

PUBLIC INTERNATIONAL LAW

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International Law A-L, 21/22, 2nd semester
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Introduction to Public International Law

INTERNATIONAL LAW – February 21, 2022

What is International Law?

One of your colleagues suggests that **International Law** is made of customs and treaties for states, referring to the two most important sources of international law: **Customary Law** and **Treaties** (agreements, conventions, etc.). He also referred to the most important subject of international law which are States.

International law regulates the relationships among states, their rights, and their obligations. But States are not the only subject of international law: International organizations, like the United Nations, are, for instance, also subjects of international law.

Someone mentioned the European Union, which is a very peculiar type of international organization founded by treaties among member states. The European Union has powers that other international organisations do not have but still is an international organization as it has not yet become a federal state.

International law also applies to individuals. But are individuals, from the standpoint of international law, subjects of international law or actors in the international law framework? Which might be the difference between subjects and actors?

The main difference has to do with being involved in the decision-making process and creation of international law rules. Are Individuals part of this process? Can individuals create a treaty or sign a treaty? No, but they might be the addressee of Treaty provisions¹.

An example can be found in Human Rights Treaties, which give rights to Individuals but are created by States: in this case, individuals are only the addressee of these treaties.

So, most of the time, actors like individuals do not take part in a direct way in the creation of international law rules but they might benefit from them. They may also be obliged or prohibited from doing something by a treaty. But technically, individuals (apart if they are the head of State of Government of a country) are not directly involved and therefore do not have the power to create international law rules. This means individuals are only actors, and not subjects.

Other actors might, for example, be companies, multinational corporations, and NGOs.

Actors might be entitled to act and do something if they are protected by International Human Rights.

Human Rights cover a specific sector of international law since they are also protected by National Constitutions, but International Human Rights are recognized at an international level and entitle individuals within each state to be protected from their own state.

The last actors that we mentioned (NGOs) represent an important kind of actors for international law.

Take Amnesty International as an example: *what is the main goal of Amnesty International?* Amnesty International works to make sure that some rules are applied all over the world.

NGOs often have the form of a public company and have their own basis in the national legal system of one or more states. Amnesty International has its own subsidiaries in Italy, France and around the world.

¹ **Treaty provisions.** The provisions of the Treaties are the primary source of EU law.

Their work and the organization are governed and ruled by rules of domestic law and national law, not international law, but they work to ensure and monitor the application and the implementation of international law rules.

Amnesty International has access to all places in the world where human rights violations have occurred, such as torture, violations of freedom of expression or murders of journalists; therefore, they help to make international human rights law effective and respected.

They may not be able to create new rules as States and International Organizations are, but they are very useful in verifying that the international rules we have are applied and respected.

Greenpeace does the same thing for International Environmental Law rules.

NGOs could only work in one, two or three countries, but this is not important because NGOs have the capacity to monitor actions around the world. There are small NGOs that work only in Italy, for example, but they all work in the same way and the concept is the same, as they help to apply the norms of international law.

Sometimes nongovernmental organizations help monitoring ceasefires: many NGOs, for example, are currently working in Ukraine.

NGOs may have a real perception of what is happening in the world, sometimes even better than that of international organizations because they have a closer connection with the population and are more involved, as they are part of civil society: this means that they have a different point of view.

So, this is a very first definition of what **Public International Law** is: International Law may confer rights and obligations to actors, but actors cannot create International Law rules.

Also, there is a big difference between Public International Law and Private International Law: Private International Law deals with conflict of laws and situations in which different domestic laws can apply.

Example: if I marry someone from another state and decide to leave and buy our house in a third state. Later we decide to divorce, what national law will be applied? Is my national law, my husband's law, or the national law of the state in which we live? The answer to this question is given by rules of private international law that establish what the most relevant link between national laws and regulations that should be applied to solve the case is.

All these issues are solved by Private International Law, but this is something that we are going to study and discuss during our course.

Private International Law is made of different rules, some of them are treaties and most are still National Laws. So Private International Law basically describes a set of rules of an international nature and national nature that apply whenever we have a situation to which different domestic laws can apply.

What are the main differences between International Law and Domestic or National Law?

For **Domestic Law**, those who have the right to create law are the Government, National Assemblies, Parliament; we could describe these institutions as a legislative group of bodies representing the legislative power.

Most of the time, in National Legal Systems we find clear rules about who has the right to legislate and what kind of division must be made between the group of bodies representing the legislative power.

In International Law, on the other hand, there is no centralized legislative power.

This represents a difference between Domestic Law and International Law.

As mentioned, the power to create international law rules is shared by States and IOs. We might find multilateral treaties or bilateral treaties that regulate only the relationship between two states.

And not only we do not have a legislative power or a legislative branch: international law also lacks executive power.

One of the weakest points of international law is **enforcement**: there is no police force; but we do have some institutions that have this power and the most important one is the United Nations Security Council. Important is also the NATO, the North Atlantic Treaty Organization.

These institutions are important but are not able to avoid a war, like for example in the case of Ukraine. Why?

- The main reason is of a political nature: the UN Security Council is made of **five permanent members** and each of them has a veto power. Among these permanent members there's Russia along with China, France, the United Kingdom, and the United States.
- Important to know is also that the UN Security Council doesn't have its own military forces, and it can only rely on the military forces of Member States.

This means that in this case, the UN Security Council is basically unable to adopt any kind of decision.

International law therefore relies on many different types of instruments, like for example sanctions that can be adopted by the UN Security Council or by the European Union, or by other International Organisations, and even by States.

The norms of international law are increasing day by day and affect very different aspects of our everyday lives. Most of the time these rules are applied by Member States and International Organizations, but not because there is a police force that enforces these types of obligations, but because these rules are considered to have their own legitimacy and because they are considered useful and of a reciprocal nature.

An example would be **Trade and International Trade Treaties**: this type of treaty creates mutual rules and obligations; therefore, by violating an international trade treaty, I can expect the same violation to apply to me, and the treaty will not benefit anyone in the long run.

In the event of a violation of international treaties or a violation of international law, **International Courts** intervene. These international tribunals are obviously different from the judicial branch that exists in all national legal systems, as such courts and judges are established within the framework of international law.

The most important international court is the **International Court of Justice**, which is an organ of the United Nations. It is important to know that also Regional Courts, Arbitrations, Human Rights Courts, and even National Judges can apply International Law Rules.

There are different aspects that we should take into consideration before stating that international law is not effective. All taken into consideration, most of the rules of international law are respected and applied.

Important is the **Peace of Westphalia**² which is usually considered to be a very important date for international law because, back in 1648, it put an end to the Thirty Years War and a period of instability and

² **The Peace of Westphalia.** The Peace of Westphalia is the collective name for two peace treaties signed in October 1648 in the Westphalian cities of Osnabrück and Münster. They ended the Thirty Years' War (1618–1648) and Eighty Years' War (1568–1648), and brought peace to the Holy Roman Empire, closing a calamitous period of European history that killed approximately eight million people.

fragmentation in Europe; it also ended the power of the Holy Roman Empire and disputes among different religions (Catholics and Protestants).

This important treaty established a system whereby Europe was divided in sovereign states, all considered equal and all having the same kind of power within their own territory, establishing the basic principles of international law, which are the **Principle of Non-Intervention** and the **Principle of Non-Interference** (in the domestic affairs of another state).

All sovereign states are considered equal and can therefore exercise their authority within their own jurisdiction, their own territory and on their own citizens. The other states are not allowed to intervene with the use of force against the serenity of the other states; they should not interfere in their domestic affairs.

The concept of domestic affairs is more and more limited by the development of international law. At the very beginning, international law created a system that was helpful to preserve the peaceful existence between states. This concept originated in Europe, which means that these principles did not apply to other territories which were yet considered states: colonialism and slavery were therefore considered legitimate and allowed by international law (until the Second World War).

The territories outside Europe, were basically considered property of no one, *terra nullius*³.

International law evolved from the establishing of rules for the peaceful coexistence of European sovereign states, which included: rules for war conduct, treatment of prisoners of war, treatment of citizens of other states, diplomatic protection, rules about ambassadors and diplomats between states, immunities of foreign officials and of states.

These rules are so old that are nowadays mostly regulated by customary international law.

A change in International Law happened mostly after the WWII thanks to

- a spread of International Organisations (that were not so common before),
- Multilateralism: States voluntarily decided to regulate among themselves fields and matters that were not regulated by International Law because it was considered of utmost importance to avoid another world war, so they created International Organizations like
 - the United Nations,
 - the World Bank,
 - the International Monetary Fund,
 - World Trade Organization,
 - Regional Organization,
 - the European Union
 - and several different treaties.

All the international human rights treaties were negotiated after the Second World War.

In the last 20 years or so, we have seen that international law being used to regulate issues that cannot be addressed by states alone, not even by groups of states, and these can be defined as Global Public Goods or Global Public Issues like for example International Peace and Security, Climate Change, the loss of Biodiversity, etc. These issues cannot be confined in national borders.

³ **Terra nullius.** *Terra nullius* (/ˈtɛrə nʌˈliːəs/, plural terrae nullius) is a Latin expression meaning "nobody's land". It was a principle sometimes used in international law to justify claims that territory may be acquired by a state's occupation of it.

These problems require a different approach, different for example from that for international trade relations.

International Law has evolved from the law of coexistence into the law of cooperation: peace, stability and equality of the sovereign states are not at the centre anymore; what is at the centre now is what states together can do to achieve something that cannot be done by a single state alone, like the protection of the environment. **Cooperation** is now the key word.

International Legal Subjects

States

INTERNATIONAL LAW – Lecture of February 22, 2022

In this scenery we're addressing the most portent element in the entire international law frame: **international legal subjects (states)**.

States are the original subjects of international law; in fact, international organizations are much more recent and were created mostly at the end of World War II: almost all the international organizations we know were created after World War II. International law dates back to the 19th century: only states were able to create international law.

There is a big change since the end of the First and Second World Wars in the number of states that exists today in the international community: from 50 states at the end of World War II to more than 193. International law has in fact sought to establish criteria for identifying when a state begins to exist only before the First World War.

What we are referring to is usually a treaty signed in 1933: the Montevideo Convention on the Rights and Duties of States: the rules contained in this treaty also amount to rules of customary law of international law and are therefore ambivalent in nature. Norms of an ambivalent nature are not only defined by a treaty but are also considered customary in nature and bind not only the States that have signed the treaty but all members of the international community.

This convention is an original type of treaty, it was signed between almost all the states of the Latin American region and the United States: the main reason why this treaty had to be negotiated between these states was that the Roosevelt administration in the United States was very clear in making a very important commitment of the Latin American states that it would not interfere or intervene in the internal heritage of those other states. The United States later turned out not to be very enthusiastic about a promise that it was not able to keep.

An example is the Nicaraguan Revolution which included growing opposition to the Somoza dictatorship in the 1960s and 1970s, the campaign led by the Sandinista National Liberation Front (FSLN) to oust the dictatorship in 1978-79, the subsequent efforts of the FSLN to govern Nicaragua, and the Contras⁴ War, which was waged between Nicaragua's FSLN-led government and the United States-backed Contras. Upon taking office in January 1981, Ronald Reagan cancelled the dispersal of economic aid to Nicaragua, and on 6 August

⁴ The **Contras** were the various U.S.-backed and funded right-wing rebel groups that were active from 1979 to 1990 in opposition to the Marxist Sandinista Junta of National Reconstruction Government in Nicaragua which came to power in 1979 following the Nicaraguan Revolution. From an early stage, the rebels received financial and military support from the United States government, and their military significance decisively depended on it. After US support was banned by Congress, the Reagan administration covertly continued it.

1981 he signed National Security Decision Directive number 7, which authorized the production and shipment of arms to the region but not their deployment. On 17 November 1981, President Reagan signed National Security Directive 17, authorizing covert support to anti-Sandinista forces.

This treaty was negotiated and signed in that specific geo-political situation but clarified what are the criteria that state an entity that is not called "state" should meet to be considered as such.

The text was signed in December 1933 and entered into force a year later (the time of signing the treaty and that of the entry into force of the treaty are different).

So, *what are the criteria for statehood?*

Article 1 of the Montevideo Convention qualifies a state under international law as an entity possessing four qualifications

Article 1

The state as a person of international law should possess the following qualifications:

- a. a permanent population;
- b. a defined territory;
- c. government; and
- d. capacity to enter into relations with the other states.

The capacity to enter relations with the other states is a quality of the government.

Not all scholars had always shared this definition, because for many the state is identified only by its population or by the definition of a community of people living in a society. Other experts proposed to identify the state only with the organs of the state, therefore only with the government; in this case population is not really a key element in the definition of the state.

The definition provided by Article 1 has now become customary, so in front of an entity it would be necessary to verify whether it possesses these four characteristics.

But is there a minimum amount of population that must live in a certain territory for an entity to become a state? What category do small islands or microstates fall into? Is it a permanent title? What about the territories that are lived by nomadic tribes?

These are not questions that are not entirely theoretical, especially that of the nomadic tribes in fact they are the subject of debate for Western Sahara and Morocco.

Although it has been considered sufficient to meet one of these requirements only for a period of time, there is a minimum amount of territory that is sufficient, which must be there for a state to be self-sufficient and therefore to be considered endowed with international legal personality.

The most important thing concerns contention, that is, when there are issues concerning a precise agreement or the definition of where the borders between two states are located: if the borders are disputed this makes an entity incapable of becoming a state because the borders are not clear. An important example is Palestine and Israel. These do not lose the quality of having been because the government in office exercises effective control (government and effectiveness) over a part of the territory, even if the boundaries of a large part of that territory are in question.

Is the form of government relevant? Should the government be democratically elected? Does the government have to be effective? What happens in case of failed states?

Is it also what happened to Afghanistan? The answer is no because in that case there was a change of government.

There is a big difference in international law between a change in government that does not affect statehood and that which affects statehood. There is a big difference in international law between a change in government that does not affect statehood and that which affects statehood. The failed states, on the other hand, have been that no longer have a government capable of governing the territory and the population; for example, Somalia.

Somalia is the perfect example of a failed state and has been a failed state for a long time as it had no government. Internal wars between tribes did not allow a government to settle. It did not cease to exist, but there was no one to represent the population of the state and could not be part of international organizations (such as, for example, the UN).

Did customary law and the Montevideo Convention say anything about the need for an entity to become a state to have a democratic government? Is having a democratic government and respecting the rules of law, human rights, minorities, etc. a key criterion for an entity to be considered a state? Actually there are many examples of states that do not meet these criteria.

This criterion may become relevant for admission to IOs. For example, the EU only admits the few Member States that meet these requirements: to have a democratic government, to respect human rights and to respect the norms of law.

Nowadays, some of the governments that are already within the EU are putting all these aspects at risk: there are two countries in the EU that do not really apply the rules of law and democratic principles.

In principle the EU and also the UN could require a State to meet these principles in order to become a member, but it still depends on the rules of each Government of International Organizations (third requirement); the government must meet two different characteristics: (1) have effective control and (2) be independent.

Government comes from a Latin word and the concept is that basically the government has exclusive authority within its own territory and over the population.

So when a government has no effectiveness? For example, in the case of insurrectionary movements or unrest, it can lose effective control over part of the state territory or even over the entire territory of the state or in case of government-in-exile phenomena (as happened for example during the Second World War, when many European governments fled into exile because the Nazi-German movement, or more recently in the 90s during the war between Iraq and Kuwait, when the Kuwaiti government fled into exile losing effective control over the territory).

In the case of the Iraq-Kuwait war, who had control of Kuwait's territory? Iraq had it even though there were military forces (United Kingdom, United States, Italy) to help Kuwait, fighting the aggression of Iraq: there were therefore Iraqi occupation forces and defensive military forces of a few allied states of the Kuwait side.

If a State is occupied using force and against its will, the resulting situation cannot be recognized as legitimate by the other members of the international community.

A rule of international law (A33) has been made stating that an act of aggression by another state cannot give rise to the creation of a new state or the annexation of territory in a lawful manner. However, this happens anyway, and we have proof of it; Unfortunately, the rules of international law are one thing, and what really happens is another.

These events are treated by the international community as violations of international law, but in the general political order, they are sometimes accepted. However, this does not mean that their origin is a violation of international law.

A state needs to have a government that is able to guarantee law and order in its territory, moreover it must have effective control of its territory and be able to administer it so as to ensure compliance with national laws and regulations.

A government in effective control is a government that can pass laws, can issue judicial decisions, can perform administrative acts and guarantee basic services to its population, protect the population and also its minorities.

The other important element is independence. A ruling by the international Judge Anzilotti (Italian judge) a few years ago gives the description of what is meant for independence.

In 1931, the Council of the League of Nations requested an Advisory Opinion from the Permanent Court on whether a customs union established between Germany and Austria in the Protocol of Vienna of 1931 would be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol I of Geneva, signed in 1922, in which Austria undertook not to alienate its independence. In a separate opinion Anzilotti made some interesting comments about the concepts of independence and sovereignty, which he rightly considered to be synonyms. He said in the Advisory Opinion on the Customs Union between Germany and Austria:

Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law. The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the exceptional and, to some extent, abnormal class of States known as 'dependent States'. These are States subject to the authority of one or more other States. The idea of dependence therefore necessarily implies a relation between a superior State (suzerain, protector, etc.) and an inferior or subject State (vassal, protege, etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of international law. It follows that **the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of de facto dependence which characterize the relation of one country to other countries. It also follows that the restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.**

According to ordinary international law, every country is free to renounce its independence and even its existence; this rule does not apply to Austria who, under Article 88, cannot voluntarily lose her independence, still less therefore her existence, except with the consent of the Council of the League of Nations. Similarly, **according to ordinary international law, each country must respect the independence of other countries, but it is not forbidden to**

agree to another State's voluntarily renouncing its independence in its favour. This is not allowed in the case of Austria, as regards the signatory States to the Treaty of Saint-Germain, except of course with the consent of the Council of the League of Nations.

Independence therefore has nothing to do with the constantly increasing situation of a factor of practical dependence that has characterized the relationship of one country with others. An example is the concept of modern colonization or postcolonialism: just think of all the ties that remain there even if the State has acquired independence from its modern colony, but is still politically linked economically to the previous sovereign; and as long as the restrictions do not place the state under the legal authority of another state, the former remains an independent state, however extensive and annoying its political or economic ties with another country may be.

So what is required for independence is that the authority of this government is legally absolute and does not act on the basis of decisions made by external authorities. A typical example that is made to describe a situation in which there is no real independence is the case of the Turkish Republic of Northern Cyprus: Cyprus is basically divided into two parts: one has become a member of the European Union, the other has a government that governs a part of the island and really follows the instructions basically of the Turkish government. This is the view of the European Community and this case is usually used as an example to demonstrate and clarify when a government is deprived of independence.

The situation remained the same, although at the beginning of the 2000s a referendum was held with the aim of unifying the two parts of the island into a single state. This referendum was rejected hand in hand and therefore there was no unity and only Cyprus joined the European Union.

Satellite states are the states that are influenced very heavily by a powerful state: it is a concept that was commonly used during the Cold War between the United States and the former Soviet Union and that has now returned to the pages of newspapers.

Being a satellite state does not mean that they do not have enough independence to be deprived of statehood, but they are obviously under strong influence from a powerful state. An example of a satellite state is Belarus under the influence of Russia: Belarus is considered the area under the political influence of Russia, in such a way as to make Belarus a satellite state that is inclined to make its territory also used by another state for the purpose of what is a huge violation of international law (i.e., Russia that used Belarusian territory to attack another independent state).

Note: There are no forces to enforce the rules of international law; aggression and interference with the internal affairs of another state are the pillars of the law of coexistence that have been achieved in all these centuries.

There are two regions of Ukraine that have been granted a special status of independence within the Ukrainian domestic legal order; moreover, Putin recognizes them as independent regions.

It is as if someone recognized Sardinia as an independent state but without any result of a democratic process from within: in fact, Putin says that Donbass and Luhansk declared themselves willing to become independent and that at some point they were willing to join Russia.

There is a set of criteria written in 1933 concerning population, territory, government, ability to enter relations with other states, which is another way of saying effectiveness and independence.

A UN intervention took place in the case of Kosovo in the case of East Timor, and the United Nations took over the temporary administration of the territory of Kosovo.

So basically, it was the United Nations, which ruled the country for a number of years and also instructed and trained personnel, administrative authorities, people who will become part of government officials.

The temporary administration of the United Nations in Kosovo is also decided which currency the country should adopt in fact, it decided to use the euro for that period of time and then slowly and gradually the government of Kosovo was formed. Kosovo finally became a state, but the formation process took several years.

Even though Kosovo has become an independent state with its own government capable of exercising effective control over the territory and population without the help and support of the United Nations, created by the number of repercussions around the world and Kosovo, it is still not recognized by a number of states.

For example, Spain has the problem of Catalonia which is not recognized by China which in turn has the problem of Taiwan and Hong Kong which have not been recognized by Russia.

However, Kosovo has been recognized by most other European states and by the United States and other members of the United Nations.

Kosovo is a member, for example, of the International Monetary Fund and the World Bank and has thus become a member of international organisations.

Kosovo is born of a state and derives from war, genocide, self-determination, the democratic expression of the will to become a state on the part of the people and population living in the territory.

Kosovo has also entered relations with other states to be recognized by the majority of the international community.

The state has the right to defend its integrity independence to provide for its preservation and prosperity, and consequently to organize itself.

Recognition is not a constitutive element of statehood but has only a declaratory value: it is something that remains in the power of other already existing states and is an expression of the will to enter into a relationship with a new subject of international law; it is something that comes from the fact that the entity has acquired statehood but does not make the entity a state.

INTERNATIONAL LAW – Lecture of February 23, 2022

The criteria on **statehood and states** established by the Montevideo Convention, which is a treaty binding on members but are considered customary in nature, are binding on ALL international communities.

This convention gives a tripartite conception of the State: territory, population, and government, which must have two main characteristics:

(1) Independence:

- a. case of the puppet government, referring to those who do not have independent legal authority over the population of that specific territory, but their decisions are entirely framed on the decisions of another state (for example, Turkey and the Republic of Northern Cyprus);
- b. federal states are not independent, so they do not have an international legal personality. In fact, the component units of a federation, such as California in the

United States, do not have an international personality, but only the federation has it (USA, India, Germany, etc.);

- c. Trusteeship (Art. 73 of the Charter of the United Nations) is included in the Charter of the United Nations, since it was negotiated at the end of the Second World War, at that time there were many colonies and dependent territories (the last one that gained independence was Palau in 1994).

(2) Effectiveness:

- a. the government must be able to guarantee law and order in its territory, effective control over its population, and therefore, be able to pass laws, execute administrative acts, issue judicial decisions, and enforce decisions with the police and military force; however,
- b. these aspects do not require respect for human rights and the rule of law, because if a dictatorship is able to exercise effective control, it can be considered a state.

Examples of governments that are not effective: government in exile, such as Kuwait; failed government, like Somalia (no effectiveness, but cannot be occupied or conquered).

When there is a conflict/revolution or **insurrectionary movement** in a state and one side requires independence to govern part of the territory autonomously, what happens?

From the point of view of statehood, an insurrectionary movement can be considered to have international legal personality to the extent and for the time it enters into force on a part of the territory of the state where the insurrection takes place: it is a temporary international legal personality, limited in time and scope.

It is a temporary international legal personality because the situation must manifest itself in one way or another at a set time:

- (1) if the insurrection is successful, it will become a new government without affecting the statehood of the state as it was before; or
- (2) there can be a succession, that is, a state that succeeds the previous one, and therefore, a part of the state becomes independent and will be governed by those who started the revolution within a government. If this happened, there would be two states: the predecessor state and the new one. If the situation remains in favour of the previous government and the original government returns to control even the territory where there was the insurrection. In this case the insurrectionary movement would be treated by the ruling government not as a group of freedom fighters, but as a group of terrorists or as a group of rebels as required by the domestic legal order.

When the insurrectionary movement has control over at least part of the territory, then international law recognizes this movement as a limited international legal personality (limited not only in time but also in scope). International law recognizes the leaders of insurrectionary movements only for certain specific purposes, not for everything a state has the right to do on the international space: they may be able to conclude treaties (not all), such as peace treaties for example. They have international legal personalities when it comes to the treatment of foreign citizens in the territory they control or when it comes to the norms of international humanitarian law, applied to the conduct of hostilities (prisoners, soldiers of party opponents, protection of civilians), or when it comes to immunities that will allow

them to go to a foreign country and negotiate a political solution (peace treaty with the government of the mother state).

They therefore possess a very limited type of international legal personality: they have the right to relate to other states only for these purposes and for a certain period of time, unless the situation evolves in some way.

In such a situation the other states of the international community can continue to help the government of the state in charge, providing assistance, weapons, economic assistance, if they need it but it is against one of the fundamental rules of international law for a state to assist the insurrectional movement (*international law of coexistence*⁵). The main purpose of international law concerns the capacity of the international legal order, the stability of competition of states that respect the sovereignty of other states, the principle of the prohibition of interfering in the international affairs of other states, the principle of the prohibition of the use of force.

In theory in the case of a civil war, the other states do not intervene by helping the insurrectionary movement formed within a foreign state; the state should intervene in favour of the legitimate government. In practice, however, the rules are not always followed.

Then there is **the issue of illegality in the creation of a state**: statehood cannot be acquired as a result of a violation of international law (for example, through the use of force).

For example, in the mid-1960s there was the declaration of independence of the white minority government of Southern Rhodesia⁶ with a government that supported apartheid. Apartheid is in violation of international principles, so this declaration was not considered legal by the international community, and they therefore did not acquire international legal personality. The case of Rhodesia strongly indicates that an otherwise effective territorial entity may be effectively prevented from becoming a state for the purposes of international law if its creation violates the right to self-determination of the local population.

In that case, there are also two other problems:

- (1) South Africa immediately recognized Rhodesia as an independent state;

⁵ The **international law of coexistence**—also referred to as ‘general international law’—contains the answers required to separate the powers of the sovereign states and thereby uphold peaceful coexistence. Thus, it is here the lawyer finds the classic topics of international law. These topics include issues related to the delimitation of—and title to—territory, the criteria for statehood and the recognition of new states and governments, jurisdiction and immunity, the use of force, the conduct of armed hostilities and neutrality in times of armed conflict. Also included are the fundamental principles of treaty law and the secondary legal principles on state responsibility. As a legal structure, the international law of coexistence is primarily horizontal in the sense that it is mainly concerned with the manner in which sovereign states interact with—and between—each other. It is also important to note that the international law of coexistence merely seeks to ensure that states can pursue their different and separate interests (whatever they may be) in a way that respects the sovereignty of other states. As a fundamental structure of international law, the international law of coexistence is relatively stable and not subject to much change.

⁶ **The declaration of independence of the white minority government of Southern Rhodesia.** On 11 November 1965, a white minority government issued a declaration of independence in the British colony of (South) Rhodesia. Even though it appeared to fulfil the formal criteria for statehood, Rhodesia was met with overall rejection of its claim to statehood, including from both the UN General Assembly and the UN Security Council. In a series of resolutions, the Security Council called upon all states to refrain from recognizing the ‘illegal racist minority regime’ and explicitly referred to the new government as an ‘illegal authority’.

- (2) The UN Security Council commented on this declaration of independence by the government of Southern Rhodesia reaffirming the general principles of international law, prohibiting other states of the international community from recognizing Southern Rhodesia as a state.

The principles have been "reaffirmed" because the duty not to recognize an entity that claims statehood on the basis of the violation of international law is already a norm of customary international law. If the UN Security Council felt the need to make this reaffirmation, it was to warn all members.

Similarly, the military occupation in Kuwait does not alter the statehood of the Iraqi-occupied state. The principle of «ex iniuria ius non oritur» states that legal rights cannot derive from unlawful conduct.

The ban against the occupation of another state is firmly established by a document which is the resolution of the United Nations General Assembly on friendly relations between states in the 1970s.

Recognition is not constitutive of statehood, so it is not one of the conditions of the general criteria to be met in order for an entity to acquire international legal personality and become a state; it is primarily a political decision by other members of the international community to recognize or deny recognition to a new state.

Basically, it is an exercise in diplomacy, because with recognition begin commercial and diplomatic relations and so on. Recognition can be a formal act, a speech, a statement made by the head of state of a government. Examples are the case of Kosovo⁷ or Putin's recognition of the two regions of Ukraine (Donetsk and Luhansk).

It is therefore a political instrument in the hands of the government.

- (1) Recognition is a voluntary act because you can decide whether to express your recognition or not.
- (2) Recognition may be implicit. The moment a state enters a diplomatic relationship or sends an ambassador to the new one it is a sign of recognition of the existence and international legal personality of that new state.

Importantly, there is nothing to prevent a state from conditioning its recognition and subjecting the new state to additional criteria to that required by the Montevideo Convention.

For example, the EU in 1990, at the time of the dissolution of the former Yugoslavia and the dissolution of the former Soviet Union, adopted a declaration in which it stated that it would recognize new states formed after the dissolution of the two dissolved states, if they complied with the rule of law, the protection of human rights and had a democratic government: these elements are not necessary to be a state, but they may be relevant for other states of the international community to recognize or enter into relationship with these new entities, so there is nothing wrong with adding these conditions to recognition.

From this point of view, recognition can be used in different ways as expecting a new entity to respect human rights can be used in a political way (state X recognizes Y only if it becomes its ally and not an ally of its political enemies). An example is the Cold War scenario or today's Russia recognizing the two

⁷ **Kosovo's independence from Serbia.** The practical application of the right to self-determination arose with regard to Kosovo after it declared its independence in 2008. In February 2008 a newly formed Assembly of Kosovo declared Kosovo's independence from Serbia and the establishment of a sovereign state. In a 2010 advisory opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, the ICJ did not offer its views on whether international law confers a positive entitlement to Kosovo to secede. The Court simply noted that international law did not preclude Kosovo from issuing a declaration of independence.

Ukrainian republics, because it wants them to remain under its influence and does not want them to apply for EU or NATO membership).

Thus, recognition can be conditioned by other elements and conditions, in addition to statehood.

There is a difference between succession of states and regime change that can be explained by a particular example of the Anglo-Saxon world that considers two false states namely Aspatria and Ruritania.

- (1) In Aspatria we have a dictator who has ruled the country for about 40 years and is suddenly overthrown by a rebellion and after a period of transition a new democratic government is elected. So, *what happened?* There has been a change of government (which does not affect the statehood of Aspatria), but no succession.
- (2) In Ruritania, on the other hand, we have two regions: the Tania region, which without the use of force succeeds and in agreement with the Ruri region, forms a new independent government to govern that part of the state. *What happened in this case?* A peaceful and legitimate succession that led to the formation of a new state and the predecessor continues to exist, although without a part of its territory.

If one state were replaced by another (state succession), *what would happen to international legal obligations (existing treaties)?* For example, *those treaties that Ruritania has stipulated are also binding on Tania or not?*

There are several modes of state succession:

- (a) secession (e.g., the secession of South Sudan from Sudan in 2011);
- (b) merger (e.g., the union of the two Germanies in 1990, North and South Yemen, Tanganyika and Zanzibar which formed the federal state of Tanzania);
- (c) annexation;
- (d) dissolution (e.g., the complete dissolution of Yugoslavia without any successor, because Serbia and Montenegro – when they were together – were not considered its successors; the dissolution of the Soviet Union whose successor is Russia but of which there are other independent countries around; and Czechoslovakia).

When these phenomena occur, what are the legal consequences? Is the successor legally bound by the treaties of the predecessor? What happens to the treaties on human rights, property, deaths, trade, peace, and borders?

International law seeks to provide an answer to this problem by adopting a treaty called the "The Vienna Convention on Succession of States in Respect of Treaties". It is a codification treaty, but it has not been very successful, it was only an attempt to establish rules that will apply in all different cases of state succession: despite being applied, it was only ratified by 23 states.

Most often, relations concerning the new state are defined by ad hoc agreements, revolutionary agreements, peace treaties. They are considered on a case-by-case basis in practice.

The rule that should be applied in almost all cases is the "Clean Slate Rule" or "Tabula Rasa Principle", according to this principle the new state is not considered bound by the international treaties stipulated by the predecessor. So, *what happens to human rights treaties?* Recently, the theory has been developed that human rights treaties must remain applied, even if there has been a succession. This theory has been underlined by the International Court of Justice, for example in an opinion on the coercion of genocide and the prohibition of genocide established therein; the European Court of Human

Rights also agrees with this idea by stating that international human rights treaties belong to individuals living in the territory of the State concerned, regardless of the dissolution or other forms of succession of it. The focus is on a legal obligation that binds the state to something from which individuals have the right to be protected.

The rules on succession to treaties are complex and largely depend on the subject matter at hand. But as a point of departure it will often make sense to accept that the emerging state is not bound by the treaties and agreements that were concluded by its predecessor. There are, however, a number of exceptions to this so-called 'clean slate' approach. The principle of *uti possidetis juris* stresses that geographical boundaries created by treaties remain in force regardless of whether or not the boundaries coincide with ethnic, tribal, religious or political affiliations. Predictability and stability would be greatly jeopardized if territorial boundaries were subject to negotiation whenever a state changed its legal status. In the Frontier Dispute case, the ICJ applied the *uti possidetis* principle to an old colonial border and noted its 'exceptional importance for the African continent'. This principle has also been applied in non-colonial settings and to internal boundaries. In the Territorial Dispute case, the ICJ rightly noted that a boundary agreed upon in a treaty, 'achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary.'

The Lupala Exercise

The region of Lupala is populated by four different peoples: the Alphas, the Betas, the Gammas and the Deltas. Although these peoples have different cultures, religions and ways of life they have been living in perfect harmony for many years.

Until 1999, the region of Lupala was governed by the State of Caprivi. In January 2000, however, the Council of Lupala, composed of the heads of the four peoples, proclaimed the region's independence. The Council also decided to take over the tasks previously executed by the Caprivian government. The Council of Lupala established various institutions to administer the territory of the region. Among these, the Council also created a Parliament where all the four Lupalaian peoples are equally represented. The entire transition process was peaceful.

In 2002, the Council of Lupala had acquired the knowledge and capacity to carry out almost all administrative tasks on its territory. However, the military and police force were still exclusively managed and controlled by Caprivian authorities on the entire Lupala region. Moreover, the army and the policemen deployed in the region only came from Caprivi and were only loyal to the government of Caprivi.

At the end of 2003, Lupala signed a treaty with Caprivi on the withdrawal of the Caprivian military and police forces. The treaty established, among other things, that the authorities of Caprivi would no longer exercise their function in Lupala after 30 April 2004. This deadline was meticulously respected, and from 1 May 2004 onwards, the Council of Lupala had its own security forces.

Moreover, in December 2003, Lupala signed several bilateral treaties, especially of a commercial nature, with various States. At the end of 2004, the

Can we say that Lupala is a State according to international law? If yes, since when?

What if the Council of Lupala was made only of representatives of three out of four peoples and the Deltas were strongly discriminated and even object of gross violations of human rights?

Solution to the Lupala Exercise

1. Applicable law

There is no legally binding definition of a State. However, the most widely accepted definition of a State can be found in the Montevideo Convention on the Rights and Duties of States from 1933. This Convention it has been concluded only among some Latin American States. Nevertheless, the definition of a State contained in its first Article is considered to have customary nature. Hence, we will also use it here.

According to Article 1 of the Montevideo Convention, there are four elements any entity has to have in order to be a State:

- (1) A permanent population (though the size of the population does not matter-in particular there is no minimum established. Otherwise, States with very small populations, such as Tuvalu, which has some 10,000 inhabitants, could never qualify as States).
- (2) A defined territory (however, the fact that some of its borders might still be disputed or the size of the territory are not relevant for this criterion).
- (3) A government (this is usually equated to the necessity of an entity to have internal sovereignty and control over its whole territory).
- (4) Capacity to enter into relations with other States (this is often termed external sovereignty).

Now we can assess whether Lupala fulfilled all the four statehood criteria and when. The scenario is one in which the mother-State agrees upon the secession of part of its territory.

- (1) A permanent population. This criterion does not pose any problem. The four peoples live there and together constitute the permanent population. As noted above, the size (of which there is no indication) or the character (mixed here between four peoples) does not matter.
- (2) Defined territory. This criterion also does not seem to be problematic. What is known as Lupala clearly occupies a certain physical territory.
- (3) Government, that is the existence of public authorities capable of expressing the will of the State, exercising a certain degree of effective control over the territory and provide internal order and stability. The enforcement branch is therefore essential in the same manner as administrative and legislative organs.
 - a. Lupala's government only became effective when it was able to control the territory through its own military and police forces; the third criterion is broader than just having executive, legislative and judiciary organs. It is also necessary that the government can actually control its own territory to the exclusion of other States; therefore, the third criterion is only fulfilled from May 2004 onwards.
- (4) Independence (which in the Montevideo Convention is framed as the capacity to enter into international relations with other States) manifests itself initially through the initiation of diplomatic relations and the conclusion of bilateral treaties to then move to the conclusion of multilateral treaties and the admission to international organisations. The fact that Lupala has concluded a series of bilateral (commercial) treaties clearly indicates that other States do recognise it as an equal partner. However, recognition only has a declaratory and not a constitutive value.

The date in which all four criteria are met is 1 May 2004.

INTERNATIONAL LAW – Lecture of February 28, 2022

Self-determination is a right to which people are entitled in public international law: it is a recent type of law, specific and limited.

In classical international law people were not subjects, in fact before the Second World War people were not considered to have any rights under international law. The principle of self-determination was recognized after World War II and is attributed to entities that aspire to become an independent state.

In today's international law all entities have the right to freely determine their political status and pursue their economic, social and cultural development, as an independent state: they therefore have the right to acquire the statehood that is a disruptive right in international law. Initially, the original public international law was composed of laws and rules that wanted to regulate relations between states and to ensure their peaceful coexistence.

Guaranteeing the right to acquire the state bond and therefore independence does not fit well with the law of cohabitation: this right has in fact been recognized but has also been interpreted restrictively.

The right to statehood uses the concept of "people", not easy to define and this creates a series of problems, in fact:

- "people" is different from "population" (people living in a given state)
- "people" is also different from another concept used in international law which is that of "indigenous peoples".

For example, people living in the Amazon are indigenous people whose rights are protected by international law, because of the culture and their special relationships they have with a specific territory, but it is different when the principle of self-determination is taken into account.

- "people" is also different from ethnic groups or minorities

So, *who are the people who have the right to self-determination?* The definition that mainly describes these people as the constituent people living within a certain territorial entity in history is that of a native population of a non-autonomous territory that was grouped in colonial times (non-independent country) to form a given political entity over which to govern. This is one of the common definitions we have of peoples entitled to self-determination.

This tells us a lot because people before the First World War and during the Second World War lived in a non-autonomous territory, therefore in a country that was not independent and that was governed by a colonial power. So, the right to self-determination could not be thought applicable to the population living in Catalonia, willing to become independent from Spain, or from Sardinia, hypothetically willing to become independent from Italy.

So, *Kosovo had the right to separate from Serbia? Does Catalonia have the right to separate from Spain? Does Quebec have the right to separate from Canada?* Quebec being a French-speaking region of Canada also added this issue to its secession by becoming independent before the Supreme Court of Canada in the 80s and 90s and a solution was in fact given by the Supreme Court of Canada.

Even in the case of the Ukrainian regions of Crimea, Donetsk and Lugansk, the right to self-determination should not be understood as a right of secession from an existing state.

The origin of this right comes from the Covenant of the League of Nations that came into force from 1920 to 1946: this pact is the predecessor of the United Nations and was not actually a successful experiment in international law.

This Covenant was established at the end of the First World War, with the aim of keeping the peace but failed to prevent the Second World War.

At that time the Covenant of the League of Nations was signed by 58 members (58 states, recognized as such in the international community that decided to ratify the League of the Nation) but did not have its own armed force, similar to the UN. The Covenant of the League of Nations also had to establish how to consider the colonies that already existed at that time.

Referring to Article 22 of the Covenant of the League of Nations:

Article 22

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

Countries that at that time were considered developing and that could not be considered sufficiently capable of governing themselves autonomously are called "peoples not yet able to stand alone": peoples who, according to what was said, needed to be put in the hands of advanced countries that could give them enough civilization and security, as they are unable to do it themselves.

This concept is at the origin of the CHARTER of the United Nations: those people were put under the tutelage of advanced nations which basically means that colonial countries and their peoples could not enjoy any right of self-determination at that time. This was the consideration adopted before the change brought about by the Second World War took place.

We can see differences if Article 22 of the Covenant of the League of Nations is compared with Article 1 of the Charter of the United Nations. Article 1 which was concluded in San Francisco in 1945 and contains the aims and principles of the UN.

CHAPTER I: PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

In paragraph 2 there is a clear institution on the right to self-determination of persons and there is also an important reference to how this could be achieved in Article 55.

CHAPTER IX: INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;

- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Note: The war in Ukraine is a clear violation of these rights.

Article 55 concerns international economic and social cooperation and aims to create the necessary conditions for friendly relations between nations based on respect for equal rights and self-determination of persons.

The UN should promote:

- a higher standard of living,
- employment,
- the conditions for economic and social progress and development,
- solutions to international economic and social assistance and related problems,
- cultural and educational cooperation,
- protection of human rights.

All these are elements of development cooperation and in this sense the UN should use (not referring to the UN Security Council, but more to ECOSOC⁸) its powers to engage and promote international economic and social cooperation.

There was a great change that happened after the Second World War, and the position was reversed, and it is on the basis of these two articles that in the 60s and 70s the UN started a process of promoting decolonization.

The promotion of decolonization was one of the main achievements of the UN and allowed countries and peoples that were previously placed under the tutelage of advanced nations to become independent and acquire statehood.

There are several important documents:

International Covenant on Civil and Political Rights (Adopted: 16 December 1966; Entry into force: 23 March 1976)

PART I

Article 1

1. All 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.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of

⁸ **ECOSOC.** The Economic and Social Council is at the heart of the United Nations system to advance the three dimensions of sustainable development – economic, social and environmental. It is the central platform for fostering debate and innovative thinking, forging consensus on ways forward, and coordinating efforts to achieve internationally agreed goals. It is also responsible for the follow-up to major UN conferences and summits. The UN Charter established ECOSOC in 1945 as one of the six main organs of the United Nations.

the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The General Assembly declares that it is able to support countries that were under colonial rules and wanted to become independent: it is a resolution of the United Nations General Assembly, adopted in 1960. It was a transition that sometimes took years and that took place in the vast majority of cases without the use of force.

The text with which the UN General Assembly declares that it is ready to support all developing countries that were still under colonial rules and wanted to become independent:

Declaration on the Granting of Independence to Colonial Countries and Peoples (Adopted: 14 December 1960)

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end

Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

All UN documents usually have a preamble with a long list of "recognizing", "considering", and other various affirmations and therefore is a list of all the premises on which the document is based, and then we have the text of the recommendation or resolution.

In the case of a UN General Assembly resolution, the text adopted is not binding. In the case of the United Nations Security Council, resolutions adopted under Chapter 7 of the Charter of the United Nations are binding and mandatory.

When the UN General Assembly resolution is not, the recommendation helps anyway; in this case, in fact, it helps to define the boundaries of the application of the right to self-determination and the first boundary is to recognize the application of this right to persons subject to a colonial power: this resolution was used by the International Court of Justice to declare and affirm that the right to self-determination has become a norm of customary law since 1960.

Resolution 2625 (XXV) of the United Nations General Assembly, 1970, "Declaration on the Principles of International Law Relating to Friendly Relations and Cooperation between States" in accordance with

the Charter of the United Nations reaffirms very important principles including the principle of self-determination of persons and also other principles that are clearly violated in the event of aggression, such as the duty not to intervene in matters falling within the internal jurisdiction of any State.

These principles are:

- a. The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,
- b. The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,
- c. The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,
- d. The duty of States to co-operate with one another in accordance with the Charter,
- e. The principle of equal rights and self-determination of peoples,
- f. The principle of sovereign equality of States,
- g. The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

These documents have been used by scholars and also by the ICJ to recognize that the right to self-determination has become a principle of customary law, a rule of a jus cogens nature or peremptory norm (erga omnes obligation)

Most of the fundamental principles and rules that exist in international law are customary in nature; moreover, the right to self-determination also has the characteristic of being an erga omnes obligation, which not only establishes an obligation of a reciprocal nature or in a bilateral relationship, but an obligation for the entire international community of States as a whole.

Therefore, the violation of people's right to self-determination cannot involve only the two parties in a given scenario but can involve all the other states of the international community.

The International Court of Justice has applied this principle in several cases where it has been asked to issue an advisory opinion, such as in the case of Western Sahara or in the case of the construction of a wall in Palestine by Israel: in fact, the International Court of Justice held that this construction constituted a violation of the principle of self-determination and there was therefore a violation of Israel's obligation to respect this right towards the Palestinian people.

More recently, the ICJ has also applied this principle in the case of the Chagos Islands.

In the East Timor case (Portugal v. Australia), the ICJ stated that the right to self-determination is an essential principle of international law that has an erga omnes character.

An important distinction must be made between external and internal self-determination as public international law recognizes people's right to self-determination only when it comes to external self-determination.

External self-determination is today recognized to people under colonial rules (as stated by the ICJ, since 1960): people under colonial rules become independent states and inherit the borders previously established by their colonial rulers but without the possibility of re-discussing borders that are considered inviolable and unchangeable.

The International Court of Justice has also given an interpretation of the application of the right to self-determination to people under racial segregation, apartheid.

The last case on which there is consensus is that in which people who are under foreign military occupation can exercise the right to become a new state or to associate with a pre-existing state: those who fight for this purpose cannot be considered terrorists, because they also have the right, if the need requires it, to resort to violent means (even if not everyone agrees).

While peoples under a colonial power, under racial segregation, or illegal foreign military occupation can fight to use this right and become independent, on the other hand colonial powers cannot use force to prevent or block any attempt by this people to exercise their right to self-determination.

In such a scenario, states are prohibited from assisting oppressor states; no other state can interfere or intervene by using military force in these situations to assist the population involved: self-determination cannot be achieved militarily by third states.

Eternal self-determination can then be exercised in such limited circumstances by people under colonial rules, apartheid, or illegal foreign military occupation, within the limits set for becoming an independent state or separating and joining a pre-existing state.

Internal self-determination is different in that it describes the right of people to have the right to political participation and representation or the right to choose the form of government by which they want to be governed (possibly democratically).

The right to internal self-determination is often linked to the protection of human rights, the protection of minorities, sometimes even the protection of indigenous peoples; somehow it becomes the right to choose the constitutional system, the type of government, the type of regime and the public authorities by which they will be governed.

In the case of Quebec's secession from Canada, the Supreme Court of Canada clearly stated the differences between external and internal self-determination ("Quebec Secession," 1998, paragraphs 132-133).

Reference re Secession of Quebec (Date: 1998-08-20)

[132] The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

[133] The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the *Declaration on Friendly Relations*:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- (a) To promote friendly relations and co-operation among States; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Domestic self-determination is not recognized as a rule of customary international law; only external self-determination is recognized as such. Internal self-determination should not be considered a legitimate way through which to achieve statehood: if you are ruled by a dictator, this does not allow people living under dictatorship to separate and create a new state.

Obviously, the right to self-determination creates several problems and questions. Does something like corrective secession exist in international law? There is a long discussion on this issue, because it has been suggested that the passive violation of human rights, against a minority, a minority political group, or ethnic groups, gives the right to a corrective secession, pushing the argument further into situations such as:

- genocide,
- mass killings,
- widespread torture,
- disappearance of persons,
- systematic discrimination.

There is also the right of third parties to intervene militarily to free those people in situations of abuse and serious violations of human rights: in these very exceptional cases of oppression, some argue that there is the right of foreign countries to intervene militarily to enforce the right to self-determination.

Intervening during an ongoing or pending genocide may be such a case, but other cases of (discriminatory) crimes against humanity, targeted massacres among an oppressed population, and large-scale "ethnic cleansing" are also good examples.

However, this doctrine is not recognized in international law and does not have a status of customary law.

In the early hours of Thursday, February 24, 2022, Russian President Vladimir Putin addressed his nation, announcing a "special military operation" against Ukraine.

The speech came on the heels of his decision to recognise the Donetsk People's Republic and Luhansk People's Republic on February 21 and the signing of mutual cooperation agreements between Russia and the two breakaway regions.

Excerpt of Putin's speech declaring war before launching the biggest attack by one state against another in Europe since World War II:

« In this regard, in accordance with Article 51 of Part 7 of the UN Charter, with the approval of the Federation Council of Russia and in pursuance of the treaties of friendship and mutual assistance ratified by the Duma⁹ on February 22 with the Donetsk People's Republic and the Luhansk People's Republic, I decided to launch a special military operation. Its goal is to protect people who have been subjected to abuse and genocide by the regime in Kyiv for eight years. And for this we will pursue the demilitarisation and denazification of Ukraine, as well as bringing to justice those

⁹ **Duma.** A дума (дума) is a Russian assembly with advisory or legislative functions. The term comes from the Russian verb думать (думать) meaning "to think" or "to consider."

who committed numerous bloody crimes against civilians, including citizens of the Russian Federation. »

The language used by Putin to justify intervention in Ukraine, and also the recognition of the two regions, is based on the doctrine of corrective secession. The Ukrainian government was declared to have undertaken genocide in those regions, so they had the right to remedy with secession and not being able to do it alone they needed Russia to intervene to help them become independent: it is on these legal arguments that Putin's speech is based.

Note: To date, however, there is no evidence of an ongoing genocide in Ukraine.

Corrective secession is not recognized in international law as an existing norm of public international law, but there may be cases where cause of genocide or other oppression requires intervention (but always without exercising the use of force and only through military intervention).

The case of the Island of Serondela – Exercise

The small island of Serondela, situated only about 500km north of Madagascar, has spent most of its history at the crossroads between major maritime commercial powers; it was first used as a trading post and then, in the seventeenth century, the western part of the island became colonised by Alfa, while Beta took over the eastern part.

Even though the border between the eastern and the western part of the island was clearly defined, during World War II the united Serondela people of the entire island fought the occupation by a third foreign neighbouring State at a high human life cost. After the war, despite their efforts and sacrifice, the island remained divided between two colonial masters.

Soon, however, Alfa renounced to govern the western part of the island and a newly established authoritarian government proclaimed its independence: the new State of Karnela was formed.

The eastern part of Serondela remained instead under a rather uninterested Beta administration which nonetheless used violence and purges to rule. In the 1970s, a civil war broke out between the pro-Beta government and the pro-independence movement. At that point, the Beta colonial authorities fled the island.

Despite official assurances that it would not interfere with the eastern part of Serondela, the dictator of Karnela took advantage of the opportunity and annexed it against the will of the population. The occupation and forced annexation faced heavy insurgency resistance and caused thousands of deaths among civilians. Beta still felt it had a right in deciding the destiny of East Serondela.

What is the status of East Serondela under international law?

The small island of Timor, situated only about 500km north of Australia, has spent most of its history at the crossroads between major powers dominating maritime southeast Asia; it was first used as a trading post for China and India, and then in the seventeenth century the western part became colonised by the Dutch while the Portuguese took over the eastern part of the island. The Portuguese were not very efficient in establishing governance which resulted in two parallel systems of rule – the colonial and the indigenous one (Taylor 1994, 12). Even though the *Sentenza Arbitral* codified the border between the eastern and the western part of the island in 1915, the Timorese people all over the island fought the occupation by Japan in World War II with guerrilla tactics under the leadership of Australian commandos (Taylor 1994, 12–13). Even though Australia left the island in

1943, the Timorese continued their guerrilla fighting on the side of the Allies until the end of the war and at a high human life cost (Taylor 1994, 13).

