonable notice.
4. unanimous agreement > treaty clause.

iii. Extrinsic: Article 62: Termination of Treaties by circumstance

- 1.

Cannot invoke circumstance as grounds for terminating unless

1. Essential basis of the consent of the parties (earlier)
2. the circumstance changes the obligations to be performed.

2. Cannot use circumstance if:

1. treaty = boundary.
2. another party breaches.

I. Capacity to Conclude Treaties

- i. Art. 6: governed by the constituent rules of the organization
- ii. full powers doctrine
- iii. cannot invoke internal law to justify a failure to perform
- m. Third States

- i. Art. 34: treaty does not create obligations for a third State without its consent
- ii.

Art. 35: obligations for third states or third organization only if expressly accepted in writing iii. Art. 36: rights apply for third states or third organizations if assented to; assent is presumed if the contrary is not indicated. n. International Institutions 1. Enormous variety in size and function 2. Constitutional organizations. 3. Functional organizations (e. g. IMF, WB etc.. ) 4. Regional (council of Europe, ASEAN, etc.. ) i. Personality; 1. implied and inherent power 2. Reparations Case: 1. count Bernadoti killed 2. UN seek ICJ advice: . “ has personality if capable of possessing rights and duties and can bring an international claim” 3. Constitutional limitations within constituent treaty or resolution 4. power to enter into treaties 5. power to represent employees. ii. VC: 1. treaties between states and an international organization or between international organizations. 2. not applicable to treaties where a non-state/non-organization is a party. 3. applicable only to treaties in writing 4. such treaties still of legal effect outside the Vienna Convention. iii. Privileges: 1. equired for effective performance 2. Boundaries of doctrine are unclear 3. look to constituent document 4. necessarily implied 5. immunities for delegates? 4. The Relationship btw. Public International and Domestic Law a. Theoretical concepts i. Problem of enforcement. ii. Compatibility of international and domestic iii. Violation in a monist state ??? court hearing iv. Violation in dualist state ??? no court hearing v. International level: public international > domestic vi. Domestic level: domestic > public international vii. Alabama Claims Arbitration 1.

Tribunal rejected the British argument that because its constitutional law was not such as to provide it with the power to interfere with the private

construction and sailing of the ships concerned, Great Britain had not violated its obligations as a neutral in the United State Civil War by allowing the construction and sailing to occur. b. Australian Position: i. Conclusion of treaties by the executive: ministers/prime. ii. International Tin Council Case (1989) iii. Bradley v Commonwealth (1973) ??? decisions by international organs are not binding without the cooperation of the internal legal system. iv.

Teoh v Australia (1995) ??? legitimate expectation v. Polites v Commonwealth (1945). – conscription 5. International Personality: a. States are the fundamental b. Entities that can participate in the development of international law and hold rights and duties i. Reparations Case: 1. count Bernadoti killed 2. UN seek ICJ advice: 1. “ has personality if capable of possessing rights and duties and can bring an international claim” c. 3-part test: i. What status do the rules of international law allow to a type of entity? ii. What do the rules of international law allow that entity to do? iii.

What recognition do other participants in the international system allow to the entity? d. States: i. ICJ Statute, Article 34 1. only states appear before the court ii. Montevideo Convention on the Rights and duties of States: 1. Article 1: 1. State has 1) permanent population 2) defined territory 3) government and 4) relations with other states. 2. Manchuko (1931) 1. 1931 JAP invade Manchuria, 1932 recognized as a new state. 2. JAP dominating Chinese in Manchuko therefore not recognized as a true state. 3. Kuwait v Iraq ??? government of Kuwait was exile. 4. Dissolution of the USSR 5. Eastern Greenland Case: 1.

Norway told Danish Minister that the Norwegian Government would not make any difficulty in the settlement of the question of Danish sovereignty over Greenland.

e. International Institutions:

- i. Recognized as international personality but with different rights and obligations
- ii. Individuals are subject to international law (criminal ) and can fall into the definition of personality as per the ICJ
- iii. Reparations Case 1. count Bernadoti killed 2. UN seek ICJ advice: 1. “ has personality if capable of possessing rights and duties and can bring an international claim”
- iv. Arab Monetary Fund v Hashim (1990) . Focus on powers contained in constituent instrument. 1. defined limitations by constitutive treaties. 2. created by treaties and are empowered by those treaties
- vi. corporations and individuals 1. corp: have some scope for being considered international personalities 1. rights/obligations 2. can maintain claims 3. can contribute toward international law
- f. individuals: due to international criminal law, there is a increasing recognition toward individual within the definition of international personality.