Despite their efforts and sacrifice, the island remained divided between two foreign masters after the war – the western part was incorporated into Indonesia while the eastern part remained under rather uninterested Portuguese administration which nonetheless used violence to rule. In the 1970s, as a civil war broke out between the pro-Portuguese and pro-independence movements in their Timorese colony, the Portuguese simply left, burdened by the coup d'état in their homeland (Calvocoressi 2001, 561).

Despite official assurances in April 1974 that they would not interfere with the Portuguese Timor (Taylor 1994, 25), Indonesia took advantage of the opportunity and annexed the eastern part of the island, although neither the UN nor Portugal ever recognised this annexation. It is at that point that the situation of East Timor appears in the UN SC documents for the first time.

During the first months of the occupation, the Indonesian military faced heavy insurgency resistance in the mountainous interior of the island. The '80s and '90s saw continuous clashes between Indonesian and East Timorese groups over the status of East Timor, until 1999, when a majority of East Timorese voted overwhelmingly for independence (the alternative option being obtaining a "special autonomy" while remaining part of Indonesia). After a further two and a half years of transition under the auspices of three different United Nations missions, East Timor achieved independence on 20 May 2002.

Many efforts were being undertaken in the background, particularly towards resolving the role of Portugal and its relationship with Indonesia. Even though Indonesia *de facto* administered the territory, Portugal still felt it had a right in deciding the destiny of East Timor despite the decision of the International Court of Justice in the Case Concerning East Timor (Portugal V. Australia) in 1995 which found that East Timor is a territory without self-government and the East Timorese are a people with a right to self-determination.

The Serondela case was really copied from what happened in the case of East Timor. It was a case centred on the principle of self-determination which concerned a country/people struggling to become independent after a colonial period. So, there were colonies that at some point in time decided to declare their independence and wanted to be recognized as such.

Despite the interference of other states and previous colonial powers, other powers, such as Indonesia, instead of taking advantage of what was happening in that specific territory, tried to occupy the territory of East Timor.

The case of Timor-East is one of the most important cases in which the International Court of Justice decided to apply the principle of self-determination, and in that specific case the International Court of Justice also stated that the principle of self-determination (the right to self-determination) is an "erga omnes obligation" (among the most important obligations of international law).

International Organisations

INTERNATIONAL LAW – Lecture of March 1, 2022

International organizations are another subject in international law.

The following topics will be discussed:

- the notion of what an international organization is and its development;

- the main governance structure of an international organisation and its powers vis-à-vis the Member States;
- the UN (how it works and what are powers), also taking into account the Ukrainian war and why the UN Security Council is very important in the field of international peace and security.
 - the veto power of permanent members of the UN Security Council (such as Russia);
 - the more limited powers of the UN General Assembly.

Note: In this period the UN is discussing in a special emergency session what to recommend to member states in terms of sanctions applicable against Russia (since Russia is the target state).

International organisations have an international legal personality distinct from a Member State, therefore they are international legal entities with their own rights.

The fact that international organizations have a separate international legal personality was not clear until World War II. The main idea was that states were the primary subjects, the original subjects of international law, and that international organizations were only a creation of states, so they had and still have a derived nature. So, the pillar of the system still remains state, so it took some time before the doctrine of scholars recognized the international organization (IO) as an international legal entity.

Thus, it is significant that the Italian Court of Cassation, one of the main judicial bodies of the Italian legal order back in 1931 - before the Second World War - affirmed that the IOs were neither a state, nor a super state, nor a confederation of states, and that only states were the primary subjects of international law and that the organizations had only a derived international legal personality.

At that time the number of international organizations was very small, and this also explains why there was such conception of IOs. The usual examples that can be given are:

- the International Telegraphic Union (International Communication in the 19th Century);
- the Universal Postal Union;

The organizations were very sectoral and focused on technical cooperation, with the aim of facilitating international communication; they were nothing comparable to what the United Nations has the power to do.

- the League of Nations (which is known for not having been very successful, having failed in its primary objective of preventing the use of force due to World War II).

Everything changed after the Second World War with multilateralization and the new spread of cooperation between states, which already existed at that time. At the end of the Second World War there were many colonies in the southern part of the world (in Latin America, Asia, Africa).

The northern part of the globe was made up of states that had already decided to cooperate more strictly than before on several objectives: from peace and security, to trade, health, international monetary cooperation and development.

There have been numerous international organisations from the Second World War to the present and this may have necessitated a different qualification of their nature, so the concept had to be redefined as they could no longer be considered just a derivative of the expression of the Member States.

International organisations are no different from intergovernmental conferences: international organisations therefore have the rights and obligations conferred on them by their Member States. While states are sovereign and can exercise any kind of power, international organizations have only those specific powers that have been conferred on them and delegated to them by member states.

For example, the European Union has exclusive competences: in fact, the European Union completely replaces the Member States, because the Member States have stripped themselves of the power to exercise a certain competence in a certain area and this competence is now in the hands of the European Union and its institutions (e.g. trade and monetary union - i.e. the euro for members who are also part of the eurozone).

The International Organization may also have shared competences, and in this case States would remain authorized to operate in the same field within a framework of cooperation with other States that can do the same: they can therefore share competences.

This principle of the limited powers of an international organization can be referred to as:

- conferrable principle (therefore only what is conferred);
- principle of attributed power (which refers to the concept just described and means that international organizations are not sovereign as a state but can only work and exercise their powers in a given field; for example, the board of directors of the health organization that has no power in the field of peace and security but is called to work to prevent another pandemic in the health field).

International organizations - in the words of the International Court of Justice - are vested by States (primary subjects of international law) with powers and the limits of these powers are an expression of the common interest that these States all have together.

So, it is necessary that states, by creating the international organization, agree on the boundaries in which the IO can act. In other words, it has been said that international organisations do not have a general competence.

The IOs have only the international legal personality necessary to carry out the functions assigned to them by the Member States (very limited compared to the States).

And they are really a different kind of entity: they have no territory and no population (which are criteria for statehood); so they are a completely different kind of subject.

How are they established? What is the legal instrument for creating an international organisation? IOs are established by a treaty. The instrument is a treaty, a pact and/or an agreement (which are different definitions for the same instrument).

An organization is established by a treaty and is a matter that in turn is governed by international law and has international legal personality.

The Treaty is the reference that should always be consulted, read, and referred to when talking about an international organization, because in the Treaty we have:

- the entire description of the competences of the International Organisation;
- its governance structure, through the bodies and institutions that govern the functioning of the organization;
- the description of the organisation's power vis-à-vis the Member States (whether, for example, the international organisation can take decisions binding on the Member States and what kind of majority; therefore, decision-making power is also an important element).

All these elements can be found in the treaty and sometimes even in the statute of the organization.

These international legal entities are governed and regulated by international law, not as a multinational that has its legal basis in a particular country, such as Belgium and therefore is governed by the rules of the Belgian legal system.

Being subjects of international law, they must comply with their obligations under international law.

International organizations also have a headquarters, but this does not change the fact that they are governed by international law: the United Nations has its headquarters in New York and also in Geneva, but this does not mean that US law or Swiss law applies to the United Nations.

They must respect all the norms of international law in a similar way to states, but not quite in the same way because they have a different nature.

The agreement or treaty establishing the organization defines all the different aspects of the life of the organization: moreover, a treaty is not frozen in time, as there are always rules and procedures that can be followed to amend or modify the text of the treaty.

Taking the European Union as an example, since the foundation of the Treaties of the European Economic Community (as it was called in 1952 and 1954) - that is, the original treaties of Rome (because they were negotiated in Rome) - there have been numerous times when the Treaty has been amended in order to extend the competences of the European Union, and to better integrate the Member States into this very special international organization which is the European Union.

But the same happens to all other international organizations, although sometimes reaching the majorities required to amend these treaties is very difficult: the classic example concerns the United Nations and the fact that in the **United Nations Security Council** there are five states that can exercise a veto power and could block at their will in a discretionary way any decision of the United Nations Security Council if they wanted; and amending the UN Charter to deprive the permanent members of the UN Security Council of their veto power is almost politically impossible.

These cases can sometimes be called **conundrum**. International law is facing this right now because of what Russia is doing and is fundamentally preventing the UN Security Council from taking any relevant decision in the case of the Ukrainian war.

This change in the voting rules of the UN Security Council is perhaps one of the worst examples, because there are many other examples where the required majorities can be reached and consensus can be reached to change the text of the founding treaty.

Definition of **conundrum**

1.
 - (a) an intricate and difficult problem
He is faced with the conundrum of trying to find a job without having experience.
 - (b) a question or problem having only a conjectural answer
... the political conundrums involved, particularly the problem of how the richer areas ... can be made to subsidize the poorer. — Douglass Cater
2. a riddle whose answer is or involves a pun (as in "Why didn't the lost hikers starve in the desert? Because of the sand which is there.")

The Treaty should be taken into account to verify the procedure and the majority vote required, which is sometimes unanimity that obviously makes the procedure more difficult, but unanimity is not always required.

The Treaty regulates the entire life of the international organization:

- its **birth**;
- the **maturity** of the international organization, giving it more and more skills;
- the **end** of the international organization, in fact the founding treaty (the Statute) can also provide for the end of the international organization (an example of this type is "the European Coal and Steel Community", in fact the first treaty in the history of European integration that established that it lasted from 1952 to 2002; at the end all the competences of the European Coal and Steel Community were transferred to the European Union).

So the Statute or the Treaty establishing the organization also describes the governance structure of the organization. By governance structure we mean fundamentally the system, the group of institutions and bodies that enable the organization to achieve the objectives set by the founding States and its Member States; obviously without institutions and bodies it is not possible to carry out and implement the activities of the organization.

In order for an international organization to be considered as such,

- it must have a permanent dimension and an independent and organised governance structure,
- it must not rely on the bodies and institutions of the Member States, as it must have its own bodies and institutions.
- it must have a tight triple governance structure (most international organizations are structured in this way).
- it must have a plenary body in which all Member States are represented.

Note: Institutions are those that are necessary for the organization to achieve its goals, so the functions and bodies are complementary, not really at the centre of the organization. If we are talking about the UN Security Council, we should call it an institution, although sometimes the terms institutions and bodies are used in a similar way the definition that should be used is institution.

So, the plenary body is the one in which all the Member States are represented, but since it is the plenary institution, it is usually not the one responsible for the day-to-day functioning of the IO. The plenary body in the example of the European Union is the European Council (not the European Parliament, which is made up of representatives of the citizens, and not of the government; it is composed of representatives of all political parties with a direct election)

Note: The European Parliament is one of the main peculiarities of the European Union as an international organisation, because in other international organisations there is no institution in which citizens' representatives sit. There are only bodies in which representatives of countries and therefore of the government of a country at any given time sit. An example is the General Assembly or the Board of Governors of the IMF or the World Bank.

These, the International Monetary Fund (IMF) and the World Bank Group, are international organizations of 190 and 189 member countries respectively; they do not have the same number of UN member states (193), but it is still not possible to have more than 180 people decide the daily work of an international organization.

Thus, these institutions will be the ones authorized to discuss the most important aspects in the life of the organization, such as the admission of new members or the modification of the founding treaty (decisions that can really change the dynamics or powers within the organization).

The plenary and all bodies and institutions with a limited number of members are those that are usually responsible for the administration of the international organization.

These meet permanently, not every six months, as most plenary bodies do (except the European Union, which is always a very special case as the European Council meeting is much more frequent), but border governors usually meet twice a year or when the need requires it; on the other hand, institutions with limited members are almost always in session.

The anomalies of the European Union are:

- the European Parliament;
- the European Commission, because it is composed of independent experts who must have the citizenship of the Member States, but are sitting there not to represent the interests of their own Member State but for the interests of the entire European Union (they are therefore called upon to serve the European Union, guaranteeing independence from any influence coming from the government, political parties and even private actors; they are selected for their experience in a certain field).

As the sole plenary organ, the General Assembly assumes a special political position with limited members in charge of administering the organization, and then there's the judicial organ, which is the International Court of Justice.

The typical example is that this body is responsible for resolving disputes between Member States and therefore whenever a dispute arises over the application of the founding treaty, Member States may have recourse to the Judicial Body. Within the European Union, it is the European Court of Justice.

The International Court of Justice, which is the judicial body of the United Nations, is very particular because it has the right to resolve any interstate dispute arising from the interpretation of a rule of international law provided that the States in conflict have accepted the jurisdiction of the tribunal: therefore the ICJ not only has the right to apply and interpret the Charter of the United Nations, but also a large number of other norms of international law.

Always according to the characteristics of the international organization, they must be able to express their will independently and in such a way that their decisions are separated from those of the Member States. This concept is quite clear when referring to the rules on decision-making power, which prescribe the fact that the decision can be taken by the international organization through majority voting and not based on unanimity.

Member States must therefore be prepared to relinquish part of their sovereign powers in order to confer these powers on an international organisation and agree to be bound by the decision of the organisation taken by the majority even if they are part of the minority that is opposed to a particular decision.

There are areas in which the member states of an international organization are more ready to accept decisions taken by the majority and other areas that are more sensitive and important from a sovereignty point of view in which states are very cautious when they have to rely on the decision-making power of an international organization.

Today there is much discussion about a common European defence force, that is, a military sector that does not belong to the Member States but to Europe as a whole (this is an example of an area in which the European Union can only decide unanimously).

The military field is obviously very important for states: it is one of the central elements of sovereignty, so relinquishing power and letting an international organization decide on the use of military force and an army is a sensitive topic, especially after the Second World War. Probably already eighty years ago (in the 60s) there was a proposal to create a European defence community that was never successful because it could not get enough consensus. Today, however, things have changed: the Russian intervention and the aggression against Ukraine could be the trigger that will push Europe to create a Common Defence Force; sometimes it can be an external element or actor that triggers this type of devolution of competences.

There is a very particular way of taking decisions, which is often used by international organisations, which is not really a procedure.

There are therefore decisions on matters requiring unanimity or others requiring a qualified majority or a simple majority. **Consensus**, on the other hand, is different: it is not really a procedure, but it can be defined as a decision-making process, because it consists in arriving at a decision without a formal vote.

The rules of procedure may require you to cast your vote and may require that the decision be taken by a certain qualified majority (75% or other).

Instead of resorting to this formal procedure, the institution or the President of the session may decide to convene the decision to be taken by consensus.

For example, if X asked the question "Will we finish this lesson at 7:45?" others would have to vote Yes or No. If the consensus process was applied, no one would be asked to raise their hand and say "I am in favour" or "I am not in favour" because it is not necessary to express their position.

From this discussion, the President of the meeting can realize what the general consensus is and in the made example most likely the general consensus will be against finishing the lesson at 7:45.

But why is this process useful in a context of international organization?

Imagine that you are a member of the General Assembly (193) and the decision to be made concerns the use of economic funds to support a project in a given country such as Cuba for example (a kind of developing project).

Each represents a different state such as the United States, Spain, Portugal, the Caribbean island, so each has its own clear political point of view on the subject. The United States, most likely, would be totally opposed to this project.

If it is proposed to adopt a decision by consensus, the representative of the United States will not have to declare his position (strongly negative) in front of everyone and, knowing very well that it would be almost impossible to get a general negative vote on the proposal, will be set aside.

This practice can be applied in all different aspects: without the need to express a clear position (No or Yes), it leaves room for the creation of a middle ground that will be enough to pass the decision.

And besides, for example, the representative of the United States will not have to go back and report to the government that he lost, despite having made it clear that he was against the decision. This procedure therefore also has to do with the internal dynamics between the representative of the Member State and his own State and government.

It is very useful in a context like that of the UN Security Council, it never applies when there is veto power of the permanent members of the UN but there are other cases in which it is often used.

Consensus does not always reflect unanimity and is not exactly the same as unanimity; however, it is described as the best way to reach a general agreement without the explicit expression of objections, as it really helps to reach common ground.

However, different types of decision require a different majority of votes.

There is indeed a difference between binding and non-binding acts: UN Security Council resolutions adopted under Chapter Seven of the UN Charter, for example, are binding on all Member States; EU regulations are binding on all Member States; EU directives are binding on all member states to which they are addressed (which are often all Member States and other times are not).

Recommendations are an important tool for international organisations: these are non-binding decisions that provide for a different set of obligations and entail an obligation for Member States to cooperate as much as possible with the IO. States must therefore consider the recommendation of the organization from which they may decide to list themselves in good faith.

One of the effects that the recommendation of the international organization can have, is above all in the field of sanctions: for example, at the end of this emergency session of the UN General Assembly, the assembly could adopt a resolution (and since it comes from the General Assembly it is not binding on the Member States but has an important value of only one recommendation) in which it recommends that the Member States introduce sanctions against Russia.

This in a sense legitimises the Member States to do so.

In Italy, this is often described as *effetto di liceità* (legitimation effect): a decision that is not binding, but strongly recommends that Member States abide by/comply with what is written in the decision.

Another very important characteristic for our international organization is that it must be able to act at the international level and **enter relations** not only with its Member States but also with other international legal entities (other States, third States and international organizations). So international organisations have the capacity to conclude treaties, and for example the European Union concludes many trade treaties.

The ability to conclude treaties in the areas of competence of the international organisation is an attributed power; for example, the World Health Organisation cannot conclude treaties on trade in agricultural products.

The requirements to become a member of the Organization are clearly established by the Founding Treaty or the Statute.

Usually, the original members are distinguished from those who acquire membership at a later stage. For example:

- the IMF originally had 44 members and now has 184;

- the European Union initially had 6 founding states and now has 27 member countries.

Then the treaty establishes the admission criteria, procedure and decision-making process (to admit a new state within the organization a majority of votes is required).

For example, the European Union requires in Article 49 of the Treaty that States wishing to be admitted to the Union comply with a few criteria, including: statehood, respect for the rule of law, democratic government and human rights, and be ready to apply and implement within their legal system all the legislative rules that the European Union already has in place.

Indeed, when Ukrainian President Zelensky signed an application for admission to the European Union, the president of the European Commission Ursula von der Leyen confirmed that it cannot be done immediately.

The reason for this wait may be the fact that at this moment we do not know whether Ukraine will continue to be a state or whether the government will still be in office or whether it will continue to be respectful of human rights and the rule of law; The biggest problem is that Ukraine is not currently ready to implement and comply with the full set of regulations, decisions, and directives that the European Union has in place.

From the moment a new state enters the European Union, all European legal systems are extended to be applied also in the new territory of the new member state. It is not an easy process, in fact the countries that apply for admission to the European Union need a very long transitional period to be ready to move from their legal system to European standards.

Anything can happen to the Member States; in fact, States are always subject to modifications, successions, annexations, or dissolutions.

The succession of states also has an impact on membership of international organizations; for example:

1. The former Yugoslavia dissolved into a number of new independent states, and all of them acquired statehood at a different time. There was no continuation between Yugoslavia and one of the states that were formed by the Yugoslav crisis, and all of them had to reapply to become members of international organizations such as the United Nations, the IMF, the World Bank, the World Health Organization and so on.
2. The former Soviet Union is also an example of dissolution, but in this case Russia is considered the continuation of the former Soviet Union. There were a number of new independent countries (such as Ukraine, Belarus, Azerbaijan and so on) but Russia had the right to maintain the position it was before the Soviet Union, especially in the United Nations. In fact, Russia took the place of the Soviet Union within the United Nations as a permanent member of the United Nations Security Council.

Russia therefore did not have to run again to be readmitted as a member, as it was considered a continuation of the membership that the Soviet Union already had before: this happened because of the similarities between the former Soviet Union and Russia today and also many geopolitical considerations. Political reasons are therefore often overwhelming over everything else.

Russia was considered the continuation of the Soviet Union, while Serbia and Montenegro were not considered (before separating) as the continuation of the former Yugoslavia.

On Monday, February 28, there was the live streaming session of the emergency session of the General Assembly of Ukraine, where the Ukrainian representative asked the members of the General Assembly

if they were ever called to vote on this succession of Russia to the position of the former Soviet Union, and the answer was no. Thus the UN General Assembly never cast its vote on the succession of the former Soviet Union; the fact has just happened.

These days this fact has become relevant, because for the moment no one has really considered stating that the position of the Soviet was controversial; but now with Russia blocking any decision and behaving as it is doing, the political situation changes.

In fact, the treaty also provides for the withdrawal of sanctions to States from membership and the suspension of the voting rights of countries that behave badly or that do not respect the obligation deriving from membership.

Exercise on G-7/8 and G-20

Read the description of these groups and assess whether they have the features of an IO with international legal personality

1. Since the 1970s there has been a high degree of informal consultation among countries on major political and economic issues in the context of intergovernmental fora. Intergovernmental groups (Gs) have no institutional structure and change their composition by mutual agreement. They are devoid of any kind of conferred powers and permanent administrative structure. The government which periodically hosts the group usually provides administrative and secretarial support. They contribute to international coordination on various economic issues.
2. The G-7 consists of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States, with some additional observers. Russia joined the group as full participant since 1998, thus marking the birth of the G-8. In 2014, however, in response to actions taken by Russia in Ukraine, the G-7 leaders announced they would not meet with Russia in future summits. The G-7/8 Summit meets at the level of Head of State or Government and issues Final Communiqués which are not legally binding but represent the leaders' political commitment.
3. Since 1998, in consideration of its expanding working agenda, the organization of ministerial meetings, independent from the Summit of the Heads of State or Government, has become common practice. The country holding the Presidency decides upon the number and agenda of ministerial meetings. Traditionally, along with the annual Summit of the Heads of States and of Government, the meetings of the Foreign Ministers and of the Finance Ministers and Central Bank Governors are also convened. The conclusions reached at ministerial meetings are usually reflected in the Summit Final Communiqué. Well-known meetings of the G-7 Finance Ministers and Central Bank Governors resulted in the Plaza Accord (1985) and the Louvre Accord (1987), which addressed the problems of fluctuating exchange rates of major currencies.
4. The G-7/8 usually convenes immediately prior to the semi-annual IMF meetings. The agenda of G-7/8 meetings of finance ministers may cover subject matters which are in the mandate of the IMF. In this case, consensus reached at the ministerial meetings might supersede consultations within the Fund. G-7 countries detain in fact 41,29 percent of the voting power in the IMF.
5. The G-7/8 has lost much of its prominence since the emergence of the G-20, a group that was established in 1999 in the wake of the Asian financial crisis with the aim of stabilizing financial markets. The G-20 brings together major advanced and emerging economies (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, the Republic of Korea, Turkey, the United Kingdom, the United States) and the EU (represented by the President of the European Council and the President of the European Commission). Spain is a permanent invited guest. The IMF Managing Director (together

with the Chair of the IMFC), the President of the World Bank and of the FSB are also invited to attend. Countries which chair key regional groups - such as the African Union, the Association for Southeast Asian Nations, the New Partnership for Africa's Development and the Caribbean Community - are generally invited to the summit.

6. The G-20 Finance Ministers and Central Bank Governors meet annually and discuss measures to promote global financial stability. Since 2008, the G-20 also meets in a Heads of State or Government format and, at the Pittsburg Summit of 2009, the leaders designated the G-20 as their 'premier forum' for international economic cooperation. During the global financial crisis, the G-20 started to play a greater role in promoting economic cooperation and reforming the international monetary and financial system. Currently, the G-20 represents around the 77 percent of the voting power in the IMF and when it reaches a consensus there are high expectations that the IMF will act accordingly.

[<http://www.g7.utoronto.ca> ; <http://www.g20.utoronto.ca>]

The International Court of Justice's "Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, p. 174" is an Advisory Opinion, so it is not a dispute between Member States, but it is a legal question posed to the International Court of Justice to have the court's interpretation of the relevant norms of public international law. It has to do with the definition of what an international organization is.

The text is important and can be used to define the characteristics of an IO and establish whenever an international organisation has international legal personality.

INTERNATIONAL LAW – Lecture of March 2, 2022

The International Court of Justice's Advisory Opinion cited as "Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, p. 174" represents the so-called "Bernadotte Case".

This case takes its name from Folke Bernadotte: a Swedish diplomat who during World War II negotiated the release of about 31,000 prisoners from German concentration camps. After the war, Bernadotte was unanimously chosen to be the United Nations Security Council mediator in the Arab–Israeli conflict of 1947–1948. During his mission in Jerusalem on behalf of the UN, he was assassinated.

You might ask yourself why the ICJ, which is one of the main UN organs usually called to settle disputes between states and between IOs and provide legal expertise, was asked to give an advisory opinion on what happened to Bernadotte in Jerusalem.

The question that was raised at the time and made this advisory opinion one of landmark opinions delivered by the ICJ, concerned the capability of the UN to obtain reparation for damages caused by Israel for not having been able to prevent the assassination of the UN Mediator. The question was therefore whether the United Nations and/or Sweden were entitled to obtain such reparation.

States have the duty to protect foreign subjects: Israel should have prevented this assassination and having failed to do so, from the point of view of Public International Law, was responsible for this.

The legal issue around this fact concerned the position of the United Nations.

We must stress the fact that IOs were not considered to be a separate international legal entity from states until shortly after World War II. The ICJ was asked to solve this issue knowing that only international legal subjects have rights and obligations under international law.

It was certain that Sweden, as legal subject, and state of nationality of Bernadotte, was entitled to reparations. But it still was not clear whether the United Nations had the same kind of right.

Since Bernadotte had the role of UN Mediator, his assassination had an impact on the function of the organization itself too. Folke Bernadotte was undertaking official duties and his assassination obviously put a stop to the negotiation in the Arab - Israeli conflict. This assassination was considered by many at the time as an attempt to prevent peace.

The International Court of Justice can be requested to deliver an advisory opinion on any legal question by a number of subjects among which the General Assembly and the Security Council [in accordance with Article 96, paragraph 1, of the Charter of the United Nations].

And in the Bernadotte Case, the General Assembly requested what was the first advisory opinion delivered by the ICJ.

Before ruling on the case, the International Court of Justice had to clarify whether the United Nations was a separate legal subject from states.

To answer this question, which is not settled by the actual terms of the Charter, the ICJ took into consideration what characteristics that were intended thereby to be given to the Organization and made clear that IOs are, and were already at the time, international legal subjects.

The two most important paragraphs in the Advisory Opinion of April 11th, 1949 "Reparation for injuries suffered in the service of the United Nations" are paragraphs 178 and 179.

[p178] The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article 1, para. 3). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; [p179] by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members.

[Citation: Reparation of Injuries Suffered in Service of the U.N., Advisory Opinion, 1949 I.C.J. (Apr. 11)]

International Organizations are, first of all, established by a treaty under the international law. IOs must also have an **independent governmental structure**.

The relationship and the powers towards the Member States must be clearly defined in the founding Treaty. The organisation's decisions might be binding on the Member States if the founding treaty so requires.

Binding powers are important to International Organisations but not all acts adopted by IOs are binding: a perfect example might be the power given to the General Assembly to adopt recommendations which, as the name suggests, are not binding.

It is important to remember that International Organizations are also granted **privileges and immunities**¹⁰ and have the capacity to **conclude agreements**.

Knowing what the requirements, rights and duties of International Organizations are, we can ask ourselves whether the G-Groups (Group of 7, Group of 10, Group of 15, Group of 20, Group of 24, Group of 77, etc.) are IOs or not.

Since the 1970s there have been many meetings among countries on major political and economic issues. The group that has met most often in recent years due to the pandemic is the G-20, as these were emergency meetings and there was a necessity to deal with the pandemic emergency.

Of particular importance in last years was also the **BRICS**¹¹ (Brazil, Russia, India, China, and South Africa). The BRICS played a key role amidst the pandemic and is to play a significant role in post-pandemic world for recovery and common development.

The **G-7** consists of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States (the seven richest industrialized countries), with some additional observers. Russia joined the group as full participant since 1998, thus marking the birth of the G-8. In 2014, however, in response to actions taken by Russia in Ukraine, the G-7 leaders announced they would not meet with Russia in future summits. The G-7/8 Summit meets at the level of Head of State or Government and issues Final Communiqués¹² which are not legally binding but represent the leaders' political commitment.

Since 1998, in consideration of its expanding working agenda, the organisation of ministerial meetings, independent from the Summit of the Heads of State or Government, has become customary practice. The country holding the Presidency decides upon the number and agenda of ministerial meetings. Traditionally, along with the annual Summit of the Heads of States and of Government, the meetings of the Foreign Ministers and of the Finance Ministers and Central Bank Governors are also convened. The conclusions reached at ministerial meetings are usually reflected in the Summit Final Communiqué.

We must remember that the G-Groups have **no attributed powers** and **no governmental structure** and cannot therefore be considered International Organizations. However, these groups are referred to, in the context of **intergovernmental fora**, as Intergovernmental groups.

Intergovernmental groups (Gs) have no institutional structure and change their composition by mutual agreement. They are devoid of any conferred powers and permanent administrative structure. The government which periodically hosts the group usually provides administrative and secretarial support. They contribute to international coordination on various economic issues.

¹⁰ **Privileges and Immunities.** Privileges and Immunities granted to International Organizations create rights and duties upon the international plane and between parties possessing international personality. (See: The "Convention on the Privileges and Immunities of the United Nations" of 1946, in particular, Section 35).

¹¹ **The BRICS.** BRICS is the acronym coined to associate five major emerging economies: Brazil, Russia, India, China, and South Africa. The BRICS members are known for their major influence on regional affairs.

¹² **Final Communiqués.** Terminology used to describe final statements or releases.

States do not delegate their powers to intergovernmental groups, but they meet to discuss topics that a state alone could not address, such as climate change or international security. At the end of the meeting, states issue a final communiqué and agree to commit to the decision that was taken.

In order to allow International Organizations to function properly, they were granted privileges and immunities. Such immunities allow IOs to intervene and exercise their powers on the territory of the Member States.

These privileges function as a shield for International Organizations and grant them immunity from the jurisdiction of International Courts.

An example might be the Haiti cholera epidemic brought by UN Peacekeepers: The Haitian people were facing endemic poverty, political instability, and the devastating earthquake of 2010. The cholera epidemic that soon followed added a deeper layer of tragedy and suffering. Scientific evidence has conclusively shown that cholera was imported into the country by sick Nepalese UN peacekeepers who were relocated in 2010 to Haiti to help with a devastating earthquake. The UN failed to screen the Nepalese force for the disease, which could have been done before they deployed from Nepal. UN peacekeepers brought cholera to Haiti causing the deaths of thousands of people, but peacekeepers could not be indicted by the International Court of Justice because of the organization's immunity.

INTERNATIONAL LAW – Lecture 7 of March 7, 2022

Since the end of the Second World War, multilateralism has become a new normal, and along with the birth and establishment of the **United Nations**, several other international organizations have been created.

The UN is particularly important, not only in this period, but also because the main characteristics of the United Nations can serve as a model and parameter for understanding how other international organizations work.

In addition, most other international organisations, including the European Union which is very special, the World Trade Organisation, the International Monetary Fund or the World Bank have very specialised expertise and therefore work in a very narrow field of competence compared to the United Nations.

The main objective is to understand how the UN works and to be able to compare it to other organizations.

At the end of World War II in 1945, the Charter of the United Nations was signed in San Francisco in the United States in June and entered into force in October.

The UN was the successor to the League of Nations, which was unsuccessful and therefore the UN took its place.

The original founding members of the UN in 1945 were 51 states and now UN membership has reached 193 states. The last to join was South Sudan: after a referendum, South Sudan managed to leave Sudan peacefully even if the reasons behind the succession were not peaceful (in fact the reason was the **Darfur genocide**¹³).

For the Ukrainian conflict it may also become relevant to emphasize the fact that at the San Francisco Conference (way back in 1945) the 51 states that were invited, and then became the original members of the United Nations, were not actually already all states.

¹³ **Darfur genocide.** The **Darfur genocide** is the systematic killing of ethnic Darfuri people which has occurred during the ongoing conflict in Western Sudan.

There were at least two entities that had not yet reached statehood: in fact, they did not meet the criteria required by the Montevideo Convention not being considered independent. In particular these two entities that became original members of the United Nations were not independent of the former Soviet Union and are Belarus and Ukraine.

So why were they accepted among the original founding members of the United Nations, even though they were not States (because they were under the former Soviet Union) and they were not independent? The reason is entirely political.

In fact, at the Yalta Conference¹⁴, they were accepted to participate in the UN negotiations to provide a little more influence and power to the USSR; among the 51 countries that were invited to the conference, and therefore to the negotiations of the UN Charter, there was only one other communist country apart from the former Soviet Union and that was Yugoslavia.

So, to provide a little more balancing power in negotiations to that area of the world, Belarus and Ukraine were admitted as separate entities from the Soviet Union, even if they did not meet the criteria of statehood.

In the end, in this way, the communist countries had four votes, and the Soviet Union could count on four votes (which are not many, but still better than just two).

If these criteria applied at the time of the discussions on the Charter of the United Nations and at the beginning of the birth of the organization (that two entities that had not yet been declared a state were accepted as original members) the same can no longer be said today, so it could not happen again. In fact, the text of the Charter of the United Nations describes the procedure for admission to the organization in a particular way in Article 4.

CHAPTER II: MEMBERSHIP

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

There are four requirements in this article:

- it must be a state;
- he must be peace-loving;
- it must accept the obligations contained in the Charter; and
- it must be able and willing to carry out these obligations.

These requirements are assisted by the decision of the United Nations Security Council and the recommendation of the United Nations General Assembly.

Thus, we can also say that when membership of the United Nations is recognized following the procedure in Article 4, there is a kind of collective certification of the international legal personality of

¹⁴ **Yalta Conference.** The Yalta Conference (codenamed Argonaut), also known as the Crimea Conference, held 4–11 February 1945, was the World War II meeting of the heads of government of the United States, the United Kingdom, and the Soviet Union. In detail, the agreements officially reached in Yalta included: the proposal for a conference (to be held in April 1945 in San Francisco) in which to discuss the establishment of a new world organization, the United Nations (UN); and in particular in Yalta the establishment of the Security Council was considered.

a given entity. It is certified that an entity is indeed a state. The four requirements are not always easy to satisfy.

As for the first requirement, one of the problems is to establish at what point an entity becomes a state; in this case the political determination of the members of the UN Security Council, which comes first, becomes relevant.

The question concerning, for example, the statehood of Kosovo remains unclear to this day even though Kosovo is a member of the International Monetary Fund and the World Bank (therefore it acquired the status of a member in other international organizations, before being admitted as a member of the United Nations).

In the fourth requirement, the other main issues, in addition to statehood, that have been raised on these requirements concern states that proclaimed themselves neutral (such as Switzerland).

Is Switzerland able to fulfil its obligations under the United Nations? This question was asked because the UN Charter provides for the power of the UN Security Council to adopt binding resolutions, through which it instructs the Member State to implement measures that could also allow the use of force and other measures that do not require the use of force (such as embargoes and other sanctions).

Why were there 51 states at the beginning? And why were most of them Westerners?

In fact, initially the members were almost all belonging to the northern part of the world, or at least to the industrialized countries. Basically, all the others, at the end of the Second World War, (Africa, in Latin America, etc.) were subject to the rich states and were therefore considered colonies: they had not acquired independence and were therefore not yet states.

This is the main reason why only 51 countries were invited to the conference.

The difficulty of balancing powers at the end of World War II created a number of problems.

Satisfying Russia's desire and finding a balance between the two superpowers of the time was a question raised only a few years after World War II; in the years immediately following the entry into force of the Charter of the United Nations, 16 states asked to be admitted to the United Nations and among them were Italy, Finland, Austria, Albania, Ireland, (...) and other countries in the Soviet area, such as Bulgaria, Romania, and Hungary.

Western countries that were already members of the United Nations were obviously opposed to the admission of other communist countries but the Soviet Union could claim that it was not ready to accept the admission of Italy and Finland, for example, if the United Nations did not simultaneously accept the admission of Romania, Bulgaria and Hungary.

The USSR therefore threatened the admission of Italy and Finland if the other communist countries were not admitted at the same time. The Soviet Union basically proposed to adopt a package of agreements instead of trying to assess whether each country meets the requirements of Article 4 and proposed to admit all States together to rebalance the two superpowers again.

Obviously not all members of the United Nations were ready to follow the proposal of the USSR and the General Assembly referred the matter to the International Court of Justice, the judicial body of the United Nations, asking it to advise (it was not a dispute or a case, but it was an advisory proceeding).

The ICJ was only asked to provide its own interpretation of Article 4 of the UN Charter and asked to answer two questions.

The General Assembly,
 Considering Article 4 of the Charter of the United Nations,
 Considering the exchange of views which has taken place in the Security Council at its Two hundred and fourth, Two hundred and fifth and Two hundred and sixth Meetings, relating to the admission of certain States to membership In the United Nations,
 Considering Article 96 of the Charter,
 Requests the International Court of Justice to give an advisory opinion on the following question:
Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

Obviously, the UN General Assembly was opposed to the position adopted by the Soviet Union, because this would give the permanent members of the UNITED Nations the power to always add additional requirements and/or additional conditions, depending on the political position they had, whether they were in favour of the admission of a new member or against, according to their will and not on the basis of legal norms, but on the basis of geopolitical considerations.

On this occasion, the International Court of Justice gave its first advisory opinion (while the second *Reparation for Injuries Suffered in the Service of the United Nations* is the Bernadotte case, in which the ICJ provided a definition of what an international organization is).

The relevant part of the Advisory Opinion of May 28th, 1948 – Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) – delivered by the ICJ is this one:

The terms "Membership in the United Nations is open to all other peace-loving States which" and "Peuvent devenir Membres des Nations unies tous autres États pacifiques", indicate that States which fulfil the conditions stated have the qualifications requisite for admission. The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph I of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.

The International Court of Justice answered the question posed by the General Assembly in a way that prevented the adoption of the solution proposed by the Soviet Union. No package can be adopted; there is no way for the UN Security Council and the UN General Assembly, during the discussion for admission, to decide on the basis of considerations, other than those referred to in Article 4 (peace-loving state, which accepts obligations and is able and willing to perform those obligations).

The procedure requires the UN Security Council to recommend the admission of one member with the affirmative vote of nine out of 15 members, including the five permanent members who have veto powers.

Although, from a legal point of view, the Court of Justice has discarded any other considerations of a political nature from the assessment of the requirements necessary for admission, in the UN Security Council each member obviously takes some political weight for the decision.

And the important thing is that, however, other considerations will not, at least formally, be included in the motivation for refusing a state admission.

For example, if a country like Iran asks to be admitted to the United Nations, the United States cannot simply refuse or vote against admission because Iran is an enemy of the United States, but must justify its decision on the basis of other considerations such as the statehood or democracy of Iran; for example, the US may be able to prove that Iran is not a peace-loving state and all other issues must be kept outside.

So, the UN Security Council must recommend the admission of each state with at least 9 positive votes, including those of the permanent members, and the UN General Assembly should decide by a 2/3 majority: in fact, being an important decision for the organization, it requires the heaviest majority in the vote at both the UN Security Council and the UN.

Member States that violate the principle of the UN Charter, including the prohibition of the use of force, may be suspended and may even be expelled from the organisation. Even if it does not happen quite like that, because, for this to happen, the UN Security Council must take a decision including the permanent members of the UN who have veto power.

*How to **amend and revise a treaty** establishing an international organization?* In the Charter of the United Nations, there are two different articles that set out the procedure to be followed to amend the Charter: Article 108 and Article 109.

These procedures have not been used often, but most often that the CHARTER of the United Nations has been amended using the procedure of Article 108 and not that of Article 109.

The most important difference between the two is that Article 109 requires the convening of a General Conference, while Article 108 does not require.

These procedures are called:

- the first, that of Article 108, is called **the procedure for the amendment** of the Charter.
- the second, that of Article 109, is called **the procedure for the review** of the Charter.

The point that makes any change, any modification of the UN Charter so difficult, is that both Article 108 and Article 109 require all permanent members of the UN Security Council to agree; therefore, if there is a difference between the five permanent members of the UN Security Council, there is no possibility of changing the UN Charter.

And what is the most important and problematic aspect of governance that everyone agrees on? The veto power of permanent members. However, we cannot deprive permanent members of this veto power without them accepting it, which is likely not to happen.

Amendments that have been adopted in the past and the balancing of powers within the UN Charter are probably not possible.

The composition of the **UN Security Council**, which is at the heart of the UN, the most important institution because it is the one that has the power to act when there is a threat to peace or an act of aggression, therefore when there is a violation of the prohibition of the use of force. The UN Security Council consists of 15 members, a number that was amended in 1965 (at the time the UN Security Council consisted of only 11 members and the UN Charter was amended, using Article 108 to bring the number of members to 15).

Five of these 15 members are permanent members: China, France, Russia, the United Kingdom, and the United States.

Why these five States? Because they are the ones who put an end to hostilities during the Second World War.

The geopolitical situation of these countries at the end of the Second World War was confused on the Charter of the United Nations. The victors of the war had to rule the world and because they had different sizes and economies, they all had to be able to act on an equal footing by giving each of them veto power within the UN Security Council, for whenever the UN had to decide on issues concerning conflicts, wars, and violation of the prohibition of the use of force.

Many discussions take place regularly finding a way to change this structure, but there is no possibility, using Article 108 or Article 109 there will be no changes, because each of them should agree and accept the decision made, renouncing one of the most important powers they have in the world since 1945.

They, even if they are only five, are not counterbalanced by the other ten members of the UN Security Council who are elected by the General Assembly every two years in rotation with a majority of 2/3. Every two years the 10 non-permanent members of the UN Security Council change and are elected by the General Assembly taking into account when they already sit on the UN Security Council and the distribution between geographical regions (two from Latin America, two from Africa to Asia and so on and so on) so that there is a geographical balance in the other ten members.

However, even if they are the majority, they will be able to lead a Security Council decision only on procedural issues and on matters on which one, or more, permanent members decide to abstain. Abstention does not count as a veto, even if it is not written in the Charter of the United Nations, it has become the practice of the organization, without which for a long period of time any decision of the Security Council would have been blocked: in fact, if abstention had been considered as a veto, there would have been no possibility for the UN Security Council to act.

This is a diplomatic solution, because it offers at least some room for manoeuvre within the UN Security Council.

Thus, if the permanent members do not vote, this does not prevent the institution from deciding on substantive issues, because substantive issues require the affirmative vote of at least nine of the 15 members of the Security Council, including those of the permanent members (although reference is made to the affirmative vote, abstention is treated in the manner explained).

In addition, there is a difference between substantive and procedural issues: when the Security Council must decide on a procedural issue, permanent members do not have the power to express a veto power.

On procedural issues the UN Security Council does not require the positive vote of the permanent members, the majority of nine out of fifteen is sufficient (even if the nine are only among the ten non-permanent members).

The main problem is sometimes to distinguish between substantive and procedural issues.

For example, towards the end of February 2022 the UN Security Council was called upon to discuss the Ukrainian crisis (which was not yet a full-fledged aggression as it is today) and was expected to adopt a resolution binding on all member states, condemning Russia's acts in the two regions of Donetsk and

Lugansk, and calling for a ceasefire, calling for an end to hostilities and condemning in general what was happening.

The resolution was about a substantive issue concerning peace and security, so it was necessary for Russia to vote in favour of it, but not only did Russia not vote in favour, but it also did not abstain, so the UN Security Council was blocked.

What happened? The UN Security Council was asked to decide whether to convene the General Assembly to stop the Ukrainian crisis: this type of request (to activate another UN institution) was considered procedural in nature; in fact, asking the General Assembly to decide to clarify its opinion on what was happening is a procedural matter.

In this case, therefore, the UN Security Council decided to adopt this type of solution and refer the matter to the General Assembly. Russia could not have vetoed the adoption of this resolution by the UN Security Council, because this is a procedural issue.

The substantive and procedural nature sometimes becomes extremely relevant in the work of the organization, but the more sensitive discussions over which the UN Security Council has the right to act (those concerning the maintenance of peace and insecurity are of a substantive nature) are those over which the five permanent members have veto power.

All those countries that contributed to the end of the Second World War are those that were then admitted to the exclusive club of permanent members.

The UN Security Council has the primary responsibility for maintaining peace and security, and has the power to take executive measures, when one of these three situations occurs: a threat to peace, a violation of the peace or an act of aggression.

In such cases, the United Nations Security Council shall have the power to adopt implementing measures which may also involve the use of force. If these measures were to involve the use of force, the UN Security Council would authorize a few members to use force in a given scenario. If the UN Security Council adopts measures that do not involve the use of force, it will adopt sanctions such as embargoes or the interruption of other trade relations.

While the UN Security Council is the executive institution, it has a restricted composition, the **United Nations General Assembly** is composed of all members of the United Nations, and each member can be represented by no more than five different persons.

Note: The fact that each country can have five representatives does not mean that it has five votes in the General Assembly, in fact each state has only one vote.

The same principle also applies in the UN Security Council (1 state = 1 vote), but in this case the permanent members have the veto vote (while in the General Assembly they all have the same powers).

There is a different voting power on the basis of economic power in the world and this is what happens, for example, in the International Monetary Fund and the World Bank: in fact, in the governance structure of this international economic organization, the vote of the United States will have more weight than the vote of Burundi or any small developing country.

While, in the General Assembly it works differently: the General Assembly adopts a decision that, depending on the meaning they have on the life of the organization, can be adopted by qualified majority or by simple majority of 51% of the members present and voting; moreover, in the General Assembly, abstention is considered as not voting, but it is important for the quorum.

What are the powers of the General Assembly in the field of peace and security? There is a residual power compared to those of the UN Security Council, but in general, what is important to emphasize is that the UN General Assembly usually adopts acts that are not binding in nature and that remain in the category of recommendations (sometimes a reference is found to "acts that have a soft flow nature", another saying for non-binding).

The UN General Assembly therefore only recommends that the member states follow these acts, but there are no sanctions against those who do not.

And the General Assembly, although it has only the power to adopt recommendations, apart from a few exceptions can adopt recommendations in any matter that falls within the scope of the United Nations organization within the mandate of the organization.

This is because international organizations work based on the power attributed to them, they cannot act outside the boundaries established by their founding treaty (by the statute).

In the United Nations, the General Assembly can always adopt a recommendation; it is not the same for the UN Security Council, which deals mainly with international peace and security issues and therefore has no power in all other fields (such as human rights, economic and sustainable development operations, international cooperation, and so on).

What are the organizations in the mandate of the United Nations?

For economic and social cooperation, reference must be made to ECOSOC¹⁵, the Economic and Social Council, one of the six main organs of the United Nations, composed of 54 Member States, which are elected every 3 years by the United Nations General Assembly, and which work fundamentally in the field of international economic cooperation. This is a very important mandate: it concludes agreements with several other international organisations that are part of the UN family. So, there is the UN at the centre, surrounded by a number of other international organizations that have very specific mandates in specific areas.

All these international organizations are linked to the United Nations and, although they are independent of the UN, should respect the principles established by the United Nations.

These specialized agencies are legally independent, with their own rules, with their own Member States, with their own institutions and bodies and with their own financial budget, but they have a special relationship with the United Nations and should respect its rules, especially with regard to human rights and the fundamental principles of international cooperation.

The main bodies of the United Nations are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the UN Secretariat. All were established under the UN Charter when the Organization was founded in 1945.

The UN specialized agencies are autonomous international organizations working with the United Nations. All were brought into relationship with the UN through negotiated agreements. Some existed

¹⁵ **ECOSOC.** The Economic and Social Council is at the heart of the United Nations system to advance the three dimensions of sustainable development – economic, social, and environmental. The UN Charter established ECOSOC in 1945 as one of the six main organs of the United Nations.

Building on its coordination role within the UN system, ECOSOC is a gateway for UN partnership and participation by the rest of the world. It offers a unique global meeting point for productive dialogues among policymakers, parliamentarians, academics, foundations, businesses, youth and 3,200+ registered non-governmental organizations.

before the First World War. Some were associated with the League of Nations. Others were created almost simultaneously with the UN. Others were created by the UN to meet emerging needs.

Among these agencies are: the Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), the International Civil Aviation Organization (ICAO), the International Labor Organization (ILO), the International Monetary Fund (IMF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the World Bank, etc.

The Economic and Social Council is the principal body for coordination, policy review, policy dialogue and recommendations on economic, social and environmental issues, as well as implementation of internationally agreed development goals and is the body inside the United Nations which concludes the relationship agreement with specialised agents.

And in the relationship agreements there are all the details of how this special link with the UN is to be implemented, for example: the relationship agreement between the UN and the International Monetary Fund explains to what extent the IMF should consider and implement the sanctions imposed by the UN Security Council against certain statements.

Currently the Security Council has decided to impose sanctions or embargoes or block all trade and financial relations, targeting a certain state; in this case the IMF must apply and take into account this sanction in the areas of its activities, and this means that there is a hierarchy.

These organizations are independent, but they are under the umbrella of the United Nations, so all the legal principles enshrined in the Charter of the United Nations should also be respected by these specialized agencies.

They make their own decisions as long as the UN Charter is respected.

The Secretary-General is the head of the administration and has an important role when it comes to peacekeeping operations, as is the case of the Blue Helmets.

The Charter describes the Secretary-General as "chief administrative officer" of the Organization, who shall act in that capacity and perform "such other functions as are entrusted" to them by the Security Council, General Assembly, Economic and Social Council and other United Nations organs. The Charter also empowers the Secretary-General to bring to the attention of the Security Council any matter which in their opinion may threaten the maintenance of international peace and security. These guidelines both define the powers of the office and grant it considerable scope for action. The Secretary-General would fail if they did not take careful account of the concerns of Member States, but they must also uphold the values and moral authority of the United Nations, and speak and act for peace, even at the risk, from time to time, of challenging or disagreeing with those same Member States.

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A question was raised about the ability of states like Switzerland to be admitted as members of the United Nations because their neutrality considered to make them unable to satisfy one of the requirements of article four of the United Nations Charter to carry out the obligations arising from the UN Charter.

The original text of the UN Charter referenced to the fact that Member States should contribute with their troops and armed forces to the UN so that it would have been able to enforce measures to preserve peace through its own army. The UN will therefore have at its disposal troops and a military on its own.

This though didn't happen, which means the agreements between Member States and the UN for the contribution to a UN Army never concluded. The UN therefore does not have its own army and relies on two different tools: the **authorization of the use of force** and the peacekeeping forces.

The authorizations on the use of force authorizes Member States to use force in certain scenarios as a **reaction to an attack or a threat to peace**. The peacekeeping forces are used by the United Nations.

Even if Switzerland and other countries have in their own national legal order and in their Constitution declared to be against any form of use of force and to be entirely neutral, this was not considered to deprive them of the ability to comply with all the other obligations arising from the UN charter, also because this ad hoc agreements for the supply of military forces were never enacted.

As already discussed, colonies were not independent and therefore were not included in the original members of the United Nations. The original members were 51.

Fifty were the states who negotiated and signed the UN Charter on 26 June 1945, and were: People's Republic of China, France, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United States of America, Argentina, Brazil, Belarus, Chile, Cuba, Czechia and Slovakia, Denmark, Dominican Republic, Egypt, El Salvador, Haiti, Iran, Lebanon, Luxembourg, New Zealand, Nicaragua, Paraguay, Philippines, Poland, Saudi Arabia, Syrian Arab Republic, Turkey, Ukraine, Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia and Slovenia, Australia, Belgium, Bolivia, Canada, Colombia, Costa Rica, Ecuador, Ethiopia, Greece, Guatemala, Honduras, India, Iraq, Liberia, Mexico, Netherlands, Norway, Panama, Peru, South Africa, Uruguay, Venezuela.

Poland joined several months after and signed on 15 October 1945.

The signing and ratification of the Treaty are two different steps that are necessary for a not only the Treaty to enter into force, but for the state be bound by it. China, for example, signed the Treaty in June and ratified the Treaty in September.

Apart from the five permanent members (that are China, France, Russia, the United Kingdom and the United States of America), most of the original member states were indeed northerners and were from Latin America. While quite a few were the states from Africa or even from (East) Asia.

Having discussed some special specific powers of UN permanent members, one of the key principles in international law that should be discussed is the **prohibition of the use of force**.

Every discussion on the prohibition of the use of force must start with Article 2, paragraph four of the United Nation Charter.

United Nations Charter

Chapter I: Purposes and Principles

Article 2

The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles. [...]

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

This is not only a treaty provision, that as such binds all the members of the United Nations, but it is also a customary law rule, that binds all the subjects in the international legal order. It is also a peremptory norm

of international law, which means that it is one of the most important constitutional fundamental rules of international law.

This provision has all these different qualities and it is also an ***erga omnes*¹⁶ rule** which means that it is not only due to another counterpart as for example happens in bilateral treaties or multilateral treaties that establish mutual obligations for the members of the treaty but is due to all international legal entities in the international community.

This single rule therefore is a treaty rule, a customary rule, a *ius cogens* rule and an *erga omnes* rule; because of these qualities, this rule applies to all states and not only to the Member States of the United Nations.

The interpretation of this provision has given rise to many different discussions on the scope of its application.

Note: The text of the provision does not refer at all to “war”, but the word “force” is instead used. “Force” applies to many different situations and not only to cases of conflicts or war between two different States.

The provisions aimed at ensuring the security and stability of the international legal order, and the security of both each individual state and the global order in general. This derives from the fact that it is an *erga omnes* obligation (an obligation owed to the international community as a whole).

The framework that the negotiators of the UN Charter had in mind should be taken into consideration to contextualize this provision.

The provision prohibiting the use of force has been supplemented by the powers of the United Nations Security Council in the field of maintaining and preserving peace and security. It was coupled with the powers of the United Nations Security Council which are established and specified in chapters seven and eight of the Charter of the United Nations to enforce this provision.

But are there any exceptions? Yes, there are. The most important is provided for by the UN Charter itself and is **the power to react to an attack or threat in self-defence**.

This provision focused on the fact that the UN Security Council would be responsible for enforcing the ban on the use of force. So, if there had been a breach of this obligation, the UN Security Council would have reacted by deploying its own army and troops. These troops were to be made available to the UN Security Council by the Member States.

It was arranged through special agreements signed under Article 43 of the Charter of the United Nations; however, it never came into force. The ban on the use of force has been coupled with the strong power of the UN Security Council to react to any violation of that prohibition.

What was provided for in the UN Charter has not been achieved, so we now have a structure in which the UN Security Council is deprived of the most important power it should have had at the end of the Second World War.

¹⁶ ***Erga omnes* rights or obligations.** *Erga omnes* is a Latin phrase which means "towards all" or "towards everyone". In legal terminology, *erga omnes* rights or obligations are owed toward all. For instance, a property right is an *erga omnes* entitlement, and therefore enforceable against anybody infringing that right. An *erga omnes* right (a statutory right) can here be distinguished from a right based on contract, unenforceable except against the contracting party.

In international law, it has been used as a legal term describing obligations owed by states towards the community of states as a whole. An *erga omnes* obligation exists because of the universal and undeniable interest in the perpetuation of critical rights (and the prevention of their breach). Consequently, any state has the right to complain of a breach. Examples of *erga omnes* norms include piracy and genocide. The concept was recognized in the International Court of Justice's decision in the Barcelona Traction case [(Belgium v Spain) (Second Phase) ICJ Rep 1970 3 at paragraph 33].

This made it necessary to find ways around the fact that Article 43 was never implemented, and so the UN Security Council found ways to react to the ban on the use of force in other ways.

Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

It is also necessary to provide some clarity on how the concept of the use of force has been interpreted over the years.

The cases of threat and use of force are different, but both involve a reaction from the international community and the UN Security Council. The threat of the use of force (the notion of prohibited threat) is designed under the Charter of the United Nations to apply in international relations and relations between States. But it is also excluded if we consider only the text of Article 2(4).

According to this article, internal threats to states and everything that happens within the state are therefore excluded, even if it is an undemocratic government that violates the human rights of a part of the population or if there is an internal conflict.

The words used in this ARTICLE of the UN Charter do not cover many of the most important scenarios we face in today's international relations such as internal conflicts that are, for example, rebel uprisings, freedom fighters, and the issue of non-state actors.

Over time, as can also be seen in the jurisprudence of the International Court of Justice, the notion has been interpreted broadly enough to include internal situations and therefore also situations of conflict within a country, such as huge violations of human rights within a country (e.g., apartheid in South Africa) and violent oppressions of minorities, genocide and even terrorist attacks, the proliferation of weapons of mass destruction and, most recently, health crisis.

A few years ago, the spreading of the Ebola disease was considered to be to a situation of threat of peace because it caused instability inside a few neighbouring countries. This instability *per se* was a threat to peace and not a breach of peace.

Extrajudicial executions and targeted assassinations, for example, have never been considered to reach the level of a threat to peace. These cases are obviously illegal and occur on the territory of a foreign state that uses a certain level of force within that state without applying the usual rules of criminal law, but do not reach the level of seriousness necessary to bring them within the scope of a threat to peace or a threat of the use of force.

See for example the case of poisoning of Sergei and Yulia Skripal (2018, England)¹⁷.

Some things clarified by the International Court of Justice that could become relevant today were clarified in the Nicaragua case of 1984. This is a key case for many important aspects of international law. This is a dispute, not an advisory opinion.

It was a case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America).

The ICJ stated that the mere fact of possessing weapons is not covered by the prohibition of the threat or use of force. So, building a number of weapons that a state has at its disposal does not trigger a violation of the prohibition of the use of force.

And the ICJ added a reflection a few years later, in 1996, this time in the form of an advisory opinion on nuclear weapons: even building an arsenal of nuclear weapons does not amount to a violation of the prohibition of the threat or use of force, even if the actual use of nuclear weapons could be against some of the most important rules of international humanitarian law; the construction of armaments, including nuclear weapons, has never been considered contrary to the prohibition established by Article 2.4.

Also, Article 39 of the UN Charter.

Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 2.4 established the prohibition and Article 39 is the first in Chapter Seven of the UN Charter which describes the powers of the UN Security Council to react to a ban on the use of force. Once again there is a reference to the notion that appears in Article 2.4 and mentions the threat to peace, the violation of the use of force, the violation of peace and the act of aggression; The Security Council is expected to react in all these different cases with the instruments made available to the Council by the Charter of the United Nations.

The key word is **deterrence**: promote fear in the opponent party. This concept goes back to the Cold War and the balancing of the powers of the two parties: the United States v. the Soviet Union.

In this context several other subjects started to build their own arsenal of nuclear weapons. This was obviously considered by the two international powers (USA and USSR) to be against their interests. There were in-between several multilateral treaties being signed on disarmament that aimed at the reduction of the weapons at the disposal of the two superpowers.

¹⁷ **Poisoning of Sergei and Yulia Skripal.** On 4 March 2018, Sergei Skripal, a former Russian military officer and double agent for the British intelligence agencies, and his daughter, Yulia Skripal, were poisoned in the city of Salisbury, England. According to UK sources and the Organisation for the Prohibition of Chemical Weapons (OPCW), they were poisoned by means of a Novichok nerve agent. Both Sergei and Yulia Skripal spent several weeks in hospital in critical condition, before being discharged. The British government accused Russia of attempted murder and announced a series of punitive measures against Russia, including the expulsion of diplomats. The UK's official assessment of the incident was supported by 28 other countries which responded similarly. Altogether, an unprecedented 153 Russian diplomats were expelled by the end of March 2018. Russia denied the accusations, expelled foreign diplomats in retaliation for the expulsion of its own diplomats, and accused Britain of the poisoning.

There is a special treaty (**Treaty on the Non-Proliferation of Nuclear Weapons**) which prohibits the construction of additional nuclear weapons by the two parties mentioned above and also aims to regulate the use of nuclear powers for civil purposes only and not for military purposes.

Uranium, for example, has a dual-use nature: according to the treaty, it can be used for producing energy or research purposes, but it cannot be used for military purposes.

The NPT treaty prohibits "non-nuclear" signatory states from procuring such weapons and "nuclear" states from transferring nuclear weapons or other explosive nuclear devices to anyone. Furthermore, the transfer of nuclear technology for peaceful purposes (e.g., for electricity production) must take place under the control of the IAEA (International Atomic Energy Agency).

The treaty was signed by the United States, the United Kingdom and the Soviet Union in 1968 and entered into force in 1970. France and China (which possess nuclear weapons) joined in 1992. North Korea and Iran were suspected of building atomic bombs.

There are currently 191 signatory states. So basically, those who are not part of the nuclear powers that are recognized as such in that specific treaty are allowed to build a new arsenal of nuclear weapons and the nuclear powers should instead reduce the number of nuclear weapons.

Note: From 1966 to 1974, France blew up 41 nuclear weapons in above-ground tests in French Polynesia. The French government has long contended that the testing was done safely. But a new analysis of hundreds of documents declassified in 2013 suggests the tests exposed 90% of the 125,000 people living in French Polynesia to radioactive fallout.

Now let's go back to analysing the notion of threat to peace, breach of peace and act of aggression.

In case there is a violation of the prohibition of the use of force, and we found ourselves in a case in which there is a threat to peace, a breach of peace or a clear act of aggression.

Note: The Russian intervention is a real act of aggression.

Only in the event of a threat to peace is the use of force allowed as a reaction by the Charter of the United Nations. The first exception under the UN Charter for the use of force is Article 51, which provides for self-defence.

There is a general prohibition of the use of force and when someone some country violates this general prohibition a few things can happen that will legitimize – both on an individual basis and a collective basis – the other states to react for individual self-defence or collective self-defence. But there are also other powers and exceptions given to the UN Security Council to react.

United Nations Charter, Chapter VII:

Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack *occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. [...]

In this article the threshold is quite high: it states that self-defence can be exercised when there is an armed attack.

The UN Security Council can react even when there is a threat to peace, a breach of peace or an act of aggression, but self-defence requires an armed attack.

And an armed attack covers a wide range of different situations: from a what is happening now in Ukraine to a fully-fledged military invasion in the territory of another country, from cross border shootings to frontier incidents.

Therefore, to have an armed attack in every situation, we should always assess the scale, the effects, and the gravity of such attack. There are obviously situations that fall squarely within the notion and others that should be assessed carefully.

A country providing funds and support is much different from a country sending military personnel.

Only provides financial support, logistical support and weapons is one thing if it sends.

If we stick to the definition of financial support of rebels in another state, the International Court of Justice does not consider it to reach the level of a fully-fledged armed attack and therefore it does not justify a reaction in self-defence.

There is a difference between supporting rebels and supporting, within a scenario of an internal conflict, a government rightfully governing its country from an armed attack coming from another state.

An example are the European countries and the United States supporting the rightful government in Ukraine from the Russian attack. This scenario cannot be considered an armed attack against Russia. Therefore, Russia cannot claim the right to answer in self-defence to that kind of measures.

This is considered to be less of an interference with another country, which does not reach a level of gravity such to trigger self-defence.

The notion of armed attack is important, and another important thing is to always analyse the wording used in treaties: we should focus our attention to the word *occurs* («Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack *occurs* against a Member of the United Nations [...]»; Article 51, United Nations Charter).

Occurs means that the armed attack should have already taken place.

Basically, the concept applies to an armed reaction whose aim is to prevent another attack from occurring, so not an armed attack that has already occurred, but an arm attack that has been planned.

This theory is related to what happened in 9/11 and was put forward especially by the then President of the United States George Bush.

But it considered possible.

In this statement that he gave during **The National Security Strategy of the United States of America** following the events of 9/11, Bush claimed that it was legitimate for a state to use force in self-defence to prevent an imminent attack (an attack that has not yet occurred but was already planned). This concept was also sometimes defined as preventive self-defence.

In the same National Security Strategy, Bush also claimed that self-defence would be exercised **even against non-state actors**.

Following the attack to the Twin Towers, the United States wanted to react and claimed to be exercising the right to self-defence against terrorists that could've targeted again American cities and/or buildings. The United States therefore decided to exercise force in self-defence to prevent further terrorist attacks.

Non-state actors¹⁸ are all groups of private parties that are not organs of the state and are not officially part of the state but act within a state with no direct link or responsibility of the territorial state for what they are doing; an example are terrorist groups.

This means that the usual rules of international law that regulate relationship among states do not apply because the possibility of this event wasn't even envisioned.

The rules that are established by the UN Charter need to be adapted to the new scenarios and this is what President Bush tried to do with the National Security Strategy following the 9/11 events in order to apply the notion of self-defence in the case of armed attacks conducted by non-state actors (terrorists) and even in a preventive way applying the theory of anticipatory self-defence or preventive self-defence.

Bush's strategy adopted by the United States found several objections in the international community. Even if this document was used by different states at different times and was even used by the US to justify intervention in Afghanistan, it is not considered at the time being to be consistent with the rules of international law.

Note: In self-defence there's no need to be authorized by the UN Security Council because it is an internal method. If, for example, we had a group of terrorists here in Italy, it would be our state's responsibility and duty to do whatever is possible to arrest, prosecute, and prevent any further attack.

Some affirm that this theory cannot be legitimately applied, because there is no rule of international law that allows this kind of reaction. Other experts adopt a more nuanced approach and affirm that: if the territorial state on which non-state actors (terrorists) found shelter and from which they launched their own terrorist attacks is unable and unwilling to stop or prevent these terrorist groups from conducting terrorist attacks, then and only then the target state can act in self-defence.

According to international law rules, self-defence should be a proportionate reaction and it should be immediate, which means it should be taken in a reasonable lapse of time after the armed attack has occurred.

Then there is also a procedural duty which is the duty to report to the attack to the UN Security Council, which should be informed as soon as possible so that it should be given the opportunity to take other measures and to take the matter in its own hands.

Important to know is that self-defence can be exercised by individual states or **collectively**.

The NATO, for example, is currently providing many collective answers on what is happening in Ukraine. The NATO is an alliance treaty that provides for a collective answer if any single member state of the alliance is attacked.

Collective self-defence can be exercised if the state under attack, which is the first entitled to react in self-defence, consents to the exercise of collective self-defence by other states or even asks for the intervention of other states to help him react to the attack.

INTERNATIONAL LAW - Lecture 9 of March 9, 2022

Exceptions to the **prohibition of the use of force** of Article 2(4) of the Charter of the United Nations

¹⁸ **Non-state Actors.** A non-state actor (NSA) are organizations and/or individuals that are not affiliated with, directed by, or funded by any government. Among NSAs are non-governmental organizations, banks, corporations, media organizations, business magnates, people's liberation movements, lobby groups, religious groups, aid agencies, and violent non-state actors such as paramilitary forces.

1. Self-defence is the only exception expressly set forth by Art. 51 UN Charter; see also Art. 21 ARSIWA on State responsibility
2. The UNSC authorization to use of force
3. Other legitimate forms of unilateral military intervention (for example, humanitarian intervention)

The negotiators at the time of the San Francisco Conference (April 1945) could not have imagined what the world would be like today: in fact, there are a number of issues in today's world that were not there before; there is also the question of interpreting the main terms concerning the text of the Charter of the United Nations; moreover, the original security order has not been realized and the Charter has remained halfway (with only one pillar, compared to what was initially thought).

There is an immediate reaction on the part of individual states, the object of an attack of damage or a violation of the prohibition of the use of force (threat of force), which should face the decisions of the United Nations Security Council.

Initially the UN Security Council was supposed to govern, stop conflicts and intervene (it was supposed to last decades after World War II). The powers of the UN Security Council are not what they were initially thought to be, as soon as it became clear that no troop could ever be made available, they had to think of an alternative.

The second exception to the prohibition of the use of force concerns authorisation by the UNSC: Article 39 of the Charter of the United Nations lays down the preconditions authorising the United Nations Security Council to adopt implementing measures.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Chapter VII (ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION) of the UN Charter is the chapter under which the United Nations Security Council may adopt mandatory resolutions binding on all Member States and not just the typical act of an IO recommendation which is not binding. Chapter 7 deals with actions binding on all Member States.

Although at the end of the establishment of the Charter of the United Nations there were united nations troops, this prediction never materialized; however, the UN Security Council can still exercise strong power for the maintenance of peace and security.

The UN Security Council has established that first of all it is necessary to determine the existence of a threat to peace, a violation of the peace or an act of aggression (which represent a kind of gradual increase in the level of violation of the use of force).

In recognizing that there is an issue concerning global security and peace, the UN Security Council has a great deal of room for manoeuvre and uses this discretion when called upon to decide whether there is a threat to peace in place, as an act of aggression would not require recognition.

The notion of threat to peace could be interpreted broadly as to include domestic situations such as apartheid, violent oppression of minorities, gross violations of Human Rights, terrorist attacks, giving shelter to terrorists, proliferation of weapons of mass destruction, or even widespread diseases such as Ebola, that could spread to neighbouring countries. Of course, the notion of threat to peace also includes all the different types of serious crimes against human rights (from genocide to apartheid) that are crimes against humanity.

The Security Council determines its competence to act on the premise that there is a threat to peace and not only when there have been wars of an international nature, but also when in the case of internal conflicts that could have spread or created instability in another region.

When does the UN Security Council take this kind of decision? Based on the different violations of the prohibition of the use of force can decide how to react.

The first type of reaction is to make a recommendation and then move in a sort of gradual path until you also reach the intervention of UN troops (which has never happened).

The UN Security Council may adopt resolutions imposing on all Member States the obligation to enforce both measures that do not directly involve the use of force (sanctions, embargoes, the cessation of trade relations and diplomatic relations) and measures that do. These are the typical sanctions that can be adopted by the UN Security Council without the use of force. In addition, based on Article 42, there are measures involving the use of force.

In the event of a threat to peace, breach of the peace or act of aggression, the UNSC has the power to:

- make recommendations to facilitate a peaceful settlement of the dispute (Art. 39),
- adopt provisional measures like a ceasefire (Art. 40)
- adopt enforcement measures not involving the use of force (embargoes, sanctions, the interruption of economic relations) (Art. 41)
- adopt enforcement measures involving the use of force (Art. 42) (originally with its own armed forces, that is the contingents made available to the UNSC by MS on the basis of ad hoc special agreements, Art. 43)

Since the UNSC does not have its own troops, it authorizes MS to take action

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 42 provides for the deployment of the United Nations Army

and since this has become impossible for the UN Security Council to do, and the UN does not have its own troops, what has happened is that the UN Security Council has begun to give member states the power to act in its place.

So, instead of doing it directly with its own troops, the UN Security Council began authorizing particularly powerful states willing to intervene: this never happened before the end of the Cold War, but from 1991 onwards it became quite common.

Iraq is a perfect example with the UN Security Council authorising a state coalition willing to counter war: authorisation for the use of force by the UN Security Council was not only established in the event of international conflicts, but also to implement peace agreements. Authorized member countries can enforce embargoes with the use of force and even use the use of force in the context of internal conflicts (within a country and humanitarian crisis, as in the case of the genocide in Rwanda).

It also happened that the authorization of the use of force by the UN Security Council came following a unilateral intervention by a group of states already begun: the UN Security Council authorized the same country that had already used force to use force later. In this case their intervention before authorization can be classified as an exercise for self-defence.

Scholars for a long period of time have wondered if this is a legitimate practice on the part of the UN Security Council. *Is there a legal basis for the UN Security Council to authorise the use of force by a group of countries that are almost always the same?*

There has been a huge debate on the point, especially at the beginning of this practice, because it began in the 90s and then became common: today it has formed a new customary rule that replaces what is written in Article 43 et seq. of the UN Charter on Troops and which allows the UN Security Council to authorise certain Member States to use a force as a reaction to a violation of the prohibition of the use of force and thus as a reaction to a threat to peace, a breach of peace or an act of aggression.

Another issue that has been discussed is that the UN Security Council resolution containing such an authorization to use force is not always crystal clear: this authorization has been read through the lines by a powerful country willing to intervene or that has an interest in intervening, but there has been nothing explicitly said, Stated by the UN Security Council in its resolution, this is an implicit authorisation.

In this case the best thing would be for the UN Security Council to explain it in clear words, although this is not always possible because of the way the Security Council works and moreover decisions are taken on the basis of Chapter 7 and therefore always depends on the scenario: for example if the use of force is authorized by the UN Security Council only after some states are already intervened, can be used as a cover up the umbrella of legitimacy.

But what happened before the authorization? Is this an exercise in collective self-defence or something that happened in violation of the rules of international law?

When we have a violation of the prohibition on the use of force, the legal consequences are always very difficult to achieve because apart from all the tools that the UN Security Council can deploy and being able to refer to the International Court of Justice for the settlement of disputes or to ask the court to declare that there has indeed been a violation of the rule of international law.

The use of force may be exercised lawfully when it is exercised in self-defence or when authorised by the United Nations Security Council.

There is an open debate about whether there are other legitimate forms of military intervention, or unilateral use of force, and the most important is based on the doctrine of humanitarian intervention: the idea behind considering a humanitarian intervention, legitimate, is that when there are serious violations of human rights, which occur in the country by the government of the country against its own population or against a minority of the population (genocide, apartheid, etc.) or other similar situation, the international community thinks that the only solution is to intervene with the use of force to stop atrocities and stop the violation of human rights. So, in this case, the intervention is to be considered legitimate, since there is a kind of responsibility of the international community to intervene where serious violations of human rights have occurred.

If it is admitted that there is a rule of international law that makes this type of intervention legitimate, it is clear that an abuse of this doctrine could occur.

For the time being, this type of doctrine has been used to justify, for example, the intervention in Kosovo in 1999, by forces from other countries, especially after the genocide committed in the city of Srebrenica.

The issue was discussed at the level of the UN Security Council: the motivation was contested by two permanent members of the UN Security Council, namely Russia and China: therefore, with two permanent members opposing it, the UN Security Council could not adopt a resolution on the basis of Article 42 authorizing the use of force, but the only way the other three permanent members would justify their intervention was for humanitarian intervention reasons (i.e. for reasons of protection obligation, as they believe they have a responsibility to protect).

If one is more critical of this doctrine, one can see it as a violation of a principle; the prohibition of the use of force can then be used to justify any type of intervention and the same countries (United States, United Kingdom and France) that intervened in Kosovo, in other cases did not intervene using the same motivation. For example, in Syria they did not intervene, justifying this decision always with humanitarian intervention, but this time saying that humanitarian intervention is not legitimate under international law, and therefore they had no duty to intervene. As in Kosovo, in the Syrian crisis, the UN Security Council was entirely blocked by the cross-vetoes of the permanent members, but this time the doctrine of humanitarian intervention was used saying that there is no rule in international law that justifies this sort of intervention.

From these small examples we can see how this doctrine can be used by one side or the other, being useful for the geopolitical strategies of the moment.

General public international law does not allow this type of intervention, we can exclude humanitarian intervention as a legitimate ground for the use of force.

It is time for the UN to adapt, after the original governance structure has failed, to be fully implemented and this tool is used for peacekeeping operations.

Another tool in the UN's arsenal to preserve peace and security is the blue helmets, which have become a useful tool for the UN to try to impose from the beginning a ceasefire and an initial period of peace between two fighting forces.

So basically, there are three different generations of peacekeeping operations.

The first generation includes the blue elements that have been used, mainly as interposition forces between two fighting groups, to monitor and ensure the end of hostilities or a peace agreement and to prevent the resumption of hostilities: therefore, their task is to promote everything that is necessary to move from a conflict situation to a post-conflict peace situation. Blue helmets are also used in the construction of a new administration, a new government, to make peace concrete: in this context they are no longer called peacekeeping operations, but a reference could be found to "peace building operation" as they come to administer certain territorial services guaranteeing internal security and adding a civilian dimension to the military dimension.

The blue helmets were allowed to work for repatriation or with refugees, and for example to train officials and staff (those who were supposed to govern the country). They helped to move from a fragile peace to the construction of all the organs, institutions and services that then made lasting peace possible.

The third generation is called "peace enforcement": there were some peacekeeping operations that also had a peace enforcement role.

In this case they could even use force, which usually the blue helmets cannot do (for example they had the right to do so in Somalia): we move from the total maintenance of peace to the construction of peace, to the application of peace; so the powers of the blue helmets have increased over the years. They still rely even in the third generation on a basic prism, a prerequisite that is the consent of the territorial state or, if there is no central government, of the factions fighting in a certain territory (so the presence of consent is important).

1. The UN cannot send peacekeepers without the consent of the country in which they will be deployed
2. Peacekeepers should always be neutral, impartial between the parties to the conflict
3. Usually, apart from the third generation of a peacekeeping operation, blue electors are allowed to act only in self-defence.

The fact that they could not use force was at the heart of the failure of the peacekeeping operation in Rwanda: in Rwanda, when genocide spread, violent acts across the country were committed against women and children.

The peacekeepers who were sent there would not have used force, so they were unable to prevent some of these crimes from being committed. This, despite the fact that the commander-in-chief of the round of peacekeeping operations had repeatedly asked the UN to expand the mandate of its peacekeepers and allow them to use force to protect civilians.

This, however, was not possible. Peacekeepers are basically also civilians from UN member states that have agreed to be made available to the United Nations: women and men make themselves available and sometimes weapons and cars are also made available by states. This is regulated by an ad hoc agreement between the member state and the UN: there is something that is between the use of force and measures that do not really involve the use of force.

So even in this case the question arises as to what the legal basis for the UN is that takes sides to decide to deploy this peacekeeping operation: the answer is similar to that on the authorization of the use of force.

There is now a customary, specific rule within the United Nations system to be considered.

The UN wants to impose peacekeepers all over the world, always with the authorization of the country, and we have already seen this in a number of cases (in the case of Kosovo, in the case of Syria, in the case of Ukraine); but what happens when the UN Security Council is blocked by the veto of one or more permanent members?

- nothing may be done to persuade a permanent member to abstain or not to appear at the meeting;
- the absence is not considered equal to the veto.

What can be done? In this situation for example, for a number of years during the Second World War:

- the USSR tried to block any determination of the UN Security Council
 - ↳ it started with a question concerning a debate on the resolution to be taken to protect the Republic of Korea, against the aggression launched in the 50s by North Korea;
- at that time, it was not even clear whether absence from a meeting was considered sufficient to allow the Security Council to make any decision (then after a few more years it was considered possible);
- the USSR boycotted Security Council meetings and blocked the adoption of any resolution by the UN Security Council (it started with the Crisis of Korea and then moved on to many other issues, including the subsidiary responsibility of the General Assembly in matters of peace and security);
- whenever the UN Security Council has been blocked from adopting any decision with cross-veto power
 - ↳ when the UN Security Council is unable to take a decision, the matter may be referred to the UN General Assembly (not always);
 - ↳ there are certain procedural steps that must be met, and this very specific special procedure applies only in very special circumstances, those that are considered to be of a certain severity;

- the General Assembly adopted a resolution: "Uniting for peace"¹⁹.

The most important part of General Assembly **resolution 377(V)** is Section 8:

[*The General Assembly*] Recommends to the States Members of the United Nations that each Member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or the General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter.

The UN General Assembly resolves that if the Security Council because of lack of unanimity of the permanent members fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to peace, each of the peace or act of aggression, the reference is made to Article 39 of the UN Charter. The General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures in the case of a breach of the peace or an act of aggression, including the use of armed force when necessary to maintain or restore international peace and security.

- The UN General Assembly may adopt appropriate recommendations to members for collective measures which may include the use of armed force if necessary to maintain or restore international peace and security;
- Collective action is a fairly strong power that the General Assembly assumes over itself, replacing the UN Security Council;
- The United Nations Security Council may, in accordance with Articles 41 and 42, adopt binding decisions and resolutions; instead, the General Assembly can only recommend, it is not binding what the General Assembly will decide in these very specific special circumstances.

Is this content of the General Assembly resolution on the Union for Peace compatible with what is written in the Charter of the United Nations?

Article 12 establishes primacy, Paragraph 1 of the Security Council with regard to all matters relating to international peace and security.

While the Security Council exercises, in relation to any dispute or situation, the function assigned to it by the Charter, the General Assembly makes no recommendation: if the UN Security Council is discussing a matter concerning the violation of the right or to peace or an act of aggression, from the wording of Article 12, it seems that the General Assembly cannot discuss the same topic.

It is only subject to the provision of Article 12 if the General Assembly may recommend measures or the peaceful adaptation of any situation, revolutionizing what is written in Articles 12 and 14.

¹⁹ General Assembly **resolution 377(V)** is known as the **Uniting for peace resolution**. Adopted in 1950, the resolution resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility to act as required to maintain international peace and security..., the General Assembly shall consider the matter immediately with the view to making recommendations to Members...in order to restore international peace and security. If not in session, the General Assembly may meet using the mechanism of the emergency special session. To date, 11 emergency special sessions have been convened.

So, the General Assembly can deal with an issue that should only have been discussed by the UN Security Council, but this is justified by the fact that the UN Security Council cannot decide anything because of the veto powers of the permanent members.

The Security Council resolution can be adopted to require the General Assembly to meet in a special emergency session, but this is very specific and does not cover a substantive issue, it is considered to cover only a procedural issue: the fact that the request is a procedural thing frees the Security Council from the adoption of vetoes by permanent members.

1. [*The General Assembly*] Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a **threat to the peace, breach of the peace, or act of aggression**, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.

In the General Assembly when an emergency session is opened, all the representatives of the Member States meet and vote on the adoption of the recommendation: they are obliged, it is a duty to exercise their powers within the General Assembly.

- the content of what the General Assembly decides is not binding on the Member States, it is only for them a recommendation: they are not obliged to implement and enforce what is written

Text of Article 2(4)

The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles. [...]

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4)

- It concerns a call to end the violation of the prohibition of the use of force and even a dedication to refrain from any other illegal threat of force;
- It also refers to internationally recognized international borders, so it is also an interference, a violation of territorial sovereignty (like what is happening to Ukraine because of Russia);
- We have a reference to the Declaration of Russia on the State and Independence of the Donetsk and Lugansk Regions, which is once again considered a violation of the territorial integrity and sovereignty of Ukraine.

Other points that should be taken into account:

- Crisis of 2014: the Minsk agreements²⁰ were supposed to help close the conflict peacefully, but they were never put in place and never followed by either side, not only by Russia (so Ukraine did not implement its part of the commitment in the Minsk agreement)
 - This agreement consisted of a package of measures, including a ceasefire, withdrawal of heavy weapons from the front line, release of prisoners of war, constitutional reform in Ukraine granting self-government to certain areas of Donbas and restoring control of the state border to the Ukrainian government. While fighting subsided following the agreement's signing, it never ended completely, and the agreement's provisions were never fully implemented.
- Refers to humanitarian assistance, the protection of civilians, the violation of international humanitarian law and human rights violations;
- It happened not only that the resolution was blocked by Russia, but it did not receive the positive support of China and India, the United Arab Emirates;
- The fact that the UN Security Council could not agree on this text left the way open for the convening of an emergency session of the General Assembly and the resolution passed by majority vote because it was not subject to veto.

The Sources of International Law

Customary International Law

INTERNATIONAL LAW - Lecture 10 of March 14, 2022

We should discuss the sources of public international law, starting with customary international law and treaties.

The sources of law determine the rules of the legal society and public international law sources, therefore, determine the rules which apply to the entire international community or only to some states in the international community.

A list of the sources of public international law can be found in **Article 38 of the Statute of the International Court of Justice**.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

CHAPTER II: COMPETENCE OF THE COURT

Article 38

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

²⁰ The **Minsk agreements** were a series of international agreements which sought to end the war in the Donbas region of Ukraine. The first, known as the **Minsk Protocol**, was drafted in 2014 by the Trilateral Contact Group on Ukraine, consisting of Ukraine, Russia, and the Organization for Security and Co-operation in Europe (OSCE), with mediation by the leaders of France and Germany in the so-called Normandy Format. After extensive talks in Minsk, Belarus, the agreement was signed on 5 September 2014 by representatives of the Trilateral Contact Group and, without recognition of their status, by the then-leaders of the self-proclaimed Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR). This agreement followed multiple previous attempts to stop the fighting in the region and aimed to implement an immediate ceasefire. Amid rising tensions between Russia and Ukraine in early 2022, Russia officially recognised the Luhansk and Donetsk people's republics on 21 February 2022.^[4] Following that decision, on 22 February 2022, Russian president Putin declared that the Minsk agreements "no longer existed", and that Ukraine, not Russia, was to blame for their collapse.

- 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 recognized by civilized nations;
 - 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.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The ICJ is an organ of the United Nations, but it has its own statute: it is an instrument separate from the Charter of the United Nations, and it has the value of a treaty.

The Statute of the International Court of Justice contains all the elements necessary for its functioning: it concerns the organization of the Court, the jurisdiction of the Court, the procedures applicable by the Court and its two main functions which are **the ability to solve disputes between States and the ability to issue advisory opinions**.

However, it is very important to focus on Article 38 of the ICJ Statute, because it provides a list of all the different sources of international law.

The list is included in the Statute of the ICJ because these sources are the ones on which the ICJ should rely to provide advisory opinions and to solve disputes between states: the court will function and take decisions «in accordance with international law».

This list **is not exhaustive** since there are at least two other sources that are not mentioned in Article 38 of the ICJ Statute:

1. The first one is unilateral commitments by States. States can unilaterally commit to a certain conduct or a certain behaviour.
2. The second source of international law is usually defined soft law, which is not binding but might give rise to binding rules in the future.

The list also does not provide a distinction between primary and secondary sources of international law.

The **primary sources** are the first three ones mentioned in the Article: international conventions, international custom, and the general principles of law recognized by civilized nations. The fourth one is mentioned as a **subsidiary means**, not primary.

What is the difference between primary and secondary sources? Judicial decisions and the teachings of the most highly qualified publicists of the various nations, being subsidiary means, can only help the interpreter to identify the applicable rules, but are not per se able to create rules.

Thirdly, no hierarchy of sources is provided, as is the case in national legal systems (with the Constitution above and then to follow laws, decrees, administrative legal acts, etc.).

Article 38 begins with international conventions instead of beginning with custom, even though custom, as indicated in Article 38, is a general practice accepted as law and therefore applicable to all subjects of international law, while conventions can be general, if ratified by all members of the international community, or are more commonly binding only on states and international organizations that ratified them. Why?

The answer could rely in the fact that it is easier to know what is written in a treaty than to know what is established by customary law. Because it's (likely) not written, the interpreting and understanding of a customary law rule is much more difficult than relying on a Treaty text. However, this is not the only possible answer.

Since the mandate of the International Court of Justice is to solve disputes between states (leaving aside the fact that it also provides advisory opinions), the first thing the ICJ should look at is if between those states there is a treaty or convention which binds them to a certain conduct or certain behaviour (a treaty that regulates the relationship between the two states that are in dispute). A dispute is most likely to arise from a violation of a treaty than from a violation of customary law.

The fact that the ICJ is called upon to resolve disputes between States means that the first rules applicable by the court to resolve disputes are those that are specifically binding on the State (first treaties and then, in a second stage, customary law).

The ICJ is forced to examine first the *lex specialis*²¹ and the special relationship between the States in dispute, and then, if no answer is found, it should also examine customary law. This is also why treaties are listed before customary law.

Customary international law, which is binding on the entire international community, is a set of rules that have emerged from the constant and uniform practice by States and from the fact that such conduct is considered binding by States. For a rule of customary law to emerge, it is therefore necessary to consistently repeat a conduct (in Latin, *Diuturnitas*) and to consider such conduct as binding and mandatory by international legal entities (States, international organizations, etc.).

This is the subjective element and in Latin words is often referred to as *opinio juris sive necessitatis*²² («an opinion of law or necessity»). The objective or material element is state practice.

International and customary law are not created by individuals; they are made by States and by State organs that express the position of the states and entail their responsibilities.

State practice is adopted by the organs of states, therefore by legislative and judicial bodies and not by individuals, corporations or legal persons.

The same reasoning should also apply to international organisations. Therefore, the practice of the international organisation can be considered when trying to assess the existence of an international custom,

²¹ **Lex specialis.** In legal theory and practice, *lex specialis* is a doctrine relating to the interpretation of laws and can apply in both domestic and international law contexts. The doctrine states that if two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law governing only general matters (*lex generalis*).

²² **Opinio juris sive necessitatis.** It is the belief that an action was carried out as a legal obligation.

Opinio juris is the subjective element of custom as a source of law, both domestic and international, as it refers to beliefs. The other element is state practice, which is more objective as it is readily discernible. To qualify as state practice, the acts must be consistent and general international practice.

In international law, *opinio juris* is the subjective element used to judge whether the practice of a state is due to a belief that it is legally obliged to do a particular act. When *opinio juris* exists and is consistent with nearly all state practice, customary international law emerges. *Opinio juris* essentially means that states must act in compliance with the norm not merely out of convenience, habit, coincidence, or political expediency, but rather out of a sense of legal obligation. Article 38(1)(b) of the Statute of the International Court of Justice accepts "international custom" as a source of law, but only where this custom is 1) "evidence of a general practice," (the objective component) (2) "accepted as law." (the *opinio juris* or **subjective component**).

and, in that case, we should consider international organisations as the sum of the practice of the Member States.

What kind of acts or what kind of conduct are relevant to assess the existence of the practice? An example would be Russia's President Vladimir Putin's **statement** that his military actions were a reaction to an ongoing "genocide" against the Russian-speaking population of the Donetsk and Luhansk regions, collectively known as the Donbas. Putin has been telling Russians that the objective of his war in Ukraine is the "demilitarisation and denazification" of the Ukrainian government.

This statement is only an example of practice, but this does not mean that current events will give rise to a customary law rule.

A **conduct** that could give rise to a customary law rule might also be, for example, the granting of immunity, physical acts (sending ambassadors or military forces) or acts of verbal nature (political statements, national judicial decisions).

Non-intervention and omission also play an important role. If no one intervenes in a certain situation, after a while that conduct might be recognised to be lawful.

Another very important element is **the density of the practice** (even more important than time and duration). This is because states or international legal subjects in the international community do not always act at the same time.

Taking, for example, humanitarian intervention (as in the case of humanitarian intervention in Rwanda or Kosovo in the 90s), to this day we still do not have a customary right in this field because each time states have adopted different positions regarding humanitarian intervention.

Density stands for the **uniformity and consistency of practice**; the objective element of practice should also be **extensive and representative**.

It should be clear that extensive is not the same as unanimity; extensivity is represented by widespread support and participation but is not universal. Thus, there is no need for a certain majority of states.

Practice should be **representative**.

Of particular importance is the practice of those subjects of international law and those states whose interests are specifically affected.

An example to make this concept clearer might be the international law of the sea. There are several customary rules that apply in the field of the law of the sea, one of which the one regarding the safe passage of ships.

States bordering the straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships. States that do not have access to the sea do not have the power to contribute because the rule **does not affect them**.

Thus, practice must be representative, consistent and, as much as possible, uniform.

Two different aspects should therefore be considered: **internal consistency** (the same state should always follow the same practice) and collective consistency (for the general practice).

An example is the United States or Russia being in favour of humanitarian intervention sometimes and totally opposed at it other times. This is an example of inconsistent internal practice.

Internal consistency is the consistency adopted by a single subject of international law (a single state).

Moreover, the existence of the practice is not sufficient to have a rule of customary international law. We must also check whether it is accepted as law.

The International Court of Justice states that practice not even in aggregate would suffice to constitute a customary law rule and that, to constitute one, two conditions must be fulfilled: the objective element and the subjective element.

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77. The essential point in this connection-and it seems necessary to stress it - is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would **not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; - for, in order to achieve this result, two conditions must be fulfilled.** Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

So not only the acts concerned must amount to accepted practice, but they must also be such as to be evidence of a belief that this practice is made obligatory by the existence of a rule of law that requires this very conduct.

There are **two different types of approach to the subjective element**. One is to consider the subjective element (the *opinio juris*) as an expression of consent bound by subjects of international law. Thus, States accept custom as law and thus give their consent to be bound by that specific norm of customary law.

The second theoretical reconstruction of the subjective element is more about the belief of recognising the existence of a rule and recognising a given conduct as a response to a legal obligation.

Both approaches represent valuable solution to describe the subjective element; to this day, there are strong debates among scholars about which of these two approaches is the correct one.

Why is the subjective element so important? The subjective element is important to distinguish between acts that are motivated by the willingness or recognition of a legal obligation and those that are not.

There are several conducts that States and subjects of international law apply even if these are not considered mandatory. In this case, there is the element of practice, but the subjective element is not present because this type of conduct derives from non-legal motivations: it is rather of a moral or ethical nature or sometimes even just for convenience.

Sometimes states agree to pay for hypothetical damage, not because they agree that they have violated a law or rule, but because they think that doing so is the best choice to fulfil a moral and ethical duty (and not really a duty of legal nature). This is the case of ***ex gratia*²³ compensation for damages**.

²³ ***Ex gratia* compensation for damages.** An *ex gratia* payment is made by an organization, government, or insurer for damages or claims, but it does not require the admittance of liability by the party making the payment. An *ex gratia*

In this case it's also important to verify and to have evidence of the fact that a certain behaviour is undertaken because it is considered to derive from a legal obligation and, to do that, statements (government official publications, official legal opinions, etc.), diplomatic correspondence, decision of national courts and resolutions of international organisations should be taken into consideration.

The draft conclusions on the methodology of identification of customary law rules were provided by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.

The ILC Draft Conclusions on Identification of Customary International Law (2018)

The International Law Commission adopted in 2018 its draft conclusions on the methodology to be adopted for identifying rules of customary international law.

The **ILC conclusions** seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined.

A necessary digression on the International Law Commission

The ILC is a subsidiary body of the UN General Assembly which has the mandate to progressively develop and codify international law.

The ILC Statute (art. 15) specifically establishes that the expression "progressive development of international law" means the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" means the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

The ILC efforts have resulted in wide variety of instruments, some very successful in codifying customary law, others less. Some ILC draft articles have been converted into multilateral conventions or treaties under the umbrella of the UN General Assembly (f. ex. the 1969 Vienna Convention on the Law of Treaties. ILC Draft Articles which do not translate in a treaty text but maintain their draft status are considered highly authoritative and are often deemed as reflecting customary international law.

In our case, however, the Conclusions are more like guiding principles for all those called to identify customary law rules, national judges included.

[Read the text of the ILC Draft Conclusions at the link https://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF]

Everything should be clear, at least until Conclusion n. 11.

Conclusion n. 11 concerns treaties as evidence of customary law:

- There is no general presumption that a treaty **codifies** existing customary international law
- Treaties seldom simply codify well-established and uncontroversial rules of customary international law; usually they aim at the regulation of a specific area of international law among the negotiating State parties

payment is considered voluntary because the party making the payment is not obligated to compensate the other party. In Latin, "ex gratia" means "by favor."

- This does not exclude the possibility of a treaty containing specific provisions which do represent existing customary law; a treaty may contain some provisions that amount to customary international law and others of a purely conventional nature.
- Multilateral treaties can provide the impulse or model for the formation of new customary rules through State practice and *opinio juris*.
- Multilateral treaties can assist in the “crystallization” of emerging rules of customary international law (they sort of “freeze” a new custom at the time it arises). But there is no presumption that they do.

Conclusion n. 12 deals with resolutions of IOs – like UN GA resolutions – as evidence of customary law:

- UN GA resolutions may in some instances constitute evidence of the existence of customary international law CIL; they help to crystallize emerging customary law (frozen in time); or contribute to the formation of new customary law.
- Resolutions accepted unanimously or almost unanimously, and which demonstrate a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption: that is when it is established that a resolution provision corresponds to a general practice that is accepted as law (cfr. Art. 38 ICJ Statute).
- In the event of a lack of unanimity, States voting against the resolution may prevent the creation of a general rule of customary international law; and individual dissenting States may enjoy the benefit of the persistent objector status (see Conclusion 15).

Persistent objectors/dissenters

- If, whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it (at least as long as it maintains its objection) (NB it has to dissent during the formation process of the rule, not afterwards).
- The objection must be clearly expressed, made known to other States, and maintained persistently.
- A persistent objector state can be protected from the application of new and emerging customary rules, but it cannot impede its formation, it cannot stop the rule coming into being for others.
- New states are bound by existing customary law: when a rule has come into existence, it can no longer be objected to (f. ex. decolonization and new independent states and expropriation). New states can try to change CIL, first adopting treaties or new practices (these might be considered breaches, but if enough states jump on the bandwagon it might lead to a new custom).
- No one can object to jus cogens norms

This document helps us introduce an important organ of the United Nations, which is the **International Law Commission**. It is a subsidiary organ of the UN General Assembly.

Recently there was a new election of the members of the International Law Commission: the Italian jurist and university professor, former Head of the Faculty of Law of the University of Trento, Giuseppe Nesi was elected to be part of the UN International Law Commission for the period 2023-2027.

The International Law Commission was created already back in 1947, at the beginning of the work of the UN. Its main purpose was to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

The International Law Commission is made of several individual experts who do not represent the interests of a state. These experts work to identify the existence of customary rules of international law. It might take years or even decades for the International Law Commission to concludes its work.

These experts meet to prepare conventions and draft conclusions in which they try to summarise and codify **existing rules of customary law**. These conclusions or draft conventions then are submitted to the UN General Assembly that approves or endorses these documents and sometimes can even open them up for the signature and ratification of Member States (which means that these documents can become treaties). They basically assess the objective and subjective elements in every different field of international law.

These experts might discuss on the immunity of state officials from foreign criminal jurisdiction or the protection of the environment in relation to armed conflicts for example. An interesting discussion might also concern the sea level rise in relation to international law. These topics are much relevant in today's world.

Since its establishment in 1947, the ILC produced an incredible number of draft conventions that sometimes have become treaties.

Another very important factor to consider is that of the persistent objector: this is the case in which a state really doesn't want to become bound by a customary law rule that has not yet been formed.

A persistent objector is a state that persistently and openly objects to the formation of a customary law rule. If they do so in a consistent and coherent way before the customary law rule has been established, they will be excluded from that specific customary law rule and therefore won't be bound by that custom.

The theory of the persistent objector was raised in the 1970s by all the countries that had recently become independent because of the decolonization process to come object. These countries objected to certain rules that allowed other states to keep using their natural resources. A persistent objector cannot stop the formation of a customary law rule and its application to other states or other international law subjects, but it can protect itself from the application of the rule to its territory.

INTERNATIONAL LAW – Lecture 11 of March 15, 2022

The territory of the island of Chagos (the United Kingdom created the BIOT²⁴, for example the island of Diego Garcia) was separated from Mauritius, but the British administration also decided to expel and prevent the return to the local population, the inhabitants of the island. After the detachment, Mauritius became an independent state beginning in 1968. Claiming the fact that this part of the territory was under British administration, this separation was not made in accordance with international law (statements to which the United Kingdom never responded).

In 2017, the UN General Assembly started the process of asking the ICJ to give an advisory opinion on the legitimacy of what happened in the case of the Chagos Islands and then decide on what kind of rules the right to self-determination is based, when it was established in international law and why these rules exist. Was it already an applicable law when the UK decided to separate the Chagos Archipelago?

²⁴ The **British Indian Ocean Territory (BIOT)**, an archipelago of 58 islands covering some 640,000 sq km of ocean, is a British Overseas Territory. It is administered from London and is located approximately halfway between East Africa and Indonesia.

The ICJ was asked to initiate an access process when the process of forming a rule of customary law was completed: if the rules already existed in the 60s when the United Kingdom divided the archipelago, then the United Kingdom violated international law at that time and it is a continuous violation of a rule of customary law (*tempus regit actum*). If there is no rule there is no violation of the rule.

The ICJ had applied to the objective element and the subjective element a reasoning: it had to determine the nature, content, and purpose of the right to self-determination;

- ⇒ **Customary Law**, custom is constituted through “general practice accepted as law” (Article 38 of the Statute of the Court);
- ⇒ What was the status of the law at that time? The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization. **General Assembly resolution 1514 (XV)** clarifies the content and scope of the right to self-determination. There is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption:
 - «General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.»

It is important to underline what is specified: resolutions are not binding, but only of recommendation, however they can, in certain circumstances, provide evidence to establish the existence of a rule or the emergence of an *opinio juris* (especially with regard to the subjective element).

Another important element is that it was adopted without negative votes against, but with a huge majority: none of the states disputed the existence of the people's right to self-determination. The International Covenant on Economic, Social and Cultural Right (16/12/1966) reaffirms the right of persons to self-determination.

This resolution is sufficient to determine the existence since 1966 of a rule of customary international law: if the right to self-determination already has the nature of customary law, it was therefore already binding on the United Kingdom when they decided to separate the Chagos Islands.

For all these reasons, the ICJ states in an advisory opinion that the continuation of the British administration of the Chagos Islands constituted an international unlawful act and a clear violation of the rule of customary international law.

It is clear to everyone in the international community that the UK is violating public international law: in fact, immediately after the opinion of the ICJ, the UN General Assembly again adopted a resolution calling on the UK to withdraw from the Chagos archipelago and then end the administration of the island and return it to Mauritius.

In a situation where there is a clear violation of customary law, there is a number of renewed resolutions of the ICJ. However, the UK has no intention of leaving the island.

This case clarifies the process by which the ICJ or any other actor in the international community would have to pass to access the existence of a rule of customary law. This case is specific because the core of the decision is an act of an IO (an International Organization; a group of states working together) and the resolutions are evidence of the *opinio iuris* (in part of all the states that had taken part in this decision).

There was no negative vote, in fact most states were in favour of declaring the existence of the right to self-determination for the colonies.

The "Draft conclusions on identification of customary international law", adopted by the International Law Commission at its seventieth session, in 2018, establishes how and when customary law is formed.

- during part of the convocation, both agree that a resolution adopted by an IO cannot in itself create a rule of customary law, but can provide evidence to determine the existence of a rule of customary law or contribute to its development (taking into account conclusion 12, the provision may reflect a customary rule if it has already been established)
 - **Conclusion 12. Resolutions of international organizations and intergovernmental conferences.**
 1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
 2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.
 3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).
- a resolution adopted unanimously shows that there is a clear intention to establish a rule that can create a custom for the simple fact of adoption

This case shows that international law has rules but that in certain specific circumstances it is difficult to enforce those rules: international law cannot require states to behave responsibly to implement international law as no force (such as police) can be applied.

Treaties

Like other societies, a state company also needs rules governing the agreements entered into by its legal entities: no company can function properly if its subjects are in constant disagreement on the application and interpretation of their agreements.

Treaty law is one of the oldest areas of public international law and is an integral part of the coexistence of international law, without which law and its predictability would be difficult to maintain.

The primary norms in treaty law are found in the 1969 Vienna Convention on the Law of Treaties.

Treaties are defined as a deliberate act of creating norms: IOs or states, willing to enter into a treaty, create a treaty with binding rights and obligations; since **consent** is the basis of a treaty, it is obvious that treaties bind only the parties who had concluded and accepted the treaty (Art. 34 VCLT). When a state agrees to be bound by a treaty and becomes a party to it, it must respect its terms: this is reflected in the principle of *pacta sunt servanda*, that is, a treaty in force "is binding on the parties and must be performed by them in good faith".

A treaty consists of the expression of consent by two or more international legal entities (States and IOs) on the regulation of an object through international law: it reflects the willingness of two or more international subjects to apply international law as a means of regulating their interests.

- Evolution: From the prevalence of customary law to the law of treaties;
 - ↳ Custom was very important at the origin of international law and until the Second World War: most of the final treaties governed by international law were governed by customs; for example,

customs concerning the rules applicable to war, international humanitarian law, diplomatic relations, immunity of officials of states.

- Aim: Common interests or safeguarding global public goods.

Then after World War II two things happened:

- The **international community** became **more heterogeneous**: no longer only states, but also IOs and international legal entities; there was therefore a very rapid evolution and development of the system and the number of subjects and fields became wider than before (this happened mainly by consensus of the states).
- The **evolution of the global system** and the **changing need of the international community**: a number of issues that had to be considered as global public goods, that couldn't be protected by a single state, and that needed the international community to act together.
 - There was a need for more international rules to regulate all these different issues.