6. Territory in international law

a. General concepts: i.

Fundamental to international law

- ii. Sovereignty: 1. ability to control what happens in the territory 2. control what members of territory do in and out.
- iii. Cannot have statehood without territory
- iv. Control over resources
- v. Island de Palmas case (1928)Harris 187 1. Spain gave island to the US as gift after Spanish-American war (cession) but Netherlands alleged peaceful and continuous display of state authority over the island 2. NED: prevails 3. sovereignty = independence in relation to a portion of the globe ??? right to exercise function of a state to the exclusion of any other state. . Acquisition
- i. State = acquisition + recognition
- ii. Eastern Greenland Case 1. uninhabitable

2. Denmark had colonies in Greenland but not Easter 1. But established treaties that covered all land 3. Norway built pole without opposition by Denmark. 4. Occasional expedition to E. Greenland by Denmark = sufficient act of sovereignty. iii. Methods of acquisition: 1. occupation: occupation of a previously unclaimed territory 2. prescription: exercise of sovereignty over territory without objection from another state 3. conquest: taking territory using military force 1. now illegal = UN charter 4. cession: acquisition of territory by donating/receiving a gift. 1. Transfer of territory from one state or another 2. Force? v economic duress? iv. Land Claims: 1. who gets it? 2. who did the most to keep it? 1. Effective occupation: efforts to occupy: i. How much is occupied? ii. Who occupied the land? iii. Manner of occupation? 3. If one claims land and there is no objection, then the claim is valid. 4. nature of the land affects the manner of occupation required. v.

Decolonisation/self-determination 1. 1960 GA Res 1514. Art. 1 1. Colonies may choose to be absorbed or self-determined 2. ICCPR: 1. Art. 1: i. The right to determine own affiliation and future/political economic activity ii. Right to belong to a people. c. Abandonment/Renunciation i. Without affective occupation, either 1) expressively or by 2) failure, a state is assumed to have abandoned the state. ii. Acquiescence: where there are 2 competing states, an act done by 1 to show estoppel/acquiescence of the other' authority will nullify that opposing actor. d. Continental Shelf and Sea Bed . Truman Proclamation 1. on the continental shelf boundaries. ii. UNCLOS e. Airspace i. Chicago Convention (1944) 1. Art 1: every state is sovereign over its airspace ii. Nuclear Test Case: pollution infringement of airspace by France. 7. Jurisdiction a. Exercised by military b. Legislation influence by

international law c. limits of jurisdiction ??? territoriality d. Territorial Jurisdiction: i. Fundamental because of the relationship to sovereignty and statehood ii. Island de palmas case 1. can only do what it likes within limits of international law 1. customary int. law iii. territorial sovereignty is not absolute 1. rights and entitlements are limited iv. states are entitled to prescription and enforcement of law on international level . v. Art. 2 UN CHARTER 1. exceptions ??? humanitarian vi. SS lotus case: Brownlie 300 1. FR boat collide with TUK ship on high seas. 2. state can do anything within limitation of own territory 3. limitation exists: 2 states boats in high-seas. 4. limitation applies 5. effects principle: Turkey claimed affect within territory ??? flagged ship e. Nationality: i. States can govern all their national wherever they are at all times ii.