"Vienna Convention on the Law of Treaties²⁵" (1969)

- A treaty creates through the consent of states, the law and obligations for international legal entities that had become part of the treaty.
- Very specific set of rules of international law that apply to the law of treaties (by treaty law, we refer to all the different rules on the creation, validity, legal effects of treaties);
 - ↳ All these aspects are covered by Treaty law and is usually governed by customary law;
 - ↳ There are rules and norms of customary law that establish how a treaty is formed, how and when a treaty was validly inserted: all aspects of the life of a treaty are defined by norms of customary law and we find all this information codified by the Commission on International Law in the 1st codification exercised by the Commission on International Law that gave rights to the Vienna Convention.
- Process: First discussion among the members then a draft presented to the General Assembly of the United Nations and then the same text was open for ratification to all members of the international community;
 - ↳ The treaty was concluded in 1969 but entered into force in 1980 (and is not yet ratified).
- The VCLT's draft articles were prepared by subsequent Special Rapporteurs of the International Law Commission (ILC);
 - ↳ As the VCLT seeks to codify customary practices, it generally reflects customary international law.

²⁵ **VCLT**. The convention was adopted and opened to signature on 23 May 1969, and it entered into force on 27 January 1980. It has been ratified by 116 states as of January 2018. Some non-ratifying parties, such as the United States, recognize parts of it as a restatement of customary international law and binding upon them as such. List of State parties: Afghanistan, Albania, Algeria, Andorra, Argentina, Armenia, Australia, Austria, Azerbaijan, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Holy See, Honduras, Hungary, Iran, Ireland, Italy, Jamaica, Japan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Nauru, Nepal, Netherlands, New Zealand, Niger, Nigeria, North Macedonia, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Russian Federation, Rwanda, Saudi Arabia, Senegal, Serbia, Slovakia, Slovenia, Solomon Islands, Spain, St. Vincent and the Grenadines, State of Palestine, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Ukraine, UK, United Republic of Tanzania, USA, Uruguay, Uzbekistan, Viet Nam and Zambia.

- The VCLT applies only to treaties concluded after its entry into force (as far as States Parties are concerned) however most VCLT provisions are considered to be representative of customary international law and as such are applicable to previous treaties and treaties concluded by non-state parties.

Vienna Convention

> VCLT only applies to written treaties (between states), oral agreements are also “treaties” under international law => Art. 3 explicitly stipulates that the fact that the Convention only applies to written treaties doesn’t affect the legal force of other agreements

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;

> this convention is meant to codify customary rule only applicable to treaties concluded between states => there’s another Vienna Convention

> capacity to conclude a treaty: all states have treaty-making power but not all the oranges and representatives (Art. 6: “every State possesses capacity to conclude treaties”) => however not all representatives of a state are competent to conclude a treaty on behalf of a state

> head of states, head of government had the power to conclude treaties, conventions, covenants, but it’s not like a member of the parliament can conclude a treaty

> it’s required that those representing the state during negotiation of a treaty has full powers

=> Art. 7: “full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty

=> there’s a list of different phases necessary for the formation of a treaty

=> representatives of states had to show a document that allow them to act in the name of the treaty

Phases:

- (1) Negotiations
- (2) Adoption of the text (art. 9 VCLT): when the text is finalised => is usually done at unanimity, sometimes the text can be also adopted without the half majority
- (3) Authentication of the text (art. 10, important phase) the signature means that the text is authentic and the final version of the text => cannot be changed anymore without reopening the entire negotiation = authenticate by signature the states are bound by a minimum level of obligation = they cannot behave in bad faith
- (4) Consent to be bound by the treaty (art. 11): moment when a state is really bound by all the provisions => in order for a state to become legally bound by a treaty, it must consent to it > the VCLT is fairly

flexible and leaves it to the parties to the treaty to determine the means by which the required consent may be expressed

> every states after having signed should always express its consent to be bound by the treaty, in different way:

- exchange of instruments (for bilateral treaties), ratification (traditional way: only with it the states conclude to be ready to be bound by the provisions*), accession, approval
=> under Art. 15, a state can give consent by accessions whereby it consents to be bound by a treaty already negotiated and signed by other states, often after the treaty has already entered into force, in these circumstances:
 - a. if the treaty provides for it
 - b. if it otherwise established that the negotiating parties were agreed that it should be possible
 - c. if all the parties have subsequently agreed that a state may express its consent by such means
- every State has its own internal law for determining which organs are empowered to make a treaty binding on the State;
- traditionally, after the signature the State needed to confirm that it intended to be bound by the treaty through ratification;
- in more modern times, also through “definitive signature”: ratification and signature at the same time

> there’s an important distinction between signature and ratification: Art. 14 illustrates that, in some circumstances, and very often with regard to multilateral treaties, consent to be bound by a

treaty requires not only a signature by the potential state party in question => but also a *subsequent confirmation* by the state

=> the purpose of such ratification is to allow the signing state a period of time before it gives its binding consent

(5) prior to its entry into force (during the so-called interim period), the signatory States are bound, under the principle of good faith, not to adopt any conduct in contrast with the object and purpose of the treaty (art. 18)

> good faith requires that a state isn’t entirely free to act as it pleases when it has given its consent to be bound or expressed an initial intention to be bound => but needs to give subsequent confirmation = interim period

> Art. 18 specifies that states must refrain from acts which would “defeat the object and purpose” of the treaty when:

- a. it has signed the treaty but not ratified it, until it has made its intention clear not to become a party to the treaty
- b. it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty

(6) Entry into force: according to Art. 24, a treaty enters into force “in such manner and upon such date as it may provide or as the negotiating states may agree”

> in the case if simple bilateral agreements: the treaty may enter into force when both parties sign the agreement => but it isn’t unusual for a substantial amount of time to pass before a multilateral treaty enters into force

> if the treaty doesn't specify when it enters into force, it will generally enter into force as soon as consent has been established for all the negotiating states => a treaty that hasn't yet entered into force cannot create any legal obligations for the contracting states

(7) Amendments: according to Art. 39 a treaty may be amended by the specific agreement of the parties, often "protocols" => in practice, many treaties, and most multilateral treaties, will contain provisions on amendments

> if there are no such provisions, the usual consent-centred formalities on the conclusion and coming into effect of treaties apply

> according to Art. 40: proposed amendments should be notified to all contracting parties => regardless of any amendment (art. 41) 2 or more parties to a multilateral treaty may conclude an agreement modifying the treaty between them

* every state has its own rules, but when the domestic law process is concluded the treaty is binding the states

> every treaty in force is binding upon the parties to it and must be performed by them in good faith

> internal law cannot be invoked as a justification for the failure to abide by a treaty, for not fulfilling a treaty-based obligation

INTERNATIONAL LAW - Lecture 12 of March 16, 2022

TREATIES AS SOURCES OF INTERNATIONAL LAW

The different phases in the formation of a treaty are relevant, especially the difference between signature ratification and entry into force.

RATIFICATION and ENTRY INTO FORCE:

Ratification is a way to express, for every state party to a treaty, consent to be bound, but the moment in which a state ratifies a treaty is not yet the moment in which the treaty enters into force → the Treaty becomes entirely binding not only when a state has ratified, but also when it has entered into force.

So for *bilateral* treaties it is very easy: ratification and exchange of documents between the two parties immediately create the consent that makes the Treaty binding.

When the Treaty is a *multilateral* most often there is a provision in the same text of the Treaty which explains when exactly the Treaty will enter into force. And it is often formulated in a way that explains this Treaty will enter into force after the 20th Instrument of ratification has been deposited with the UN secretariat → This is 1 possibility, because for entering into force it declares in practice that at least 20 states need to have ratified the Treaty. So in the moment when the 20th state ratifies the Treaty, it will enter into force for all the other 19 as well, and only in that moment all the others, that are in a middle ground, because they have signed the Treaty, but not yet ratified, they are not entirely bound by all the provisions of the Treaty sets, they are not subject to the rights and obligations set forth by the Treaty, but nonetheless they have a good faith duty not to act in a way that contrast the purpose, the object of the Treaty. Waiting for ratification and eventually, also after ratification, waiting for entry into force of the Treaty, this good faith obligation remains. And the 2nd aspect in the formulation "the Treaty enter will enter into force when the 20th instrument of ratification is deposited with the UN Secretariat" = this is because the UN secretariat is always in the place where all the treaties are usually submitted and so it is a sort of a deposit of all the treaties existing in the world.

This is not a requirement, so it's not necessary that the Treaty is deposited with the UN secretariat for the Treaty to be valid or binding in force, but it is a way to make the treaty known to the entire international community.

Remember the difference in timing signature, ratification entry into force, because when it comes to disputes, for example, before the International Court of Justice or any other sort of international dispute, it is very important to assess what kind of rights and obligation the state involved in the disputes were subject to, at the moment of the facts, of the conduct or of the situation, that is under contestation → This is the object of the claim. ("Tempus regit actum")

And another relevant thing is that the Treaty is obviously binding on the parties of the Treaty. But the parties of the Treaty can create through a treaty: obligations, rights and obligation for third parties. They can do that only with the consent of these third parties.

So it's like an agreement made with me and one of you and we decided to agree on something that also benefits another colleague, another state.

We can do that only if the other states are set to have this kind of rights and obligations without being a party to the treaty itself, it needs the consent of the third party. And in the same way, third party state to our treaties can also agree to confer rights to individuals. Just think about human rights treaties in this case, since individuals are subject, under the jurisdiction of every state of the international community, there is no need of their consent.

They are not International legal subjects, they do not have international legal personality as States and international organization, but they can be the addresses of rights and obligations deriving from a treaty.

So states agree to confer rights and obligations upon individuals without the need of individuals involvement in any way. This makes again a difference between subjects of international law, states other peers that are at the same level equal and actors, like individuals and other NGOs or multi level multinational enterprises. But specifically in the case of human rights we are mostly referring to individuals.

if the third party is a state, it has to consent, it has to accept the rights and obligations deriving from a treaty concluded by other subjects of international law.

Individuals can receive, by the way of a human rights treaties, rights and obligations without the need of their involvement or acceptance.

How can individuals be impacted in some way by a treaty? How can they avoid that to happen? So what if most states agree with something that affects in a negative way the rights of individuals. Since the individuals have no right to sit at the negotiations of such treaties, they only have an indirect sort of protection because individuals and citizens are those who choose their own government and therefore they can, from the parliamentary way, contribute in defining the Foreign Relations of their own government. But this happens if we are talking about a democracy, If we are not talking about the democracy then citizens are much less protected. (More of a political nature.)

It's the monitor, being exercise of the media newspapers, NGO's are, from civil society. So the pressure that they can put on members of a representative of the state negotiating a treaty.

For example, a few years ago the Transatlantic Partnership Agreement involved the United States and many other countries in Europe and another one was Mega trade agreements in the area of Asia with Japan, the United States again, involved in this kind of negotiations. Called "Mega Treaty", because it concerned trade

in a number of items and services and investments, it covers a wide range of products and services, some of which are very critical for some of the countries involved in the negotiation.

Like the protection of wine and food European specific food and food products and wine that could have lost the special protection if this kind of agreement was to be concluded as it was at the beginning negotiated. It was a question about Parmesan, the use of the trademark, the use of the geographical denomination of the product, if Parmesan could be defined as such even if produced in the United States and then sold here in Europe.

And it was only because of civil society and monitoring and newspapers that these kinds of issues were steered in another direction during the negotiations and it is always possible, when at least the negotiations are made public, at least at a certain level, because often negotiations are secret.

As an individual, can you appeal or claim that a treaty has violated your rights?

The answer to that question is quite complex.

It is not always possible, because, especially under international law, the disputes on treaty interpretation and applications of treaty provision are often inter state disputes. Just think about the field of international trade; we have an international organization of almost universal character: the World Trade Organization.

All the rules about trade, quite complex sector, wide the number of rules are applicable to international trade relations. Only states can claim they have been violated, so we have disputes, for example, between China and the United States, or Europe, because Europe is acting in itself, so it is not France, Italy or Germany (which is a member of the World Trade Organization), but the European Union.

But it's not always the company that can ask the World Trade Organization dispute settlement system to decide on a violation committed by the United States. It's always through the state, the companies might obviously provide information to pressure their own state to act, but it's an inter-state dispute.

If we think of the European Union, but it's a very specific and peculiar scenario, then within the European Union and a very specific international organization, individuals can claim, but it is not the traditional way of international law workin.

Only areas in which individuals can act on the international plane and bring a dispute against a state, so we have individual state disputes, a single person or company, a natural or a juridical person against the state, is in the field of human rights. But this is a citizen and its own state. Or in the field of international investment law, and in that case is an investor. Ex I decided to open a beautiful hotel on a beach in Cuba. I made an investment, I moved my capital, my money there, I built the hotel, I started running the hotel and then Cuba decided to come nationalize and expropriate everything.

I, as an individual, a foreign investor in Cuba, I'm protected, my investment is protected against this kind of actions, this kind of expropriation and nationalization under a very specific set of international law rules, in this case I can act, I can claim that my rights have been breached. Before an international arbitral tribunal against Cuba.

This happened in Cuba for all the US investments back in the Cold War period, so investor state can happen, but it's a very specific sector.

Most of the time negotiations are kept secret, so it's not easy to understand what's going on. In certain specific cases, there are updates published regularly, but this doesn't happen very often.

Wikileaks and TheLike always provided inside information and were able again to steer the negotiations a little bit the negotiations because of a leak of a confidential document, but treaty negotiations are often kept quiet, under secrecy.

INVALIDITY OF A TREATY

So we are going to look at the grounds for the invalidity of treaties and the rules again of the Vienna Convention on the Law of treaties, focusing on the articles from Article 46 to Article 53.

The list: manifest violations of internal law provisions, error, fraud and corruption, coercion and conflict with a peremptory norm.

1ST GROUND OF INVALIDITY: CONCERNING COMPETENCE TO CONCLUDE

TREATIES

The first ground dimension for the invalidity of treaty is more complex to understand, it concerns the competence to conclude treaties.

The Treaty text in the article 46 says that: "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 the competence to conclude treaties as invalidating its consent, unless the violation of national law is manifest and concerns a rule of fundamental importance." The question here is: when it comes to the ratification of the Treaty, the moment in which every state expressed its consent to be bound by a treaty and this happens in violation of domestic law, ratification is undertaken in accordance with the domestic law of every state, so in every state the rules really change.

Ex. The rules of the UK and the United States. Italy has a different set of rules.

What happens if those rules, that are of a national nature, are violated? And what happens to the international plane? One thing is within the state and another aspect, which is the one addressed here is what happens at the international level.

So the provision of the Vienna Convention on the Law of Treaties says that the fact that the national rules on ratification have been violated becomes relevant at the international level only if those rules were manifest and of fundamental importance. - Manifest:

means that the ruler should be objectively evident to any state acting on the basis of the

normal prudence and in good faith so it should be a rule that the other states of the international community should be able to locate, to understand in a quite evident way. States in the international community, according to the International Court of Justice, are not obliged to keep themselves always informed of all the legislative changes happening in other Member States.

If a state adopter changes the rules about ratification and creates a very complex procedure different from the common practice in the international community, this is not something that can be considered manifest to the other states in the international community.

So for example: a national law that prohibits a foreign minister to negotiate, sign and ratify treaties is something that is really weird, because the main competence of the Minister for foreign affairs is negotiating, signing and eventually ratifying treaties, so it would be really weird to allow this to happen. And the other states are not expected to know this kind of rule.

- it should also be of fundamental importance.

So for example, the case about the U.S. military base that is in Italy, in Sardinia, on the island of La Maddalena. And there was a treaty concluded between Italy and the United States to allow for this military bases to be established on the island of La Maddalena.

The treaty was kept secret and was negotiated without anyone involved apart from very few people and it was not subject to the ratification procedure provided for our Constitution, which requires the involvement of the national parliament. So the Parliament didn't know anything about this treaty, but the treaty was signed by the government.

Further, a treaty in violation of national rules about the ratification. Is Italy bound by this bilateral treaty on the international plane?

Yes, the Italy is bound on the international plane, because the other party was not expected to know that under Italian law, a definite signature by the representative of the government was not enough. So the Treaty is valid and is binding on the international plane.

The problem became an internal political one that concerned the relationship between the Parliament and the government and also the Parliament knew it at a later stage. In between the government had changed. It becomes an internal problem, in fact in between the government changed, but at the international level the Treaty remains binding and entirely valid. If the position of Italy changes, it will be in breach of the bilateral treaty.

Question: If the treaty was secret, the United States should have at least understood the fact that the Italian government was not negotiating in entirely good faith, keeping in the parliament so without any kind of information.

On secrecy, this kind of treaties, especially in military ones, but almost all treaties are negotiated in secret → secrecy is not a point for the invalidity of the Treaty.

The fact of negotiating with the government in itself would have been enough for the US side. The government is obviously always entitled to negotiate and sign treaties.

That makes the treaty valid in and it probably was convenient for both parties not to involve the Parliament, so if you are the government of a state willing to accept a military base of a foreign state, do you really want the Parliament involved in such a decision?

Probably not, from a political and democratic point of view, but from the legal nature of the Treaty this doesn't change; and the problem remains an internal problem within Italy and Italy has to deal with that. It doesn't bother the United States when the Treaty is there signed and final.

2nd GROUND OF INVALIDITY: ERROR

Easy ground of invalidity error may be invoked if at the time of the treaty conclusion, the fact or the situation to which the error relates consisted from the essential basis of consent. So if the error concerns something that is at the core of the Treaty, was the main motivation to consent to be bound to the Treaty. Error should not be a parochial error, not a minimal error, a small mistake, it's an error that really concerns an aspect of the Treaty around which all the Treaty is built, negotiated is the essential basis of the consent of the parties.

There is just one example of this in the literature, usually it is referred to the Temple of Preah Vihear, on the border between Thailand and Cambodia.

The property of the temple was disputed back at the beginning of the last century, around 1907 and there was an agreement between Siam, the name that Thailand had at the time, and France, which was the colonial power over Cambodia, agreed on the property of this temple. And they decided during the negotiation that the temple was to be assigned to Thailand, but they drew a map annex to the treaty (all the next is to treaties of the same value of the Treaty) and in the map the temple was in Cambodian territory. Everything remained as such for a number of years.

Siam became Thailand, Cambodia became independent, there was the First World War, the Second World War. In the 60s finally, Thailand decided to raise a case before the

International Court of Justice claiming the property of the temple back and saying the treaty of 1907 is invalid, because there is an error on an essential element of the Treaty itself. And what does the International Court of Justice say? Where is the temple now, Thailand or Cambodia?

The temple remains on the property of Cambodia, despite error in the map.

ECJ recognized there was an error on the essential basis of the Treaty but basically adopted a different approach, saying that Thailand had waited 60 years to claim something. So inaction and acquiescence in this case made the ground of invalidity disappear.

3RD GROUND OF INVALIDITY: FRAUD AND CORRUPTION

Fraud - Article 39:

A state may claim invalidity if it has been pressured to conclude the Treaty by the fraudulent conduct of another state.

Corruption - Article 50.

Corruption of a representative of state.

4TH GROUND OF INVALIDITY: COERCION

Which is discussed in Article 51 and 52 of the Vienna Convention.

Coercion consists in a series of acts or even threats directed against a state representative or directly to state, according to Article 52, by the threat or the use of force.

The example of coercion of a representative of a state, in World War Two: Goering, of Germany, forced the President of Czechoslovakia at the time to sign a treaty accepting the control of Germany, the Third Reich, over the state.

The issue is about coercion of a state through the threat or the use of force.

Because what happens to peace treaties? What happens in the case of peace treaties?

If we apply the notion of coercion, all peace treaties will be invalid.

So what is the reasoning that we apply to preserve the validity of peace treaties despite the customary law rule about coercion?

In the case of a peace treaty, there is always a state attacking another one and one winning or losing, or both winning and losing a little bit.

So there is always coercion through the threat, mostly the use of force.

These treaties are often signed on this kind of condition, so it can be claimed that especially when there is a clear winner and a clear loser in the war, the loser is cursed to sign a peace treaty.

If we apply this kind of reasoning, all the peace treaties will be invalid, and it's something that clearly is not positive for the international community. We want peace to be applied and respected. So what is the legal reasoning that we should use to preserve the validity of peace treaties?

Even if peace treaties are concluded under coercion, how can we make these treaties still valid? What kind of argument can you develop to make these treaties remain valid? (The article 52 says: coercion through the threat or use of force in violation of the principle of the UN Charter basically, the only way in which force can be used lawfully is either for self defense, or if it is authorized by the UN Security Council. Usually we have someone acting as a mediator, especially after the authorization of the UN Security Council in Self Defense. Still, before a user forces an unlawful attack that makes a lawful reaction in self defense.)

What is used to preserve the validity of peace treaties is basically a waiver, a consent, the fact the state under coercion, participating in the peace treaty asset and afterward also asset, nonetheless, to be bound by the Treaty, It is not in the interest of the state coerced to come to waive its right to claim the invalidity of the Treaty at a later stage.

So even if often this waiver is written down explicitly in the text of the peace agreement, if it's not, it is considered to be there in an implicit way.

If you claim that the peace treaty is invalid and you lose the war, you can claim your territory back. The only way you will obtain it is through legitimate use of force.

Ex. MINSK AGREEMENT: It was included in a UN Security Council resolution and It was the one about Russia and Ukraine after the Crimea war (South peace agreement). But if you claim that the Minsk agreement is invalid, Ukraine will ever be able to obtain Crimea back even on the basis of an invalidity of a peace treaty.

→ The aim is to arrive at a point in which peace is preserved and it should be safeguarded as much as possible. So the stability of the geopolitical relations also rely on the fact that the peace agreement cannot be claimed to be invalid because of coercion.

Even If from a logical point of view It would be correct, what is truly important is the security and stability of the entire global order, much more than the rules on the invalidity of treaties. These rules are supposed to apply to trade treaties, investment treaties, and commercial relations. Talking about peace and war security these are not the correct rules to be applied there.

The ground is implicit or explicit waiver of the right of the loser state to invoke version as a ground of invalidity.

TERMINATION, SUSPENSION AND WITHDRAWAL FROM A TREATY

Which are dealt with in section three of the Vienna Convention on the law of treaties From Article 54 to 64, the Vienna Convention set for the customary law rules applicable to the definitive termination of a treaty, the provisional suspension of a treaty and the right of a state party to withdraw from a treaty.

All these three situations have in common that the rights and obligations set forth by the Treaty are no longer applicable either in a definitive way or for a period of time definitive termination for a period of time suspension, either for all the parties to the Treaty or for some parties only, termination all the parties of the Treaty, withdrawal only some parties. There is a difference with the invalidity: in the case of treaty invalidity,

the treaty is null and void (null and void 'ab initio' in Latin words). So since the very beginning it had never entered into force, it never exists, it was never binding. Invalidity affects the very existence of the Treaty.

While termination, withdrawal and suspension have effect from the moment a given situation arises, so from the moment in which the condition for termination, withdrawal and suspension are met, so from that moment onwards, it's not backward looking, but forward looking.

The termination concerns the extension of the Treaty, the Treaty ceases to exist as of all as a whole, in its entirety. And many treaties contain explicit provision to that end, as for example: European Convention on Steel and Carbon, one of the first treaties in the history of European integration, that provided for its termination after 50 years.

But there might be other causes or grounds for the termination of a treaty. Obviously a multilateral treaty can never be terminated only as a fact of the willingness of one or few states only, but there should be at least a certain majority of member parties to the treaty that agree on that, if there is a specific provision to that end, otherwise unanimity is required. And suspension concerns temporary release from the rights and duties arising from the

Treaty. In practice, it releases certain parties to the Treaty from the obligation to abide to the Treaty and perform all the obligations that are set forth by the Treaty itself. Only concern one party or two parties, it doesn't affect all the other state parties of the Treaties.

The important thing is to look at the grounds on which termination and suspension can be claimed, especially for what concerns suspension.

1. VIOLATION OF THE TREATY: MATERIAL BREACH

The first ground for termination or suspension of a treaty is the violation of the Treaty or it's often referred to as "material breach" of the treaty (Article 60 of the Vienna Convention).

So similarly to what happens in a contract, this provision concerns the situation arising from the fact that one state party to the treaty violates one or more than one of its more important provisions.

It was not easy to define the borders of application of this rule about material breach because:

- on one side, it's important to provide the consequences for a breach of a treaty, especially when we are in a situation where states assume reciprocal obligation through a multilateral treaty,
- but on the other side it's important to avoid abuse of this ground to escape the obligations arising from a treaty.

Termination and suspension can be based on the material breach of a treaty only if the breach concerns a provision which is essential to the accomplishment of the object or purpose of the Treaty, but it has to be very important provisional, not an ancillary or accessory one of the treaty, it should be at the core of the Treaty itself.

Ex. The Cotonou Agreement

= A huge trade agreement between the European Union on one side and the ACP countries on the other side ACP which means African Caribbean and Pacific continent countries. So basically all the African countries and this is a trade agreement which relies on the relationship that European countries had with the previous colonies in that specific area of the world (it's Africa and all the islands nearby Africa).

The Cotonou Agreement is a trade agreement, so it concerns trade of products that are important from both sides, because natural resources are exported from African countries to Europe and Europe on the other side exported products that are more technological in nature or that are already being transformed.

It's a trade agreement, so violations, material breach of this agreement, you might imagine will be the ones concerning commerce, trade offs specific products that are considered essential, but this is not the case because the European Union has always used this kind of agreements exploiting the trade commercial economic relationship with other countries to exercise its soft power and influence behaviors in the other partners on the other side of the Mediterranean Sea.

How the European Union is exerting soft power through the cotton agreement? The European Union wants the other members to respect human rights, the rule of law, democratic principle and fundamental elements of good governance.

In this version of the agreement, the Cotonou Agreement is the last of a long series of treaties signed between the EU and African countries that start back in the 60s. In this version, which is still in force, the European Union decided to introduce an article which defines human rights, democratic principle, the rule of law and good governance as essential elements of the Treaty → So that if African countries are found to violate this principle, the Treaty can be suspended as a last resort with the effect that the African countries, found in violation of the essential element clause of the cotton agreement, will not benefit anymore of the preferential trade conditions negotiated with the Cotonou. It becomes sort of a sanction, and the concept is there: even if it's a trade treaty, the essential elements do not concern trade, but they concern human rights, rule of law etc. Since these are the essential elements, If an African state violates those principles, at the end of a long procedure that is explained by Article 96 and that comprehends political dialogue and negotiations, suspension can be applied as a measure of last resort.

Why did the European Union do so?

Because in the first version of these trade agreements with African countries the Lomé Convention (Lomé, capital of an African country), the predecessor Treaty, there was nothing like this, there was no essential element clause.

In 1977 Uganda became ruled by a non democratic/undemocratic government and the civil society in Europe started to claim: "Why are we supporting this kind of government dictatorship providing preferential trade to that country among all the other African countries?, Cannot we suspend the agreement, suspend this privileged trade relationship that we have? We do not want to support that kind of regime."

But the Lomé Convention at that time didn't have an equivalent of Article 9 so, all the aspects concerning human rights, democratic principles would not be considered automatically to be essential elements. It was a trade agreement, It had nothing to do with the other aspects concerning democracy and human rights.

So there was no way to apply Article 60 of the Vienna Convention on Material breach.

So in subsequent versions of the Treaty to renegotiation and amendments, the European Union decided to introduce this essential element clause that made it clear that in case of violation of Article 9, Article 60 of the Vienna Convention on Material breach could have been applied and therefore the violating state would have been suspended from the Treaty. So sort of the mechanism applied as it is applied by the European Union, It's very similar to a sanction, because it suspends a state party to an agreement from the benefit deriving from trade with the European Union, import and export.

→ The violation should concern a provision essential to the accomplishment of the object and purpose of the Treaty is not always evident and in the case of the Lomè agreement, it was not, and therefore the European Union decided to make it explicit in Article 9.

2. THE SUPERVENING IMPOSSIBILITY OF PERFORMANCE

Another ground for the termination of the Treaty or suspension in case.

And this is agreed and concerns a situation which is impossible to carry out, to keep applying and respecting the Treaty, because an object indispensable for the execution of the treaty has permanently disappeared or has been distracted.

Application of this rule in a practice very seldom used, very few applications, like treaties concerning borders or territory or use of certain part of a land, for example an island that because of an eruption or becomes submerged, nothing new happens.

Ex. Tonga 2 months ago (in January).

The destruction of a dam or of a hydroelectric power, some infrastructure that is shared between two states or more than two states, especially at the borders for the exploitation of rivers and the generation of electricity, this can happen.

The only important thing here is that financial difficulties , economic crisis, this sort of scenario can not be used as a ground to terminate a treaty.

Article 61 doesn't cover economic crises or serious financial difficulties, so situations like the crisis in Venezuela or in Argentina a few years ago are not covered.

3. CLAUSULA REBUS SIC STANTIBUS

Article 62 of the Vienna Convention on the Law of Treaties and this is a ground for the termination of the treaty which is difficult to realize in pratica, because it is only applied:

- if there is a change of the circumstances that existed at the time of the conclusion of the treaty.
- if the change of a fundamental nature and it was not foreseen by the parties.
- if it concerns that were the essential basis of the consent of the parties → If everything is put together, the changes result in a radical transformation of the obligations imposed on each of the parties.

Obviously this ground can not be invoked if the circumstances are the result of the conduct by the state that is invoking the termination of the treaty.

(The most important one is the one about article 60 that concerns material breach).

Reading of the communication sent by the representative of the Russia Federation at the Council of Europe about withdrawal of Russia from the International Organization of the Council of Europe which has nothing to do with the EU, it is a separate thing, and also the withdrawal from the European Convention of Human Rights.

INTERNATIONAL LAW - Lecture 13 of March 21, 2022

Have some initial thoughts about the impact that treaty withdrawal may have, especially when it comes to human rights treaties?

> as usual we have to make a reference to the Vienna Convention => the relevant provision is

Article 56

> it's important to know that the treaties often provide themselves the ?denunciation or withdrawal => they basically establish our procedure, that state parties have to follow to communicate their intention to denunciate to or withdraw from a treaty, and this obviously has consequences

> these ?denunciation or withdrawal are unilateral acts that a state party to a treaty undertakes when it wishes to set it free = free from the treaty obligations

> the main difference between denunciation and withdrawal is basically a very easy one, because denunciation refers to bilateral treaties, whilst withdrawal refers to multilateral treaties => obviously when it comes to bilateral treaties the denunciation of the treaty, by one of the two parties, is the equivalent of terminating the treaty

=> so if one of the two parties decide that it doesn't want anymore to be bound by the obligation of the treaty, denunciation it's possible, if the treaty provide to terminate the treaty => whilst in the case of multilateral treaties, even if one party decides to exit from the treaty, the treaty will remain in place for all the other state parties

=> withdrawal doesn't affect the existence of the treaty itself, which remains in place among the other state parties

> a very famous example of treaty provision concerning the withdrawal of a state party from the treaty: Brexit = the treaty provision is the Article 50 of the Treaty on European Union

=> there are 2 or 3 features that regulate the relationship among members of the European Union:

1. the Treaty on European Union: is the one setting the most fundamental principles
2. the Treaty on the functioning of the European Union: is much more detailed and establish all the different rules in all the different fields of competence of the European Union

> constitutional issues are often regulated by the Treaty on European Union and its Article 50, among the final provision, is the one regulating the withdrawal of a state from the European Union with all the procedures described and the need for a treaty between the withdrawing party and the orders to be established

> what it's not written here, but it was not relevant for the UK in particular, but it might become relevant for other states, is that nothing is said about withdrawing from the Union or withdrawing only from the euro area member

=> so the question was posed for example during the crisis when Greece was on the verge of default and was subject to the austerity measures => so Greece, which is a state member of the European Union and also a member of the euro area => there was some discussion about Greece withdrawing from the UE while remaining in the European

=> no solution could be explicitly found in the in the Treaty because Article 50 doesn't say anything about it, but the majority of scholars agree on the fact that it's not possible to withdraw from the European Monetary union (euro area) without also withdrawing from the European Union, from the entire organisation

> most of the time treaties contain themselves a provision like this one among the final provisions concerning withdrawal => from the treaty or from the IO set up by the Treaty

> in other cases the treaty is silent: attention should be paid to the intention of the parties at the time of the negotiation

> for certain types of treaties withdrawal is considered not to be allowed under customary international law, so there are certain specific kind of treaties, a specific field of our specific nature from which no withdrawal is possible

> one of this kind of treaties: peace treaties are among those very specific types of treaties from which no withdrawal is possible, and similarly treaties are those setting borders or concerning the transfer of a part of a state territory

=> so when it comes to the territorial integrity and the definition of a peaceful coexistence of states in the international community, that specific kind of treaties will be against the interest of the international community to let states withdraw from that kind of treaties

> when there are final provisions about withdrawal these provisions always contain details about the procedure to be followed, but most importantly: period of time during which the treaty continues to remain in force after either denunciation or withdrawal = sunset clauses

=> it's the period of time during which the treaty remains in force and allows for a transition towards the validity of the treaty, for one state parties => sunset clauses are very important, for example in the context of bilateral investment treaties (investors, private investors coming from the other state)

> ex: the investors from European countries investing in a hotel in Cuba or in another state all over the world and this investment should be protected by Cuban for example against any sort of interference that might affect the right to property and the profits of the investment

=> they work especially to protect from expropriation and nationalisation

=> here it will be against the object and purpose of this kind of a treaty if the host state, in our example Cuba, would be allowed to withdraw and benefit immediately from its withdrawal so

that Cuba will decide tomorrow to withdraw from a bilateral investment treaties

> those treaties have a very long sunset clause that is usually around 10 years, even more

> withdrawal and expulsion are 2 => because withdrawal or denunciation comes from the unilateral decision of a state party, expulsion on the other side is a decision of the other members of the treaty or other state parties of a treaty

=> but this goes especially for treaties establishing IO: it's in the powers of the organs of international organisation to decide to expel a member from the organisation

> these 2 rights, on one side of a state party, and on the other side of the institutions and organs of an IO, can overlap (documents concerning Russia)

> if the sunset clauses aren't included in the treaty, it's possible to withdraw if it's possible to imply, to deduct this intention => that the negotiating parties allow this possibility

> the main issue is that they're withdrawing from human rights treaties because they are international sources that are, in a way, empower individuals within state party => it's not only a treaty that provides for rights and obligation of state parties, but these treaties have an impact: they benefit individuals in all state parties

=> is it possible for a state to withdraw from our human rights treaties even if this affect, obviously in a negative way, the rights of its own population? = this is the main issue, it's not easy to provide an answer because there we have a number of human rights treaties that contain a

provision on withdrawal

> for example the ECHR has a provision dedicated to withdrawal from the treaty order => the 2 that were negotiated at the end of the 1960s, but enter into 10 years later => the 2 covenants:

1. the Covenant on Civil and Political Rights

2. the International Covenant on Economic, Social and Cultural Rights

=> they don't have a provision on withdrawal and in this case, again reference should be made to Article 56 of the VCLT, and the interpreter should look at the intention of the parties => but the intention of the parties is not so clear

> can we assume that the intention of the parties is to allow a state to deprive its own citizens and population of fundamental rights?

Do we have in the history of international law, number of cases in which states have withdrawn from human rights treaties?

> in 1977: the Democratic People's Republic of Korea tried to withdraw from the International Covenant on Civil and Political Rights, ICCPR => the question was raised by the Human rights committee, which is the most important organ competent in providing interpretation of the treaty => published an authoritative interpretation of the covenant, the name of this very important piece of interpretation of the Human Rights Committee are "General Comment"

=> in this case, the Human Rights Council adopted general comment 24, but a few years later, Greece denounce the ECHR and withdraw from it

> this decision at that time was based on the fact that Greece was under a dictatorship and it was in violation of a quite huge number of civil and political rights => he was subjecting some of his citizens to torture and ill treatments, especially the opponents of the ruling party decided to withdraw

=> the issue was regulated by Article 58, which quite improperly is titled: Denunciation, instead of withdrawal because we are talking about a multilateral treaty and Article 58 provides that the withdrawal from the ECHR requires 6 months notice => so it becomes effective after 6 months > this means that for 6 months all the procedures, all the disputes standing before the European Court of Human Rights, that citizens have submitted to the court against their own state in this case against Greece, during this six month period, could still be adjudicated by the court > the same happens for other regional human rights treaties

> for the International Covenant on Civil and Political Rights, the competent organ is the Human Rights Committee => it really depends treaty by treaty

> in general, every interpreter should obviously rely on what is written in the treaty, and if not, the intention of the parties

What happened in last week? On one side, the organs of the Council of Europe, the IO under which a huge number of human rights treaties have been negotiated and are now in force since the end of the WWII

=> the most important of these human rights treaties is the ECHR

> so we have an IO, the Council of Europe, which facilitates the negotiations of human rights treaties => from the general ECHR to convention about women, gender disabilities

> the states that are members of the Council of Europe are 44 and among those there is also Russia => so Russia is both a member of the Organisation Council of Europe and a state party to the ECHR

=> everyone subject to its jurisdiction, the jurisdiction of Russia, citizens, but also foreigners under its jurisdiction, are basically under the power and effective control of Russian authorities = not only within the territory of Russia, but also abroad whenever Russia

= effective control over territory and population also in case of military occupation for example

> a difference should be made between everything happening during the armed conflict, during which international humanitarian law applies => the set of rules governing the conduct of war and what happens after, at the end of the conflict and then the ECHR will apply

= not immediately, but soon => hopefully soon the ECHR will become very relevant and even before the conflict

Russia was amongst the states against which the hugest number of disputes were pending => we're talking in the last three years of around 10,000 claims submitted before the European Court of Human rights for Russia's violations of human rights

= more than most of all the other state parties to the European Convention of Human Rights

> the IO has the power to expel any member states that violates its fundamental principles => protection of fundamental rights, abidance application of the rule of law, democratic principles => and in front of brave violations of this principle states can be expelled from the Council of Europe

> we had at the beginning discussion within the committee of Ministers, and the Assembly of the Council of Europe about suspending 1st and then expelling Russia from the Council of Europe, because of what was happening in in Ukraine

=> such a serious violation of the obligations arising from being a member of the Council of Europe that it cannot be put aside waiting for the end of it => the Committee of Ministers and under Parliamentary Assembly moved quite quickly from discussing suspension to discussing cessation of the membership = expulsion

What happens about the pending applications before the European Court? The European Convention has this 6 months notice period, so for 6 months all pending cases are still be heard and decided, but after these 6 months no new claim

> no violation of the ECHR can be raised against Russia => we're in a situation in which, because Russia decided to withdraw also from the Council of Europe, there is no Russian judge working anymore

=> and there's this rule under international law which, as by common principle, that a state cannot be a judge if in the court doesn't sit at least one judge of its own nationality

=> basically, even if the 6 months notice period are provided in Article 58 of the ECHR, because Russia withdrew from the Council of Europe, there is no Russian judge => it would become very difficult for the European Court to decide, even on pending case, during this six months notice => only minor decision, those

about that miscibility of applications, can still be decided, but all the most important decisions cannot be adopted anymore

[the state can always be back, it happened for Greece: it withdrew and then join again => we don't know when Russia will be ready to come back to the ECHR = it's a tragic decision not only because Russia decided to exploit even abuse of the right to withdraw from the European Convention, but it's awful the fact that what it was the Committee of Ministers and Parliamentary Assembly of the Council of Europe that also on the other side pushed Russia in a corner, when they start discussing = expulsion, the cessation of membership => suspension would have been much better and provided more flexibility, especially if you think about the consequences of people living in Russia's jurisdiction]

> when, for example, in the International Court of Justice the dispute is among 2 states and none or one of them isn't represented by a judge of its own nationality and a dock judge is selected to sit in the court => judge a dock with the nationality of the parties, which is not otherwise represented in the composition of the court

=> it's quite common and it depends also on the rules regulating the functioning of international courts and tribunals => this rule is applied in the context of the European Convention

Treaty interpretation

Reference to Article 31 of the Vienna Convention on the Law of Treaties

What can we define as inter temporal law and treaty interpretation? This basically means that any fact, any action or situation must always be assessed in the light of the rules that are contemporaneous with the relevant fact, act or situation

> this principle has some obvious limits: we often have in front of us treaty rules that have been negotiated in that time and are still applicable to events of a completely different nature, because of international community, the world order technology innovation

> some of the most important multilateral treaties, that we still apply today, were negotiated at the end of WWII => the question is always how to interpret a treaty rule => 2 exigencies:

1. the certainty of the law
2. the fact that the law should be in a flexible way to adapt to new situation as much it's possible to adapt a treaty provision, old 50 years, to new scenario, to new situations

> treaties often represent a compromise resulting from difficult negotiations and their provisions contain language that is often broad or ambiguous and requires interpretation

> we have to apply for this purpose Article 31 of the VCLT: the different and basic methodologies of interpretation, treaty interpretation = 3 basic methods

- (1) the objective or textual treaty interpretation: it's a kind of interpretation which focuses on the meaning of the text of the provision and sometimes when one interpreter, look at the objective or textual meaning of the provision also goes back to the use of language to dictionaries and to encyclopaedias
=> means that the corner of applying this kind of interpretation often the result is very broad and not consistent, because you can have different kind of interpretation of the wording depending on on what sources you rely => it's difficult to arrive at an objective meaning of the provision

- (2) the subjective interpretation: focuses on the intention of the charism => you go back and look at what was the main goal of the parties when they sit at the table and started negotiating the treaty
=> if you try to apply this kind of interpretation in an evaluative way, you might arrive to unknown solution because what was the intention of the parties, 50 years ago, is probably something that you cannot apply to something that happened today
=> it might be that what happened today wasn't even foreseeable 80 or 50 years ago, at the time of negotiation => the intention of the parties, again, has some pro but also some cons
- (3) the teleological interpretation: interprets the text of a provision in the light of its object and purpose => the object, the subject matter, the purpose, the goal, the aim = the overall goal and aim of the treaties
=> these might achieve some more liberal results, but it still can go well beyond what was the intention of the parties back 50 years ago
= these are the most important methodologies of interpretation

On top of these we should add 2 other methods that try to combine elements of these

- (1) the contextual or systematic interpretation: takes into account the entire treaty as a whole and also everything that happened among the parties to the treaty after its conclusion = all the subsequent practise agreements and other rules enter into by the same parties
- (2) the evolutive interpretation vs principle of contemporaneity (any fact, action or situation must be assessed in the light of the rules that are contemporaneous)
> it's the one applied most, for example by the European Court of Human Rights => the treaty is the one negotiated back in 1950, but applying an evolutive interpretation, the court has managed to apply old rules to new scenarios
> example: if you look at the ECHR Article 8, paragraph 1:
"1. Everyone has the right to respect for his private and family life in his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
> private life, family life: if you think about what family means and you apply a textual or objective interpretation, your result will be different if you apply an evaluative interpretation of the same term and the same provision
> if you just try to think to what kind of aspects of private life and family life this article applies to important right in the framework of the European Convention, you will be surprised to see that in the jurisprudence of the ECHR, private life, the right to private life has been applied to all the sphere of private life, physical, psychological, moral integrity => included all these elements (privacy, identity and autonomy)
> gender identity included, while family life has been applied in a number of other issues and not only to couple of different sex
> art. 8 have even been applied to protect some environmental rights => from the text of this Article, which only mentioned private life and family life, the interpretation was given by the

ECHR

=> the evaluative interpretation is something that cannot be done in all fields, it's easily done when it comes to human rights, always taking into account the evolution of the civil society in the state parties => but it's more difficult to apply an evolutive interpretation, for example, when it comes to disarmament treaties, trade treaties, or commercial treaties

> the general convention, VCLT, Article 31 establishes the rule for interpreting treaties which is considered to be of a customary nature

> Vienna Convention on the Law of Treaty is a codification treaty adopted by the International Law Commission => it codifies customary international law and the principle is to interpret a provision in good faith, but especially in accordance with the ordinary meaning

> the objective interpretation has to be coupled (sort of compensated and combined) with looking at the object and purpose of the treaty = it's a combination

=> Art. 31 VCLT follows a combination of good faith (which requires reliance on the intention of the parties), the literal or textual approach (which focuses on the ordinary meaning of the text) and the teleological or purposive approach (which seeks to interpret the text in light of the object, subject matter and purpose, aim of the treaty)

> the balance between these criteria is to be found in the contextual approach in the light of the treaty as a whole => including its preamble and annexes

> this is the 1st rule of treaty interpretation that should be applied => all international courts and tribunals should do that

> if the meaning of the provision remains unclear, they should look at context and look at the treaty as a whole, including also

- the preamble, which usually doesn't have mandatory or binding character because it explain what are the purposes, the goals and the premises of the treaty + annexes which instead have binding characters = the treaty as a whole, you cannot extract a single provision from the treaty text
 - any agreement relating to the treaty that was made between the parties and any instrument relating to the treaty
- > it also concerned those specific agreements between the parties that, after the conclusion of the treaty have been adopted to clarify, for example, some aspect of the treaty itself

> in addition to context, or to better understand what the context is, references should be made also to subsequent agreements (1) regarding the interpretation of the Treaty

=> for example in the context of IO: organs of international organisation can adopt interpretation of certain meaning of the treaty or practise => the conduct of state parties to the treaty = what happened in reality since the treaty entered into into force

(2) subsequent practice on the application of the treaty

(3) any relevant rules of international law applicable in the relations between the parties

According to Art. 32 of VCLT on the (subordinate) supplementary means of interpretation, among which the preparatory work (*travaux préparatoires*) = the work that was discussed during or before the negotiation

=> subordinate supplementary means of interpretation may be used only in 2 cases:

1. to confirm the meaning resulting from the application of the primary methodology of interpretation (art. 31 VCLT)
2. when interpretation of the primary methodology leaves the meaning ambiguous or obscure, or to lead to a result which is manifestly absurd or unreasonable

Further principles:

- the principle of effectiveness (*principe de l'effet utile*): entails that where there are 2 possible interpretation of a treaty, the interpretation that facilitates the most effective application is to be preferred
- analogy
- *argumentum a contrario*
- interpretation *contra proferentem*: interprets an ambiguous text to the benefit of whomever is obligated by the treaty, and especially to the detriment of the one who has drawn up the text and should have been more precise

Optional reading material on how treaty interpretation is applied, for example, in a case of the

International Court of Justice => reference to an article of the International Convention for the Regulation of Whaling

> it governs the exploitation of a series of endangered species for commercial purposes and even for reserved purpose => there was quite a huge dispute pending before the ICJ regarding the interpretation of Article 8 of this Convention => Japan vs Australia, with New Zealand intervening as a third state party

> all the dispute between Australia and Japan concern a very specific project: "Montana Project" was a programme founded, promoted by Japan, called ARPA 2 was the 2nd in a series of programmes.

EXERCISE Article 8 – ECHR

Interpretation

ECHR Art 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

See ECHR Guide on Article 8 of the ECHR (2018)

ECHR Art. 8 applies to:

PRIVATE LIFE

1. Physical, psychological or moral integrity

Victims of violence

Reproductive rights
Forced medical treatment and compulsory medical procedures
Mental illness
Health care and treatment
End of life issues
Disability issues
Issues concerning burial
Environmental issues
Sexual orientation and sexual life
Professional or business activities

2. Privacy

Right to one's image and photographs; the publishing of photos, images, and Articles
Protection of individual reputation; defamation
Data protection
Right to access personal information
Information about one's health
File or data gathering by security services or other organs of the State
Police surveillance
Stop and search police powers
Privacy during detention

3. Identity and autonomy

Right to personal development and autonomy
Right to discover one's origins
Religious and philosophical convictions
Desired appearance
Right to a name/identity documents
Gender identity
Right to ethnic identity
Statelessness, citizenship and residence
Marital and parental status ...

+ FAMILY LIFE

Sphere of application of family life

1. Couples

Marriages not according to custom, de facto cohabitation
Same sex couples

2. Parents

Medically assisted procreation/right to become genetic parents

3. Children

Mutual enjoyment
Ties between natural mother and children
Ties between natural father and children
Parental allowances, custody/access, and contact rights
International child abduction
Adoption
Foster families

Parental authority and State care

4. Other family relationships

As between siblings, grandparents

Prisoner's right to contact

5. Immigration and expulsion

Children in detention centres

Family reunification

Deportation and expulsion decisions

Residence permits

ECHR Art. 8 has often been used for strategic litigation

NB applicable also to Environmental issues

Reservations to Treaties

INTERNATIONAL LAW - Lecture 14 of March 22, 2022

RESERVATIONS TO TREATIES:

Referring to the Vienna Convention on the law of treaties and to the International Law

Commission guide to practice on reservations to treaties, which was compiled by the International Law Commission (main organ of the UN General Assembly with a mandate to codify customary international law.)

RESERVATION:

1. Definition;
2. comparison between reservations on one side and interpretative declarations and derogations on the other side.

DEFINITION

Definition is contained in the General Convention on the Law of Treaties for 1969 in Article 2, which provides all the definitions of the relevant terms used by that convention.

A treaty is the result of negotiations between two states or among multiple States; and once the Treaty text is finalized (adopted after signature), it is no longer possible for any individual single state party to amend the text of the Treaty.

This makes it very difficult sometimes, at the phase of the negotiation, to make everyone agree on a final version of the treaty and, later on, to obtain acceptance by states that did not take part in the negotiation that will ratify and accede to the Treaty at a later stage. The way in which treaties are negotiated, obviously creates a sort of a barrier → It's very difficult to have everyone on board.

Reservations are a tool that can help in providing some flexibility, especially to convince a state which does not like all the terms or or all the provisions of a treaty to become nonetheless a party to that treaty.

The reservation allows some flexibility, because they are a tool, unilateral tool through which a state can exclude or modify the legal effect of certain provisions of the Treaty, when they apply to that same state, to the reserving state.

The state can, unilaterally and under certain conditions that have to be satisfied, adopt a reservation for the purpose of excluding or modifying the legal effect of certain Treaty provisions to which it all it would have otherwise not agreed.

So if the provision as it is written in the Treaty text would remain strictly applied as such, most probably the reserving state would have decided not to sign, ratify or accede to the Treaty text, but with this instrument the state can provide a nuance of its own view of the Treaty provision, specifying how it intends to abide to that specific rule or treaty provision. Even if this is a unilateral and discretionary power of a state, the reservation should be always accepted by the other states party to the treaty.

The reservation can be by the other state parties either accepted or objected too.

It is a way to limit, in a certain way, the scope of application or modifying the legal effect of a Treaty provision.

For example a reserving state can adopt a reservation for the purposes of excluding the application of a treaty provision in a certain territory or in a part of its territory, it happens for very far away islands or other parts of the territory of a state → in this case there is a

reservation to the territorial application of the Treaty.

Ex. Paragraph 1 - Article 15 of the International Covenant on Civil and Political Rights.

“No one shall be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

If subsequent to the Commission of the offence provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

= If the sanctions imposed by law becomes lower or lighter, even if that lighter penalty was not the one applicable at the time the criminal offence was committed in favor of the individual who committed the crime, it should benefit from the lighter penalty. It's an exception to the fact that the rules applicable in every situation, act or conduct has to be assessed on the basis of the law applicable at that time.

So if there is a modification or subsequent modification of the law, usually this should not be taken into account, but when it comes to criminal offences, if a lighter penalty is afterwards after the fact after the crime is adopted by law, then the criminal is entitled to benefit from this lighter sanction.

→ This is the principle enshrined in Article 15 of the International Convention on Civil and Political Rights.

Focusing on the list of reservations entered into by all the different state parties to the ICCPR (the list is incredibly long):

Ex. the reservations adopted by Italy in relation to Article 15, paragraph one, in particular the last sentence about the application of the lighter penalty.

About this, the Italian Republic deems that this provision will only apply to criminal cases that are in progress, that are still pending. So when the case is closed (*res iudicata*), no possibility to ask for a lighter penalty will be allowed.

The text of Article 15 doesn't say anything about the timing for request of application of a lighter penalty/the right to have a lighter penalty.

And the reservation of Italy in this case modifies the legal effect of the right enshrining article 15, paragraph one, because it clearly states that Italy considers this provision/right to be applied only to criminal cases that are still to be decided in a final definitive way, only in progress.

Considering the definition of reservation contained in the Vienna Convention on the Law treaty, it is clear that the purpose of the Italian reservation was to modify the legal effect of Article 15. Looking also at the IC guide to practice on reservations to treaties, Article 111.

DIFFERENCES BETWEEN A RESERVATION AND A DECLARATION

Declarations, looking at the guide practice 1.2, are always unilateral statements made by a state or an international organization through which the state party tries to specify or clarify the meaning or scope of a treaty or, more likely, of a certain treaty provision.

The main difference is that it doesn't exclude or modify the legal effect of the provision like reservation, they have more declaratory nature, they make clear to other states what the declaring state understands the obligation to be, but they have a declaratory nature, so they have a different impact, as compared to reservation, in the relationship with the other state parties to the Treaty.

Example of interpretative declaration: It refers to the Paris Agreement that is a very important treaty on climate change. → In this case, the declaration reads in this way: "the government of State X declares that no provision of the Paris Agreement shall be interpreted as derogating from the principles of general international law (customary law) including but not limited to the rights and obligations concerning state responsibility for the adverse effects of climate change" → this declaration, referring to state responsibility for violations of international law rules and to the consistency of the obligation rising from the Paris Agreement with other general International law rights and obligation doesn't add nothing new. It's a declaration that doesn't add to the law, doesn't modify the scope of the provisions contained in the Paris Agreement. It's only a way to underline what is already in the disposition in the powers of that specific state. It's only a way to reaffirm something that is already provided by international law. For this reason, If compared to the reservation objective of making that right of Article 15 ICCPR applicable only under certain circumstances. This is only sort of a clarification of a way of reaffirming something that is already provided by international law.

Last difference: talking specifically about human rights treaties, delegations are allowed by human rights treaties in certain circumstances, under which states parties to human rights treaties are not obliged to abide by the provision of the Treaty → this usually apply in times of emergency, like for example war, the same human rights treaty provides for a sort of an exception, derogation and allows Treaty state parties to derogate for certain provisions of the Treaty.

This is established for example in the human European Convention on Human Rights in Article 15. It says that: "In times of war or other public emergency threatening the life of the nation, any high contracting party

may take measures derogating from its obligations under this convention. “ Obviously without limitations, so subject to certain conditions.

This can be done to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations of international law. Can you imagine a situation of public emergency threatening the life of a nation that can be invoked to derogate to human rights established by the European Convention?

Examples:

- epidemic:

The list of notifications under Article 15 of the European Convention on Human Rights that were communicated by some Member States to the Council of Europe concerning the COVID-19 pandemic. And this was done, almost always at the beginning of 2020 by a number of states, among which Albania, Armenia, Estonia, Georgia, which is the last to have notified a measure for COVID-19 related reasons in January of this year, Latvia, North Macedonia, Moldova, Romania, San Marino and Serbia → all these are state parties to the European Convention on Human Rights and have notified the Council of Europe of their intention to delegate to certain rights provided by the same convention, because of an emergency threatening the life of the nation, which amounted to the COVID-19 pandemic. → freedom of movement, questions related to old issues concerning vaccines, all the questions concerning the possibility of assembling together in one place → quite a huge number of rights. But not all the states involved in the delegation in time of emergency, in fact old Europe Member states, such as Germany, France, Italy, Spain, Portugal, did not invoke Article 15 for COVID-19 purposes.

- in the period during which Greece was ruled by a part of dictatorship: “The colonels regime”.
- terrorist attacks.
- war: an international war or a civil war.

Not all human rights can be restricted or derogated in times of emergency.

So derogation is one thing, is a possibility, but derogation cannot involved poor human right, like for example: the right to life or the right of prohibition to use torture and ill treatment → so we always have a minimum core, the most fundamental human rights that can never be limited or delegated from even in time of emergency. = These core human rights are almost always, also those that are considered to be jus cogens rule under international law.

Jus cogens are the most fundamental rules of international law. Absolute rights can never be derogated.

Delegations fulfill very different purposes from reservation.

They provide a right to a Member State to derogate in certain specific scenarios, circumstances to protect human rights that are completely different from reservations that fulfill another purpose.

FORMAL REQUIREMENTS THAT RESERVATION SHOULD SATISFY:

- it should always be worded in a clear way, so the other state parties to the Treaty will be able to understand and to assess the compatibility of the reservation with the object and purpose of the Treaty and the impact that the reservation will have on the bilateral relationship established under the Treaty.

For example the Italian reservation mentioned before says “Cases in progress, cases that are not yet defined”
→ It is still quite broad, but clearly defines the limits under which Italy will apply the right established by Article 15 ICCPR.

This “clear worded” requirement makes certain types of reservation invalid. For example in cases in which reservation that merely invokes internal law is to be considered invalid such .

Ex: A convention adopted in 1989 about children 's rights. Malaysia adopted a reservation to that convention, saying that it will abide by the provisions and obligations arising from the Convention, only if they are in conformity with the Constitution, the national laws and the national policies of the Government of Malaysia.

Is that an acceptable and clear enough reservation? It doesn't really say when and how the rights provided by the Convention will be limited, in what direction and in which way, it only makes reference to the Constitution, national laws, and even national policies.

More like that the reserving state, in this case Malaysia is basically claiming that it would be able to do whatever.

The motivation that has been used to consider this kind of reservation invalid is not linked too much with the content of that kind of reservation, but with the fact that the other state parties are not put in a position to really understand what is the scope of application of the reservation. There is no clarity at all, it basically sets the hands free for the Malaysian state. And this is not acceptable, because treaties are always concluded and binding on the parties on the basis of a reciprocal commitment, and this needs to be fulfilled even when it comes to reservations, because reservation can be unilaterally adopted by all the other states parties that can react to reservation, either accepting the reservation or objecting to the reservation. Clarity is a very important formal requirement.

(Question about Russian aggression in Ukraine: in that specific setting we are not going to apply human rights law, but international humanitarian law which applies during conflicts The answer is the protection of civilians, we are talking about civilians here, so they should be protected by the belligerent parties under the rules of international humanitarian law, as long as they do not take arms, they are always to be protected.)

Always talking about the clarity of reservation.

Similar to the case about Malaysian reservation, there are types of reservation that are described often as “Sharia reservations” and they give rise to the same kind of objection mentioned before.

One example of this, Mauritania, reservation to the Convention on the Elimination of All Forms of Discrimination against Women, a convention aimed at preventing any form of discrimination against women.

Mauritania ratified the convention, but added a reservation saying that Mauritania would apply the provision of the Convention, as long as they would be consistent with Sharia, with Islamic law.

The question is not the fact that the reservation has to do with a religious law, it is not to be considered invalid, because the reference is made to Sharia, but because in the same way as Malaysia, it didn't clarify the scope of application of the reservation, making only reference to constitutional and national law.

In both cases, the reservation merely invokes the law applicable in the country without identifying any specific provision to a limit or modify the application of the treaty provisions.

- communication:

The reservations should always be communicated to the other state party to the Treaty in writing. They should be communicated and notified in writing.

- procedural nature requirement:

Once a state adopts a reservation it has to wait for the acceptance or objection of the reservation by the other state parties.

Because treaties have a consensual nature, so even if reservation provides some flexibility, this flexibility should be coupled with the power of the other states parties to react to that unilateral act.

And on a substantial point of view, reservation would never be adopted when they are against jus cogens rules

In terms of evolution of the law on reservation, there have been quite a number of changes in international law for what concerns reservation.

EVOLUTION OF THE LAW ON RESOLUTION

We have basically three different phases:

1. Before World War Two: reservations were only allowed if they were formulated during the negotiations or if the treaty specifically allowed the states to adopt reservation at a later stage, so when they were signing, ratifying or acceding to the Treaty. But if the treaty was silent and nothing was decided during the negotiation of the treaty, no reservation could be entered into by state parties or states willing to accede to the treaty.

Moreover, once a reservation was adopted by a state, it needed to be accepted by all the other state parties. It was a sort of an amendment, a state providing for a reservation, the reservation would enter into force when all the other state parties adopted and accepted that same reservation → It is not really an amendment, because the treaty will remain as it is among all the other state parties, whilst the treaty interpreted through the reservation of state alpha would become binding in the relationship between state Alpha and all the other state parties of the treaty.

So sort of a little exception negotiated between the reserving state and the other state parties of the treaty. But all the others should accept this in the very first phase of treaty law.

2. The change derived from a necessity to have the Genocide Convention ratified by the major possible number of states.

And the Genocide Convention did not contain anything about reservations, so the treaty was silent. And If we applied the law as it was before World War Two, no reservation would ever be possible, but there was a need in the international community to have as much as possible states ratifying the Genocide Convention after the horrors of World War Two. The Genocide Convention (which affirms the prohibition of genocide) was negotiated in 1948 and it entered into force in 1951.

There were some states, mostly socialist countries, willing to ratify the Genocide Convention, but with some reservations.

So the question was put to the International Court of Justice, which was asked to deliver an advisory opinion and the ICJ was asked to answer the question "if the Treaty is silent, are acceding states and all the other states forbidden, prevented from entering a reservation? Or they can do that?".

And because there was this need, but not only a need related to the Genocide Convention, in fact there was a different world after the Second World War, full of: multilateralization, the rising number of treaties,

multilateral treaties, international organization → international law had a different role and the flexibility provided by reservation was considered to be useful. So also for policy reasons, the ICJ decided that even when a treaty is silent on reservation, they are permitted nonetheless, basically, it reversed the rule that was applicable before the war when no treaty provision = no reservation. While, after war no treaty provision = reservation is fine.

So the ICJ adopted a much more flexible approach, it set aside the classic rule that reservations were not allowed and even set aside the rule that a reservation made by a state needs to be accepted by all the other parties.

3. But this is the changing moment in the law of reservation and this turning point is the one that now you can find in the Vienna Convention on the Law of treaties and in the International Law Commission Guide To practice to reservations.

Now, reservation can be adopted by a state when signing, ratifying, accepting, acceding to a treaty and every unilateral reservation can be accepted or objected to by the other state parties.

This complicates the scenario quite a bit, because it creates a network of different relations among the contracting states, among state parties.

If we take the Treaty as it is, with no reservation allowed, all the state parties are under the same set of rights and obligations. If we allow reservation and if we allow reservation to be either accepted or objective, we create a different kind of relationship between the reserving state and the other states. There are different effects that a reservation can have. The premise is that: since treaties have a consensual nature, a state cannot be bound by another state reservation without its consent.

Ex. If I adopt a reservation and there is Francesco or Georgia that object, in our relationship the reservation will not apply.

EFFECTS OF THE RESERVATION ON THE RELATION BETWEEN TREATY PARTIES*

There are three different scenarios possible:

- I adopt a reservation and one of you, another State party to the treaty, accepts the reservation. → In this case the Treaty enters into force with the reservation in place in our respective relationship.

Ex: making a reference to Italian reservation.

Spain accepts that Italy will apply article 15 only to criminal cases that are still pending that are still in progress.

- While, if France doesn't accept Italian reservation, Italy and France will be bound by Article 15 ICCPR as if Italy will not adopt the reservation. France objects to the reservation made by Italy, the provision of the Treaty preserved by Italy will not be applied in the relationship between France and Italy as interpreted by Italy with the reservation, but it will be applied as it is written in the Treaty text.
- If a state objects to reservation in a very radical way: In this case, the state objecting to reservation specifies that the treaty as a whole, in its entirety, will not enter into force in the specific relationship between the reserving state and the objecting state. If the objecting state finds the reservation to have such a huge impact on the entire Treaty that radically transforms the obligation of the reserving states under the Treaty, it can radically object to that reservation, and consider that the treaty between Italy and France would basically not be in force.

This doesn't mean that Italy will not be bound by the Treaty with all the other state parties with or without the reservation in place, depending on the other state party accepting or objecting to the reservation.

But in the relationship between France, because France considers the reservation to be so wrong, the treaty is like it's never been enforced as long as the reservation stands, because it's always in the right of a state to withdraw the reservation at any moment.

It's a quite difficult web of bilateral relationships that is established by the mere fact of allowing every state party to enter into a reservation.

Then you should look at the specific relationship with the reserving States and all the other state parties and verify if the other state parties have accepted, objected in a simple way the reservation or radically objected to the reservation, to see what is the scope of application of the Treaty between those two parties. So, if the Treaties apply with the reservation in place, if the Treaties apply without the reservation in place, or if the Treaty doesn't apply at all, as long as the reservation stands.

→Ex. the Genocide Convention contains a provision under which all the disputes concerning the application of the Genocide Convention have to be submitted to the International Court of Justice, not another international court tribunal.

Let's suppose that I adopt a reservation saying that I do not want the ICJ to have competence on these cases or at least on certain specific disputes arising from the Genocide Convention → I limit the judicial competence of the ICJ for cases concerning my state.

You are another state or you consider this to be really unacceptable, radically objecting. In this case the Genocide Convention as a whole would not apply in the relationship between me and you.

**To sum up this part with the synopsis:*

As a consequence of the consensual nature of treaties, a State cannot be bound by a reservation to which it had not consented.

Therefore, a reservation will not become effective in relation to another contracting State unless the latter has accepted it, either explicitly or implicitly.

Every State is free to decide if to accept (tacit after 12 months from notification or ratification) or object to a reservation.

Such flexibility introduces a considerable degree of relativity in the subjective scope of application of multilateral treaties.

A State may:

- accept a reservation
- object a reservation
- or NB preclude the entry into force of the whole treaty between itself and the reserving State or IO (the provision on which the reservation is made is considered of critical importance by the objecting State)

The combined effect of these possibilities gives rise to 3 scenarios:

- State A accepts the reservation made by State B: the treaty enters into force between the two parties with the reservation in force;
- State A simply objects the reservation made by State B: "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation" i.e. the treaty

binds the two States except that for the (part of the) provision on which the reservation has been made;

- State A objects to the reservation made by State B and express the intention that the treaty as a whole should not enter into force: the treaty will not govern the relationship between the two States (but it will govern the relationships of A with C, D, etc).

In other words, three forms of relations are possible:

- treaty relations are amended by the reservation with respect to any State that has explicitly (or tacitly) accepted the reservation;
- there are treaty relations except for the 'reserved-to provision' with respect to any State that has objected to the reservation without rejecting treaty relations.
- there are no relations under the treaty at all with respect to any State that has objected and made clear that it intends to deny treaty relations;

→ *Exercise on the UN Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment (Article 2, Paragraph 2: No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency may be invoked as justification of torture).*

INTERNATIONAL LAW - Lecture 15 of March 23, 2022

UNCAT Reservation Exercise

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) states in Art. 2(2): «No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture. »

State Alpha has recently been subject to a series of suicide bomb attacks in some of its major cities by dissidents who disagree with the country's foreign policy.

State Alpha sends in its ratification of the Torture Convention with the following reservation:

«State Alpha reserves the right to use any means necessary to protect its citizens from the threat of terrorist attacks where it is convinced that such means will protect human life».

You represent your country, State Zeta, which is already a party to the UNCAT, and your president has asked for your advice on whether State Zeta should accept such a reservation.

State Zeta and Alpha are long-time allies, and State Zeta has been very supportive of State Alpha's attempt to curb terrorism.

Some citizens of State Zeta, however, consider the government of State Alpha illegitimate and often organize street demonstrations against it. A minority group among them favours recourse to violence and might have linkages with foreign terrorist organizations.

What will you advise your president? Remember that if you do nothing for a year after notification of Alpha's reservation, your country will be deemed to have accepted the reservation.

This exercise has to do with a very sensitive topic which is torture. It concerns The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the delegations arising from it in a specific scenario in which the threat of terrorism is endangering the national security of the state.

In this setting, it is not expected to focus on the underlying policy issue, but rather on the legal issues, on the obligations arising from the Convention against Torture and on the mentioned already facts about reservations.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Part I – Article 2

1. [...]
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Article 2(2) of the said convention explicitly says that the right not to be subject to torture, so the prohibition of torture, is an absolute right from which no derogation is possible and is also an *ius cogens* rule of international law.

Having this in mind, it should be established what was the purpose and the impact of the reservation proposed by State Alpha. But *is this reservation possible?*

The questions that should be asked are: *What is the reservation about? And is that kind of reservation possible? Can that reservation be against a provision of the UN Convention against Torture?*

Presumably, with this kind of reservation, the State Alpha was reserving the right to subject terrorists to torture or something very similar to torture in circumstances dangerous to the survival of the nation. In this specific case, the right not to be subjected to torture cannot be waived (or derogated) as is clearly written in Article 2(2). Therefore, this kind of provision is not subject to any kind of derogation, not even in times of public emergency.

Is the derogation sufficiently clear? Does it fulfil the formal requirements? Is it valid from this point of view under international law?

What was the main interest of State Zeta? Should the Zeta State have accepted the reservation made by alpha, should it have objected to it in a simple way or radically objected to it? (In a simple way and radically are used to distinguish the two types of objections)

This type of reservation is not valid, but it is still up to the states to decide whether to accept or oppose this type of reservation, having the right to invoke the invalidity of the reservation.

So, in addition to going to court, probably the International Court of Justice, to ask the court to declare the reservation invalid, the other States parties to the UNCAT Convention can decide whether they agree or object. If they simply oppose it, the Convention will remain in force between Alpha and Zeta without reservation. So, the Treaty will remain in force as it is, without the reservation made by Alpha.

If Zeta decides to radically object to the reservation made by Alpha, as a result the Treaty will have a hole and will not be applicable in its entirety to the relationship between Alpha and Zeta.

What is the result that the State Zeta wants to achieve? Would the State Zeta prefer to have an uncut convention in place or no convention against torture in place?

If State Zeta decided for the radical objection, it would renounce to help part of its citizens that would otherwise be protected against torture under the jurisdiction of State Alpha. It is therefore preferable to lodge a simple objection and ask the ICJ, or a court in general, to declare State Alpha's reservation invalid.

[This is the method to adopt to solve this exercise. The argumentation adopted is a kind of legal reasoning that has nothing to do with policy and the issue of terrorism and national security.]

Is it possible for State Zeta to negotiate with State Alpha an amendment of the reservation? The answer is no, because reservations are unilateral acts, and therefore cannot be not negotiated with the other state parties.

Note: International law is strictly connected with Policy issues. Legal rules and legal reasonings should always be applied if possible and only if there is an opening, policy issues should be considered.

The last part of the topic regarding reservations concerns the invalidity of reservations and what happens when a state adopts an invalid reservation.

When discussing an invalid reservation, the Vienna Convention on the law of treaties (concluded at Vienna on 23 May 1969) can be used as a reference.: in particular, the second section regarding reservations from Article 19 to Article 23.

SECTION 2. RESERVATIONS

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
 - (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
 - (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

- (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
 - (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
 - (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:
 - (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
 - (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

These provisions establish reservations are excluded and, therefore, if adopted, become invalid in three circumstances, to which two other cases should be added.

The first case is the one in which the reservation is directly prohibited by the treaty.

An example is the statute of the International Criminal Court (the Rome Statute and founding Treaty of the International Criminal Court).

This court prosecutes individuals (and not states) that have committed international crimes. The Court has jurisdiction with regard to the following crimes: the crime of genocide; crimes against humanity; War crimes; the crime of aggression.

There are several discussions on the competence that the International Criminal Court currently has, to start an investigation to prosecute individuals committing those crimes in the Ukrainian scenario.

This court has a very different kind of mandate as compared to the International Court of Justice, which can only decide upon interstate cases, and not cases regarding individuals.

The ICC Statute (or the Rome Statute) in Article 120 provides that no reservations can be made to any provision concerning the functioning and the competence of the ICC.

PART 13. FINAL CLAUSES

Article 120

Reservations

No reservations may be made to this Statute.

As previously mentioned, if a Treaty contains no excluding clause reservations are instead always possible. However, if a state adopts a reservation to the ICC Statute, it will be totally invalid.

A second case is that in which the Treaty provides for the possibility to adopt certain reservations limiting the scope of reservation to a certain specific field or to a certain specific set of provisions: this kind of exclusions are more difficult to assess because in this case the text of the reservation should be compared with what is written in the Treaty provision, applying all the rules about treaty interpretation.

The third case is the most important one and excludes the possibility to adopt a reservation which is incompatible with the object and purpose of the Treaty. A reservation is – using the words of the International Court of Justice – incompatible with the object and purpose of the Treaty, when it affects an essential element of the Treaty, and it impairs the *raison d'être* and very essence of the Treaty.

These are the three main cases in which reservations are excluded and, if adopted, invalid. In addition to these three, there are two others:

1. reservations can never concern rights from which no derogation is possible (human rights, core rights, absolute rights, non-derogable rights²⁶ cannot be object of a reservation). Non-derogable rights are listed in Article 15 Paragraph 2 of the European Court of Convention of Human Rights Convention that are: the Right to life, the Prohibition of torture, the Prohibition of slavery and No punishment without law («[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed»);

Convention for the Protection of Human Rights and Fundamental Freedoms

ARTICLE 15 (2)

Derogation in time of emergency

²⁶ **Non-derogable rights.** Rights and freedoms from which no derogation may be made and cannot be limited or suspended under any circumstance. These are the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude and freedom from the application of retrospective criminal laws.

No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

2. reservations to *ius cogens* norms are not allowed.

In all these five cases (three of a general nature and two concerning human rights and *ius cogens* norms) reservations are invalid.

What happens to a state adopting an invalid reservation? Is State Alpha bound by the treaty if it adopts an invalid reservation or is it not? What are the consequences? For the individual reserving state that has adopted an invalid reservation, does it affect the nature of its consent to be bound by the Treaty as a whole or not?

This is an area in which international law has evolved after the Second World War and this evolution has been divided into 3 phases.

Immediately after the Second World War the International Court of Justice system was asked to deliver an advisory opinion on the genocide in 1951. At that time, the ICJ affirmed that a state which adopts an invalid reservation, especially when the reservation is incompatible with the object and purpose of the Treaty, was to be considered not to be bound by that treaty. This meant that the state was to be considered as if it had never become a party to the treaty and that it would have no legal obligation under the treaty.

But is this kind of approach a useful approach for the development of international law? Should all states that adopt invalid reservations be expelled from the Treaty? No, because the aim of these treaties is to attract as many states as possible.

The ICJ usually adopts a traditional approach and tends always to stick with the traditional doctrines of international law.

We can say that the ICJ does exactly the opposite of what the European Court of Human Rights does when interpreting a Convention. The European Court of Human Rights put under Article 8 of the European Convention on Human Rights, which provides a right to respect for one's "private and family life, his home and his correspondence", several issues which are not exactly coherent with the words "*private and family life*": from same sex marriage to environmental protection in an evolutive way. The ICJ would never adopt this approach.

It was the European Court of Human Rights, the first to try to change the approach that was adopted for what concerns invalid reservations and did it with what later became a landmark decision of the European Court, the *Case of Belilos v. Switzerland*. This judgement was adopted in 1988.

The ECHR decided that an invalid reservation can be considered separable from the state ratification of the Convention. Instead of having as a result that the state adopting an invalid reservation being expelled from the treaty, the reservation only will be considered invalid so that the state remains bound by the Treaty as if the reservation never existed.

This means that the reservation goes against the adopting state but does not affect the scope of the obligations that the state had accepted by ratifying the Treaty.

The Case of Belilos v. Switzerland concerns the facts of April 1981, in the city of Lausanne. The Lausanne police laid an information against Mrs. Belilos for having taken part in a demonstration in the streets of the city for which permission had not been granted. Some 60 or 70 people had taken part to the march requesting that the municipality should provide an autonomous youth centre.

On 29 May, the municipal Police Board, in Mrs. Belilos absence, imposed on her a fine of 200 Swiss francs (CHF). She objected the Police Board's decision, but the Police imposed the fine on her and refused to provide her the chance to defend herself and her motivations.

One of the most important rights guaranteed by the ECHR is Article 6 which protects the right to a fair trial. In this case, no kind of defence had been granted and this was therefore totally contrary to the right to a fair trial.

European Convention on Human Rights

ARTICLE 6: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The right to a fair trial is not a non-derogable right, in fact Switzerland had adopted the following interpretative declaration (but the Court considered it to amount to a reservation) with regards to ECHR Art. 6: «The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge. »

That is, Switzerland would protect the right to a fair trial, if the judicial organs (in this case, the Court of Appeal) could review the acts of administrative organs (in this case, the Police Board). The right to defend themselves or the possibility to allow the other party to defend itself was not mentioned.

The European Court of Human Rights, at the request of Mrs Belilos, held that the reservation was invalid for several reasons, but in particular because it went far beyond what was the main purpose of the protection provided by the European Convention on Human Rights. Therefore, the European Court of Human Rights decided, contrary to what was decided by the ICJ 30 years earlier, that Switzerland was bound by the European Convention as if the reservation had never been adopted.

Case	BELILOS v. SWITZERLAND, Application no. 10328/83
Parties	<i>Applicant:</i> BELILOS <i>State Party:</i> SWITZERLAND
Facts	<p>In a report of 16 April 1981, the Lausanne police laid an information against Belilos for having contravened the municipality's General Police Regulations by having taken part in a demonstration in the streets of the city on 4 April for which permission had not been looked for in advance.</p> <p>Ms. Belilos complained that she had not been tried by an independent and impartial tribunal within the meaning of Article 6 § 1 (art. 6-1) of the Convention, with full jurisdiction to determine questions both of law and of fact.</p> <p>The Government maintained: A. the Court has no jurisdiction to consider the merits of the case; B. there has been no infringement of that provision as it applies to Switzerland.</p>
Procedural Posture	<p>Ms. Belilos applied to the Criminal Cassation Division of the Vaud Cantonal Court to have that decision declared null and void. The Criminal Cassation Division dismissed the appeal on 25 November 1981.</p> <p>The applicant lodged a public-law appeal against this decision with the Federal Court. On 2 November 1982, the Federal Court (1st Public-Law Division) delivered a judgment dismissing the appeal.</p> <p>The case was referred to the Court by the European Commission of Human Rights and by the Government of the Swiss Confederation on 18 July and 22 September 1986, respectively. It originated in an application (no. 10328/83) against Switzerland lodged with the Commission under Article 25 (art. 25) by Ms. Marlène Belilos, a Swiss national, on 24 March 1983.</p>
Issues	<ol style="list-style-type: none"> 1. Whether the declaration was a mere interpretative declaration or not have the effect of a reservation? 2. Is the Court's competent to decide the validity under Article 64 (art. 64) of the Convention of a reservation or, where appropriate, of an interpretative declaration has not given rise to dispute in the instant case?
Rights	<i>Directly:</i> the right to a fair trial
Holding & Reasoning	<p>The Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of Article 64 (art. 64) as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.</p> <p>The declaration in question does not satisfy two of the requirements of Article 64 (art. 64) of the Convention, with the result that it must be held to be invalid.</p> <p>The Court notes that the Convention does not give it jurisdiction to direct the Swiss State - even supposing that the latter could itself comply with such a direction.</p> <p>The Court notes, like the Delegate of the Commission, that the applicant did not produce details, with supporting documents, of the expenses not covered by legal aid.</p>
Rules of Law	<p>In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content.</p> <p>The Court notes that the Convention does not empower it to order the State to alter its legislation; the Court's judgment leaves to the State the choice of the means to be used in its domestic legal system to give effect to its obligation under Article 53.</p>
Decision	<p>There has been a breach of Article 6 § 1 (art. 6-1) of the Convention.</p> <p>The respondent State is to pay the applicant in respect of costs and expenses the sum of 11.750 Swiss francs.</p>
Validity	Legally binding

This standpoint completely changed the approach adopted by the ICJ and is especially useful when it comes to human rights treaties. It is adopted and followed by several Human Rights Courts and by the Human Rights Committee (when it interpreted the International Convention on the Protection of Civil and Political Rights).

The **Human Rights Committee**²⁷ is the treaty body mandated to monitor the implementation of the ICCPR: it is the organ entrusted to interpret in an authoritative way, the International Convention on Civil and Political Rights. It is not a court, unlike the ECHR, and therefore has not the same kind of power. It can receive individual application, but it cannot adopt binding decisions.

The Human Rights Committee mostly adopts important documents that are called general comments (authoritative interpretation of the rights established by the ICCPR).

In the case of reservation, the stance adopted by the European Court of Human Rights is to be confirmed by the Human Rights Committee. In the Belilos case for example, the ECHR stance was confirmed by the Committee's General Comment no. 24 which concerned issues relating to reservations made upon ratification or accession to the covenant.

Note: The General Comment adopts the same approach that was adopted by the European Court in the Belilos case.

This does not mean that everybody agrees with this approach: the ICJ adopted its position back in 1951 while the Human rights court and the Human Rights Committee have adopted the opposite stance.

Also States adopt distinct positions: for instance, the United Kingdom and the United States of America not in favour of the severance option and reject in total this doctrine, and even France, which is historically one of the pioneers of human rights, is totally against the severability doctrine.

The reasoning behind these positions adopted by states is that if a state adopts an invalid reservation and then the state is forced to comply with the Treaty in its entirety, the state is basically forced to do something it does not want to do. The premise around which treaties are formed and also the most important source of public international law is consent.

The third part of this case concerns the ILC which tried to find a compromise.

The International Law Commission should codify customary law rules (that is the main mandate of the ILC) but in this case it failed to do so. The 2011 ILC Guide to Practice on Reservations to Treaties is, as the name implies, a guide for the states and is not binding. This guide tried to balance the two different approaches just described.

Art. 4.5.1 ILC Guide:

A reservation that does not meet the conditions of formal validity and permissibility is null and void, and therefore devoid of any legal effect.

Art. 4.5.3 ILC Guide:

²⁷ **Human Rights Committee.** The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its States parties.

The Committee's work promotes the enjoyment of civil and political rights, resulting in numerous changes of law, policy, and practice. As such, it has improved the lives of individuals in all parts of the world. It continues to strive to ensure all the civil and political rights guaranteed by the Covenant can be enjoyed in full and without discrimination, by all people.

Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organisation without the benefit of the reservation.

The ILC compromise is a presumption of severability that can be rebutted if the state that made the reservation has made it clear that it will only be a party to the treaty if it can rely on and benefit from the (invalid) reservation.

The status of the author of an invalid reservation in relation to the Treaty depends on the intention expressed by the State making the reservation: the intention to determine whether it intends to be bound by the Treaty without the benefit of the reservation or whether it considers that it is bound by the Treaty.

Unless the author of the invalid reservation has expressed a contrary intention, it will be bound by the Treaty without the benefit of the reservation.

The compromise is between (1) the ICJ position, according to which the author of an invalid reservation is not bound by the Treaty, and (2) the ECHR position, according to which the author of an invalid reservation is bound by the treaty as a whole as if the reservation never existed (severability doctrine or severance option).

The International Law Commission affirms that the reservation doesn't exist, is null and void, but it depends on the intention of the state: whether the state wants to be bound by the Treaty as a whole or not.

Why did the International Law Commission focus on the intention of the author of the invalid reservation? To respect the principle and the right to consent of the State to be bound by a Treaty.

In this way, the ILC put consent at the centre again.

Note: Since 2011, however, the ILC Guide has never been really tested in practise, so it is still unknown what could happen if a case concerning an invalid reservation would be submitted to the ICG.

An example concerning the discussion about reservation is the US reservation to Art. 6 of the ICCPR and Italy's objection.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 6 of the ICCPR concerns the right to life, which is a non-derogable right but that makes an exception for countries which have not yet abolished the death penalty (e.g., the United States).

In those countries, the sentence of death can be imposed only for the most serious crimes in accordance with the law in force. Limiting the application of the death penalty, paragraph 5 affirms that the sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.

In those countries which still accept the penalty, it can still be applied even if this is against what is the one of the non-derogable rights of the ICCPR.

The reservation of the United States affirms: «The United States reserves the right. . . to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below the age of eighteen years of age».

Many countries objected to the US reservation because it allegedly went against the object and purpose of the treaty. Italy was one of those countries: «The Government of Italy [...] objects to the reservation to Art. 6, para. 5 which the USA included in its instrument of ratification. In the opinion of Italy reservations to the provisions contained in Art. 6 are not permitted, as specified in Art. 4, para. 2 of the Covenant (no derogations even in time of emergency). Therefore, this reservation is null and void since it is incompatible with the object and the purpose of Art. 6 of the Covenant. [...] These objections do not constitute an obstacle to the entry into force of the Covenant between Italy and the United States. »

Italy's objection is a simple objection and not a radical one because it does not constitute an obstacle to the entry into force of the covenant between Italy and the United States.

Note: The United States reserved the right to impose capital punishment on any person newly convicted under existing or future laws. The United States did not mention what kind of crimes are covered basically reserving the right to modify and change their own laws on the application of death penalty.

The Relationship between Sources of International Law

INTERNATIONAL LAW - Lecture 16 of March 28, 2022

RELATIONSHIP BETWEEN CUSTOMARY LAW AND TREATY LAW

In particular:

- codification of customary law rules;
- existence of treaty rules and customary rules.

About the codification of customary international law, it's not only the International Law Commission that has the mandate and the power to codify customary international law, but It is certainly the most important organ with the power to do so, it's the organ of the General Assembly that was established back in 1947, at the very beginning of the activities of the United Nations.

There are also forms of codification made by experts:

- the International Law Association, which is a famous scientific association made of experts and scholars, present in all from different countries (for example ILA Italy, ILA United States) and then the members of the different countries of the associations discuss every two years in a conference the results of their research, so they are doing something very similar to what the International Law Commission is doing, but they are not representing the interests of state, but they comes from the academia and from specific from an expert in very specific fields → a sort of a private organisation. It's completely different from an organ of an international organisation in nature.
- the International Committee of the Red Cross which is very active in conflict fields, it is involved in conflict scenarios, in situations in which international humanitarian law has to apply → all the rules of international law applicable during a conflict of an international or internal nature, those are the rules concerning the protection of civilians against certain types of arm attacks, that they cannot be victims, they cannot be targeted of arm attacks or of certain weapons, the treatment that has to be afforded granted to prisoners of war, the fact that it is bounded and people should be protected and so all those rules, let us see that mostly have a customary law nature, are evolving along time with the different methodology of war. So we have new techniques, new weapons, so it is a field that evolves and the International Committee of the Red Red Cross usually tries to codify existing customary law rules in the field of International humanitarian law, taking into account the fact that they are subject to a certain degree of evolution and modification.

The International Law Commission (ILC) is the most important entity, specifically devoted to codification of customary law. It has two different goals:

- the progressive development of international law = means that the International Law Commission can prepare draft treaties, draft conventions on certain subject matters in uncertain fields/topics that have not yet been regulated by international law or not enough. so that practice and opinion uris are not developed to the point of establishing a customary law rule.
The ILC works in the direction of sort of setting the stage for the establishment of a customary law in a specific subject matter.
- the codification of international law = the International Law Commision systematize/codify the rules of customary law already existing in a given field

→ this is what is written in the International Law Commission statute, but the International Court of Justice back in 1969 in the North Sea Continental Shelf Case try to clarify exactly what is the relationship between a codification treaty and customary law, according to the ICJ there are three different circumstances, 3 different results that can derive from an exercise of codification. And the fact that the codification exercise was undertaken by the ILC or by the Red Cross, or by the International Law Association doesn't count, because we are talking about codification in general.

1. So according to the ICJ a codification treaty can simply codify the custom:

→ this happens when the rule in question at the time of the adoption of the Codification Treaty was already pre existing as an international custom (= the codification Treaty may merely codify something that already exists as a custom). And the codification treaty basically writerright down in a treaty text a custom that was already there.

2. Then there is something of an intermediate nature:

In the process of codifying customary law in a treaty, in the process of negotiation of this treaty, in the elaboration of the treaty provisions, the customary law rule that was not already existing becomes

crystallised → the codification Treaty at the very moment in which it is formed, crystallise, make real a customary law rule.

The moment the Codification treaty is adopted, custom crystallizes.

The custom didn't exist before, but because of the codification Treaty, it became a certain rule, a customary rule.

3. The fact that a qualification treaty contains certain provisions or certain rules is not enough to make that rule a customary rule, it doesn't produce the effect of crystallizing a customary law rule. But because of the adoption of the treaty, it promotes enough practice and *opinio iuris* (the two elements that are needed to be satisfied to have a custom), so that in the near future, soon afterward the adoption of the Codification Treaty, a custom concretize.

Because of the codification treaty, a process starts and ends up with a custom being created.

The previous explanation is necessary to understand the discussion on customary law, the International Law Commission draft conclusion on identification of customary law adopted in 2018 → conclusion number 11:

The International Law Commission has written down what the International Court of Justice already established back in 1969. So the three outcomes are basically the three results that are written here in the LC draft conclusion:

- the Treaty rule codified a rule of customary law already existing at the time when the Treaty was concluded.
- The codification Treaty led to the crystallisation of a rule of customary law that started to emerge prior to the conclusion of the Treaty
- Given rise, soon afterwards, to general practice that is asserted as law generating in this way a rule of customary international law.

Another important thing that conclusion n.11 says, is that: there is no general presumption that a treaty, not even a codification treaty, codifies existing customary law.

So we should always look at practice and *opinio iuris* (the two different required elements that need to be satisfied in order to have a customary law rule).

And even codification treaties, those written/elaborated by the International Law

Commission, not always really contain provision by provision that all amount to real customary law → So you should not take for granted the fact that an ILC Convention/ILC draft, codification treaty or convention, is really successful in codifying customary law. Many times codification treaties by the ILC contain certain provisions that are truly customary law rules and others that instead only amount to the progressive development of international law. These kinds of treaties are like a zebra agreement, because some provisions are truly customary law rules, whereas others only have treaty law nature. Zebra = black and white → some are blacks, others are white, some are treaty law rules, others are really customary law rules. Why is this so important?

A treaty only binds those who ratified the Treaty, while custom is binding on all the international legal subjects (States and international organisation).

→So:

- when we have in front of us a codification treaty, we have a number of states that ratified the Treaty, but if the treaty really codifies custom, not only those who ratify the Treaty are bound, but the entire international community.
- otherwise if we have a codification treaty that is half successful in codifying custom, we will have in front of us a situation in which the treaty provision that are only writing down an existing custom will be binding on every subjects of international law, while the others will only bound states or International organisation that have ratified the. So the fact that a codification treaty may be described as zebra means that the impact/the legal effect of the treaty will be different, according to the fact that the provision also amounts to custom or if the Treaty provision remains only a treaty provision.

Even if we have numerous multiple international treaties which contain similar, we should not take for granted that those treaty provisions or consider together amount to a custom. So even if we have 1000 bilateral investment treaties all containing the same kind of provision, this does not is not enough to say that provision also amounts to custom because we all we can affirm that only looking at practise and opinion iuris.

To be super clear again.

When a treaty codifies customary international law, all the parties to the Treaty will be bound by the Treaty as well as by custom. The non parties to the Treaty will only be bound by custom. (It's another way to say the same concept). → when a treaty codifies customary international law: all the parties to the Treaties will be bound both by the Treaty and by custom, while non parties (those which did not ratify the Treaty) will only be bound by custom.

→ what happens if a treaty, containing a customary law rule among its provisions, ceases to exist? Are the states which had ratified the Treaty free? No, because they are still bound by the customary provisions

The impact of all of these will become evident in the Nicaragua case, where this difference between treaty law and customary law and their parallel existence was the key for the ICJ to decide the case in the way it was decided.

The premise is that the Nicaragua case is a landmark decision of the International Court of Justice, whereby the ICJ confirms the fact that treaty rules and customary law rules have parallel existence, their effects/their impact is different.

So even if we have a treaty containing a provision equal to a customary law rule, the two rules, the one of a treaty nature and the one of a customary law nature, retain a separate and parallel existence.

INTERNATIONAL COURT OF JUSTICE AND ITS JURISDICTION

The ICJ was preceded by the Permanent Court of Arbitration, an international law tribunal which was established back in 1899, which obviously is not yet in force, and was also preceded by the Permanent Court of International Justice, the judicial organ of the League of Nations (the predecessors of the United Nations).

It was established in 1922, and despite being established back a century ago, it is still in force. For example, one of the cases that was pending before the Court was the Enrica Lexie case, the case of India VS Italy ("Maro Case").

Let's say the ICJ is made of a small group of judges, despite the fact that is the World Court, so it can judge disputes between almost all the members of the United Nations (more than 190 states), It is only composed of 15 judges, and this is a permanent body, this means that the composition it is always the same.

These 15 judges are elected for nine year terms by the United Nations General Assembly and the Security Council → there are two different steps of the procedure at absolute majority (and this goes also for the UN Security Council).

The ICJ has the duty to promote the peaceful settlement of disputes → one of the basic principle of international law and this is one of the way in which, after the Second World War, the negotiators of the San Francisco Charter, another way to call the UN Charter (another name for the treaty found in the United Nation) decided to prevent the use of force = create a sort of an international tribunal for states to be able to settle their disputes in a peaceful way through in front of our judicial organ.

The ICJ works are very important and ICJ fulfills two different kind of functions:

1. the contentious function = the capacity to adjudicate disputes between States;
2. the advisory function = number of advisory opinions.

The ICJ can only decide upon disputes between states, so it's an interstate kind of adjudication. It cannot decide disputes between individuals and states, it's not like the regional courts of human rights, like the European Court of Human Rights, where a single person (a natural or juridical person) can submit the application/ the claim against a state. In front of the ICJ it is only state A versus state B.

So the ICJ may not be seized by individuals nor by international organisations. And to be able to hear the cases, the states concerned/the two states in dispute against each other should have accepted the jurisdiction of the Court.

The ICJ does not have automatic jurisdiction over all the disputes between UN member states, but those are able to submit a dispute before in the International Court of Justice if and only if they have accepted the jurisdiction of the Court = a voluntary jurisdiction. States have to accept to go before the ICJ and have to accept to be bound by the decision of the ICJ.

And they can do that in three different ways.

1. to enter into a special agreement, the so-called ad hoc agreement, concluded for the very purpose of submitting the case to the ICJ.

Obviously, a case that can be solved applying international law, it has to do with the interpretation and application of international law rules that state A has against State B, both A and B agree to submit the dispute to the International Court of Justice, so they accept the jurisdiction of the CJ only for that specific case/dispute. It's not a general acceptance of their ICJ jurisdiction.

And this is called ad hoc agreement or sometimes a "compromis" → the two accept to submit to the court the decision about their dispute.

2. compromissory clause: the jurisdiction of the ICJ derives from a compromissory clause in a treaty to which both the parties are members. For example: the Convention on the prevention and punishment of the crime of genocide → this convention contains a complementary clause in Article 9.

Disputes between the contracting parties relating to the interpretation, application, or fulfilment of the present Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

So all this states which have ratified the Genocide Convention can ask the ICJ to adjudicate/ to decide upon a dispute with another Member State, because of Article 9, that is a compromissory close.

Sometimes this kind of clause contains a reference to procedural aspects that need to be tough steps, that need to be fulfilled before going in front of the ICJ. For example, this clause established that the parties should try to negotiate or have recourse to mediation or arbitration before submitting the dispute to the ICJ.

All the states parties to the Genocide Convention can submit the dispute to the ICJ, but, when the jurisdiction of the International Court of Justice arises from a compromissory clause, only in the interpretation and application or fulfilment of the Convention → the dispute cannot concern for example the law of the sea, but it has to concern the application of the Convention.

Reference to the genocide convention, because the most recent decision of the ICJ was delivered in the case of Ukraine versus Russia, a case that Ukraine submitted to the ICJ on the basis of Article 9 of the Genocide Convention. And this because Russia did not accept, in a very general way, the jurisdiction of the ICJ through the 3rd method (see below).

Accepting the jurisdiction of the ICJ on all possible international law disputes, but only against other states that have accepted the same obligation, this can be done by submitting to the ICJ a declaration accepting the jurisdiction, the compulsory jurisdiction of the ICJ on the basis of Article 36, paragraph two of the ICJ Statute.

So it's called "a declaration made under Article 36 ICJ Statute", "optional clause".

So every state member of the United Nation can accept the compulsory jurisdiction of the International Court of Justice for all the disputes arising against another state which has accepted the same compulsory jurisdiction of the ICJ → a sort of a reciprocal commitment, commitment to accept the jurisdiction of the ICJ, but only for disputes against states that have in turn made their own acceptance of the jurisdiction.

These kinds of declarations are unilateral acts, so every state unilaterally decides how and when to accept in such a broad way the ICJ jurisdiction and this declaration needs to be made public and submitted and registered with the UN Secretary General → in doing so every other state in the international community know that the other parties are whether or not ready to accept the jurisdiction of the ICJ. Because of the reciprocal effect of these unilateral declarations that the ICJ can decide upon a dispute

These declarations of acceptance of the compulsory jurisdiction of the ECJ can even contain certain reservations so that they can exclude certain categories of disputes from the jurisdiction of their ICJ. Ex. If you are the Government of State A and you are trying to assess and verify whether you can bring the case before the ICJ against state B, first thing you should do is to go on the website of the International Court of Justice and see whether state B has made a declaration accepting the jurisdiction of the ICJ according to Article 36, paragraph 2.

We can see that among 194 states that have asserted the compulsory jurisdiction of the ICJ, Russia and USA are not there, while Italy has been since 2014 and others since the beginning, 1950 or 1952, etc. Sometimes the reference is back to the predecessor of the international Court of Justice.

Some of these may contain reservations, limiting the scope of the subject matters on which the ICJ can decide.

When the two states both accept the compulsory jurisdiction of the ICJ, there is no problem to have the case heard, but in the case mentioned before, Ukraine versus Russia, neither Ukraine or Russia has accepted in a general way, so there is no way that a compromis/ad hoc agreement to have the ICJ decide can be reached between Ukraine and Russia. It goes without saying that's impossible, so the only way for Ukraine to bring a case before the ICJ is to find somewhere a compromissory clause and Ukraine decided to use the article nine of the Convention against Genocide, the use of the Genocide Convention is a bit contentious, but the ICJ

started to hear the case and even adopted provisional measures. When a case is submitted to their CJ, the ICJ has jurisdiction and is competent to decide and adopt its final decision, the two parties are legally bound by the outcome/by the decision of the ICJ. But the decision has no effect on ultra partes, so not outside the two parties that are in dispute.

And the decision of the ICJ also has to be applied within the national legal order, so even national courts have to stick/to abide by what the ICJ has said. In practise, this does not always happen, and unfortunately there are no sanctions available for states that do not respect the decision of the ICJ, the ICJ cannot apply any kind of sanction.

It will be a responsibility of the international community if they decide to do so, but this is again one of the weakest parts of the international legal order.

An advisory function of the ICJ, we know already that the UN General Assembly, the UN Security Council, and UN Organ and specialized institutions can ask the CJ to deliver advisory opinions, they are not legally binding, but obviously coming from the ICJ, they are very important to assess the existence of opinion *uris* towards the formation of customary law.

NICARAGUA CASE

Nicaragua is not far from the United States. We are back in the 70s.

At that time in Managua, the capital city of Nicaragua, a government was in place, more dictatorship than a real government and the leader was Somoza.

He studied in the United States, he was also a leader at West Point, military formation. Not certainly a government near Communist parties, but was more of a right wing kind of government.

It was a kind of government involved in a repression of the opposition, but everything began to change with an earthquake that destroyed a great part of the body around Managua, the capital of Nicaragua, and that was the moment in which the Somoza government started to lose the support of the population.

Because among reconstruction funds, also humanitarian, deliveries shipments of blood bags and pharmaceuticals were appropriated and sold by the people around Somoza abroad, so they made a lot of money.

And people of the family of Somoza and around them, basically, at a certain point owned almost 50% of the entire land of the country, so they were exploiting power and natural resources, enriching themselves, stealing from even the most basic products. And this obviously enraged people so that the opposition party started to obtain support from the population. The opposition party was clearly repressed, sometimes subjected to torture and other ill treatments.

It was a strong repression of the opposition party up to the point in which however, the opposition party the Sandinista National Liberation Front, which was supported by the USSR and by Cuba, was able to overthrow the government of Somoza.

We have a right wing sort of dictatorship and opposition supported by Communist parties and communist countries which were able to overthrow the President with promises of redistributing land, a more equal treatment, non discrimination.

Because of the strategic position of Nicaragua and because the new government was creating a communist friendly area in Central America, the United States couldn't really stand the existence of a country run by left wing parties. The, the United States started to support Somoza in all possible ways and they started to fund

another counter revolutionary group, called the "Contrast" → they received a large amount of funds, support, weapons and training from the United States of America under the Presidency of Mr Reagan, as part of the US anti Communist strategy and they really managed to have the contrast, fighting in Nicaragua against the Sandinista party for a number of years.

In certain cases, the United States even attacked Nicaragua territory around the border and laid mines all over even in internal waters.

The Sandinista government of Nicaragua wouldn't just stand by and let it happen without trying to find a solution, and among the different strategies that the Nicaraguan Government adopted was also the one of referring the case before the International Court of Justice.

So in 1984, Nicaragua filed a case before the International Court of Justice.

- contending the fact that the United States of America had violated the territorial sovereignty of Nicaragua, they had violated its political independence, they used force, something that is clearly prohibited by international law, they didn't respect the principle of non intervention.
- ask the ICJ to declare the United States had committed grave violations of international law And ask the ECJ to Order the United States of America to seize all this kind of conduct.

The problem for Nicaragua was that at that time, in the 80s, the United States of America had accepted the ICJ compulsory jurisdiction under Article 36, paragraph two of the ICJ Statute, the optional clause, but with a reservation in place, so it was not a general acceptance → the United States had limited the acceptance of the ICJ jurisdiction through a reservation.

And the United States in particular said that the ICJ..... registrazione interrotta per

4 minuti per problemi di connessione

Then if you want, you'll see in the synopsis, but you can also go to the ICJ list of cases and look at the ICJ decision indicator.

The ICJ was able to decide the United States of America, financing, training, equipping, arming and organising the contrast, so the armed opposition to the Sandinista government, violated the principle of non intervention in the internal affairs of Nicaragua.

Principle of non intervention in particular was violated because the ICJ could establish clearly that the activities of the United States contain an element of coercion so strong that in practise Nicaragua was not anymore free to decide.

For example, this is what ICJ said: the choice of its political, economic, social and cultural system in the formulation of its foreign policy. Because of the coercive nature of the support/the intervention of the United States in Nicaragua through the contrast. So the ICJ ordered the United States to cease and refrain from all acts that constitute breach of international law provision, the use of force non intervention and others, and to make reparation for all the injuries caused to Nicaragua. The amount of reparation was to be negotiated between the parties, if not would have been established by the ICJ in a subsequent proceeding, something that obviously kept years, never realised in the end. → But it was a very strong defeat for the United States of America, a blow to the foreign policy of the United States. Something that really changed the way the US acted in central and Southern America. It was a key moment of international law, a brilliant solution using the legal sources, the nature of the sources of international law, this parallel existence of treaty and customary law provision.

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Having discussed in detail the relationship between the sources of international law (in particular between treaty rules and customary rules) and having described the parallel and separate existence of customary law, remember that the Nicaragua case is a very important case and a landmark in the judgement of the International Court of Justice for many different reasons.

State responsibility for the violation of international law rules and rules of attribution also concern the discussion of the Nicaraguan case.

Note: The extract of the decision (which you can find in the synopsis of the previous class) is something that you should read carefully and be ready to comment upon for the final exam.

Staying on the subject of the relations between the different sources of law, we should focus on the relationship between treaty rules, which also go under the textbook definition of *conflict of laws*.