Who is a national? Citizen? 1. recognized by a duty or obligation of allegiance to the state iii. Crimes (Aviation) Act 1991 cth. iv. Crimes (Child Sex Tourism) Amendment Act. 1. offence to engage with underage children in the world 2. 2 options 1. 1) request local authorities to arrest the violator and the extradition of the person. 2. 2) cannot send fed. Police to enforce in local gov. ??? refusal to comply. v. Crimes: Foreign Incursions and Recruitment Act. 1. forbids mercenary activity for foreign states 2. react: 1. extradition by request 2. immediate arrest upon reentry. . Protective Principle: i. “ a state is entitled to assert its jurisdiction to protect its essential security interests” ii. Joyce v DPP (1946) 1. prosecution of Mr. Joyce (Lord HanHan) British citizen. 2. WWII went to US and received UK citizenship. 3. went to GER & FR” radio broadcast to UK requesting they surrender to the Reich. 4. UK asserted jurisdiction over Joyce using protection principle. 5. does not permit

intervention to extradite a person from overseas. But can form basis to prosecute. iii. Crimes (Hostages) Act cth. iv. Definitional problem: excessive states discretion. . Universal Jurisdiction i. Some crimes are so serious that all states have an interest in bringing perpetrator to justice (no matter what the state). 1. some say obliged ii. jurisdiction of all states (regardless of location of crime or nationality) iii. creature of customary international law iv. Pinochet: 1. claims of genocide and torture. 2. whether to be extradited to Spain 3. depended on if Crime by Pinochet would have (@ the time) been considered a crime within the UK. 4. 2 decisions by house of Lords 1. 1) Lord Hoffman ??? Amnesty International 2. ) Redecide due to potential bias effect. 5. systematic torture: acts considered a crime in the UK at the time of action. v. Eichman v Israel 1. IS: " The Illegal abduction of Eichman does not bar him from prosecution" vi. Alvarez v MacLain 1. Alv. = criminal: murdered undercover police in the US 1. Fled to Mex. 2. Followed: abducted/tried/jailed vii. Universal jurisdiction allows prosecution of individuals by a state even where there is no direct connection between persons and the state 1. does not overcome prescription/enforcement limits. h. Passive Personality: . Widely discredited ii. Focuses on nationality of victim on assigning jurisdiction in a particular case over the offender. iii. Lotus Case: 1. Passive personality rejected by the ICJ i. Effects: i. Effects apply beyond borders: Lotus ??? because affected a person on the Turkish ship, TUK believed to have jurisdiction. ii. Relied on by states iii. Anti-trust legislation 1. restrict anti-competitive practice if they have an affect on trade and commerce. iv. Prescription: Can have a chain-effect v. Enforcement: had to enforce, but future potentials are quite high. vi. Excess of Jurisdiction Act 1.

State A cannot have jurisdiction in state B despite the effects doctrine. 8.

Immunity a. Foreign State Immunity: i. States will not interfere in the affairs of another: will not exercise jurisdiction over another states 1. unless consent has been assigned by the ICJ ii. does not apply on absolute basis iii.

Doctrine of Restrictive Commercial Activity 1. State is immune except to foreign commercial activities. iv. Reid v Republic of Nauru: 1. Reid sues Rep. Nauru over termination of employment contract. v. Playa Larga (1983): 1. 2 ships carrying sugar: Cuba (Chile 2. ship still on water during Pinochet takeover. 3. 2 ships breached contract: went to Vietnam. 4. court will categorize commercialized contract as commercial. b. Head of State

immunity: i. On basis of benefit of the state, not benefit of the individual ii. Possible to waive immunity. iii. Pinochet: 1. it is never valid function to claim immunity for its head of state based on systematic torture. iv. 2 forms of behavior: 1. private acts 2. At the time of leadership ??? in course of duty. 1.

For ever immune for acts done in course of leadership i. When leadership expires ??? immunity disappears. . Head of State doctrine: 1. a domestic

court will never put into question laws on the action of foreign states: state A may never examine in court, Actions of state B. 2. Butler Gas and Oil (1982):

1. it is impossible to enforce extra-territorial law without the consent of the host nation. vi. States are responsible for the acts of its official. 1. can seek damages for injuries done to its citizens if in breach of international law. 9.

Use of Force and Law of Peace a. Legality of war/armed force prior to 1945 i. “Just War”: 1. religious guidance on whether permissible 2. St. Augustine criteria . Just cause: avenging injury 2. Good intention: remove evil 3.

Authority of precedence. 3. St. Thomas Aquinas 4. Grotius 1. Needs to be a just and lawful cause. ii. 1648: Westphalia 1. state sovereignty arises ???

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decline of political religion 2. religion ceases ??? basis of 'just war' changes  
 3. no longer right v. wrong ??? emerging state equality: right v right 4. war  
 becomes non-illegal iii. 1899/1907: Hague Conventions 1. addressed what  
 can/cannot be done in contexts of war. 2. 1907: prohibits use of force to  
 recover contract debt 1. declaration/ultimatum prior to declaration of war. iv.  
 1919: League of Nations Covenant: 1. art. 12/13 1. if not abiding by  
 provisions, considered war against all other parties v. General Protocol  
 (1924) vi. 1928: Kellogg-Briand Pact: 1. outlawing war, and resort to peace 2.  
 limitation: only dealt with war as instrument of national policy v. use of war  
 as international policy. b. Legality of war, post-1945 i. UN Charter: Art. 2(4)  
 1. deals with international 2. equally unlawful to use 'threat of force'  
 compared to 'use of force' 3. deviates from 'war' ('force' 4. only include '  
 armed force' 5. use of force against 'territorial integrity' or 'political  
 independence' 6. cannot contradict the purpose of the UN 7. just cogens 8.  
 Nicaragua case 1. Claimed self-defence 2. Force/armed attack. 3. Although  
 US claimed reservation against Art. II. 2, it was a customary international law  
 therefore it applied. c. exceptions to Art. II. 4 i. Art. 51: Nothing impairs the  
 right to self-defense (inherent right) 1. Also customary international law. ii.  
 Individual self-defense: 1. 2 requirements: 1. Necessity: immediacy,  
 necessary course of action i. Self-defense v. relation 2. Proportionality: is  
 there an alternative reaction degree, by which the same aim can be achieved.  
 i. Unable to decide on proportionality of Nuclear. iii. Collective action under  
 Ch. VII/VIII of Charter 1. requirement: to report to SC ??? not under  
 customary international. 2. wide view of self-defense: Art. 51 to support  
 customary int. law. 1. Charter does not overrule existing right of self-defense  
 unless agreed to in a provision. 2. Customary right is not impaired: i. Self-  
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defense other than against armed attack ii. Anticipatory iii. Protection of nationals abroad. . narrow view of self-defense: 1. Art. 51 to restrict customary international law. iv. Armed attack: 1. right to Self defense if no armed attack 1. ICJ in *Nic v US* assumed there was an armed attack: 2. Armed attacked: consider: i. Scale ii. Effects 2. major incident needed to constitute an armed attack: *Nic v US* 3. Palestinians claim suffering therefore setup wall: Israel Wall 4. must be one state upon another state 1. must be registered state. v. Anticipatory self-defense 1. customary international law 1. restricted but not impaired by Art. 1 2. prove: i. state practice ii. opinion juris 2. *Afghanistan v USA 2001* 1. Rights of self-defense against terrorism/terrorist acts 2. Terrorists but not state 3. Taliban ruling *Afghanistan*, but Taliban harboring Al Qaeda therefore US invade. 4. Issues: i. Interpreting self-defense in anticipation 1. occurred 2. is occurring 3. is imminent d. Degrees of Force i. Intervention 1. *NIC v US* 1. Assistance to rebels = unlawful 2. Humanitarian aid needed ii. Use of force 1. *Nic v US* 1. Funding does not constitute use of force 2.

Training of officers = use of force iii. Armed attack 1. only an armed attack gives rise to self-defense 2. *NIC v US*: assistance to rebels does not constitute armed attack 3. gap: If no armed attack, then no self-defense. e. United Nations and Peacekeeping: i. UN Charter Ch. VII: Art. 41/42 1. standing army to be available for the breach of peace. 2. when international security issue, bring before the SC 1. SC determines before acting i. Breach of peace ii. Act of aggression iii. Threat to peace 3. Art. 41: use of sanctions against nations 1.