The premise is that there is a huge difference in international law as compared to the national law system: in the latter there's a clear hierarchy of sources of law and there are rules that are common to different legal orders and national legal systems. These are rules on how to solve conflicts of laws and reference is made primarily to the issue of *lex posterior* and *lex specialis*. In international law, the way in which these two principles are applied is different from national law.

Before starting to analyse the conflict of laws more in detail, it's important to underline that whenever it is possible the interpreter should try to apply the *principle of presumption against conflict*: this principle plays a very important role in international law.

When interpreting and applying two different treaty rules that seem to be in contrast with one another, preference shall always be given to the interpretation which tries to reconcile the two different norms so that the purpose is always the one of making the two rules as much compatible as possible.

However, this approach is not always possible. When the presumption against conflict cannot apply there is no way to make two different treaty provisions compatible thanks to interpretation, then we should apply the principle of *conflict of laws*.

In domestic legal system, these kinds of conflicts are easily settled applying the hierarchy of sources that are typical of each national legal order: the hierarchy of sources in national legal system is usually established by constitutional law.

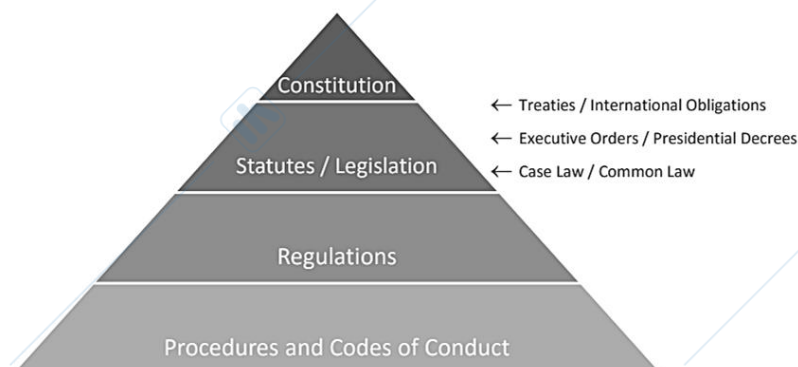


Figure 1. Respect for the hierarchy of laws is fundamental to the rule of law, as it dictates how the different levels of law will apply in practice. In general, the fundamental levels of hierarchy consist of: a constitution or founding document; statutes or legislation; regulations; and procedures.

In international law there is no hierarchy between its different sources and therefore no hierarchy between custom and treaty law. The application of the principles of *lex posterior* and *lex specialis* applies in a much more complex way.

In law, the brocardo²⁸ "*lex posterior derogat priori*" (meaning "the posterior norm derogates from the previous one") expresses one of the principles or criteria traditionally used by legal systems to resolve normative antinomies: the chronological criterion.

This principle concerns timing: for example, a law adopted ten years ago is followed by a treaty provision that enters into force twenty years later; the presumption is that the latter is the one that must be applied replacing the previous one.

As previously said, in international law other aspects should be considered: the fact that treaties are not always entered into by the same state parties complicates the entire scenario.

Therefore, the *lex posteriori* principle can only be applied if the two rules that are in conflict originates from two treaties that have been entered into by the same state parties. If not, we should ask ourselves *what could happen*.

The same kind of reasoning should be applied to the *lex specialis* principle. In law, the brocardo "*lex specialis derogat generali*" (which means: "the special rule derogates from the general one") expresses one of the principles or criteria traditionally used by legal systems to resolve regulatory antinomies: the criterion of specialty.

So, to sum up, the application of conflict law in international law is a much more complex issue to settle as compared to national law because there is no hierarchy of the sources that would provide clear guidance on how to solve conflicts among different sources of law and between different treaty provisions.

In the event of a conflict between a provision of customary law and a provision of Treaty law, what would be the right answer if we could not find the answer in the hierarchy of sources or in the application of other principles typical of national legal systems? What kind of reasoning should be used to determine whether a provision of customary law between two States or a treaty provision that is contrary to the provision of customary law between the same two States applies?

For example, there is a customary law provision in international law which states that expropriation and nationalisation of foreign property should always be compensated with a sum of money corresponding to the current and actual value of the said property: this is a customary law rule about expropriation and nationalisation.

Imagine there is a Treaty between two States which provides that in case the foreign property of one of the two states is either nationalised or expropriated, the compensation that the state must pay to the foreign investor is less than the actual commercial value of the property because it considers different aspects in evaluating the price of the property. This treaty provision is bilateral and adopts a different approach from that of the customary law rule. *Which one of these provisions should prevail?* This is an example of a conflict of two different provisions: a customary law provision and a treaty law provision.

²⁸ **Brocardo** (o **brocardo**) s. m. [dal lat. mediev. brocardum, prob. alterazione del nome di Burchardus, Burcardo di Worms (c. 965-1025), autore di una raccolta di diritto canonico]. – Nome con cui vengono indicate le Regole generali di diritto, enunciate dalla scuola dei glossatori di Bologna (sec. 12° e 13°), e considerate da alcuni quali assiomi giuridici, da altri come punto in cui s'incontrano opinioni contrarie e discutibili.

The principle to be applied does not concern the hierarchy between the two provisions. The treaty provision wins over the provision of customary law since, in that specific case, the two parties have expressly and voluntarily concluded an agreement derogating from the provision of customary law.

In this case it is a matter of willingness of consent and reciprocal consent. The essence of treaty law is the voluntary creation of a binding relationship between the parties, and because of this voluntary creation of rules through a treaty, the parties may derogate from customary law.

There is also a second aspect regarding the principle of *conflict of laws* in international law: the *lex specialis* and the *lex posterior* also operate in international law, but there is no Supreme Court that can legally apply these principles (in a binding manner) to all international legal entities.

As previously mentioned, the International Court of Justice adopts decisions that are binding only on the parties to the dispute.

International Courts' decisions are not mandatory nor do have binding effect on the international legal subjects. Unlike National Legal Systems, the Supreme Court cannot interpret the law for all the subjects in the International Legal System.

Note: The ICJ is different from a Supreme Court in terms of jurisdiction.

What happens then when there are two successive treaties on the same subject matter that contain conflicting provisions? According to the Vienna Convention on the Law of Treaties (done at Vienna on 23 May 1969), the *lex posterior* principle should be applied. On the other hand, the International Court of Justice affirmed that it is preferable to apply the *lex specialis* principle. In both cases these principles can apply only when the two treaties containing conflicting provisions have been entered into by the same state parties.

For example, on one hand there's the Treaty of Nairobi which prohibits killing rhinoceros (which protects the species from killing and exploitation) and on the other hand there's the Treaty of Arusha which permits and regulates trading of rhino horns.

These two treaties have been entered into by the same state parties and contain two conflicting provisions: one prohibits the killing of rhinos and the other one permits and regulates the trading of rhino horns.

The first question to ask is *which of these treaties is older?* The Nairobi Treaty is older, so the principle of *lex posterior* must be applied: this means that the relationship between the two states is now regulated by the Treaty of Arusha because the more recent law replaces the previous (old) law and that the trade in rhino horns is allowed. So, it is a matter of time, and always if the treaties were stipulated by the same State parties.

If there is no possibility of solving the conflict between these two treaty provisions based on timing, imagine that the two treaties entered into force at the same time and in the second example (the one that allows the trade in rhino horns) specifies that rhino horns can only be exported and imported when they are harvested from rhinos that have died of natural causes. In this case, we apply the principle of *lex specialis*: the protection of endangered species remains as a general principle or general provision in the Nairobi Treaty, but the Treaty of Arusha applies in a subset of circumstances. So, the conflict is resolved because rhino horns CAN only be traded if they are derived from rhinos that have died of natural causes. The killing and hunting of rhinos is not allowed.

The two treaties were concluded on the same date, but the Treaty of Arusha applies only to rhinos that die of natural causes, applying the principle of *lex specialis* is allowed trade in rhino horns that die of natural causes.

The fact that the Treaty of Arusha applies only in a subset of circumstances makes it possible to solve the conflict between the two.

But *what happens when treaties containing conflicting provisions have been entered into by different states?* This happens quite often in international law because there's a huge number of multilateral treaties. The states in the international community do not always act in the same way otherwise would be regulated by customary law instead of treaty law.

This occurs when the conflict is between treaties that deal with the same subject matter, but that have been concluded among different contracting parties. In this case, a State that is a party to both treaties is to choose between complying with one of the two treaties and breaching the other in its relationship with the parties to the earlier treaty that are not parties to the later one, or vice-versa.

An example of treaties concluded among different State Parties is this one: the Treaty of Johannesburg (between A, B, C, D, E) which prohibits the fishing and killing of sharks vs. The Treaty of Beijing (between D, E, F, G, H) which regulates the import/export of shark fins.

The two treaties have in common only two states: D and E.

In this example, States D and E are confronted with conflicting obligations: they must protect sharks in their relationship with ABC, but they must export a certain amount of shark fins to FGH. States D and E must choose between protecting sharks or not, but if they sell shark fins to FGH, they will simultaneously breach their treaty obligations with ABC.

So, either they violate the Johannesburg Treaty or the Beijing Treaty: whatever they decide to do, they will face international liability for violating a Treaty provision against a group of states.

Under what obligations are D and E in their reciprocal relation? Lex posterior is of no use when the addressees of the two incompatible rules are not identical. Is the lex specialis principle applicable here?

To answer this, we can try to reconstruct the reasoning in a similar way to that applied to rhinos. In this case, however, there is no possibility of obtaining shark fins from sharks that have died of natural causes.

Basically, there is no way to get shark fins without fishing and killing those sharks, so it is very difficult to find a compatibility solution, or a relationship between general and special law.

In this case, basically D and E would have to decide what to do because otherwise they will find themselves in some sort of impossible scenario in which they will have to violate one of the two provisions and will have to decide which one. They can denounce the treaty and negotiate it among themselves, but no interpretative solution is possible.

In the case of international law, when there's two different sets of state parties to the Treaties which contain different conflicting provisions it's not easy to establish which one should prevail. This kind of conflict often arises when on one side we have a treaty concerning the economic, commercial and trade relationships, and on the other side treaties that concern the protection of human rights, the environment, common goals and global public goods.

It's not easy to find a balance between these two completely different sorts of goals.

For years, international trade law could not be influenced in any way by considerations of protecting human rights or protecting the environment. These aspects were established by another set of treaties, although the two together would have raised conflicting provisions: there was no way for states to combine and find a solution until the economic treaty (the trade treaty) could in itself be amended to introduce this balancing

provision or balancing objective within the text of the treaty. So, it was a great fragmentation of fields and objectives in different types of treaties, especially when it came to trade or economic treaties.

Put yourself in the position of a court or judge: usually, for example, trade treaties provide for a specific way to resolve trade disputes between states, but the bodies created by trade treaties only apply commercial treaties to resolve these disputes; How can a judge who is asked to apply the rules of the World Trade Organization, for example, resolve a dispute even considering the duties resulting from a treaty that protects certain endangered species and the environment?

Note: We cannot solve in an easy and clear way the conflict of laws based on the *lex posterior* and *lex specialis* principles in the same way as it happens in national law. The fact that there is no hierarchy of sources also creates several shortcomings in the international legal system.

Sometimes, this fragmentation and the existence of these conflicting obligations is described as a bowl of spaghetti: it is a very complex set of rules from different sources (from customary law, environmental treaties, trade treaties, bilateral treaties) that are not always consistent so much so that a state could be forced on one side to do one thing while at the same time it may have committed to do exactly the opposite in another field.

It's important to note that the lenses through which someone tries to solve the conflict are the key because, for example, if you are a trade lawyer you will probably consider that the *lex specialis* is the one about trade and not the one about the protection of the environment.

Sometimes the Treaties themselves contain conflict provision about compatibility of derogation and the solution can be found in the treaty text.

Recently, the second generation of trade and investment treaties always contains a provision that safeguards or contains an exception or derogation for the protection of the environment, for example, or for the protection of climate change, but it must be written in the text of the Treaty, because otherwise applying only the principle of conflict of laws, it would be very difficult to find a solution.

So, there's different types of compatibility clauses that can be written down in the Treaty text: these clauses are exceptions or derogations, and they are often called safeguard clauses.

Sometimes treaties establish a hierarchy between the Treaty itself and previous treaties: for example, the Articles of Agreement of the International Monetary Fund refers to The General Agreement on Tariffs and Trade (GATT) and in this way everything is related to trade and subordinated to what happens in the WTO.

The most important between the compatibility clause is Article 103 of the UN Charter:

Charter of the United Nations
Chapter XVI — Miscellaneous Provisions
Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Basically, this article establishes a hierarchical relationship between the Charter of the United Nations, the Treaty establishing the United Nations, and all other treaties. This article represents the most important compatibility clause we know and puts the UN Charter above everything else: it is so important not because there is a hierarchy of sources, but because it is written in a treaty provision.

For example, UN member states that were obliged to trade with South Africa under certain trade obligations assumed in the 1970s would not violate their obligations to South Africa if the UN Security Council decided to block all trade relations (embargo²⁹) with South Africa because the UN Charter and everything that happens within the UN of the Treaties. Thus, embargoes and sanctions against a state stemming from the UN Charter and UN Security Council resolutions prevail over the trade treaty obligations of UN member states.

Can a treaty include a provision in which it delegates the International Court of Justice to solve future conflicts of law? Yes. Each treaty may establish different means for the settlement of disputes arising from the treaty. Therefore, the Treaty may create its own court or dispute settlement methodology (e.g., arbitration, mediation, conciliation, etc.) to achieve a peaceful settlement of disputes or it may always confer jurisdiction to interpret the application of the Treaty on the International Court of Justice.

One of these cases was previously analysed during the discussion of the jurisdiction of the International Court of Justice and the compromissory clauses which give the International Court of Justice jurisdiction to resolve disputes. One example was Article 9 of the Genocide Convention which gives it the power to resolve all disputes concerning the interpretation and application of the Genocide Convention. Compromissory clauses can also be described as procedural link provisions that establish specific procedural mechanisms and procedures for dispute resolution and link the Treaty framework with the jurisdiction of the ICJ.

So, it is a procedural link provision because the subject matter remains regulated by the Treaty, but the power to resolve the dispute is vested in the International Court of Justice. This can be described as another type of compatibility clause.

Having therefore analysed the relationship between the rules of customary law, the provisions of the Treaties and the conflict relationship between the provisions of the Treaty, we can discuss the *jus cogens* and *erga omnes* obligations.

Jus cogens and *erga omnes* obligations represent the exceptions to the absence of a hierarchy in international law. These two also represent two very special categories of sources of international law and have very peculiar features. Thus, they are also important rules in international law: they represent the basic norms (German: *Grundnorm*³⁰); they are a sort of constitutional norms of international law.

Not everybody agrees, but sometimes a reference to *jus cogens* and *erga omnes* obligations as the only two exceptions to the normative equality of the sources of international law can be found.

Taking the rules *jus cogens* and *erga omnes* as exceptions is a fairly new concept in the history of international law as it is something that happened very recently (after the end of World War II).

Jus cogens rules can be described also as peremptory norms of international law. These two definitions are synonyms, so it's either one definition or the other. Their evolution in international law derives from an exigence of verticalization: as previously seen, it is difficult is to balance different interests, different goals

²⁹ **Embargo.** embargo, legal prohibition by a government or group of governments restricting the departure of vessels or movement of goods from some or all locations to one or more countries. A trade embargo is a prohibition on exports to one or more countries, though the term is often used to refer to a ban on all commerce. (Shambaugh, George. "embargo". Encyclopedia Britannica.)

³⁰ **Grundnorm.** Every norm is a hierarchical system, that derives its existence and validity from its superior norms. The highest norm in this legal system is called basic norms or *Grundnorm*. At the top level of such hierarchy, there is to be a basic norm or *Grundnorm*. This basic norm does not derive any existence or validity from any other source therefore it is supreme. It is a concept in the *Pure Theory of Law* created by Hans Kelsen, a jurist, and legal philosopher. Kelsen has used this word to denote the **basic norm, order, or rule** that forms an **underlying basis for a legal system**.

and purposes in the fields of international law (human rights, environmental protection, climate change and all the reciprocal obligations of a economical nature existing between states).

But *how can these two different set of goals be reconciled without a hierarchical structure?* We have previously seen how difficult it can be to solve these conflicts with the *lex posterior* and the *lex specialis*.

Since the end of the Second World War, we have seen a growing trend towards the recognition of these fundamental pillars and principles of international law; this led to a version of international law in which some fields and principles take precedence over others.

Putting some goals and targets at the top of the hierarchy is not always easy: especially the International Court of Justice adopts a careful approach because it does not want to move too quickly towards the recognition of the importance of the peremptory norms of international law, but the need is there, and civil society is pushing for the implementation and application of the *jus cogens* norms in international law.

To describe what the *jus cogens* norms are, we should refer to the Vienna Convention on the Law of Treaties (1969): it is a treaty that arises from the work of the Commission on International Law; it took several years for it to be adopted and one of the most controversial issues during the work of the International Law Commission on the Vienna Convention and even after the signing and ratification of the Treaty was the notion of *jus cogens* norms and peremptory norms of international law.

There was a debate about some values that had to be considered fundamental at the time of the Convention: it was a period between the end of the Second World War and the 70s (almost 25 years after the Second World War). It was an agreement on certain peremptory norms of international law, for example: the prohibition of genocide, the prohibition of torture, the prohibition of slavery. Everyone agreed that these were fundamental values for the international community and that therefore a certain supremacy over all other rules of international law should be recognized.

However, the way in which the Vienna Convention on the Law of Treaties describes these peremptory rules has not received strong support from all states of the international community. In fact, there was no unanimity but a kind of convergence. The consensus was not mutual. As mentioned above, France, for example, has never ratified the Vienna Convention on the Law of Treaties and the motivation that France had made at the time concerned precisely the definition given by Article 53 of the Vienna Convention of what is a peremptory norm of international law (the definition of *jus cogens*).

Vienna Convention on the Law of Treaties (1969)

Article 53: Treaties conflicting with a peremptory norm of general international law (“jus cogens”)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, **a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted** and which can be modified only by a subsequent norm of general international law having the same character.

The Vienna Convention focuses on how to resolve a conflict between a treaty provision and a *jus cogens* rule; and, in determining how to resolve the conflict, Article 53 also provides a definition of what a *jus cogens* rule is.

The *jus cogens* rules are norms of general international law: this means that they are a subset of general international law. General international law is another way of saying customary law (these two terms are synonymous). Therefore, the rules *jus cogens* are part of customary law, but these have some special characteristics.

A second thing that can be seen from the wording of Article 53 is that the peremptory norms, the jus cogens, are *accepted and recognised*. *What are the two requirements that must be met for a rule of customary law to arise?* Practice and *opinio iuris*. However, «accepted and recognized» seems to refer only to *opinio iuris*.

What the Vienna Convention says is therefore not coherent: first it describes the rules jus cogens as customary rules, but then in describing them it refers only to one of the two requirements of the norms of customary law. The focus is on *opinio iuris* much more than on practice and this is one of the reasons why many states disagree with the wording of Article 53.

A peremptory norm of general international law is a norm accepted and recognized by the international community of States *as a whole*. *What does the term «as a whole» refer to? Does the term refer to all states of the international community? Do we therefore need unanimity in the case of jus cogens rules? Should we have a greater majority than what happens under normal customary law? Can there be a regional jus cogens?* The answer is no.

What does «as a whole» really refer to in this case remains unclear. The International Law Commission itself tried to clarify the meaning of this specification in its recent work on peremptory norms: a draft conclusion published a few months ago (in 2022) on peremptory norms. (Document available on Moodle).

The text of the ILC's draft conclusions on the peremptory norms of General International Law No. 7, which is exactly titled International Community of States as a whole, states:

Conclusion 7

International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (jus cogens).
2. **Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (jus cogens);** acceptance and recognition by all States is not required.
3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition.

So «as a whole» refers to a very large and representative majority of states; it is not a very different definition from that already given by customary law.

The ILC has therefore somehow withdrawn from the definition of the requirement deemed necessary at the end of the 60s: it moves from «the international community of states as a whole» to «a very large and representative majority of states».

Article 53 focuses on how to solve a conflict between a treaty provision and a jus cogens rule, and it is in the case of this conflict that the rules of jus cogens show their peculiar characteristics: they are rules of customary law but, unlike customary law, they cannot be derogated by a treaty.

Note: Due to the rule of consent and the willingness to sign a treaty commitment, treaties prevail over customs. In this case, however, no treaty can ever prevail over an obligation of customary law, which is also a jus cogens rule.

Therefore, the hierarchy sees the jus cogens that prevails over all other norms.

Thus, if there is a conflict between a treaty provision and a rule of jus cogens, the latter will always take precedence and the treaty will become invalid.

Note: Cases of treaty invalidity have already been discussed. One of the most important cases of treaty invalidity is conflict with a jus cogens rule, and in the event of this type of conflict, the treaty is null and void from the moment it was signed (as if it had never existed).

Moreover, there is no possibility of separating the provision of the Treaty in conflict with jus cogens from the Treaty. The violation is so strong and so fundamental that the entire treaty falls. It is not correct to say that only the conflicting provision is invalid, as it concerns the entire treaty.

And this is also one of those cases in which when there is a jus cogens rule the ICJ is always competent to resolve the dispute between states over the application or interpretation of Article 53 of the Vienna Convention. So, when there is a conflict between a jus cogens and a treaty provision, the ICJ is the one before which the issue should be discussed.

Jus Cogens and Erga Omnes Rules

INTERNATIONAL LAW - Lecture 18 of March 30, 2022

Today: look at jus cogens in a more substantial way => to describe and investigate some of the rules of international law that are considered to be jus cogens

One thing that is missing in the Vienna Convention is a codification of the law of treaties which first described primary norms of general international law jus cogens => during the discussion within the International Law Commission, experts had an idea of rules that were used as a reference for the discussion to arrive at a definition of jus cogens

=> but in the text of the Vienna Convention there is no example, no list of what jus cogens is => the International Law Commission ask to come back again on the topic of jus cogens

=> more recently, in the very last few years, the work of the ILC has not yet been concluded => but there's the proposed text of the draft conclusion of the ILC on the jus cogens and here the ILC is trying to fill some of the gaps left open after the adoption of the Vienna Convention

=> working on the basis of a number of judgments adopted by the International Court of Justice dealing with some of the jus cogens rules and other decisions by international courts and tribunals

> one of the gaps that the ILC Draft conclusion published this year, in 2022: starting to provide a first list of rules of international law that are recognised to amount to jus cogens => it's not a

closed list, but it's open: the tradition of aggression, the provision of genocide, their prohibition of crimes against humanity

= some of the basic rules of international humanitarian law that provision of discrimination, apartheid, prohibition of slavery, prohibition of torture and the right of self-determination

> the prohibition of aggression: is a reference to the prohibition of the use of force as established by the United Nations Charter.

> then the ILC list: the prohibition of genocide, the provision of crimes against humanity and international humanitarian law => these 3 different rules of jus cogens all have dual nature, because they are established in a number of convention

= a number of treaties has obligations falling over states, but their violation also amount to an international crime, so the individual, the single person committing genocide or crimes against humanity or violating the

basic rules of humanitarian law, also commits an international crime => for that can be prosecuted before an International Criminal Court (ICC)

Reference to the Genocide Convention: state parties to the Genocide Convention can submit a dispute concerning the interpretation and the application of the Genocide Convention in front of the International Court of Justice

> the Interstate dispute in this case, the Convention on the Prevention and Punishment of the crime and of genocide is quite an old one => was discussed and negotiated immediately after WWII because everybody now agree to have been a genocide => what was not consider? The object of a treaty obligation

> before WWII there was no treaty in place that could be used to prevent genocide => this is one of the first achievement that were negotiated immediately after the war, and that convention is meant to establish state Interstate obligations = it's a treaty so it regulates relationship between the states.

> the definition of genocide, which is a used current rule, is contained in Article 2 of the convention:

“Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- the killing of members of the group
- causing serious bodily or mental harm to members of the group
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- imposing measures intended to prevent births within the group
- forcibly transferral of children of the group to another group”

= a closed list of conducts that fall within the scope of the definition of genocide, but the most important element in the definition of genocide that differentiates this specific jus cogens rule and this specific crime from other crimes and in particular from crimes against humanity, is the intent to destroy in whole or in part a group => a group of people that have in common the fact of being a national group, ethnical group, racial group or a religious group

=> intent to this subjective element, this very specific requirement, is a fundamental element in the definition of genocide and it's also the most difficult aspect to be proved before an international court or tribunal because you have to provide evidence of the fact that all the orders, directions having against a certain group of population are meant to destroy that group in whole or in part

=> while genocide can be: if you think about the recent cases in which genocide happened => ex. in Rwanda, the Tutsi against the Hutu => wasn't a religious group, but more an ethnical group, even if not everybody agree on the ethnicity

=> the differentiation between Tutsi and Hutu (population living in Rwanda) has a very strong colonial imprinting => because the colonial power, which run Rwanda for four years was the one that started to treat differently people pertaining to the Tutsi group

=> but it wasn't something that really came from the population, this difference was exploited by the rulers to either support one that in turn supported the colonial power against the other = many described the Rwanda genocide something strictly related to colonialism

In other areas of the world, it is more difficult to apply or prove the intent to destroy a group of people on the basis of this characteristic and for example, there is no mentioning of a cultural group as being target of genocide => the genocide need to be proved to satisfy the requirement of intent to destroy in whole or in part, and only applies to a very specific set of population

- > after Rwanda 1994 we had a genocide that was considered a sort of a local genocide in Kosovo, against the population living there, and this happened under the eyes of the young peacekeeping = notwithstanding the presence of UN peacekeepers they couldn't prevent the genocide => it doesn't change the gravity the fact that was a small case, genocide only in a given city in Kosovo, for a small period of time, but still is one of the case of genocide nearest to us in the last few decades
- > then we had a genocide in Darfur currently against the Rhingya people in the area of Myanmar

After the WWII everybody thought that the war would have been the last, unfortunately, we have witnessing other cases of genocide: targeting cultural groups during the Cambodia War, the killings and torture of the Khmer Rouge and that was considered to be an example of cultural genocide because they were part of the same ethnic group, ethnic populations and national groups (not difference about religious)

=> many at that time, in the 1970s, thought that the Cambodia case of The Mirage could be considered a cultural genocide, but the definition wasn't modified in the treaties, nor later on in the Statute of the ICC

- > even if this definition has been used since 1948, in all different instruments of international law, and in the ICC statute included, sometimes, critics says this isn't enough to cover everything that needed to be covered => but the most important thing to remember, apart from the kind of groups that are included in the definition, is the mental element = the intent to destroy the mental element => that is one of the conduct listed afterwards

If we go back to the list of jus cogens rules made by the International Law Commission, we can move to the third one: the provision of crimes against humanity.

- > the concept of crimes against humanity has evolved over time => this is a field of public international law that has changed a lot from the WWII and the Nuremberg trial (trial of the Nazis) to the International Court, through the International Criminal Tribunal for the ex Yugoslavia, to prosecute and adjudicate upon traitors of crimes against humanity during the armed conflict in ex Yugoslavia ICT

= International Criminal Tribunal for Yugoslavia and the International Criminal Court for Rwanda => those were ad hoc tribunals were set up and established by the UN Security Council under Chapter 11 of the UN Charter and on the basis of Article 41, so as measures to prevent, measure of reaction to the use of force in a way => a resolution that therefore, is binding on all the Member States of the UN

=> they were established ex post facto, but applying rules of customary law (remember that all jus cogens rules are also customary law rules) that were already in place at the time => these tribunals could prosecute those that had committed crimes of genocide, crimes against humanity, even if the tribunal was established after the fact

=> it's something quite peculiar. If you apply the usual principle of Constitutional law, for example

- > crimes against humanity also have evolved over time thanks to the jurisprudence, the case law of all these International Criminal tribunals and they are formalised in their last version by the Statute of the ICC, that is also called "The Rome Statute", because it was signed in Rome in 1998 > as you can see from the quite

long treaty establishing the ICC: crimes within the jurisdiction of the court are the crimes of genocide, the crimes against humanity, war crimes, and the crime of aggression as well

=> for all this crime, the ICC has confidence to prosecute individuals that have committed those crimes

> the definition of genocide included in the ICC is the same contained in article 2 of the Genocide Convention

What is the main difference between these 2 treaties? The Genocide Convention established obligations falling on states = states have an obligation to prevent and to punish genocide and they also have a duty to implement, in their own national legal system, national criminal rules about genocide

=> and they have a duty to prosecute people committing the crime of genocide.

= this is an obligation on the side of states: the ICC try a statute, which is another treaty establishing a list of international crimes for which the competence to prosecute individuals is given to the ICC, to this international court

> when state member states are either unwilling or unable to prosecute people for those crimes, it happens in different scenarios that people committing these sort of crimes are protected by their own government

=> it's rather difficult for their own state to prosecute them in their own town, but this is why an international court is important and was really necessary

Finally, only in 1998, the ICC prosecute people responsible for the commission of genocide and also for the commission of crimes against humanity

> crimes against humanity can be committed during an armed conflict, during war, but also they can occur during peacetime => the same as genocide: also genocide can happen in the context of an international or an internal armed conflict or during peacetime

> these crimes also have a physical element: a number of conducts that are listed here => it's a long list that includes murder, extermination and slavery meant as the deportation or forcible transfer of the population, imprisonment, torture, rape and other grave forms of sexual violence, enforced disappearance, apartheid

= crimes against humanity and other inhuman acts = the list of different types of conducts that can give rise to a crime against humanity.

> it isn't only murder, but is a crime against humanity when also the 2nd element is satisfied and in this case it's a contextual element => physical and a contextual element is that they have to be part of a widespread or systematic attack directed against any civilian population

> it need to be proved that people committing these kind of conducts have knowledge of them being part of a widespread or systematic attack against the population

> there is not the same kind of gravity required for genocide, there is no need for a mental element, like intent to destroy in whole part a group, but those conduct need to be part of a widespread or at least a systematic attack directed against any civilian population

=> but the important thing in this case is that in contrast, with a genocide, crimes against humanity don't need to target a specific group: the victims can be any civilian population, regardless of affiliation identity => nationality doesn't really matter, but these these conducts cannot be isolated acts of violence, they need to be organised

=> they have to be perpetrated in a context in which there is an organisation, there is a plan to attack a civilian population

> aggression, genocide, crimes against humanity and the basic rules of international humanitarian law => international humanitarian law is an entire field of public international law that goes back to the end of the 18th century, and it's applied in all instances of armed conflict

> it's a set of rules that apply in case of armed conflict, either of an international or an internal nature

> they are relevant today in all the war scenarios that are spread all over the world => you can have heard reference to international humanitarian law in the news about the conflict between Russia and Ukraine, but there are other conflicts all over the world and international humanitarian law is always applicable in those cases

> the purpose of this set of rules of international humanitarian law is to seek, to limit as much as possible the negative effects, the impact of armed conflict, protecting persons => individuals which have never been part of the conflict are the civilian population, other are no longer taking part in the conflict like prisoners of war (ex. soldiers that have been wounded)

= all the individuals that are more fragile and also, for example, medical personnel or even religious personnel are protected under the rules of international humanitarian law

> this set of rules is called the law of war, but it has nothing to do with the regulation of how to use force => this set of rules don't regulate whether or not a state may actually use force

=> this is the subject of what is written in the UN Charter about the use of force, self-defence, collective self-defence, not the object of international humanitarian law

> when force is used in violation of rules of international law or because the use of force is allowed, because it's a form of self defence, then international humanitarian law applies and it tries to protect those that aren't taking part in the fight or aren't taking part anymore in the fight => and also try to restrict the means of warfare = to restrict the use of certain types of weapons, resort to certain military tactics

=> for example, it prohibits to use weapons that cannot discriminate between civilians and military targets: certain type of weapons that are being used in the context of Russia Crimean War cannot be used => they are used in the context of this war in violation of international humanitarian law, because those weapons cannot distinguish their target between civilian targets and military ones

=> military targets are part of the conflict, they are considered to be legitimate targets in the fight, but for example they used thermobaric bombs = not the kind of weapon that cannot distinguish between those that can be target of war, a target of military weapons, and those that should be protected like civilians, hospitals or prisoners of war

> international humanitarian law also prohibits the use of weapons that can cause, like the thermobaric that were mentioned in the chart, superfluous or unnecessary suffering

Why should we use those kind of weapons that can cause damage to the environment, for example some sort of weapons that contain radioactive elements that can contaminate the environment for years

=> all those weapons should be banned from the use during a conflict, and these are regulated by international humanitarian law => also biological weapons or chemical weapons are among those that are definitely prohibited by jus cogens rule

= the basic rules of international humanitarian law are part of jus cogens

We have among the list: the prohibition of racial discrimination, and in particular apartheid = also crimes against humanity

> it's also the a topic of another very important convention, a treaty that was adopted in 1976, which is the Convention on the suppression and punishment of the crime of apartheid => was adopted in 1976 because was the period of time in which apartheid applied in South Africa and in other Southern African countries

> the attacks of the International Convention on the Suppression and Punishment of the Crime of Apartheid => Article 2 define the crime of apartheid, but we make reference to the definition contained in the ICC stated term according to which the crime of apartheid means inhuman acts of a character similar to all these different conducts that we already have here, but committed in the context of an institutionalised regime of systematic oppression and domination, by 1 racial group over any other racial group

=> which is committed with the mental element: the intention of maintaining that regime.

> we don't have more recent instances or cases of apartheid, and hopefully we will never see it again, but you never know, and it's a good decision to keep the crime included in the list of crimes that can be prosecuted by the International Criminal Court

Then we have the reference to slavery and torture

> there is a convention on slavery that dates back before WWII, in 1926 and was updated 30 years later in 1956 => we also have a convention on the prohibition of torture, but both these provisions are included in different international human rights treaties

> we have a reference to these 2 provisions in the International Covenant on Civil and Political Rights, in the European Convention on Human Rights and in all the other regional convention for the protection of human rights like the American Convention of Human Rights or the African one = they are common to all human rights instrument even if the definition of both, slavery and torture, has been subject to a strong evolution in time

=> and especially for what concern slavery, the definition contained in the Convention against slavery has been criticised to be too much old fashion => reference is made to form of slavery that was typical of those years near to colonialism => the experts claim that there is a need to modernise the definition of slavery

=> for example, there are all the question about the distinction between slavery and trafficking child, women and therefore a new definition that isn't only based on the jurisprudential interpretation given by Human Rights Court could be, indeed, needed. => a new update of the Slavery Convention can be adopted

We should consider 2 aspects: a duty of states to criminalise torture and to prosecute and punish those committing tortures, and the the right of the victims

> then if we discuss the dark web, the problem is the jurisdiction => which is the state that is able or can have jurisdiction over those crimes? it's not an easy answer, but it has to do on the power of state to be able to locate the ones committing crimes and to bring them before justice

> international law can establish the rule against torture that applies also in those cases, but then international law lacks in the enforcement capacity => this is obviously one of the cases in which states are not really performing in the way we expect them to act

> but in the case of slavery and torture I would point your attention to the fact that they are provided in all human rights treaties and therefore, in those cases, the victims have a venue to come ask for redress before, especially in regional human rights courts

> the International Law Commission puts the right of self-determination at the end of the list, but putting self-determination in the list is quite contentious, not everybody agrees on that because for example, the ICJ, in the case we have discussed in the Chagos Island, never mentioned or defined the right of self-determination as a jus cogens rule

> there is a lengthy description of how the ICJ assesses the customary nature of the right of self-determination, but never in the decisions, the ICJ described the right of self-determination as a jus cogens rule => not include in this list rules of jus cogens that have a procedural nature

=> all those are of a substantial nature, we can distinguish between substantial rules and procedural rules of jus cogens

In this last category there are 2 procedural rules of jus cogens

1. Article 53 and 64 of the VCLT that provides for the invalidity of treaties containing a provision conflicting with the jus cogens rule
2. Article 103 of the UN Charter says that the UN Charter prevails over all conflicting obligations => the obligations under the Charter prevail if they conflict with obligations under any other international agreement (obligations arising from the binding resolutions of the UN Security Council included)
 - > in the event of a conflict between the obligations of the members of the UN, their obligations under the present Charter shall prevail

=> the primacy of UN means also the primacy of UN Security Council resolutions

INTERNATIONAL LAW - Lecture 19 of April 4, 2022

Erga omnes norms are superior in the sense that they are not merely owed to another State but to the international community as a whole. They differ from the great majority of treaty rules which are based on reciprocity.

The concept was first outlined by the ICJ in the 1970 Barcelona Traction case (Belgium v. Spain), in paragraphs 33 and 34:

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)

33. [...] "An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State [...]. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the **Crime of Genocide**,

Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

The ICJ points out here that *erga omnes* norms are owed to the international community **as a whole** and that for this reason, all states have an interest in their protection, and this fact has important consequences on the procedural plane.

And the ICJ goes on to state that such obligations derive, for example, in contemporary international law, from the prohibition of acts of aggression and genocide, and from the principles and rules concerning the fundamental rights of the human person, including protection from slavery and racial discrimination.

Some of the corresponding rights of protection have entered the body of general international law, which means customary law. Orders are confirmed by the instruments of international treaties, the law of the treaty of a universal or almost universal character.

This is the first case in which, among all sources of international law, the ICJ explicitly mentioned a number of obligations of an *erga omnes* nature that are due to the international community as a whole and gave the right to all States to seek their protection, so all States have an interest in their protection which has a few procedural consequences.

The second part of the quotation from the Barcelona Traction case refers to rules of international law which have this special character of *erga omnes* obligation both of customary law and of treaties law nature. As mentioned above, *erga omnes* obligations can arise both from customary rules and from Treaty rules. So, the *erga omnes* is not a separate source of international law: between the two typical sources of international law that derives from customary law or treaty law, there is a subset of norms that have these special characteristics.

Note: This is one of the first aspects that must be emphasized because sometimes the rules of a customary nature, also called *jus cogens*, cannot derive from the law of the treaties alone; on the other hand, *erga omnes* obligations may derive from both customary law and treaty law.

After the first definition provided by the International Court of Justice in the Traction of Barcelona, there have been several attempts to codify the definition of *erga omnes* obligations.

One of the most important definitions has been provided more recently by the Institut de droit international/Institute of International Law.

The Institute of International Law is a private institution composed of experts and scholars of international law and differs from the International Law Commission which is an organ of the United Nations General Assembly.

Basically, it is a group of renowned experts whose purpose is to study the development of public international law that meets regularly at least once a year and has long discussion sessions at the end of which the Institute adopts resolutions having an authoritative character (authoritative character because they derive from leading scholars, and not because they derive from an international organization).

The Institut de droit international/Institute of International Law in the Krakow Session in its 2005 Resolution on *erga omnes* obligations distinguished between obligations:

- *erga omnes* (customary law rules) and
- *erga omnes partes* (treaty rules, f. ex. in human rights treaties or international environmental treaties).

The first derive from customary international law and is owed *in any given case to the international community* – in the words of the Institute – *in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action.*

It should be emphasized the difference from traditional rules of both customary and treaty nature, where it is the injured state, the one to which the obligation is due or the one to which the other state is violating a treaty or an obligation of customary law, which has the power to seek conformity from the violating state.

Thus, if x is violating an obligation that owes to y, in both cases of obligations arising from customary law or treaty law, y has the right to ask x, termination, compensation, reparation or to go back and comply with the obligation that x owes to y.

If, on the other hand, an *erga omnes* obligation is violated, any state or subject of the international community may request the violating state to cease the violation and to respect the original obligation of international law.

And this stems from the fact that the *erga omnes* obligation protects common values and concerns the whole Community, and not only the State that is directly affected by the conduct of the State that violates it.

For example, the prohibition of the use of force is a rule of customary law, a rule of *jus cogens* and a rule of *erga omnes*. In case of unjustified use of force and declaration of war then it is not only the wounded state that has the right to ask me to cease any armed aggression towards their territory, but also all others in the international committee. This is because peace is the general principle in international law and is a common fundamental value of the international community and the prohibition of the use of force is an obligation of *jus cogens* ed *erga omnes* nature.

In addition to the obligations *jus cogens* and *erga omnes* arising from customary law, such as the prohibition of the use of force in the previous example, there are also *erga omnes partes* obligations that do not derive from customary law but from multilateral treaties. For example, the human rights obligations established by the regional human rights treaty.

Among human rights there are some human rights that are non-derogable rights that also have a *jus cogens* nature such as the prohibition of the use of force, the prohibition of torture, the prohibition of genocide or the prohibition of apartheid, and the prohibition of slavery.

If a state commits genocide or large-scale torture on citizens, under a human rights treaty it is not only the citizens of that state who have the right to claim a violation of human rights, but also all other states that are party to the same regional human rights treaties because these are *erga omnes partes* obligations.

This is an important distinction between *erga omnes* (customary law) and *erga omnes partes* (Treaty law).

But *what are those erga omnes obligations arising from customary international law that are due to the international community of States as a whole?* These obligations are the ones that will become more interesting in the case that will be discussed shortly.

From the existence of these *erga omnes* obligations derive special consequences, and these consequences have been codified in international law by the International Law Commission in the articles on the Responsibility of States for Internationally Wrongful Acts (adopted in 2001) that go under the acronym of **ARSIWA**.

The ARSIWA addresses, the consequences of the violation of *erga omnes* obligations in articles 40-41 and 48.

CHAPTER III: SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 40Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

Article 48Invocation of responsibility by a State other than an injured State

1. **Any State other than an injured State is entitled to invoke the responsibility of another State** in accordance with paragraph 2 if:
 - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
 - (a) **cessation of the internationally wrongful act, and assurances and guarantees of non-repetition** in accordance with article 30; and
 - (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

The actual ARSIWA codifies a field of international law, which is the law of international responsibility of states. So, *what happens when state commits a violation of international law? What are the consequences and what can be done?*

Even without knowing or going into detail about the articles of ARSIWA, particular attention should be given to the previously mentioned articles that fall under Chapter 3 of the text titled *Serious breaches of obligations under Peremptory Norms of General International Law*.

The title refers to peremptory norms that are rules *jus cogens*, and this helps to make a distinction between what happens in case of violation of the rules *jus cogens* and what happens instead in case of violation of an *erga omnes* obligation.

Articles 40 and 41 establish the very special consequences deriving from a breach of *jus cogens* and affirm that (1) there is a positive duty to do something, and in this case all states should cooperate to end any serious breach of an obligation arising under peremptory norms of international law (under an obligation arising from *jus cogens*), and (2) two negative duties, that are: no state shall recognise as lawful a situation

created by such a serious breach of a jus cogens rule and no state shall render aid or assistance come to the state responsible of the jus cogens rule breach.

For example, (positive duty:) all states would cooperate to end the use of force (prohibition on the use of force), a fact that suggests what should happen in case of war of aggression and international conflicts; (negative duties:) no state should recognise these actions of aggression as lawful (in case of forced annexation of a part of a territory of a foreign state, no state in the international community should recognise this annexation as lawful), and no state shall aid the state responsible of the breach of the prohibition on the use of force.

Taking a recent example, if Belarus is ever going to provide weapons to Russia (that is the state that started a war of aggression, thus the one who violated the prohibition of the use of force), it would be violating Article 41 of the ARSIWA. Ukraine on the other hand is the state target of a war of aggression and is therefore entitled to react in self-defence under Article 51 of the UN Charter.

So, what are the consequences that arise in case of violation of an erga omnes obligation?

The right to invoke the responsibility of the State committing the violation of the *erga omnes* obligation – referred to in Article 48 of ARSIWA – is given not only to the state directly injured by my conduct but it is also given to all the states in the international community. *What does this mean?* This means that any state can bring a case before international courts and tribunals and ask the violating state the cessation of the internationally wrongful act and ask for assurances and guarantees of non-repetition. However, these other states cannot seek for reparation and compensation or claim punitive damages for their own state because they are not directly injured, and they are only protecting an interest of the international community.

But *why are erga omnes obligations so important?* Because not always the directly injured state is able to act on international plane. Sometimes the most important values of the international community are violated by a state in its own state, jurisdiction and territory and against its own people. In these cases, most of the times, people are unable to ask the authorities of their own state to protect them.

Examples are the cases of institutionalised racial oppression of Apartheid that existed in South Africa, or the Darfur genocide³¹. It is therefore for cases of this kind that it is important that other states in the international community can try to ensure that the fundamental values of the international community are respected and protected.

The other way, in addition to giving this right to the international community as a whole, is to discuss humanitarian intervention and the right to use force in humanitarian intervention. This doctrine, however, can be abused so easily that it is probably better not to be recognized by international law.

Are jus cogens rules and erga omnes obligations the same? Do they always overlap?

Discussing *erga omnes* obligations, many jus cogens rules were mentioned: the prohibition on the use of force, apartheid, genocide, torture, slavery, etc. Jus cogens and *erga omnes* rules often overlap.

³¹ **The Darfur genocide.** The Darfur genocide is the systematic killing of ethnic Darfuri people which has occurred during the ongoing conflict in Western Sudan. It has become known as the first genocide of the 21st century. The genocide, which is being carried out against the Fur, Masalit and Zaghawa tribes, has led the International Criminal Court (ICC) to indict several people for crimes against humanity, rape, forced transfer and torture. According to Eric Reeves, more than one million children have been "killed, raped, wounded, displaced, traumatized, or endured the loss of parents and families".

As previously mentioned, among jus cogens rules there are also rules that have not a substantial nature but a procedural nature. Examples of procedural jus cogens rules are Articles 103 of the UN Charter and Article 53 (on the invalidity of treaties conflicting with jus cogens rules) of the Vienna Convention.

United Nations Charter (1945)

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Vienna Convention on the Law of Treaties (1969)

Article 53: Treaties conflicting with a peremptory norm of general international law (“jus cogens”)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Procedural jus cogens rules cannot be *erga omnes* obligations at the same time. So there is not a complete overlapping between the two concepts.

Considering core rights under international humanitarian law – genocide, torture, use of force, etc. - these are both jus cogens rules and *erga omnes* obligations. Considering Article 103 of the UN Charter (about the supremacy of the UN Charter over all other multilateral treaties) and Article 53 of the Vienna Convention on the Law of Treaties (on the validity of treaties conflicting with jus cogens rules), these are rules of procedural jus cogens nature.

To apply the concepts previously addressed we can analyse a case that is the Rohingya case. This case concerns the facts that happened in Myanmar against the Rohingya³² minority group.

In March 2017, amidst escalating violence against the Rohingya, the **UN Human Rights Council** established an **Independent International Fact-Finding Mission** on Myanmar.

The UN Fact-Finding Mission found that, against the backdrop of longstanding persecution and discrimination, from around October 2016 the Myanmar military (the “Tatmadaw”) and other Myanmar security forces had undertaken widespread and systematic “clearance operations” – the term that Myanmar itself uses – against the Rohingya.

The acts committed during these operations were intended to destroy the Rohingya as a group, in whole or in part, using mass murder, rape and other forms of sexual violence, as well as by the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses.

From August 2017 onwards, such genocidal acts continued with Myanmar’s resumption of “clearance operations” on a more massive and wider geographical scale.

Those who carried out the genocidal acts were special military officials of the State of Myanmar – called Tatmadaw³³ – and were acting on its behalf.

³² **The Rohingya.** The Rohingya are an ethnic minority group who predominantly follow Islam and which reside in the Rakhine State of Myanmar.

³³ **Tatmadaw.** The Tatmadaw is the official name of the armed forces of Myanmar.

Rohingya refugees fled violence in Myanmar at a staggering rate in 2017 – and the numbers keep growing. Over 742,000 refugees have fled to Bangladesh since 25 August 2017 as of 31 July 2019 and more than 10,000 died.

While the Government of Myanmar refuses to define what's happening against the Rohingya as a genocide, several experts and the UN Fact-Finding Mission have described the operations against the Rohingya as operation that prove the special intent that is one of the most important requirements to fulfil the definition of genocide.

The exercise has to do with a case which two states are trying to build before the International Court of Justice. These two states are Bangladesh (which is directly involved by the what's happening against the Rohingya because it is the state that welcomed the refugees) and the Gambia (an African state in a totally different geographic area). These states bring the case before the International Court of Justice on the basis of the Genocide Convention.

Three are the cases under which the International Court of Justice has jurisdiction to hear a case, and one of them is the existence of a complimentary clause in a relevant and applicable treaty text.

Thus, both Bangladesh and Gambia are trying to verify whether the ICJ's jurisdiction over the case between Bangladesh and Myanmar or between Gambia and Myanmar can be established on the basis of the compromissory clause included in the Genocide Convention, as before the ICJ they will claim that Myanmar is committing genocide against the Rohingya population that is part of the population of Myanmar.

However, Bangladesh had made a reservation to the compromissory clause of the Genocide Convention. On the other hand, Gambia has recognised the compulsory jurisdiction of the ICJ under Article 36(2) of the Statute of the International Court of Justice (the optional clause).

Convention on the Prevention and Punishment of the Crime of Genocide (1948)

Bangladesh – Declaration:

«Article IX: For the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case».

The unilateral declaration that that Gambia has made under Article 36, paragraph 2:

INTERNATIONAL COURT OF JUSTICE – Declarations recognizing the jurisdiction of the Court as compulsory

The States parties to the Statute of the Court may “at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court” (Art. 36, para. 2, of the Statute).

Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other States, which have accepted the same obligation, before the Court, by filing an application instituting proceedings with the Court. Conversely, it undertakes to appear before the Court should proceedings be instituted against it by one or more other such States.

The declarations recognizing the jurisdiction of the Court as compulsory take the form of a unilateral act of the State concerned and are deposited with the Secretary-General of the United Nations. [...]

Suppose that you are requested by the governments of Bangladesh and the Gambia to assist them and verify whether you are entitled to bring the case before the ICJ, under which basis, if, for Bangladesh, this reservation to article nine of the Genocide Convention is valid or is instead invalid. If this is enough to

establish the jurisdiction of a decision in a case between Bangladesh and Myanmar or if the recognition of the compulsory jurisdiction by Gambia is enough to establish the jurisdiction of the ICJ.

To answer these questions the legal basis of the ICJ jurisdiction, the validity of the treaty reservation and important extracts from decisions of the ICJ should be considered. The meaning and consequences of *jus cogens* and *erga omnes* should also be clear.

For the purpose of the exercise, it is important to consider the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and not focus on the criminal responsibility of the military forces that in Myanmar are committing the crime of genocide. We should rather focus on states obligations and the duties to prevent, protect and punish that are binding on states.

[The solution to the exercise is in a file on Moodle with the title of *The best 2022 Rohingya paper!* in the *Rohingya OPTIONAL GROUP EXERCISE* section]

THE ROHINGYA CRISIS

In March 2017, amidst escalating violence against the Rohingya, the UN Human Rights Council established an Independent International Fact-Finding Mission on Myanmar.

The Rohingya are an ethnic minority group who predominantly follow Islam and which reside in the Rakhine State of Myanmar.

The UN Fact-Finding Mission found that, against the backdrop of longstanding persecution and discrimination, from around October 2016 the Myanmar military (the “Tatmadaw”) and other Myanmar security forces had undertaken widespread and systematic “clearance operations” – the term that Myanmar itself uses – against the Rohingya.

The acts committed during these operations were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence, as well as by the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses.

From August 2017 onwards, such genocidal acts continued with Myanmar’s resumption of “clearance operations” on a more massive and wider geographical scale.

The “clearance operations” by Myanmar are estimated to have caused more than 700,000 Muslim Rohingya to flee and seek refuge in neighbouring Bangladesh and more than 10,000 deaths (see <https://www.unhcr.org/rohingya-emergency.html>).

Those who carried out the genocidal acts were officials and agents of the State of Myanmar and were acting on its behalf.

Multiple UN investigations have also underscored the genocidal intent of these crimes.