If sanctions do not work, then art. 42 4. Art. 42: if Art 41. inadequate in bringing peace and security the use of force is permitted. 5. due to lack of standing army, UN power is designated to another state: take all necessary measures: 1st gulf war. ii. UN Charter Ch. VIII: Art. 52/53 1. nothing in Art. 52 to counter regional arrangement 2. regional arrangement: (e. g. African community) can take situation into own hands, but cannot take enforcement action iii. Peacekeepers: 1. previously not to use force 2. now granted the ability to use more force when necessary ??? for self-defense purposes. . cannot include permanent members of the SC 4. UN Charter Ch. VI & 1/2 ??? resolution for lawful peacekeeping 1. End of cold war ??? peacekeeping measures 2. Impartial 3. History i. Rwanda: lack of UN manpower and mandate to be ' active' ii. Somalia: UN peacekeeper and US soldiers 4. Mandates: need to be clear and robust f. Current contentious areas: i. Art. II. 4 and use of force and humanitarian intervention. ii. 1978: Viet ( Cam: V claimed it was responding to hum. Intervent. iii. 971: IND ( PAK: India claimed self-defense iv. 1978: TANZ ( UGA: Tanzania claimed to be responding to territorial violation. v. 1999: NATO ( Kos: claimed it was consistent with resolutions vi. 1994: Rwanda: no humanitarian intervention provided by UN. vii. 2003: Darfour 1. no genocide but widescale humanitarian violation 2. African Union sending small/weak force 3. UN unable to send in large peacekeeping force because no ' peace' is being disrupted. viii. Cannot use humanitarian intervention to impose political beliefs. ix. The Bush Doctrine: (Doctrine of Preemption) 1. o distinction btw. Terrorists and those who harbor them 2. exercise the right of self-defense in pre-emptive defense 3. intends to preemptively attack ' rogue states' 4. the greater the threat, the greater the preemptive strike and ability to act in

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advance ( increase threat = increase preempt) x. 2003: Invasion of Iraq 1. Res 607: resolution of ceasefire 1. US used in conjunction with post/9-11 WMD production. 2. US revived (Res. 678) ??? application of force. 2. Res 1441: gives Iraq last chance “ or else” authorized to use force 1. Il members supporting resolution did not authorize force 2. if force to be used, another resolution needed 3. FR and RUS threaten veto to a resolution on the use of force against Iraq 3. US justification 1. Resolution violation 2. Humanitarian right 3. Terrorism support. 10. Law of the Sea: 1st origin of international law. a. Resources: i. in the sea: fish, oysters etc... ii. in sea bed: oil, gas, coal, minerals. b. Sea: water that lies beyond the boundary of territorial sovereignty: idea of conservation of world. c. Main treaties: i. 1958 Geneva Conventions: . High Seas 2. Continental Shelf 3. Territorial Sea 4. Conservation of Living Resources of High Seas. ii. 1982: UNCLOS: United Nations Convention on the Law of the Seas 1. Not ratified by USA and France 2. Many reservations and many declarations: for and against. 3. common economic zone 4. common heritage of mankind. d. Territorial Seas: i. Claimed by all states: some waters so close to land-mass that should be within territorial sovereignty. 1. customary international law ii. cannot shot-rule: 3 miles stretch of territoriality: crystallized. iii. Within territorial sea = absolute sovereignty. 1. xtensive: undesired by states with extensive maritime trade 2. wishes: dependent on fishing. iv. UNCLOS: Art. 2: right to sovereignty over the territorial sea v. UNCOS: Art. 3: 12 nautical mile territorial sea 1. non-members claim same right. vi. Sovereignty must be subject to other forms of customary international law and treaty law. vii. Absolute sovereignty: exclusive rights to resources and practices within the

territory. 1. exception: any ship has the right to innocent passage (passage through territory). 2. UNCLOS: Art. 19: Right of Innocent passage 1.

Passage is innocent if involves transit through territorial sea: purpose of traversing through. 2. Not innocent: if prejudicial to coastal state. i. Spying ii. Use of weapons iii. Harmful iv. Loading/unloading v. Willfull pollution vi. Fishing 3. Submarines must traverse surfaced. viii. Corfu Channel (1949): 1. UK ship passing through mined Albania coast. ix. UNCLOS. Art. 33.