The UN Special Advisor on the Prevention of Genocide, Mr. Adama Dieng (from Senegal), based on his own fact-finding activities, including interviews with survivors who had fled to Bangladesh, stated: "Rohingya Muslims have been killed, tortured, raped, burnt alive and humiliated, solely because of who they are. All the information I have received indicates that the intent of the perpetrators was to cleanse northern Rakhine State of their existence, possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide."

Myanmar strongly denies the accusations of genocide and/or ethnic cleansing and rejects the findings of the various United Nations reports.

Myanmar is a member of the United Nations and ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in 1956.

The Genocide Convention contains a compromissory clause providing for the ICJ jurisdiction (Art. IX Genocide Convention: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute"). You can find here the text: https://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf

Both Bangladesh and the Gambia are member of the United Nations and have ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide respectively in 1998 and 1978.

Bangladesh, however, made a reservation to Article IX of the Genocide Convention which reads: "For the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case."

(see here https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en#EndDec)

Only The Gambia has recognized the compulsory jurisdiction of the ICJ under Art. 36.2 of the ICJ Statute (see here <https://www.icj-cij.org/en/declarations>)

In September 2019, as a group of leading experts in international law, you were requested to assist the governments of Bangladesh and The Gambia on the judicial strategy to adopt to put an end to the Rohingya crisis. Both States were in fact separately considering instituting proceedings against Myanmar before the ICJ (that is, there could be two separate ICJ cases: Bangladesh v. Myanmar and

The Gambia v. Myanmar) to ask the Court to order Myanmar to stop genocidal acts, prevent new acts of genocide and refrain from destroying evidence.

1) You should first establish whether the ICJ will have jurisdiction to hear the case brought by Bangladesh and/or The Gambia against Myanmar. (Remember that the ICJ jurisdiction is always based on the consent of the parties).

2) Once you have established whether the ICJ will have jurisdiction, you should demonstrate that being a party to the Genocide Convention is sufficient for a State to be entitled to ask the cessation of the alleged violations by Myanmar (this question concerns the standing of the applicant).

3) On the merits, you should try to demonstrate the responsibility of the State of Myanmar in relation to the violation of the obligations arising from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. (Remember that you are in front of the ICJ, not of the International Criminal Court, so you are NOT dealing with individual criminal responsibility).

Before providing your answer, please study carefully the following topics:

- the legal basis of the ICJ's jurisdiction,
- the validity of treaty reservations (read the extract from ICJ, Congo v. Rwanda, 2006 attached hereinafter)
- jus cogens/erga omnes norms
- the notion of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide

Extract from ICJ, Armed Activities in Congo (Congo v. Rwanda), 2006, paras. 64-70.

The Democratic Republic of Congo (DRC) invoked Art. IX of the Genocide Convention as the basis for the ICJ's jurisdiction.

Rwanda, however, had adopted a reservation to Art. IX of the Genocide Convention ("The Rwandese Republic does not consider itself as bound by Article IX of the Convention").

The DRC contended that Rwanda's reservation was invalid because incompatible with the object and purpose of the Genocide Convention and because it sought to prevent the Court from safeguarding peremptory norms.

Rwanda observed inter alia that, although the norms codified in the substantive provisions of the Genocide Convention have the status of jus cogens and create rights and obligations erga omnes, that does not in itself suffice to "confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations".

On Article IX of the Genocide Convention as the basis for the Court's jurisdiction, the ICJ affirmed the following:

64. The Court will begin by reaffirming that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and that a consequence of that conception is "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*). It follows that "the rights and obligations enshrined by the Convention are rights and obligations erga omnes" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 616, para. 31*).

The Court observes, however, as it has already had occasion to emphasize, that "the erga omnes character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29*), and that the mere fact that rights and obligations erga omnes may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.

65. As it recalled in its Order of 10 July 2002, the Court has jurisdiction in respect of States only to the extent that they have consented thereto (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 241, para. 57*). When a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein (*ibid.*, p. 245, para. 71).

66. The Court notes, however, that it has already found that reservations are not prohibited under the Genocide Convention (*Advisory Opinion in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, pp. 22 et seq.*). This legal situation is not altered by the fact that the Statute of the International Criminal Court, in its Article 120, does not permit reservations to that Statute, including provisions relating to the jurisdiction of the International Criminal Court on the crime of genocide.

Thus, in the view of the Court, a reservation under the Genocide Convention would be permissible to the extent that such reservation is not incompatible with the object and purpose of the Convention.

67. Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.

68. In fact, the Court has already had occasion in the past to give effect to such reservations to Article IX of the Convention (*see Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), p. 772, paras. 32-33; Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), p. 924, paras. 24-25*). The Court further notes that, as a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.

69. In so far as the DRC contended further that Rwanda's reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a State to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention. Rwanda's reservation cannot therefore, on such grounds, be regarded as lacking legal effect.

70. The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article IX of the Genocide Convention, this Article cannot constitute a basis for jurisdiction in the present case.

The Relationship between International and National Law

INTERNATIONAL LAW - Lecture 20 of April 5, 2022

The relationship between international and national law

> it's quite a political and technical topic => let me stress the fact that the relationship between international and national law or the reception or the adaptation or the incorporation are all synonymous that you can find in different textbook of international law

=> national law differs greatly from domestic legal system, it is something that is usually studied from the standpoint of the national domestic legal order

> class focus on the overall picture and with this overall picture then you should be able to find the domestic rule, those of the state from which you come from and understand how they apply in this particular case

The main issue is how International law is incorporated in national law? How this happens in all the different states that are part of the international community? how this happened and the 2nd step that really depends on each national legal system? What is the rank? What is the hierarchy granted to international rules within the domestic legal system

= how international rules are treated compared to domestic rules, once international rules have entered into the domestic legal system

> until now we have described different sources of international law and we're going to focus, later on, on fields of international law like immunity and state responsibility, always discussing them looking at the international sphere => and we have discussed relationship between customary law rules and treaty rules, but always looking at the international community

> we have not yet discussed on how international rules enter domestic legal system and this is what we are going to do

The international law is clearly dependent on states for its effectiveness => without states that are enforcing, implementing, abiding to international law rules, international law has no effectiveness > the domestic implementation of international law by every state is crucial => when we said that the prohibition of the use of force is an international rule of customary nature, of a treaty nature because it's written in Article 2, paragraph 4 of the UN Charter

> when we say that it has jus cogens value and it's also erga omnes obligation we're saying this, only looking at the international law sphere, but we still need to make this important provision under international law effective and how can this be done without incorporating this rule into their domestic legal system

> we aren't talking about the question that we have a number of states that always or quite often violate the prohibition of the use of force => we have seen armed conflict everywhere in the world since the establishment of the United Nations and the entry into force of the UN Charter => but we are looking at how this rule is made up, received, absorbed or incorporated into domestic law

> there is a little hope that international law will work if states don't direct the authorities, their organs their population to behave in a way that is compliant with international law obligations => for international law to be effective really needs states to recognise international law to make it enter their own national legal system

How this is done? International law doesn't say or doesn't oblige states to do this => incorporation or adaptation in a specific way, international law leaves states to decide how international law is giving effect within their legal system = states are free

=> this is why it changes for every state and every domestic legal system

What is important is compliance with the rules of international law, but how? In which way this is achieved is left to the sovereignty of states in the international community => the only limit to this freedom is that the states have to behave in good faith

=> but this obligation of good faith arises from one of the founding principles of international law, which goes under the Latin world: *pacta sunt servanda* = the commitments undertaken by states at international level should be satisfied in good faith

> this finds expression in Article 26 of the VLCT: "every treaty in force must be performed by state parties in good faith"

> perform means also that the treaty obligations, but also customary law obligation, the principle applies also to customary law => should be implemented and incorporated into domestic law in good faith

> the 2nd limit. And this is (the only limit that we have to the freedom that states have) to choose how to incorporate international law into their domestic legal system.

> the theories that have been used to describe the relationship between international law and national law are different

> national law also fulfil a very specific role in the formation of international law => we know this already because when we discuss customary law, we mention the fact that to establish whether we have state practise and opinio juris, we should also look at the domestic legal system and the legislative acts adopted by states = the declaration made by organs of state, by members of the government

=> international law also has a role to come and contribute to create international law rules, what cannot be done by national law is to be used as an excuse to avoid defending or implementing an international law obligation

> if we have a treaty establishing a general prohibition of torture, a provision that amounts to our jus cogens rule, and we have a national law in a domestic legal order that allows the torture that allows the military authorities of a state or the police forces to exercise torture against certain prisoners to counter, for example, terrorist attacks

> we have a treaty on one side, on the other side we have a national piece of legislation saying that in certain circumstances torture is allowed => can the state rely on this piece of national law to prevent being found responsible of a violation of the treaty or of a jus cogens rule?

> this isn't possible: in national law, domestic law can never be invoked to justify the failure to perform a treaty obligation => this is what is written in Article 27 of the VCLT, and this applies to every sources of international law

= the corollary of the *pacta sunt servanda* principle is the prohibition for a State "to invoke the provisions of its internal law as justification for its failure to perform a treaty obligation", as laid down in Article 27 VCLT: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*"

> national law can never be relied on by a state to avoid its own international responsibility that arises from a violation of customary law rule, of a treaty rule of our jus cogens rule or erga omnes obligation

> national law is no excuse never => states have a duty to comply with their international law obligations, and therefore they also have a duty to come or better to incorporate these international obligations into their domestic legal system => the domestic legal system must be consistent with the international law obligations they have assumed

=> allowing states to invoke their national law as an excuse for a failure to implement an international obligation would amount to allow every state to unilaterally and discretionarily determine how much they are bound by international obligation => this will be the end of the international legal system

= this is a very important rule of international law

the theoretical difference: we have a unique legal system where both international and national law are part of the same legal order? Or are we in front of two parallel legal system, one that exists on the international level and another one that exists at domestic level?

> these 2 theoretical ideas of how international law and national law relates to each other are called "dualism" and "monism" and they describes the relationship between international law and national law

> we have these 2 different approaches which can be divided basically in 2 different groups => some states prefer to follow a dualistic approach, some other states prefer to follow a monist approach => but this differentiation isn't always crystal clear, the 2 approaches sometimes are very often mingled together so
=> no national system however perfectly fits the model of either monism or dualism, the picture is much more blended

Dualism

> under the dualist approach international law and national law are parallel legal orders and they differ fundamentally from each other, it's impossible for international law to be part of domestic law

> diamonds are small design which help understanding: we have 2 separate different legal orders. International law on one side and national law on the other side, and they differ in a fundamental way from one another

=> because of these differences, international law could only have effect in the domestic legal order if it is transformed into national law

> national law is adopted by the legislature, by a National Assembly, under a certain constitutional procedure that is defined by every state => following our process that most of the time is a democratic process where people, the population and citizens of the state are represented in the Parliament, for example

=> they contribute to the formation of national law, international law instead is negotiated by states = basically it's negotiated by the government of state

> in most of the negotiations applying under very secretive procedure, there is not much consultation at parliamentary level, before signing of treaties => they are less democratic in nature than national legislations.

=> this is 1 big difference between national law and international law => a 2nd big difference is that national law applies and governs the relationship between the state and individuals and also the relationship between individuals => while international law aims at regulating the relationship between states

=> only in the in a few number of cases the international law also creates rights and obligations for individuals
=> example of human rights law, or International Criminal law when we are talk > the only way to make international law effective in this case is for national law to incorporate international law rules into the domestic legal system => international law needs to be transformed into national law

=> this can be done in 2 different ways:

(1) by adopting a national piece of legislation that => we have a clear incorporation of a treaty provision, an entire treaty into a bill, into an act, into a legislative decree => the source of domestic law to be used for that purpose is left to the state to decide

> every state can decide whether to provide an application of given treaty through constitutional law, through bill or other sources of domestic law => but we have in this case a transformation and incorporation of what was in the origin an international law source that is transferred, copied and pasted into a domestic piece of legislation

(2) 2nd methodology that can be used to translate, to transform international law into domestic law is a technique which is called "*renvoi*" (french word) is a way to link the domestic legal order with the international one

> in our example about the Convention of Torture, we will not have a bill that copy paste the text of the Convention on Torture, but we will have a bill that makes reference to the treaty text, to the Convention => so that the text isn't translated or copied-pasted in a piece of domestic law but still exist in the international legal sphere, but we have this link

=> the bill will basically only say: this will provide execution of the Convention against Torture in the domestic legal order of state x => making reference to the treaty text, in this way it will automatically made the domestic legal system adapt to the Convention on Torture and everything that happens on the international legal sphere to the Convention on Torture

> in the 1st case, if we have a reproduction of the treaty text into our bill, every time the Convention is amended or modified, the bill will have to be amended and modified accordingly

> if we have a *renvoi*, if we have only this kind of link, the link will stay whatever happens to the Convention on Torture at the international level => if the Convention is amended, the bill does not need to be amended at the same time, because reference is made to the Convention as it is binding in force at international level

=> this makes national law more flexible to the evolution, to the modification that happens at international law level => the *renvoi* is a technique to adapt national law to international law, which is more flexible and provides more advantage for those states that want to be up to date to what happens at international level

> dualism has also a drawback, has some very important shortcomings: in our example about the Convention against Torture, what we will have is a bill in national law => the Convention will acquire the ranking of a bill into national law

> successive bills will be able to amend prior bills => we have the *lex posterior* principle that applies, and we also have the question of the hierarchy of domestic legal sources => a bill is hierarchically inferior to constitutional law, for example

=> we have a problem with ranking of domestic legal sources has it happens always within a domestic legal system => if we decide to implement, to incorporate into a domestic legal system a treaty with a constitutional law we have a certain ranking of that piece of legislation

=> if we decide to do the same without regulation of an administrative nature, the hierarchy will be much lower, so it will be not easy to solve conflict between the administrative regulation implementing the Convention against torture as compared to a decree laws, bills, constitutional law, to the constitution itself

=> this creates a number of issues, but the ranking really depends, within the domestic legal order, on each state and how it decides to incorporate international law inside its system

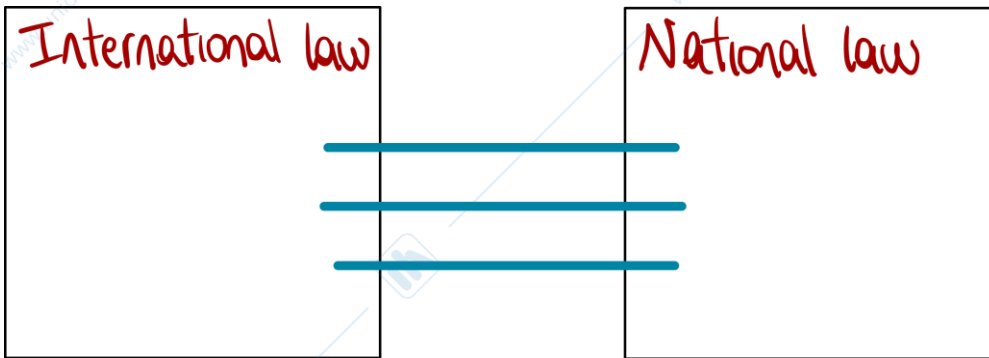
> dualism and this way of incorporating international law into national law, certainly provides clarity to the interpreters because all the rules that are binding on the states are reformulated in a

way or are transposed into domestic legislation

> so that for example, Italian citizens will only have to look at Italian domestic legislation to know also what are the international obligations binding on their own states

=> this is the pro of dualism => dualism has also a drawback, that is the question of the ranking of international law obligation within this state

= but this is one of the possible theoretical solution that can be adopted by states (the 2nd approach is monism)



Monism

> it sees international and national law as part of the same international legal order in which international law is at the top and national law receives international law => we have a top down approach in this case = monism can be described in this way

> under the monist approach: international law is automatically incorporated into national law => we don't need a domestic piece of legislation to transform, to receive international law

=> international law becomes automatically part of the domestic legal order

> the 2, international and national law are only 2 different manifestations of the concept of law => we have a unique legal system in which international law is superior to national law

> international law doesn't need to be transformed into domestic law => in case of conflict between an international law rule and a national law rule, because international law is superior, the international law will prevail

= we have this hierarchy between international law and national law

> if we imagine a conflict between an international rule and a domestic piece of legislation the judge at domestic court, that is called to assess which one needs to be applied to the case => at end will provide supremacy to the international law provision over the domestic piece of legislation

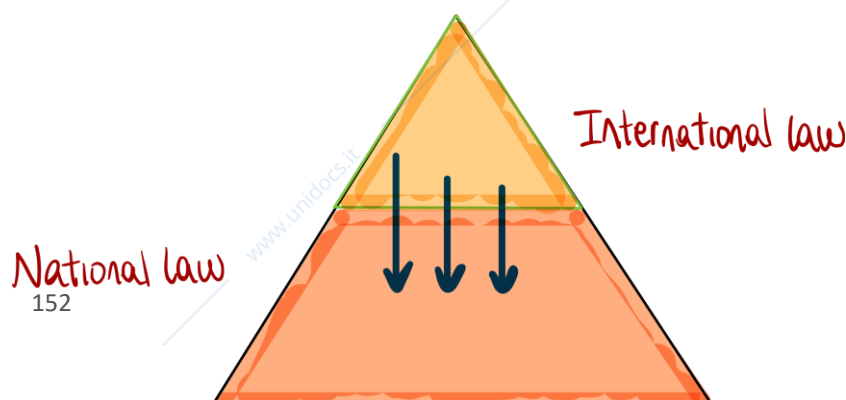
> if the same happens in a state which follows the dualist approach: the judge will need to verify whether the international rule as entered, the domestic legal order and established the ranking of that international law rule within the domestic legal system

=> it will not automatically prevail, because it will have to apply the hierarchy of sources into domestic law and we will also have to rely eventually on the *lex posterior* principle

> these 2 theories of monism and dualism are not really applied in such a clear cut way in the International Community today => the states have mixed the different aspects of monist approach and the dualist approach in different ways

=> we have a blend, most of the time, of the dualist and the monist approach, and this blend is sometimes described as a pluralist approach

> for example in most of the states that have a preference towards a monist approach, where



we have said that international law is superior to domestic law, this supremacy is not always entirely recognised, especially when international law rules create rights and obligations for individuals => in this case the number of states that distinguish between self executing and non-self executing provisions or rules => we can also refer to this kind of provision as provision which have direct enforceability or direct effect

> even in states that prefer to follow the monist approach: not all the international law provisions can be always invoked and will always automatically become enforceable before domestic courts

> the main difference is between international law provisions which provides states or the organ of state with rights and obligations, as compared to international law provision, which provides rights and obligation, but especially rights to individuals

> if a treaty provision provides, establishes a duty or a right to which the state itself is entitled, this kind of revision will be recognised to have direct effect or self executing nature within the domestic legal order

> when the international law provision, instead, will provide rights to individuals, not states or organ of state, even monist state tend not to recognise the direct effect or direct enforceability or self executing nature of those international treaty rules

> for example monist states tend to recognise the self executing nature of treaties when they establish clear and precise obligations on states and organs of state => not when these provisions have a programmatic nature or when they can be enforced only if there for example, an organ to be established to make them enforceable within this state

= only those provisions that are really clear and precise enough to provide for their immediate and direct application

> for example, the question about self executing and non-self executing nature of treaty provisions becomes very important when it comes to human rights treaties

> if we think about civil and political rights: even monist state tend to recognise that civil and political rights are included in treaty provisions which have self executing nature => individuals within the state can immediately invoke, even before a domestic hold, their civil and political rights established under an international human rights treaty

> we are talking about civil and political rights: they are precise, clear and they can be immediately enforced => the same doesn't apply to economic, social and cultural rights, because these rights have, instead, more a programmatic nature => they entail a positive duty on the state to act, to do something => they not only impose obligation on the state not to do, not to limit, not to constrain their individual rights, they require the state to do something, to enact economic, social and cultural rights

=> they are more of a programmatic nature, they cannot be directly enforced => individuals cannot go before a court and ask the immediate application of economic, social and cultural rights, because they do not have a self executing nature

This is the stance adopted, for example, by the USA for what concern the 2 covenants: the 1st on civil and political rights and the 2nd on economic, social and cultural rights

> they aren't immediately self executing within the US domestic legal order => the difference between self executing provisions and non-self executing provision becomes central always when we need to assess whether an individual can claim before a domestic court, domestic judge, to have a right that only derives from an international law provision

> there is a big difference in this situation, if the state follows a dualist approach, or if the state follows a monist approach = there is a huge difference

> example about the difference between self executing and non-self executing provision: the difference is between international law provision that provides right and obligation for states, their organs and institutions => and those international provision that establishes rights for individuals, especially human rights

> as an example the Vienna Convention on Consular Relation: establish a number of bilateral and reciprocal obligations on state parties => it's a convention that concerned the field of the diplomatic relationships between states

(I have my consulate in your country and my consulate in your country benefits from a certain number of privileges and immunities and you commit to protect my Council and my consulate in your state, and the same goes in a reciprocal way in the other way around)

= it's a convention that establishes reciprocal obligations between states for the protection of Council and consulates, that follow on state organs

> this convention establish rights and obligation on states and state organs => this is the biggest part of the Vienna Convention

> these have direct effect and direct enforceability = they are self executing

=> it's different from what happens in case of international human rights treaties, especially when these human rights treaties contain programmatic provision, like the duty to provide for the cultural protection of something

=> it's a duty that is imposed on the state to act in that direction, but it's difficult to see a self executing provision that entitle an individual to have its right immediately protected, safeguarded and satisfied.

> to make an example of a national legal order we can discuss the US legal system, which is a mix of the monist and the dualist approach, because the American Constitution seems to subscribe to the monist approach

=> because it says Article 6, Section 2 that all treaties made under the authority of the US shall be the supreme law of the land and the judges in every state shall be bound by this law

= it really seems to make reference to a unique legal system where treaties, as part of international law, automatically enter the US legal order as provided by the monist approach

> for example, if we think about what the US did when the International Covenant on civil and political rights was ratified by the US => this gives us the idea that the US tended more recently to subscribe to the dualist approach, because the US declared (civil and political rights = something that usually is recognised as self executing) that the provisions of the International Covenant on Civil and Political Rights are not self executing

> the Covenant, the Treaty in itself does not immediately or in an automatic way, create rights that are directly enforceable by US citizens or people subject to the US Jurisdiction before US courts

> what is written in the Constitution seems to make the US subscribe to the monist approach, but when it comes to the ratification of human rights treaties by the US the trend is totally different, and the US are very cautious in having international human rights treaties and convention being considered self executing and directly enforceable within their own jurisdiction without an intervention of the US legislature

=> not automatically, but they might become enforceable because the Congress decide to give them this authority, otherwise they will be considered, as declared, non-self executing.

> we have here reference to the Vienna Convention on Consular Relations: the great majority of the its provisions concerns the relationship between states, because the aim is to regulate diplomatic relations, in particular consular relations

=> it regulates the rights and duties of council when they are serving their own country abroad and in particular the immunities of councils

Article 36, paragraph 1 of the Convention also established something else: this provision provides when the national of a state is arrested, putting in custody, or detained in a state, he has the right to communicate with its own consulate

> the Vienna Convention established rights and obligation on states, but its article 36, paragraph 1 seems to also establish, create a very peculiar and specific right on persons for which are arrested or detained in a foreign state

Exercise/example

A case that really happened in the United States: it concerned two brothers of Mexican nationality and at the beginning it only concerned these two brothers, then we had a 2nd case with a number of other Mexican citizens, which were living in the US and were arrested and accused of murder in Texas.

> this Mexican citizen was, therefore, arrested and red is Miranda rights = you have the right to remain in silence => it comes from a famous case: Miranda v Arizona, which dates back 1966

> he was ready his Miranda rights and he was advised that he had a right to remain silent and he had a right to a lawyer => this guy, not really wisely, decided to confess the murder, but nobody ever mentioned or informed this guy that he had the right to communicate with his consul, the Mexican consul in taxes

> nor, on the other side, the consul was informed of his arrest, and in the true case this Mexican was later prosecuting in front of the Criminal Tribunal of Texas => he was condemned to the death penalty

=> and he was in the prison waiting for that sentence to be realised

> you are a lawyer, and you start working on the case and you realise that your client was never given the possibility to communicate with its Mexican consulate => but the question here really goes back to the monist/dualist approach, because we have a treaty convention which has entered the US national legal order, but it's a treaty which mostly provides for state obligation only in this letter B of Article 36, paragraph 1 seems to confer a right to an individual.

=> we really need to know whether this Mexican national under the US legal order has an individual right which can claim => it was breached by US authorities

=> that reopen everything, go back and try to avoid that penalty

> but is the question the same if they have subscribed to a monist or as a dualist approach, and does the Council convention provides for a self executing right? Is this article a self executing provision or it's not what?

But what kind of systems are we talking about this?

> if we refer to a monist approach we should look at whether the rule is self executing or not, and we, for sure, know that the rule will be self executing if it binds states or state organs => we aren't sure whether we are talking about a self executing rule, because it concerns a right provided to an individual

=> even if the rule seems to be quite clear, precise and not of a programmatic nature

> the answer really depends on whether we are in front of a dualist approach or a monist approach

- if we are in front of a dualist approach: we need to know whether the consular relation Convention has been transformed into domestic law => the answer lies on is there a bill? Is there a law? Is the decree law or something else that gives a effect to the consular relation convention inside the US

- if we are talking about a monist approach: we need to distinguish between self executing and non-self executing rights => in a state which adopts an entire monist approach, this provision will probably be considered self executing because it's sufficiently clear and precise

> but for the US that have this mixed approach, beat the Constitution trying to seemingly following a monist approach, but then the practise of the US later on, following a dualist approach, especially for what concern human rights treaties

=> to the point that the US said that the International Covenant on Civil and Political Rights does not contain self executing provision => you can expect the US judges to have considered this provision non-self executing

> they kept following the same stance in this case and they never recognise these Mexican guys the right that the Consular Relation Convention provided them with the right to communicate with the Council => they never reopen the case

=> the two Mexican guys were one executed to death penalty and the other was still waiting when the ICJ decided upon the case => the ICJ recognise, instead, that the US violated the Consular Relation Convention

=> even then with a judgement of the ICJ, the US proceeded and executed even the second brother => there was no reopening of case even violating the judgement, the decision of the ICJ

> we see how the relationship between international law and domestic law might become complex as a result of the theoretical approach that every states adopt => this is a quite interesting case to show the differences between the dualist and the monist approach

=> exactly for the interpretation given to Article 36, paragraph 1 of the Convention and the impact the dualist/monist approach can have on the life of individuals.

> for the US, this was also a political decision, they didn't want to have to reopen a number of cases against foreigners of all the countries of all over the world

LaGrand Case

The Vienna Convention on Consular Relations, 596 U.N.T.S. 261, spells out the rights and duties of consuls when they are serving their own country abroad. Article 36, para. 1 of the Consular Convention also establishes that:

With a view toward facilitating the exercise of consular functions relating to the nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the

same freedom with respect to communications with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Your client, a Mexican national living in the U.S., is accused of murder in Texas. He was arrested and read his Miranda rights (*Miranda v Arizona*, 384 U.S. 436 (1966)) under which he was advised that he did not have to say anything and that he had a right to a lawyer. Your client, nonetheless, confessed to the murder.

Both Mexico and the U.S. are parties to the Vienna Convention on Consular Relations.

The defendant was never told that he could get in touch with the Mexican Consul in the district where he was arrested, nor was the Mexican Consul informed that the defendant had been arrested.

You would like to raise the lack of Consular Convention notification as a defense in your client's trial.

Does your client have individual rights deriving from the Consular Convention?

This question does not address the issue of the appropriate remedy for violations of such rights.

Does the answer change if the U.S. subscribes to a monist as opposed to a dualist approach?

Immunity

INTERNATIONAL LAW - Lecture 21 of April 6, 2022

IMMUNITY

In International law, immunity shields or protects states as such and their officials, as well as international organisations and their officials, from the exercise of jurisdiction of other states. = it's a protection against the exercise of jurisdiction of another state, especially the exercise of adjudicatory or enforcement jurisdiction.

→ Do you know how to define jurisdiction and how many different forms jurisdiction can have?

What is jurisdiction? What falls within the scope of a state jurisdiction?

The power to make law, the power of judges and courts to adjudicate:

- one side: the power that each state has to declare what is the law in its own legal order or the power to prescribe what is the law, and to what kind of subject these laws apply ("prescribe", because the power to make law is often defined as "*prescriptive jurisdiction*").

→ The power to regulate, to state, to define the law and regulation applying within the state jurisdiction and so the lower regulation that applies to natural and juridical persons that fall within the state jurisdiction which is broader than the state territory.

- on the other side: the power of the courts of the national judges and tribunals to apply the law to conduct of certain subjects that a man and this power give rise to "*adjudicatory jurisdiction*".

= the power to make the law + to apply the law.

- the power to ensure compliance with the law: after the courts or tribunal have adopted a certain decision, this decision should be enforced. So these are two different phases in the process:
 - I. Court says what is the applicable law and
 - II. decides a dispute/a claim in a given direction, and this gives the winning party, the applicant or the respondent, a title that can be enforced, and that can be executed. And therefore this third type of jurisdiction is called "*enforcement jurisdiction*" or "*executory jurisdiction*").

→ Immunity is concerned not with the prescriptive jurisdiction, but has to do with adjudicatory and enforcement jurisdiction → it's a protection granted to States and their officials, then as well as to international organisations and their official not to be subject to the adjudicatory or and/or the enforcement jurisdiction of a foreign state.

Example. Italy cannot be brought before courts of the United States nor Italian Public officials, members of the government, The Ministry of Foreign Affairs can be brought before the course of Germany or France or whatever other country.

= neither the state itself nor its own officials. The same happens for international organizations and their staff members at the higher level.

You cannot promote a claim here in Italy before Italian courts against conduct that is put in place by the United Nations, for example. Immunity has to do with the adjudicatory and or enforcement jurisdiction, but before explaining this better.

Jurisdiction is broader than the state territory, because every state can exercise its jurisdiction, one of the three mentioned before, If a certain Nexus a certain link exists with its own legal order. And these criteria are:

- nationality:

Ex. Italian citizens are subject to Italian jurisdiction.

- the territory:

Ex. If you are in Italian territory, you are subject to Italian law, you should comply with Italian law and you are also subject to enforcement jurisdiction in Italy. So even if you are a foreigner, you will be obliged to pay a fine, if you park your car on zebra crossing.

These nationality and territoriality are quite simple criteria to understand, to establish the jurisdiction of a state and they are considered to be of a customary international law nature. → every state in the world is recognised to have jurisdiction over conducts that take place in its own territory or to conduct that are made by its own nationals.

On top of that, we have other criteria on which there is no consensus at international level, so it remains to be demonstrated that they are recognised as customary law rules: passive personality principle and the protective principle:

- the passive personality criteria is used by state to claim jurisdiction over foreign nationals for offences committed abroad (neither nationality neither nor territoriality) that however negatively affect their own citizens.

This is especially used for criminal jurisdiction.

Ex. the United States, which is one of the countries which has relied most on the passive personality nexus. The US used the passive personality criteria to prosecute a foreign national that abroad has committed a crime against my own citizens.

When can this happen? With terrorist attacks.

But that's being used by the US to establish their own jurisdiction to try and prosecute terrorists which had acted abroad.

→ No nationality and no territoriality is enough, because the offender is a foreigner and because the act was committed abroad. But because these terrorists attacks has killed or injured US citizen, the US claim that they can establish their own adjudicatory criminal jurisdiction.

- the protective principle: in this nexus we have a foreigner, an "alien", who has committed an act that is prejudicial to the state interest.

This is not as before, because it has not affected a national right. But in this case, it was considered prejudicial against the interests of the state itself.

The conduct doesn't harm or affect the interest of a national, of a person, natural or juridical person, but the interest of the state.

For example, It is used to establish jurisdiction, in the case of sanctions against a foreign state or foreign nationals that act completely abroad, but they come, they act, or they adopt a conduct that is against the interests of the state.

There is not even a need that the conduct affects US citizens. It is enough that the conduct is considered against the interests of the United States.

Nowadays, there are a lot of discussions about sanctions and this is one of the bases used by the United States to establish their own jurisdiction against foreigners abroad that do something that they consider against their own national or security interest.

Apart from the traditional Nexus for establishing jurisdiction, nationality and territoriality, we have other criteria that are open to debate, they can be used to enforce, especially the last one, the protective principle, to enforce the jurisdiction of the United States on something that happens entirely abroad and doesn't really seem to have any link, any direct attachment or link with the United States.

IMMUNITY

It is a **procedural** barrier, a shield. It's a barrier to the exercise of adjudicatory and/or enforcement jurisdiction by a foreign state.

Immunity doesn't mean that the subject who is protected by immunity is totally exempted from abiding to the law.

This shield only protects the subject from being brought before the courts or tribunals of a foreign state.

There are two other avenues that remain possible:

1. The subject can be brought before its own national courts, if this is possible; 2. It can be brought before international courts or tribunal when this is possible. → "when this is possible", because we sometimes have a sort of short circuit, cases in which, because of immunity, there is no avenue available for bringing to justice the state or the organ or the International Organisation who has committed the violation of international law.

- The immunity, sometimes, gives rise to a situation in which the victims are deprived of the right to access a court.

immunity from adjudicatory jurisdiction prevents national courts from judging or deciding a

dispute against a state or a foreign official or against an international organisation and their higher ranking officials.

- immunity from execution or from enforcement jurisdiction bars/excludes the adoption of measures, law of constraint of any type, like arrest, or the adoption of measures of execution over the property of a person, like seizure, or other measure of this type.

= measures that attach the property of a person to pay, for example: damages or reparation. Immunity excludes that foreign courts can judge upon a dispute and then also enforce the law through execution or enforcement measures.

Other type of Immunity:

Immunity in other scenarios: in national cases apply to, for example, members of the Parliament or members of the government. Every now and then in every country there are issues concerning the immunity of a member of the government or of the national parliament. → this is another type of immunity, which is granted by national law. Remember that the two are different, because they are established by a separate set of rules.

Immunity under international law is one thing and the immunity granted under national law is another thing and fulfills different purposes.

The main purpose, the reason, the rationale of immunity, in all its different forms under international law, is to protect every state from the interference of other states → it is a very ancient rule. In international law, the one about immunity, which sort of concretize/give effectiveness to the equality of the states, since all the states are equal in the international community they cannot be brought to justice in front of the judicial organs of another state. They are peers, they are equals, so a foreign state cannot judge upon the conduct of its own peers, its other subjects that are equal to each other.

The main purpose of immunity is to protect this equality of States and to protect States and their officials, as well as international organizations, from any sort of interference, pressure, coercion that can result in the fact that they are put in front of the courts of another state.

SOURCES OF IMMUNITY

The sources in international law of immunity are multiple:

- most of the law of immunity under international law is recognised to have *customary law nature*.
- *there are some treaty rules* that have not yet achieved the status of customary law rules.
- And very importantly, we also have a number of *national laws* that become very important when it comes to the application of rules about immunity.

[We will analyse in particular some of the provisions contained in the UN Convention on the Reduction of Immunities of States and their property in this first class. And today we are going to focus specifically at the immunity of states as such. (Ex. The immunity of Italy. The immunity of Burundi, the immunity of Peru)]

IMMUNITY OF STATES AS SUCH

When a state can be brought before the courts of another state?

When Italy can be brought before the courts of the USA or before German judges or of another state judges?

Most of the time this happens when an organ of state, so a public authority, someone exercising sovereign functions has undertaken a conduct, an act, but also an omission, that has created a damage to a foreign nation.

When we talk about immunities of state, therefore we are not talking about the responsibility of, for example, police forces that have tortured foreign nationals, but we are talking about the responsibility of Italy that is responsible for the conduct of an official organ of state, like a member of the police forces and is called to pay damages to the victim of torture before the courts of nationality of the victim of torture.

Real example: UK citizen was subject to torture in one of the Middle East state, he survived and he came back to the United Kingdom and he submitted a claim before UK court against the state which was responsible for a torture being committed in its own territory, to ask that state to pay damages and reparation.

So that the state was brought before UK courts and was supposed to defend itself to prove maybe that its military or police force didn't commit torture that it did whatever it could to prevent this to happen or at least try to defend itself in any way possible.

What did the state do? It claimed immunity, it was protected by state immunity, because it could not be brought before UK courts. → This is the situation we are talking about today. = the state is called to answer for the conducts that have been undertaken by one of its organs, one of the persons that can exercise in the name of the state, some sovereign functions/authority.

This mostly happens in case of torts, but not only.

When we talk about state immunities we are in front of a field of international law which has evolved a lot since the 19 century:

- from the 18th century until the Second World War, states were considered to have *absolute immunity* from the jurisdiction of other states = state could never be brought before the courts of a foreign state, of a peer.

- Now, after the Second World War, is a period of time under which it is everywhere recognised that states can only benefit from a limited immunity from the jurisdiction of others. (*restrictive immunity*)

But after the Second World War, the law at international level started to change also thanks to innovation in the jurisprudence of some States and in this case in particular the jurisprudence of Italy and Belgium, they started a trend that then, after a while became the prevalent trend, so not a trend anymore, but it transformed in a new customary rule → now the customary rule that we are called to apply is the one that recognises state to have only a restrictive.

Why do we move to a situation under which, in certain cases, states can be brought before the courts of other states?

The change has to do with the fact that, especially after the Second World War, the number of instances/number of cases in which states started to act as a private person, especially for what concerns trade and other economic commercial relations, increased enormously. And commercial transactions/relations between states and foreign persons (natural or juridical persons) increased enormously, so that it was recognised that these foreigners should be protected against the abuses of state. Why?

One thing is to implement the sovereign equality of states, the principle of the sovereign equality of states. But this cannot be done to the detriment of individual rights. So if the states start to enter into contracts with foreign companies, for example. Why these foreign companies shouldn't have a right to claim a breach of contract before their own courts and tribunals?

= This is the reason why customary international law changes and moves from absolute to restrictive immunity.

Today we have a number of exceptions to the rule of state immunity.

Example: Italy that enters into a contract with a foreign company which provides Italy with photocopying machines for all the public offices.

Why in a case like that the foreign company, if Italy, doesn't pay could not claim a breach of contract before its own courts?

In this case, the rationale is that Italy is acting not in the exercise of sovereign functions or not exercising sovereign powers (If it was it should have been protected by immunity). But since Italy is acting like any other private party can, entering into a contract of this type, then it has no need to be protected by the rules of immunity.

→ The distinction that is made under the restrictive immunity doctrine is between sovereign acts (and often you find a reference to the Latin words: *acte jure imperii*) as opposed to commercial/managerial acts (in Latin: *acta jure gestionis* or *privatorum*).

The difference is basically made between:

- the cases in which the state acts as a sovereign, fulfills its own duties or powers as a sovereign
- the cases in which instead the state carries out activities that can be carried out by any other private party, especially those transactions that have a commercial or managerial nature.

The rule is immunity and then we have a number of exceptions in all the cases where the state carries out commercial or managerial acts.

And all these rules, all these exceptions have been codified by the International Law Commission in a codification treaty: ILC Codification Treaty which was adopted by the General Assembly of the United Nation back in 2004.

And therefore we have the most important piece of international law about state immunity is this convention: the United Nations Convention on Jurisdictional Immunities of State and their property.

Then we also have other convention, for example, we have a European Convention on State Immunities which dates back 1972, but only has no more than 10 state parties, so it's not really as important as the UN Convention. Even if also, the UN Convention was not really successful → this is a field in which the codification efforts of the International Law Commission are considered to have failed most.

This is a codification convention, but only a few of the provisions that you find within this Treaty text are unanimously considered to be customary law rules.

= this is one of those zebra conventions or Zebra agreements where we have some provisions that are considered to be customary in nature, and some provisions that keep only a Treaty law nature.

And then, as I mentioned before in this field of state immunity, we also have a number of very important national laws, even if this is something that we are not used to here when we talk about international law. *Why are there so many states that have adopted a national piece of legislation to regulate the immunity of foreign states before their own national courts?*

Because the customary law nature of this field is not clearly established, in fact we have so many doubts about what is customary and what is not, that many states have considered it necessary to preserve the stability of their international relations with their peers, to have a national law that regulates or clarify what are the rules about state immunity that need to be applied within their own jurisdiction.

And here we have a difference between the civil law system and common law system:

- most civil law states prefer to rely on customary international law. So, almost always no piece of national legislation.
- Many other common law states have a bill, which it is often called "Foreign Sovereign Immunities Acts"

Ex. We have an SIA Act in the United Kingdom. We have it in Australia, in USA and in all the other common law countries, in order to clarify what is the applicable law within their own jurisdiction.

The UN Convention, the European Convention, some bilateral treaties that also exist, all these national laws, all agree on the fact that the rule applied is the restrictive immunity. So the general rule is absolute immunity with a number of exceptions.

EXCEPTIONS:

- the first case in which a state cannot claim to have immunity, cannot invoke immunity, is when it has expressly or implicitly waived immunity. So this is the classical case is a waiver, a renunciation to immunity. This can be formally done, for example by an international agreement or even in a contract, or this is more contentious, in an implicit way.

Typical risk for a state is:

Ex. Italy is convened before US courts and Italy sends a lawyer to take part in the very first phase of the proceedings without saying anything about its immunity, without putting first the defence that Italy is

invoking state immunity. If it fails to do so as first thing in the procedure, Italy has implicitly waived its own immunity. Sometimes it happens that states just forget. Article 8 describes the effect of participation in proceedings.

The most important exception to the rule of absolute immunity of states is the commercial exception which is the very reason that prompted a change from absolute immunity to restrictive immunity.

So here the UN Convention and also a number of other provisions in the Treaties and in the national pieces of legislation mentioned before try to distinguish a commercial act from a sovereign act: what should we look at to distinguish a sovereign act from a commercial act?

A transaction that could have been entered into also by a private company.

for example: If a state buys weapons from a foreign company, is that a commercial transaction or a sovereign transaction?

Even if it's traded, so we will have a private law contract, (the trade is made through an international contract or a procurement bill), if we look at the nature of the transaction, it can also be considered a sovereign one, because what is the purpose of this transaction? If a state buys weapons, it has probably done it for national security, to provide weapons to the military sector → it was fulfilling in this way a sovereign function.

If you look at the nature, it's a contract, it's a commercial transaction, it could be something to which immunity does not apply, but if you look at the purpose of the transaction in this case, and we said weapons, it is sovereign in nature, because it will fill one of the basic functions of a state which is its own security and military defence.

You see that distinguishing between sovereign acts and commercial transactions is not always easy.

What did the UN Convention and other conventions, like the European one, and the national laws, do? They tried to combine two different criteria to establish what a commercial transaction is. They provide a list of transactions that are typically considered to be of a private nature for which the state is not entitled to invoke state immunity and on top of that they try to establish some more general criteria.

Looking at the Article 10, we have some elements that have to be coupled with the Article 2, the article about definitions and the use of terms, where a contract or a transaction is considered: a commercial transaction on the basis primarily of its nature, but as a complementary general criterion, also, the purpose of the contract should be taken into account.

So in the example done before: the nature is a commercial contract and the purpose is a sovereign act about the purchase of weapons.

Relying on the nature or on the purpose can really make a huge difference and this is one of the provisions of the UN Convention, which is not considered to amount to customary law, because some states prefer to rely on the nature of the transaction, some other states prefer to rely on the purpose of the transaction.

For example: case of a cable car crash on the mountain of the Cermis in the end of the 90s. What happened then? There was a group of tourists taking a ride on the cavaliers cable car, they were on vacation and ready to climb or ski up the mountain.

Near this area of the Italian Northeast territory, there is a military base of the United States from which military flights always take on for training, in Aviano. Those military forces of the United States are there, because they are also part of NATO forces and the Aviano base is also used for training. US pilots do this ordinary training flights, but that day they decided to show that they were able to fly at a very low altitude

and did some crazy exercising here. They were flying solo that patted the cables of the cable car. The car crashed and a number of people died, a huge number of people died in that accident.

So we were in front of a situation in which we had. U.S. military forces on Italian territory that because of negligence at a minimum, killed a number of people, not only of Italian nationality, but there were also foreigners. The parents of the victims decided to ask damages to the United States before Italian courts.

This case is not a criminal one, it has nothing to do with the criminal responsibility of the pilots. This is a separate issue.

The case was only about getting reparation, getting damages from the United States. These military forces are organs of the state, so the state in the end is the one who has to pay damages for the conduct of its own officials.

But you are in the United States and you are in front of Italian judges.

Do you claim immunity? Obviously, you are claiming immunity, even if the negligent conduct of the pilots resulted in damages and injuries to people, even if what happened, this still remains a sovereign act (flying military planes training of military forces still remains a sovereign act, for which no exception to immunity can be claimed).

→ Immunity is a very important shield for the state and you start to understand how much this can affect the ability of victims, in this case, to get reparation, to obtain damages, because those people will not be able to obtain anything before Italian course and they had to try to obtain something going before US courts. But this obviously has a huge cost. You people of Italian nationality may not know the law of another state, which they should rely, or on US lawyers, et cetera.

The questions about what is sovereign and what is commercial, the criteria that are used to establish whether a state conduct is sovereign or conduct as a private party, are really crucial for the law of state immunity. Unfortunately everybody recognises that the commercial transaction exception is an exception of a customary law nature in international law.

But there is no agreement on how to distinguish commercial transactions from sovereign transactions. So, this is where, especially common law countries, consider it very important to have a national legislation that can clarify what is the criterion adopted in their own state.

(specifying the nature of the conduct, purpose of the conduct, a list of examples.)

And this is what happens, for example, in the United States. Ex. The chapter of the US code, which is usually called "the foreign Sovereign Immunity Act", provides all the elements applicable in the United States to decide whether a foreign state has jurisdictional immunity or not.

The United States, for example, on the definition of commercial transaction, tend to rely on the nature of the conduct, not on the purpose of the conduct → this can be explained because if you rely on the purpose, almost everything our state does can be a stretch to the point of being recognised as sovereign act.

For what concerns the list of exceptions, a part from waiver or the commercial transaction, we have a number of other exceptions about, for example:

- contracts of employment;
- properties;
- ships arbitration agreements;

- but the only one which is really important to remember, which is really contentious, is: the tort exception → if you read the text of Article 12 of the UN Convention, you'll read that: "a state cannot invoke immunity in a proceeding which relates to the pecuniary compensation for that or injury to person or property posed by an act or omission that is attributable to the state, if this conduct occurred in the territory of the state of jurisdiction."

If you read article 12 you might think that in the Cermis case, which is a typical tort case, the conduct of a foreign state in the territory of the courts that are called to adjudicate upon what happened in the Cermis cable car crash were concerned about tort damages or death to pecuniary compensation for the death or injury to persons.

BUT: Unfortunately, Article 12 has a very limited scope of application, because even if it's not written here in the text of Article 12, the UN Convention was accompanied by the International Law Commission Commentary that explains in detail and commented upon every single article of the Convention. The LC clarified that this tort exception, Article 12, could not ever be applied to damages committed by the military or armed forces of a state. So in the case of Cermis, you couldn't apply the tort exception and you couldn't apply the commercial transaction exception.

No exception basically was available to allow the victims to obtain reparation from **Italian judges**, within the Italian legal order. Not abroad, they could go before US courts, but not in Italy. Remember: immunity is a procedural protection, not something that deprives the victim of any remedy entirely.

Most important exceptions you should remember are the waiver, the commercial transaction exception and the tort exception, Article 12, that is contentious as well and is not considered to amount to customary law, not even excluding its application in all cases which involved military and armed forces.

US FOREIGN SOVEREIGN IMMUNITIES ACT

FSIA contains a list of exceptions, it makes reference to waivers and to commercial transaction, but it also contains a reference that cannot be found anywhere else in its article 1605A (terrorism) → This exception, that was copied by later on by Canada, makes an additional exception to state immunity for acts of terrorism.

If a state can be held responsible for the acts of some of its organs that participated, allowed, supported a terrorist attack, causing the injuries or death of people, it won't be able to claim immunity, to invoke immunity before US courts.

You see the rationale under the lenses of national security, but this is an exception to the rule of state immunity, which only very few states have adopted. (the very first to adopt this exception was the United States and they were later joined by Canada, maybe the UK has adopted something like that as well recently)

The lesson was about the state immunity from the adjudicatory jurisdiction of another state. But similar principles apply for the immunities of state from the enforcement jurisdiction of other states. I'm not going into the details of state immunity from execution or from enforcement jurisdiction, but the principle applies in a very similar way → we have a general rule of immunity and a number of exceptions.

ADDITIONAL MANDATORY READING

State Immunity and jus cogens

The question has arisen whether there is an additional exception to State immunity from jurisdiction in relation to allegations of gross human rights violations or international crimes that amount to violations of jus cogens norms.

On this point, please read this extract from:

Carlo Focarelli, *International Law*, Edward Elgar, 2019, pp. 310-376

“In recent decades a trend towards the denial of immunity, similar to that which has arisen in respect of foreign state organs, when the defendant State is accused of egregious violations of human rights or of international crimes amounting to breaches of jus cogens – a sort of ‘humanitarian exception’ to international jurisdictional immunities - has taken hold in legal scholarship and has been asserted in a few judicial decisions. In such circumstances, a conflict apparently emerges between state and individual demands.

The Italian jurisprudence has been, rightly or wrongly, pivotal in this context and is worth analysing in some depth. In the 2004 *Ferrini* Judgment the Italian Court of Cassation denied immunity to Germany for the purposes of an action for compensation of damages initiated by an Italian national who had been deported to Germany where he was subjected to forced labour in 1944-1945, assuming that immunity is to be denied when the defendant State is accused of serious violations of human rights (partly committed in the forum State, partly outside its territory) such as deportation and forced labour, which fall under the category of jus cogens.

The key argument in *Ferrini* was that non-immunity flows from the higher-ranking rules on international crimes which trump the ‘ordinary’ immunity rule. The *Ferrini* Judgment was almost isolated in international practice, since only two Greek decisions had taken a similar stance and these were ultimately annulled by a higher court.

Two important decisions delivered after *Ferrini* by the courts of other States on the same issue took an opposite, more traditional view, namely the 2006 *Distomo* Judgment of the German federal Constitutional Court and, most significantly, the 2006 *Jones and Mitchell* Judgment of the UK House of Lords. The Italian Court of Cassation, however, insisted on the denial of immunity to Germany in respect of ‘international crimes’ committed, in Italy and elsewhere, during World War II in 13 Orders (Nos 14200 to 14212) adopted in 2008.

In all of these decisions the Court oscillated between giving weight to humanitarian values rather than to positive rules of international law and stating that the alleged jus cogens rule authorising the denial of immunity was in the process of emerging.

Concomitantly, several courts of other States continued to deny that the *Ferrini* jurisprudence reflected international law and to hold that immunity was to be recognised also to foreign States accused of serious violations of human rights, whether committed in the past or very recently.

The 2004 New York Convention (the UNCSI) does not explicitly provide for an exception to the immunity rule in cases where the defendant State is accused of serious violations of human rights, although Article 12 on torts could be interpreted – beyond the drafters’ intention – as applying to compensation for damages stemming from international crimes committed even only in part in the

territory of the forum state. And, in the 2012 jurisdictional Immunities of the State Judgment, the ICJ denied that the tort exception reflects customary international law.

Since practice is quite unequivocal against the denial of immunity, the view of the present writer was, and still is, that the exception advanced by the Italian courts simply did not exist in international law, however unjust this might be felt to be. No doubt, the Italian Court of Cassation could contribute to the progressive development of the immunity rule in the name of values and principles deemed to be universal and fundamental. Indeed, the *Ferrini* case was, and continues to be, a perfect example of a scenario in which the courts of one State try to transform customary international law.

In 2012, in the jurisdictional Immunities of the State Judgment, the ICJ condemned Italy for violating the immunity rule owed to Germany. Certain international rules may be peremptory, but it does not follow that their alleged violation by one State allows the courts of another State to deny immunity to the former. The ICJ could not be expected to impose on State the new trends of international law promoted by individual States. It can only state the law in force at the moment when it is called upon to make a decision. It is true that existing 'customary law' is often uncertain or controversial, but it was not so in this case. The role of transforming international law does not pertain to the ICJ but to other actors, among which States stand out.