Contiguous Zone: 1. states claim right of custom, fiscal, immigration etc...in order to prevent a breach of laws within territorial sea. 2. contiguous zone = +12 nautical miles off territorial sea + 24 miles. x. EEZ: Exclusive Economic Zone 1. UNCLOS: Art. 5: 1. Area beyond territorial sea in which a state has limited rights as granted by convention: +200 mil for fishing. 2. UNCLOS: Art. 62 1. Coastal state shall promote optional utilization of natural resources: should allow access to developing states if it does not have capacity itself i. Not plundered & depleted. 3. Art. 57: 200 mile limit. 4. Art. 58: Coastal state only has right to natural resources otherwise, all other states can treat as high sea. 5. issue of overlapping EEZ: 1. ICJ recognizes equitable parting of the EEZ: share down the middle of the area. xi. Other Zones: 1. High Seas: 1.

Anything beyond the EEZ 2. To be used for peaceful purpose 3. No state can submit a claim to sovereignty 4. All ships have freedom of navigation: only the flag state has jurisdiction over itself 5. Exception of jurisdiction: i.

Universal Right: suspect genocide ii. Art. 3. ; Right to Hot pursuit. iii. Art. 101: Piracy. 2. Continental Shelf: 1. Truman Custom (1948). 2. UNCLOS:

Continental Shelf 350 mile jurisdiction. 3. East Timor v Australia i. EEZ overlap ii. Continental Shelf iii. Timor Trough. 3. UNCLOS: Part. II Deep Sea

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Bed: 1. Heritage of mankind. 1. Diplomacy a. Involves transmission of message from state A to B by a messenger b. Travel through other territories = risk c. Diplomatic Immunity: i. Arises from granting passage to messenger. ii. With consent of the receiving state, an embassy could be established that was immune to the local law 1. recognized through bilateral treaties iii. no matter what the message: will be delivered with respect to the concept of sovereignty iv. in areas of specialization: specialists > diplomats. d. Primary goal: establishing and maintaining diplomatic relations with states and institutions. . 1960: Vienna Convention on Diplomatic Relations i. Implemented into Australian law by legislation ii. Codification of customary international law. f. Functions of Diplomacy/Embassy: i. Representation of sending state ii. Protecting interests of the sending state iii. Channel of negotiation iv. Obtaining information v. Promote friendly relations vi. Distinguish from consular activities. g. Does not permit: interference with domestic law, only representation of position h. Embassy: state ( state: e. g. trade relations i. Hold immunity ii. May not exercise receiving state jurisdiction in the Embassy. . Consulate: to represent and aid individuals in the receiving state. j. 1972: Diplomatic Immunity and Privileges Act i. Art. 22: Place/People: immune from local law ii. Art. 23: Immune from local taxes iii. Art. 29: agent is immune from criminal jurisdiction. iv. Agent can travel freely 1. in and out 2. within the country v. diplomatic bag: absolute immunity vi. immunity granted to diplomats, when: 1. within diplomatic contract 2. within receiving state's territory vii. receiving state has obligation to protect sending state's Embassy 1. Tehran Case (1980). k. Waiving immunity: i.

Sending state has immunity, not the agent. ii. In case of serious prosecution, the sending state can waive immunity over a diplomatic agent. iii. Expulsion = sanction. iv. Severing diplomatic sanction = most serious sanction. 12.

State responsibility a. States are liable for their wrongs b. Central principle of pacta sunt servanda ??? obligations binding in good faith c. Breach of an international obligation entails the international responsibility of the state at fault. d. Factory at Chorzow case (1928): concept of reparations for wrongs. i. Poland seized Chorzow factory in disputed POL-GER territory ii.

Treaty between state entitling GER to territory in which the factory lay iii.

PCIJ: principle is that there must be reparation that as far as possible wipes out the consequences of the illegal act and puts back in place as though the act had not been committed 1. POL give back factory 2. pay compensation to the extent of wiping out the factory. iv. Accurate reflection of international law. e. Corfu Channel Case. f. Attribution i. States act through individuals and organs ii. What is 'state responsibility'? iii. A breach of international law by a state organ which is attributable to the state iv.

Position of individuals who act in the name of the state. v. Individuals 1.

position of individual who act in the name of the state 2. only acts done by officials in their official capacity can be attributed to state action /

responsibility g. Remedy: i. Need identified by 1) tribunal or 2) injured state.

ii. May be a right under treaty iii. Possibility of formalized dispute settlement or ad hoc arbitration iv. Custom: 1. there is no material law, therefore how does one know that there is a breach 2. how does one compensate?

according to customary law) v. reprisals: 1. Naulilaa Case: (GER v PORT) 1.

Port/ = primary authority over Angola 2. Ger. Soldiers killed by Prt. Soliders

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in Ang. 3. Ger. Sent soldiers to fort @ Naulilaa and attacked 4. Port. Claimed that Ger. Violated international law. 5. Ger. Claimed lawful reprisal. 6.

Tribunal: argued that reprisal is permitted i. Limitations: 1. actions must be proportionate to the injury 2. precondition that an illegal act must have occurred. vi. Retorsion: 1. unfriendly but lawful acts in response to both unfriendly illegal and legal acts. h. ILC Work on State Responsibility i. Drafted over period from 1949-2001 ii. Significant codification and development of customary international law iii. Transmitted to GA for comment in 2001 iv. Placed on GA agenda for 2004-2005 v. ILC Draft Articles 1. art. 1 2. art. 2 3. art. 5: official capacity ??? attribution 4. art. 14: 5. art. 19: separate category of international crimes with regard to state responsibility 1. international crimes listing that justify reprisal actions. i.

Individual and Diplomatic Protection i. Nationality: 1. states determine their own rules of nationality 2. Panevezys-Saldutiskis (Estonia v Lithuania): 1939 1. A state can bring claims on behalf of its nationals if they are injured. 2. note the right of the individual but the right of the state 3. Nottebohm case (Lichtenstein v Guatemala): 1955 1. notion of genuine nationality 2. validity of nationality in state v international 3. principle of real/genuine nationality i. real v effective nationality. . Corporations i. Barcelona Traction, Light and Power Case (1970) 1. Canadian Company 2. factory in Barcelona 3. 88% shareholders 4. Spain injured the comp. 5. ICJ: an injury to a company does not give a cause of action to the shareholder or the state 6. exception: if the corporation has been injured by the state of the nationality of the company, shareholders can bring an injury claim through diplomatic protection. 7. what laws govern the company? ii. Diplomatic protection claims can only arise



where all other alternatives have been fully exhausted fully or locally. 1. local remedies need not be pursued if it is clearly automatic that local remedies are a futile pursuit k. Diplomatic Protection: i. Exhaustion of local remedies ii. Concept of minimum standards of protection iii. Expropriation of property ??? legitimate for a public purpose? 1. relevance in foreign owned oil fields 2. can only be valid if for public purpose and must be accompanied by compensation. 13. Human Rights Law a. Beneficiaries of rights = individuals b. Violators = states c. What is a human right? i. Right to a minimum standard of living ii. Universal? d. Civil and political i. Right to life i. Not to be arbitrarily detained iii. Free speech e. Economic, cultural and social i. Shelter ii. Food supply iii. Association f. HR law: i. Attempt by global community to agree on what is a minimum standard of living 1. customary 2. treaty ii. who interprets v. who enforces 1. the state that interprets is bound by the law g. outlined in UN charter h. UNDHR: 1948: i. Absolute & fundamental rights ii. GA resolution iii. Put into writing for the first time 1. result = change in behavior 2. change in customary international law i. ICCPR (individual) & ECSR (communal rights) i.

Multilateral treaties setting obligation of state, to respect the rights contained within ii. Absolute obligation to implement into domestic law iii. Implementation 1. ICCPR: already exists in the form of customary international law 2. ECSR: aspirational. j. UNHRC and First Optional Protocol i. Has authority to hear individual complaints in own state ii. Condition 1. Art. 11: must have exhausted all local remedies 2. individuals must be affected by action of a state, or at the time of being a national of that state iii. written pleas only iv. 2 stages: 1. jurisdiction phase: does it fall under ICCPR and

optional protocol? 2. committee view: written view sent to individual and to government. v. Toonen v Commonwealth k. Enforcing: i. UN: ICCPR and HR Committee ii. Diplomatic: pressures and publicity iii. Domestic law: use of treaties to interpret statute as well as the interpretational jurisprudence to interpret treaty iv. In absence of 34d party decision maker, there is large margin of discretion. l. European Doctrine of Appreciation i. State has margin of appreciation which permits the discretionary interpretation of treaty obligations which implemented into domestic law. 4. Dispute Settlement a. No true enforcement mechanism for international law, only ‘ obligations’ set by treaties. b. Basic Principles i. Customary international law sets out that dispute cannot be settled in violation of peace ii. UNC. Art. 2. 3: states must resolve disputes such that peace is not threatened c. GA. Res. 2625: states shall seek an early and just settlement of international pursuit. i. Customary declaration that states shall use: 1. negotiation 2. enquiry 3. mediation 4. arbitration 5. judicial settlement 6. regional agencies 7. other peaceful means. d. Negotiations . 95% of disputes resolved through communication 1. preemptive 2. after dispute. ii. Positive obligation in multilateral treaty to notify concerned member of actions that might start a dispute. iii. 2 forms: 1. public negotiation in international institution 2. private negotiation e. involvement of 3rd party: i. mediation: 1. facilitate communication btw. 2 states in dispute 2. independent organ: e. g. secretary general 3. assists parties in discussion 4. requires consent of both states 5. objective transferences of message i. conciliation: 1. active effort to find solution. iii. binding decision of 3rd party: 1. used to settle dispute if impasse arises 2. obligation to peaceful dispute settlement. f. Arbitration: (ad hoc ??? one off arbitration) i. Bilateral treaty agreeing on decision making by an agreed <https://assignbuster.com/public-international-law-assignment/>

body/organ ii. Arbitration clause: upon dispute, an arbitrator of panel members shall be used: 1. clause must set out sources of international law to be used by arbitrator iii. decision of arbitrator is agreed to be absolute/binding iv. specialized arbitration bodies: 1. European commission on HR: 1. European HR Arbitration committee. 2. WTO/GATT (1994): 1. when disputes arise, a panel advises who is in violation etc. 2. Dispute settlement Body of WTO, to have dear dispute from states that are party to WTO. 3. use of appellate body to enforce compliance to rulings of the DSB 3. ICC: international criminal court: 1. application of international law to the individual 2. permanent standing jurisdiction: 75 parties, provides the court jurisdiction where a domestic court is unwilling or unable to pursue. . ICSID: International Convention for the Settlement of International Disputes. 1. states v. corporation 2. involves arbitration under World Bank, applying international law i. sanction for non-compliance: loss of bank privilege. 5. ICJ: International Court of Justice: 1. all members of UN are under statute of the ICJ 2. annex to the UN charter. 3. art. 93: all members of UN = parties to the statute of the ICJ 4. art. 94: all state agree to comply to statute of the ICJ to which they are parties. 5. if fail to comply = remedy i. state can approach SC to advise request enforcing steps. 6. permanent standing court in the Hague. 7. judges independent of state 8. Art. 2: to become a judge must be high moral character, must have qualification of highest level from their own state. 9. 15 judges: elected by vote of GA and SC. i. once elected: serve on court for 9 years and appear for reelection. ii. Diplomatic immunities 10. each states votes for own state 11. Art. 34: only states may be brought before the court i. exception: organs of UN may request (non-binding) advisory opinion of the ICJ 12. appearing before ICJ: i. Art. 36: jurisdiction of ct.

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comprises all cases which the parties referred to it and all matters specially provided for in the UN Charter or in treaties and conventions in force. ii. if a treaty agreeing to the ICJ arbitration has a defendant state that does not appear, the ICJ proceeds anyways

1. jurisdictional phase a. ICJ measures ability to hear the dispute.
2. merits phase

13. optional clause declaration: i. Art. 36(2): states may @ any time submit declaration that the ICJ has jurisdiction of resolving any legal dispute ii.

Only applies between states that have adopted the optional clause.

14. principle of reciprocity: i. reciprocal adoption of a reservation of the clause itself.
15. Art. 36: state must consent to the court exercising jurisdiction
16. Art. 59: decision only binding upon member parties
17. Principle of Necessary Party: i. Parties necessarily involved in the dispute must be present
18. only permanent court with widespread jurisdiction and general subject matter
19. great force of precedence.