In the future, the humanitarian exception could be circumscribed to specific international crimes that are committed today or will be committed in the future - abandoning the idea of 'punishing' crimes committed in the past given that virtually all states have committed acts in their history that today amount to international crimes."

FOCUS on the *Ferrini* case and the subsequent dispute between Germany and Italy before the ICJ.

FACTS:

On 23 September 1998, Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944 and deported to Germany, where he was detained and forced to work in a munitions factory until the end of the war, instituted proceedings against the Federal Republic of Germany in the Court of Arezzo (*Tribunale di Arezzo*) in Italy. On 11 March 2004, the Italian Court of Cassation (*Corte di Cassazione*) held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime (Italian Court of Cassation, *Ferrini v. Federal Republic of Germany*, decision No. 5044/2004).

[NB this was not a criminal proceeding, but a civil proceeding against Germany to obtain reparation/damages!!]

On 23 December 2008, the Federal Republic of Germany instituted proceedings against the Italian Republic, requesting the Court to declare that Italy had failed to respect the jurisdictional immunity

which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts seeking reparation for injuries caused by violations of international humanitarian law committed by the Third Reich during the II World War.

Now please read the following extract from:

ICJ, JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY v. ITALY: GREECE INTERVENING), 2012,
paras. 56-57, 92-93

56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been “adopted as a general rule of customary international law solidly rooted in the current practice of States” (Yearbook of the International Law Commission, 1980, Vol. II (2), p. 147, para. 26). That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

[...]

92. The Court now turns to the second strand in Italy’s argument, which emphasizes the jus cogens status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between jus cogens rules forming part of the law of armed conflict and according immunity to Germany. Since jus cogens rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of jus cogens, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one State to accord immunity to another. In

the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above).

COMMENT

The ICJ held that there is no territorial tort exception to immunity in relation to acts committed by military forces, and that immunity continues to apply in the face of international crimes or violations of jus cogens. According to the Court, the argument centred on a perceived hierarchy of norms – in the case the posited prevalence of jus cogens over the rules of immunity – is beside the point in that there is no conflict between a rule of jus cogens and the customary rule of State immunity that necessitate recourse to higher norms as a conflict-resolution mechanism. In the Court's view, immunity is only of a procedural character, and does not bear on the substantive (un)lawfulness of the impugned conduct. A State's entitlement to immunity in relation to international crimes does not mean that it is not responsible for the crimes it may have committed; in fact, Germany had assumed responsibility for crimes committed by the Nazi regime in the Second World War (through the adoption of the Federal Compensation Law of 1953, the agreements of 1961, and the law establishing the Remembrance, Responsibility and Future Foundation).

While the ICJ opposed the lifting of State immunity in view of the importance of the stability of inter-State relations, it is not blind to the need for accountability in respect of these crimes.

It suggested in particular that the victims' State of nationality may want to pursue diplomatic negotiations with the allegedly responsible State.

One could also think of the victims initiating proceedings against the responsible State before its own courts. For instance, relatives of victims of the Srebrenica massacre sued the Dutch government before Dutch courts (Supreme Court (NL), *Stichting Mothers of Srebrenica and others v. the Netherlands and the United Nations*, 13 April 2012).

Prior settlement agreements and domestic doctrines restricting litigation against the government may nevertheless limit the success of these avenues. According to the ICJ, the fact that the chances of success are slight is not an argument to lift the allegedly responsible State's immunity.

Reflecting on this, one wonders whether the ICJ is taking the individual's fundamental human right to a remedy sufficiently seriously.

The last development in Italy is worth noting.

With Judgment No. 238/2014, the Italian Constitutional Court (hereinafter Court) quashed the Italian

legislation setting out the obligation to comply with the 2012 decision of the ICJ in Jurisdictional Immunities of the State that uphold the rule of sovereign immunity with respect to compensation claims in Italian courts based on grave breaches of human rights, including—in the first place—the commission of war crimes and crimes against humanity. The Court found the legislation to be incompatible with Articles 2 and 24 of the Italian Constitution, which secure the protection of inviolable human rights and the right of access to justice.

In this way, the Italian Constitutional Court disallowed the application of the international law of State immunity in case of conflict with the fundamental (constitutional) principle of access to justice, and for that reason annulled a law seeking to give effect to the ICJ's judgment in the Jurisdictional Immunities of the State case. It is not excluded, insofar as other domestic courts are following this reasoning, that a new customary exception to the principle of State immunity for international crimes may emerge in due course. As we write, however, there is no evidence of such a tendency.

INTERNATIONAL LAW - Lecture 22 of April 11, 2022

Immunity

The main issue about the file (extract from: Carlo Focarelli, *International Law*, Edward Elgar, 2019) => relationship between two different rules of international law:

- the rule about the immunity of states => this shield of protection that states enjoy against the exercise of a foreign state jurisdiction
- the rules of a *jus cogens* nature => the typical context in which this sort of a conflict arises is when an organ of state commits a violation of a jus cogens rule and then this state itself or the head of state or government is called to answer before the courts of a foreign state
 - => in that case the state or the head of state or government claim to have immunity = to benefit from immunity

> the most famous case in which this kind of conflict happens is the Ferrini case, which was decided in Italy a few years ago and sparked a controversy between the German state and the Italian state in front => and a dispute in front of the ICJ

> Ferrini, an Italian national, became a prisoner of war of German soldiers, during the WWII => he was captured in Italy, and then he was brought in Germany, and he wasn't treated as a prisoner of war, but he was obliged to work in a munition factory => it was sort of a constrained to forced labour in a munition factory = creating bombs and weapons for the German army.

> this is obviously a violation of rules of international humanitarian law, because of these crimes and the violation, committed by the German state against Ferrini, after the end of the WWII Ferrini and others (all the members of the family of Ferrini) claim before Italian courts, that the German state had a duty to provide for the reparation of the damages suffered by Ferrini

> the case wasn't about individual criminal responsibility, but it was a case about the civil responsibility of the state for the damages arising from the commission of the crimes => crimes of an international nature that violated a jus cogens rule

> in the procedure, before national courts, at a certain point the case arrived before the Supreme Court of Cassazione and to have the court decide whether Germany could benefit from immunity => from the rule about the immunity of state before foreign courts

> we know that we move from a historical phase in which states had absolute immunity to a new phase in which states only benefit from restrictive immunity => there are number of exceptions to immunity

> we have also discussed the fact that the tort exception isn't a customary law rule => here in the case of Ferrini, obviously, the commercial transaction exception has no role to play => we aren't in front of anything like a commercial transaction

> we could expect the Supreme Court of Cassazione (the Italian court) to affirm that Germany, indeed, deserve to be recognised immunity before Italian courts, but the court instead decided in a diametrically opposite way => claiming that this case was about a conflict between a normal international rule about state immunity and a set of rules that were hierarchical superior, because they were of a jus cogens nature

= all the rules about the protection of civilians during a war and the main fundamental rules of international humanitarian law

> this prompted a huge debate in doctrine and constituted the premises for conflict that trade between Germany and Italy that could not be solved in any other way, not through diplomatic means or any other sort of agreement => Germany decided to raise the case before the ICJ against Italy => claiming that Italy had violated the rules of international law about state immunity

How Italy did so? because one of its organs, its judges, its court and in this case the Supreme Court of Cassazione violated the rules about international state immunity

=> the ICJ was therefore asked to decide whether we were in front of a real conflict between state immunity rules and the protection of those values in the international community that are at the core of the pacific existence between states => not at the basis of the reciprocal coexistence of states, but at their core the protection of human rights and the most important rights of the individuals

Is there a real conflict? And how could the case be solved?

while the case was pending before the ICJ, a number of doctrinal theories were proposed

- (1) 1st is the one that Italy adopted defending itself before the ICJ: is the normative hierarchy theory => there is a hierarchy of rules: *jus cogens* rules and *erga omnes* obligations are at the top and all the other rules of international law, even if of the same nature, customary or treaty rules, are at a second ranking order
 - > there are other possibilities to solve the case:
- (2) one maybe the weakest which was proposed: is that when a state or an organ of state commits a violation of jus cogens rules, this amount to an implicit waiver of sovereign immunity => if your behaviour goes against the fundamental values, that international rules aim to protect, (fundamental human rights, in our case, in a world scenario) this conduct amounts to an implicit renunciation of the right to invoke sovereign immunity
- (3) theory proposed to follow as relies on the tort exception: affirming that the tort exception applies even in case of international crimes => if we read the text of Article 12 of the UN Convention, where the International Law Commission tried to codify the tort exception, we know that the text of their provision and the commentary of their provision says that their tort exception cannot apply to the conduct of armed forces
 - > in a war scenarios, like the one applicable to the Ferrini case, the tort exception couldn't be adopted and on top of that the great majority of the commentators recognise that the tort exception doesn't have customary ature => it isn't recognised in the international community

> we had these 3 different theories to recap the normative hierarchy theory, on the basis of the relationship between jus cogens and the other rules of international law

> the 2nd one, about the implicit waiver of sovereign immunity when a state commits a violation of jus cogens rules

> the 3rd one about the scope of application of the tort exception.

> what the ICJ did was to follow a world path, it didn't follow any of those theories => basically the ICJ said that we weren't in front of a real conflict between state immunity rules and jus cogens rules => because the two set of rules are relevant at different phases and in different ways > state immunity rules, in fact, are considered by the ICJ only to be procedural rule => they don't conflict with jus cogens rules, their application doesn't amount to say that a violation of a jus cogens rule will never find justice, will never bring the violating state to justice, but only forbids certain judges, courts and tribunals to assess and adjudicate on the state conduct

> there is no conflict because the violation, the responsibility of the state, in the Ferrini case of Germany, for the crimes committed against Ferrini and others during the WWII, are not raised by state immunity => state immunity is applied and only bars the victims of the violation of a jus cogens rule to find justice before their own national courts

=> but only prevent Ferrini and all his family members to seek reparation for the damages suffered during the WWII, before the Italian courts => never stop or prevent Ferrini and Co. to go and ask reparation and damages to Germany, before German courts or, if there is a form, in front of an international court or tribunal => when there is a court of this kind that has jurisdiction

> the solution adopted by the ICJ of not seeing a conflict, because the two rules apply at different levels, is a very traditional one and the ICJ aims at protecting the stability of the international relations and of the legal order

> the ICJ was very conservative, it tried to protect the well established rule => it couldn't follow what was suggested by the Italian Court of Cassazione, for an understandable reason, even if the solution adopted by the ICJ can, obviously, create situations in which the victims might find themselves unable to find justice

=> because in the Ferrini case, for instance, no courts in Germany would have ever awarded damages to Ferrini, for a number of reasons about German law and reparation programmes that were already adopted by Germany in the past and a number of other legal reasons

=> German courts: weren't available solution, nor there was any other international tribunal available for Ferrini and its family members

> in the case of Ferrini without Italian courts jurisdiction there was no other avenue possible and there might be great number of cases that, once you applied state immunity, will end up in the very same situation

> if on one side, the decision of the ICJ protects the stability of the international relations and of the international legal system => on the other side, it's true that it will bring about cases of great injustice = that should be very clear to everybody, even if we agree that there is no real conflict between state immunity rules and jus cogens rules the final consequences of this are evident to everyone => but this might lead to cases of injustice

What happen, afterwards, in the case of Ferrini: we had a decision of the Court of Cassazione, which gave rise to a dispute between Germany and Italy before the ICJ => the decision was against Italy

> Italy was found by the ICJ in breach of the rules about the immunity of states from the jurisdiction of other states => Italy should have complied with the decision of the ICJ and for a small period of time Italy even adopted a law to make the decision of the ICJ enforceable = to ensure that all the courts and tribunals within our legal order would apply the customary law as reconstructed by the ICJ, recognising the immunity of states.

> up to the point in which, again, the Court of Cassazione, in a new decision, considered that recognising the decision of the ICJ as binding within our domestic legal order, would create a conflict within our constitutional legal system => because recognising the immunity of state would have gone against the protection of fundamental human rights recognised by our Constitution, and in particular against the right of access to justice that everyone is entitled to

=> we are again in a situation in which Italy may be found in breach of international law, even if this time the decision has been framed in a different way => the new decision of the Court of Cassazione says that international law has been recognised to say so, but if we apply this within our legal system, we will go against the fundamental values of our domestic legal system

> the ICJ decision doesn't prevent an individual access to justice, it only says that if someone is seeking justice, he/she will have to do it in front of another state court or before international bodies => but this might end up, because of the absence of proper international court tribunals, or because the domestic rules applicable, for example in Germany, will not provide for an effective remedy to Ferrini or other like this, in an absence of justice

> if you apply state immunity, you might end up of having no other courts to obtain justice => in theory you can go and ask other courts, in practise there is no other courts available = this is the issue

> the issue could be: to try to set up a proper procedure, but we know that individuals, for example, have no rights to raise a claim before the ICJ, and there is a limited number of

international courts and tribunals available to individuals => for example, the ECHR => but even the ECHR, in its case law, has recognised and applied the rule of state immunity

> we do not have the same kind of tools and protection at international level that are entirely comparable, like those that are available instead within domestic legal systems

> this is the problem we have in front and international courts do not have jurisdiction to hear claims of individuals before, for violations of international humanitarian law most of the time => therefore in those cases, it's really difficult to find a proper organs or institution that can provide reparation to the victims of those crimes and violations of international law

> in theory nobody is saying that Germany is not responsible for what it was done during the WWII, but it's very hard to find a place, where to claim and obtain reparation

> Ferrini was really a sort of a loophole in the entire landscape that arose after the WWII, because Germany didn't forget about the victims of his crime, it paid compensation, it adopted a number of programmes for providing some sort of reparation to the victims of war => especially those that were kept in concentration camps like Auschwitz or Buchenwald

=> it adopted a number of laws of this kinds, even soon before Ferrini started the case before Italian courts, but in all those laws and reparation programmes adopted by Germany, there was a loophole, a gap in which those like Ferrini didn't receive any kind of reparation

> Germany, basically, forget about civilians that were forced to work in a factory, creating, producing weapons for the the German army => what happened to Ferrini was never considered by Germany as falling under some of its reparation laws

=> this prompted Ferrini to bring the case before the Italian courts

> Germany did its part and the ICJ try to propose a solution => but this didn't achieve great results, the negotiations weren't very successful.

Immunity of foreign state officials

reference again to the UN Convention on the immunity of states (UNCSI), Art. 2

> the immunity of states that rise from the principle of equality of sovereign states trickles down to all the subjects that perform sovereign functions for the state => that acts in an official capacity > from the same state equality principle, from which the immunity of states aspire the rise, we could also derive the immunity of foreign officials

> we know that states are sort of an abstract entity, an abstract construct, but they need to rely on individuals, on natural persons, to perform their their sovereign functions => it's true that we have state immunity, but we also have immunity of state officials

> for example the Convention on the jurisdictional immunities of States and their property, even if it focuses on states, it refers to the fact the state means, not only the state as such and its various organs, but also all those that are entitled to performs, acts in the exercise of the sovereign authority of the state

= all the organs of state can give rise to the international responsibility of the state and they can benefit from immunity

When we're talking about the immunity of foreign officials, we usually distinguish between 2 categories of state officials and 2 categories of protection that is granted to them

> high-ranking officials: it's quite obvious that among the state officials, that can benefit from immunity, we have the heads of State and government (the higher top), the Ministers of Foreign

Affairs

> it's not recognised that the same kind of immunity applies to ministers of defence and even state prosecutors => it's uncertain the state of the law about that

=> those that are most involved with the international relations of the state are considered among the high ranking officials = the head of state, head of Government and the Ministers of Foreign

Affairs

=> they benefit from immunity, not to provide them sort of a personal benefit, but it's a protection that they enjoy, because otherwise they will not be able to perform their functions on behalf of their state in an effective way => immunity in this case, especially if we talk about head of States and governments and Minister of Foreign Affairs, aims at protecting, not the person, not the individual, but the function, the fact that otherwise they will be unable to fulfil and perform their mandate

> it's strictly linked to the role they play in the state organisation.

> we have high-ranking officials on one side and then we have, on the other side, the diplomatic agents and then some other categories of state officials that can benefit some sort of protection, but not at the same level of the others => for example, the number of issues concerning military personnel and especially secret agents spies

> the immunities of diplomatic agents are being codified by the International Law Commission, in the Vienna Convention on Diplomatic Relations and in the Vienna Convention on Consular Relations

> the immunities granted to diplomatic agents are based on reciprocal commitments entered into by the two states, the sending state of the diplomat and the receiving state, the one where the diplomat is sent to perform its mandate

> basically states recognise diplomatic immunities, because it's in their own interest to have this sort of reciprocal commitments against each other => the sending state, the receiving state, or sometimes it's also called "host state"

> the recognition of immunity also follows the formal appointment of the diplomats or a word, that is used, "accreditation" of the diplomat => it can also follow the events, in the sense that diplomats can be accredited = received by the host state, but the host state can also call them "*persona non grata*"

> for example what happened in the case of the Russia-Ukraine conflict is that Europe basically declare, and it was done in a reciprocal way, some of the Russian diplomats as "*persona non grata*" => that they were asked to leave and to go back to the state of their nationality

> when a state declare a diplomatic agent a "*persona non grata*", the state of nationality should call back its diplomat as soon as possible

> for what concerns diplomats, we should also pay attention to the fact that they have immunity, but they are also (separate concept) inviolable => they have personal inviolability = they cannot be arrested or put in detention

=> not only the person benefits from inviolability, but also their private residence and the premises, the buildings of the mission

=> its inviolability concerns the person the, the personal house (residence) and the offices

(buildings) of the mission

=> also, family members benefit from the same treatment they, there has been an evolution about that, because for a long time only married couples were considered to be covered by the inviolability benefit => now this is considered to extend also to partners, even off of same sex

> this is recognised almost everywhere: same-sex partners isn't a customary law rule already, because we know that we have a number of states in which this is a criminal offence => extending the this kind of privilege will not be considered established by customary law rules

> about inviolability, 1 short parentheses about Julian Assange, the founder of wiki leaks => it basically publishes confidential and secret documents that are leaked and made public, through a process that preserves the confidentiality of the source of those documents, and it has lead to a number scoop

> among the most important ones number of leaks: confidential information about what happened in Iraq and the misconduct of US forces in Iraq, became public => for this the US are investigating Julian Assange basically for treason

> then we also have: Sweden issued an international arrest warrant, probably on treason, but from the US, over allegations of sexual misconduct.

> for what concern the inviolability of diplomatic premises, the case is interesting for us, because Julian Assange found refuge in the embassy of Ecuador in London and he lived there for a number of years and the police force could not enter the Ecuador embassy => the embassy of a foreign state in to arrest someone, even if Assange doesn't enjoy diplomatic status, he's a civilian, he only benefit from the protection of the inviolability of diplomatic premises

> in the end he was arrested in 2019, because the Ecuador allowed UK forces to enter the embassy in London to make deer pressed => we have a demonstration about the inviolability of diplomatic premises = the buildings.

These 2 main categories benefit from 2 different kind of protection => we distinguish between: personal immunity and functional immunity

(1) personal immunity (*ratione personae*) is enjoyed ONLY by high-ranking officials and diplomatic agents, not by others state officials of any other ranking or function, nor by military personnel, nor by Secret Service agents

> it's even contentious if ministers of defence can enjoy the personal immunity

> high ranking officials and diplomatic agents enjoy personal immunity for both their official and private acts => they are covered by immunity even for acts that they perform in a private capacity, not necessarily fulfilling a sovereign function

=> they benefit from this kind of immunity for all their acts undertaking in official or private capacity, both from civil jurisdiction and from criminal jurisdiction => they cannot even be criminally prosecuted

> this is already a quite wide protection they enjoy, not only because on top of that the personal immunity covers act permitted both before and during the mandate => it's, basically, a quasiabsolute immunity, it's a very strong shield of protection

> they benefit from personal immunity during their time in office, but even for acts they have committed before obtaining office = before they get the mandate

> if I am a head of state or maybe a diplomat in a foreign state, ex in the US, and I was there already before my accreditation => I was, before accreditation, driving under use of drugs and I committed a homicide, I run over someone a pedestrian, I cannot be prosecuted for the entire duration of my mandate

> in this case: private acts = those committed in my private capacity, not because I am a diplomat not exercising the function and that I committed even before taking the role, that kind of immunity expires when my mandate expires

=> because this immunity protects the function, it doesn't protect me personally => it is meant to protect my capacity to fulfil my function as a diplomat => as soon as my mandate terminates then what I've done before, in my private capacity, becomes relevant again, but for what I did during my mandate, as a diplomat, for that the immunity never expires

= there is a difference in the length of the protection granted with personal immunity, depending on acts being committed in a private capacity VS acts that have been committed during the exercise of the official function.

> this is because the personal immunity isn't granted for personal benefit of the individual, but to ensure the effective performance of official function on behalf of the state

(2) functional immunity (*ratione materiae*): is enjoyed by all state officials, all state representative, it doesn't count what kind of position, ranking or hierarchy in the state

=> it's granted to everyone and it also applies to members of the army, so military personnel, when they are on official duty = only when they performed acts in an official capacity

> there was a question about the Mar case of military personnel on board of a commercial ship in the sea around India => it wasn't unclear, at the time, if they were in the international seas or in the part of the sea under the jurisdiction of India, that had to be settled

> there were members of the Italian armed forces to protect the ship against pirates attacks => the ship was navigating the sea where pirates were often responsible of attacks => they killed some fishermen on board of a little boat, because they mistakenly thought that those were pirates > one of the question raised was the kind of immunity that these two Italian members of the army had, because they were brought before Indian courts

=> could they claim to have immunity, that Indian courts couldn't prosecute them for the homicide of the two Indian fishermen, or they could not => the answer: they could benefit from functional immunity, that is provided to all state officials and all state representative as long as we could categorise the killing of the two fishermen as something that happened in the exercise of their official duty

=> they were there to protect the ship on behalf of the of the Italian state, could this be considered, to protect the ship, arriving to the point of killing someone who is innocent, is this acting in the official duty?

> sometimes it's not easy to define this, to decide whether a conduct can be considered a performance of the mandate, of the official duty, or it goes outside the official duty => in the case of the Maro, the conduct was considered to be in excess of their mandate

=> they were exercising their mandate, but they acted in excess, "ultra vires" conduct = sort of outside the boundaries, because they didn't apply enough care before shooting to assess what was the situation they were in front

> an other example of ultra vires conduct: a member of the police force who is arresting someone => until it exercises this arrest is, obviously, working under its own official duty, but if he applies unnecessary forces. Maybe constricting the person, that he has arrested, not to breath properly or arriving to the point of committing acts of torture, this cannot be considered to follow the official mandate

=> it will be exercising ultra vires = acting outside the boundaries and the limits of his mandate

> functional immunity enjoyed by all state representative, even armed forces when they are on official duty and for acts performed in an official duty, it provides protection => however, it continues to apply, even after the mandate has expired, because we are talking about official acts performed in an official capacity on behalf of the state

= they are covered even after the mandate has expired, but this kind of a immunity doesn't apply when we are talking about the commission by state officials of some international crimes > this is made clear by the

latest codification effort of the International Law Commission, something that is still in the process => the ILC is still discussing about this topic

> we have a series of draft articles that apply in the case of immunity of state officials from foreign criminal jurisdiction => these articles say that there are a number of crimes in respect of which functional immunity shall not apply

> we are always talking about a list of crimes: genocide, crimes against humanity, war crimes, apartheid, torture, and in this case even enforced disappearance => that apart from the last one we now have jus cogens status under international law

=> enforced disappearance hasn't been recognised as jus cogens nature, but still appears in the list compiled by the International Law Commission

> in this case if a state official, even during his mandate, commits an act of this kind, this cannot be considered to fall within the scope of its normal activities => if even a soldier, during war, commits war crimes, or any other of those this kind of conduct, then he should not be able to claim immunity before the courts of a foreign state

> some of the most fundamental values in international law and in this case, what the ILC is discussing, is the fact that state officials cannot benefit from immunity when they are brought before the court of another state, to be prosecuted for one of these crimes

> if this draft Article 7 will be, eventually, adopted by the ILC and later on by the UNGA will settle the question:

> up to when the policeman is exercising his official mandate and therefore he can benefit from immunity and since when it is not => if he stops with arresting someone it can benefit from immunity, but if he moves outside, if he's acting ultra vires or torturing someone is this a conduct that fall outside his official capacity?

> if we apply this reasoning, there will be no need, because for all the most crimes there will be no doubt, and there will be no flexibility left, for judges to decide whether this was an official act or a private act

> among those crimes listed by the ILC, we have too the crime of genocide and torture, for which immunity before national courts cannot be claimed also because the Genocide Convention on one side and the Convention against Torture on the other side, explicitly exclude that those committing genocide and torture can benefit from immunity

=> in the case of genocide or torture we have 2 different provisions of treaty law, not customary law, that already established that those responsible for crimes of genocide and torture cannot be will not be able to claim their own immunity before foreign courts

> there is no immunity before International Criminal courts and tribunals => all those state officials, that can claim immunity before national courts of another state, will not be able to claim immunity before the International Criminal courts

INTERNATIONAL LAW - Lecture 23 of April 12, 2022

recap about state officials:

(sembra che nella registrazione mancasse la parte iniziale sull'esempio di Pinochet, ma la cosa importante penso fosse che non ha beneficiato dell'immunità inizialmente e poi sì e perchè) And

therefore Pinochet could not benefit from immunity and it could be brought before justice and transfer to Spain.

But this first case was invalidated then, because he was later discovered that one of the members, one of the Lords, one of the member of the House of Lords, which decided the case, was a member of Amnesty International and therefore it could not be considered to have an independent opinion on the subject matter, so it should have recused itself. The case was heard again by the House of Lords under another composition and this time the court again denied Pinochet at immunity, this time relying on a better understanding of international law, so limiting the denial of immunity to crimes of torture and relying on the fact that the Convention against Torture excludes the possibility to benefit from immunity for those of every kind of ranking, every kind of status that commit torture. It is exactly on the basis of this exception that was mentioned in the previous lecture, one in the torture convention and the second one in the Genocide convention, that the UK House of Lords, the second time would deny again immunity to Pinochet for crimes of torture → this case, which is one of the most common international in international law when it comes to the immunity of head of state, In this case a former head of state, (this is also a very important element in the facts of the case to remember and to be ready to comment upon just in case this question shows up in the exam).

This is a domestic court case, most of the time it is the domestic national judges that are called to apply immunity rules. It's very rare that questions of immunity reach the

International Court of Justice, but it happened, in fact we already talked about Germany VS Italy for what concerns state immunity and we also have other ICJ cases concerning the immunity of the Head of State, but these are always cases between two different states, one which would like to prosecute a head of state and the state of nationality of that subject that claimed that the rules of immunity had been breached.

IMMUNITY OF INTERNATIONAL ORGANIZATION

International Organisation and their officials (representatives of the international

Organisation, people working for the International Organisation) enjoy functional immunity, a kind of immunity that is aimed at protecting the organisation's ability to fulfil/to perform its functions.

And the premise of all these is that international organizations are separate subjects of international law and that they have attributed powers or conferred powers or delegated powers from a Member State. And to be sure that this organisation will be able to perform those functions to fulfil the mandate they were attributed by Member States, they should be protected by interference from Member States themselves. → International organisation immunity is conceived for this purpose to allow them to act without any kind of interference. Because you can understand that if an international organisation is brought before a court in every Member State, because people all over the world want to be paid damages from the International organisation, this will be very costly for the organisation and obviously this will affect the ability of the organisation itself and of those people working for the organisation, so its officials.

The functional immunity is there to protect, as the word says, the capacity to function of the International organisation, to safeguard its autonomy from Member States and to protect the international organisation from judicial and political interference by a Member State.

There are, however, a lot of open issues for what concerns IOS immunities:

- First, because it is not fully clear if at an international organisation is recognised functional immunity by a customary international law rule.

So while everybody agrees that there is a customary rule on state immunity that we know change from absolute immunity to restrictive immunity. It is unsettled, it is not defined, and there are different opinions in the scholarship, whether we have customary law rule, providing international organisation with these kinds of general functional immunity so → there are different scholars that argue against the existence of a customary law rule and even one of the latest special rapporteurs of the International Law Commission, that worked on this topic, affirmed that it did not believe that international organisation were to be granted immunity in the absence of an explicit treaty provision = if there is nothing written in the founding Treaty of the organisation it is debatable, whether the organisation can claim immunity on the basis of a customary law rule.

Even if we have a number of treaties, the 99% of founding treaties of International organisation all contain a treaty provision providing for that organisation immunity, there is no general practice and *opinio juris* (the two elements of customary law) to affirm in a clear way that this general customary law rule exists.

Whenever we discuss the immunity of an international organisation, we need to rely basically on the founding treaty, so we have to look at the UN Charter, what the agreements are establishing, for example World Health Organisation or the World Bank says and affirm. On top of founding treaties, reference can also be made to headquarter agreements that are those special agreements that are signed between an international organisation and the States on which territory/the premises of the organisation are based.

Ex. the UN has its headquarters in New York and in Geneva, so the United Nations has two different headquarter agreements: one with the United States and another one with Switzerland.

We can find also provisions about immunity and more likely inviolability of iOS premises in headquarters Agreement, which also contain all those rules about the freedom to reach the premises of the organisation, the freedom of communication, not interference in all the movements of people coming in and out from the organisation premises and also about tax law, so that they are always exempted from paying taxes.

If, like it often happens, the founding treaties contain a provision on establishing the functional immunity of the organisation, most of the time this is phrased in a very imprecise way, so reference is usually made only to functional immunity.

The UN is provided with functional immunity, the International Monetary Fund with the same *et cetera*.

→ But it is not specified, there is no list of examples, nothing of what is functional immunity. What is the scope of application of a functional immunity? In other words, what is the extent of the protection granted to international organisation with this functional immunity? When domestic courts are called to define and assess whether an international organisation has to be recognised functional immunity or not, they do not really have any terms of reference, any yardstick to assess whether the conduct of the international organisation falls within its mandate, it is necessary for the organisation to perform the delegated powers it receives from Member States or not.

But if we compare this situation with the state immunity under the restrictive immunity that is applicable to states, we have a list of exceptions. We know that if a state enters into a commercial transaction, then this is an exception to immunity.

But for international organisation there is no list of exceptions and if we think about what international organisation do, it is very difficult to distinguish between official act that formed the core, that are at the centre of the International Organisation activity, and all those acts that are unsealer reacts, they are not at the at the centre, they are not the focus of the mandate of the organisation.

Ex. It is sometimes difficult and the domestic case law on the interpretation of functional immunity is not a clear cut to establish whether the organisation, for example, organising a

conference in its premises and organising also catering, lunch or dinner for those attending the conference with does not pay what was supposed to pay to the restaurant providing the catering services can be brought before domestic judges and be ordered to pay or not? So are the organisation of a conference and the organisation of a dinner part of the function of an international organisation? Do they fall within the scope of immune functional immunity or not? If we refer to the fact that all the powers of an international organisation are delegated acts, that are attributed to the organisation, so we can stretch this line of argument to the point of saying that basically everything the organisation does is a function, is a in the exercise of its powers and of its mandate. → there is basically nothing that escapes the protection of immunity.

It's quite easy to stretch to the concept of functional immunity to reach a sort of quasi absolute immunity of international organisations.

There are very few cases in which domestic courts have decided that international organisation do not benefit from immunity.

The example made about catering facilities is one of those indeed, so it's one of those cases in which the Court of Appeal of Amsterdam decided that an international organisation not paying for catering facilities does not deserve immunity, so it can be brought before a civil court and be ordered to pay for the services it received.

But examples like these are not many, and as you can imagine they always concern cases that are not the most contentious one. → Even if I can bring an international organisation to justice for not paying catering services, how many times can this happen?

This is not the point, the point is when an international organisation commits something that is way more damaging to the population or citizens or a given country. Remember that at the very beginning of our course about what happened in Haiti, we were talking about peacekeeping forces of the United nation that brought Cholera to Haiti.

Thousands of people that got the disease, many died and many suffered, couldn't be able to bring the United Nations as an international organisation before a court to be paid damages for what occurred in the island, because the UN is protected by immunity as an international organisation, so who cares about catering services? But what 's important here is when international organisations do something that has a huge impact on human rights, for example in the Haiti Case: the right to health of citizens and individuals all over the world and they were there for the fulfilment of their main mandate, because peacekeepers were there to, theoretically, protect and help the population after the earthquake that destroyed part of the island, so they were there to help, but instead they bring about a totally different outcome, but United Nations in that case were fulfilling one of its core mandate, not an ancillary one.

So the question of iOS immunity is relevant for our understanding of international law and the status of the international legal system when it comes to these big cases and big issues, not when it goes to payment of paper works or pens and pencils for the offices of the organisation.

If we stretch the concept of functional immunity to the point that everything falls within the scope of functional immunity, we reach the point of a sort of quasi absolute immunity and when we end up with a third parties individuals not having a remedy against the organisation because, if you cannot bring an

international organisation before any domestic court, so the courts of any country in the world, where do you go to obtain justice?

Not easy to find a place and a court and a way to obtain remedies from the organisation.

So we were starting to talk about the United Nations, so I'd like to show you the most important provisions about UN immunity.

As I said, first reference should be made to the founding Treaty and the relevant article is Article 105 of the UN Charter.

"The UN shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes." = this is functional immunity.

And on top of that, then the second paragraph has to do with officials of the United nation that enjoy similar privilege and immunities, as again they deem necessary for the independent exercise of their functions in connection with the organisation → immunity covers both the organisation and representative of Member States at the UN and officials of the organise.

So on top of the founding Treaty provision on Article 105, for what concerns the UN system the UN world, we have two important convention:

- One is devoted to the immunities of the United Nations, so of the organisation itself - we have a second one very similar in its content. which was signed the year after. (So you see the Convention on the Privileges and Immunities of the United Nation was adopted in 1946, whe UN Charter is 1945) and the other convention that is relevant for the immunities of International Organisation in the UN system is the one on immunities and privilege of specialised agencies that was adopted in 1947. → So specialised agency just to recap are those independent and separate international organisation that work in strict cooperation with the United Nation and for which a relationship agreement has been signed between the UN and the relevant organisation. Specialised agencies, among those and the reason why I'm mentioning it is because one of those is the word bank.

The content of the two Convention are very similar, and again the the main concept of functional immunity is established in Section 2 of the Convention for which the United Nations, its property and assets, shall enjoy immunity from every form of legal process, except when obviously the organisation has expressed waived its immunity.

And the person the subject entitled to waive the immunity of the organisation is the Secretary General of the United Nation that can waiver, renounce to the UN immunity, and even to the immunity of officials who are working for the organisation.

So the entire Convention established different kinds of immunities for words spoken, acts committed by the UN, by the Secretary general, by members of the different organs , by experts, for example members of the International Law Commission. → there are all different distinctions that all come back to the functional immunity case and sometimes it is added as something about taxation, inviolability and other privileges, but the concept that applies is the same.

A special reference. I would like to make peacekeepers, because this is quite a relevant aspect on the immunity of the United Nations.

We know that the peacekeepers operations are made of both military personnel and civilian personnel, and these military troops and civilians are contributed by UN member states voluntarily only to the UN and the

UN deploy them where it is needed to fulfil their mandate. What happens when peacekeepers do something bad? And what is the law that is applicable in that case?

In the case of a peacekeeping force, the UN relies on the special agreements that are concluded between the United Nations on one side and the host state, so the state in which the peacekeeping operation takes place. So, for example between the UN and Haiti, where peacekeepers were deployed back then, when the cholera disease outbreak started. There is this very special agreement that is modeled on the basis of this draft model status of forces agreement between the United nation and host countries. So there is this reference document that's a model. And then every time a peacekeeping operation is deployed abroad, the UN concludes on the basis of this model an agreement with Haiti or Bosnia Erzegovina, or Timor East or the Democratic Republic of Congo.

And these agreements contain all the elements to define what is the entity or the state responsible to prosecute peacekeepers, when they commit a crime.

The aim of this document is to avoid the fact that peacekeepers that may use force in the fulfilment of their mandate to defend themselves, for example, but when we have a peace enforcement operation and even for other purposes to enforce a ceasefire, for example. they can murder someone for example, so they can commit acts that would otherwise ring them before the criminal jurisdiction of the host state.

So the main aim of the status of forces agreement is to protect peacekeepers from interference of the host state.

You have to underline because it should not be forgotten that when the UN deploy peacekeeping operation, it always needs to have the consent of the host state. → This is one of the premises for peacekeeping operations: to have the consent of the host state, the place where peacekeepers are deployed.

The status of force agreement is one of the expression of this consent, because it's signed both by the UN and the post state.

In general, It is the operation commander, the commander in chief of the Peacekeeper forces that has authority over the peacekeepers.

And the operation Commander that basically can ask the military police of the peacekeeping operation to arrest and detain peacekeepers. So the construction, the forces in peacekeeping operation are also made of a special group of people that have to be sure that peacekeepers behave in a correct way, respecting all the rules and without committing crimes. If something goes wrong, it is those that, under the orders of the commander in chief, can arrest and detain the peacekeepers, not the host state.

And when peacekeepers are arrested, for example, they should be sent back to their home country, the sending state, and they should be brought before the criminal justice. So it's basically the sending state which is entitled to exercise criminal jurisdiction over its own peacekeepers, not the state where peacekeepers are deployed.

BUT: the sending states are not very good in enforcing this kind of criminal jurisdiction. So most of the time peacekeepers commit crimes abroad then they go back home and nothing happens, so they are subject to some sort of impunity, they obtain a sort of impunity, also because they are protected by immunity everywhere else.

There have been a number of outrageous cases that were brought to the attention of the newspapers, for example, of peacekeepers in the Democratic Republic of Congo, committing rapes, making tortures over, also in Somalia, and in other scenarios.

And they mostly escape any kind of punishment, every kind of criminal prosecution so we do have an issue when it comes to the criminal accountability and the responsibility of peacekeepers. And here the UN is trying to change things, but in a very slow way. So, it is not proving to be up to the task for the time being, → this is one of the first most important issues when it comes to the immunity of the UN and of its officials. (= problem about criminal jurisdiction and immunity from criminal jurisdiction).

But we also have the issue of civil cases when the organisation is asked to pay for damages, like in the case of Haiti, again we have peacekeepers, in this case let's keep outside peacekeepers who did not have a criminal responsibility.

It was a an issue of spreading the disease that was not done on purpose, obviously, but the UN still had responsibility for not checking, not preventing, not doing anything to stop the spreading of the disease, not to help the population and for a very long time denying to have any kind of responsibility in what was happening in Haiti.

So in that case immunity becomes relevant, but in cases where the organisation is asked to pay damages, it is civil responsibility not for the commission of a crime.

What was the main argument brought by the United Nations?

In the case of Haiti, relatives of those who died and some of those who suffered because of the disease brought a case against the United Nation to obtain damages and reparation before US courts, because the UN is based in New York.

The first thing defended itself saying that they had a functional immunity and they were doing a peacekeeping operation which is at the core of their mandate to preserve and maintain international peace and security. It's not an ancillary kind of operation, this has risk, these entails taking some some risk and responsibility if US courts accept the claim to hear the case of the applicants and deny UN immunity, what will happen in all the cases in which they deploy peacekeepers all over the world in even in much more difficult scenarios, like in the context of an armed conflict, not only in a context where the there was not conflict, but a very bad post disaster situation?

What will happen when they, for example, decide to adopt a resolution? Because the UN Security Council can adopt a resolution, deciding embargoes, commercial embargoes or individual sanctions, those will affect the rights of people all over the world.

And if they make a wrong decision targeting someone was not connected with terrorism who is not connected with anything bad, what will happen?

This will open up a Pandora's box that nobody wants because otherwise international organisation will have no way to keep fulfilling their mandate. So this was the main reasoning adopted by the United Nations.

And they won, they were recognised to have immunity and what was left was an admission on the side of the United nation of being responsible for the outbreak of cholera. So they admitted their wrongdoing and they started a programme, so it was made out, not really courtesy, but because of public opinion and political pressure, the UN did not compensate individually those victims of the cholera outbreak, but put together a funding aid programme for the island that was supposed to trickle down to benefit also the victims of the cholera outbreak, but they were not obliged to do that. They did it because it was the good thing to do, but they were under no obligation to do that because there is no reference anywhere of this kind of obligation.

In scenarios like these, victims really have no remedy, in many claims that it's even worse than what happens in the case of states that, at least, if a state cannot be brought before foreign courts, at least the individuals

can go before domestic courts of that state, Germany, Italy, ex. Ferrini case: Ferrini could go before and ask German courts to award him compensation.

But International organisation do not have domestic courts. but it's even worse than what I tried to describe to you about what happens for state state immunity.

And the European Court of Human Rights was involved in some of the cases concerning the immunity of international organisation, back at the end of the 90s and in the context of those cases, the European Court of Human Rights was asked to decide whether protecting an international organisation with immunity would amount to deprive individuals of the right of access to justice. So if you have no courts where to go? Where can you obtain justice? Do you not have access to a court ,access to a judge?

Extract of the European Court of Human Rights decision in the Waite and Kennedy case 1999:

“The court is of the opinion that states establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities and where they attribute to these organisations certain competencies and accord them immunities. There may be implications for the protection of fundamental rights.

It would be incompatible with the purpose and object of the European Convention on Human Rights, if the contracting states were able to be absolved from their responsibility, when in relation to the activities covered by international organisation.”

So if states can avoid any responsibility by only creating an international organisation to act in their place, they can escape any sort of blame, any sort of responsibility.

I do not send my own troops to enforce a ceasefire. I created the United nation that will send peacekeepers to enforce the ceasefire and the UN could never be brought before justice, so that basically they can do whatever they want and I will be able to do whatever I want through the United nation.

This is particularly true for the right of access to the courts in a democratic society; for the court the main factor in determining whether the international organisation, around which decay was built, is the material factor in determining whether immunity has to be recognised is to assess whether the applicants had reasonable alternative means to protect in an effective way their rights.

If there is a remedy, if there is an alternative remedy then the European Court of Human Rights says that it recognises immunity from foreign courts, but the organisation has to provide alternative remedies → it is a duty of the organisation to create some sort of remedial system, some sort of judicial or quasi judicial system to hear cases in which its responsibility is discussed so.

If the organisation does nothing in this direction then the Court of Human Rights might reach the point of denying immunity to the international organisation.

And this kind of reasoning, that there should be at least one possible internal remedy/system internal within the organisation available to individuals, is the most important evolution in the field of immunity that derives from the European Convention of Human Rights, but unfortunately it was established by the European Court of Human Rights back in 1999, but it didn't have a big impact in the world of the International organisation.

But there are very few international organisation that have created these internal remedy system and certainly not the United Nations. So the United Nation did not do anything about that, even if the Convention about Privilege and immunity of the United Nations said: section 29 that the United Nations shall make provisions for appropriate modes of settlement for disputes arising out of contracts, but also for disputes of

a private law character, even torts, civil claims to which the United Nations is a party, → so we can read in this section 29 an obligation: the verb used is “shall” on the United Nations to create appropriate modes of settlement of private disputes. So following the words used by the European Court of Justice, something similar to reasonable alternative means to protect in an effective way the rights of individuals.

But it remained a dead letter, section 29 has never been applied by the United Nations.

We have a very strong accountability gap certainly for what concerns the United Nations, but also for what concerns a number of other international organisations, such as the World Bank. The World Bank is a group of international organisations: we have 5 international organisations that fall under the definition of the World Bank.

The majority of them provide financial assistance to a Member State of the bank, so they provide funding, they provide loans to states to realise development projects.

So for example, the World Bank can provide financing to the construction of a dam or a power station or road or schools or hospitals = development projects in a given country. The main disputes concern the funding that the World Bank provided to India to build a power station on the coast of the Indian region of Gujarat.

The name of this power station is the Tata Mundra Ultra Mega Coal fired power plant. → What is most relevant is that it is a coal fired power plant, so energy is created through burning coal. It's not really a green project, not a green way to create energy. On one side we have the World Bank, which is always trying to promote sustainable development, so protecting human rights, protecting the environment, achieving the best possible international standards in all the projects the World Bank Fund and on the other hand we have a very bad project that keeps relying on coal and that had a huge impact on the population living in the surrounding area.

The impact of this project is: all the ashes were released in the air, creating polluting air, creating a number of respiratory diseases in the population living in the area, the ash of coal being burned fell down on earth and contaminated all the plantation, all the soil; was created this inward channel of saltwater to refresh the plant to keep a sort of refrigeration of the entire industry how it worked and then the salty water was put in and then released again back in the sea, but that there were leakages, so that all drinking water available in this area became contaminated by salt, so there was no drinking water available anymore in the area. The water used to refrigerate and everything was channeled back again in the sea, but at a very high temperature, so these created a change in the average sea temperature and destroyed all marine life in the area. The population living here rely basically on fishing and they could not fish anything anymore. They destroyed the environment, mangroves died, little crabs, little shrimps, everything died basically and people became very ill because of the pollution coming from the Ultra Mega Power Plant.

So earthrights international, which are NGOs, started a series of cases asking the

International Finance Corporation, which is one of the organisations in the Group of the World Bank, the one that had provided funding for the realisation of this project, to pay damages to the population affected impacted by the realisation of the project.

And they sued the IFC before United States courts and the very first thing the International

Finance Corporation did was to claim immunity, because it's an international organisation, so it could not be brought before courts. It claimed to have functional immunity as provided by its founding treaty and it maintains the funding to realise the project was not the real cause of the damages to the population arose

from the power plant, not by the funding the loan provided by the IFC, but the loan, the funding is the main activity of the IFC.

What the IFC was created for was to provide landing in support of this sort of project.

The case after several levels reached the Supreme Court of the United States level and the US Supreme Court affirmed in a landmark decision a few years back that relied on the foreign sovereign immunities act of the United States, It affirmed that international organisation has the same kind of immunity of states.

Basically the US Supreme Court changed the interpretation of international law, comparing International organisation to States and if international organisation have the same kind of immunity that states have, also international organisation only have a restricted immunity, not covering everything they do, but only some of the things they do.

And what falls therefore under the scope of restricted immunity of international organisation?

This is what the second phase of the case was about and we are again in front of the US Supreme Court for a second time, because the International Finance Corporation, even in this second phase of the proceedings, kept affirming that even if international organisation have a limited kind of functional immunity, what they did, providing loans, is one of our core core functions, so it is not one of those cases in which immunity should be denied, they still need to be recognised immunity.

There are a number of scholars and professors, professor Pavoni for example, who submitted an amicus curiae before the US Supreme Court, together with other scholars and professor of international law, defending the position of the applicant who is Buddha Jam. One of those fishermen living in the area of the Tata Mundra Power Plant. Buddha Jam and others against the World Bank and International Finance Corporation.

(In the webex meeting there will be: on one side Pavoni who says that immunity should not be granted to the World Bank in this case, while on the other side there would be a legal

Council of the World Bank that is instead arguing that international organisation and the

World Bank in this case still deserves to be recognised immunity.)

We are waiting for the final decision of the US Supreme Court that is expected in a few months. So we don't know what will be the final verdict.

The International Finance Corporation and the World Bank usually attach to lending to their loans a very strong conditionality → conditionality is a term that is used to describe all the requirements that the borrower should satisfy in order to be able to obtain the loan. So the Indian state and the private parties to Tata Mundra in charge of the realisation of the project had to satisfy a number of requirements established by the same World Bank and these requirements had to do, for example, with: rules to avoid corruption, but especially rules for the protection of the environment (bad failure in the case of Tata Mundra project), on the protection of indigenous communities on the protection, of the old people living where the project is relies, on number of very important and high level standards that the World Bank ask those realising the project to fulfil and the World Bank should monitor and guarantee that the borrower apply and respect those requirements.

So one of the reasons why the fishing communities and the farmers decided to bring the suits again the International Finance Corporation is because of the big failure of the World Bank in obtaining, in achieving one of its set goals which is to prompt, promote sustainable development in the countries where it provides

funding for development project This is one of the big failures, not the only one, of the World Bank. But if the plaintiff, the applicants, are successful in this case, that will open up for a way to make the World Bank accountable for its wrongdoings and then maybe to prompt a change that will also force, in a political way, not in a legal way, some other international organisation to create a remedy system, to allow individuals, like the plaintiff, to obtain compensation for the damages they suffered. = it's kind of a strategic litigation case. It's a very important one.

(The IFC can be accused of failure in enforcing their own standards and conditionalities.

So what is the kind of responsibility that an international organisation may have in this case?

Is it like a commercial transaction? is it a restricted case of immunity?)

International Responsibility

INTERNATIONAL LAW - Lecture 24 of April 20, 2022

The question of **international responsibility** arises whenever a state or international organization violates a rule of international law and commits a violation of international law. Two elements must be satisfied: (1) the assessment of the existence of a violation of a rule of international law and (2) the **attributability** or imputability³⁴ of the conduct to the state or international organisation.

It is very important to remember that when it comes to the law of state responsibility or, in more general terms, international responsibility (which covers the responsibility of both states and international organizations) it is a set of rules that are usually defined as secondary rules because they are separated from the primary rules that identify the obligations that international organizations must comply with.

The set of rules on international responsibility becomes relevant once a rule of international law or an obligation of international law has been violated: it is for this reason that they are called secondary rules.

The primary rules identify the obligations incumbent on States and international organizations; and the secondary rules of international responsibility determine when states incur international responsibility and when they are exempt from international responsibility (since there may be circumstances in which no responsibility arises: for example, speaking of the prohibition of the use of force, an exception is made in the case of self-defence).

The secondary norms of international responsibility also define the consequences that result from the commission of an **international wrongful act**.

The articles on the responsibility of States for wrongful acts at the international level also define who can invoke the responsibility of another State; and it is in this specific part that one can find the *erga omnes* obligations, which have already been analysed and discussed, in the ILC articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

³⁴ **Imputability.** The principle that internationally illegal acts or omissions contributing to the damage to foreign property and caused in some way by organs of the state apparatus, are attributable to the state and therefore incur that state's responsibility. Thus, there must have been state participation in the act before there can be state responsibility for it. International law treats as irrelevant the question whether, under municipal law, the officials of the state acted beyond their authority, provided they used state organs in performance of the act. Hence, the state has been held liable for the acts of soldiers who joined rioters instead of suppressing them (Thomas H Youmans (US) v United Mexican States (1924) 4 RIAA 10). ("imputability." *Oxford Reference*.)

The ILC began working in the 1950s with several **special rapporteurs** (the last was **James Crawford**, a famous professor of international law in the UK).

Whenever the ILC initiates a codification process, it assigns primary responsibility for coding a set of rules to a special rapporteur, which may change over time. The codification of the rules of international responsibility lasted several decades and the last speaker (James Crawford) can be called the father of ARSIWA.

The UN General Assembly welcomed the codification efforts made by the International Law Commission and recommended that States adopt and follow up on ARSIWA. However, ARSIWA has never resulted in a multilateral treaty. The Vienna Convention on the Law of Treaties, for example, is another effort to codify the ILC, but having followed the whole procedure correctly and thus became a multilateral treaty. ARSIWA, on the other hand, has not yet reached that point, so it is in this intermediate form: it was adopted by the ILC, it was welcomed by the UN General Assembly, but it has not yet become an international treaty.

And this is because not all the States of the international community recognize that this is a completely successful codification exercise: there are States that argue that the provisions contained in ARSIWA do not always represent customary norms of international law.

The same happened to the 2011 ILC Draft Articles on the Responsibility of International Organizations (ARIO): these articles were adopted by the General Assembly, but they never transformed into a multilateral treaty.

The two main elements required to have an internationally wrongful act can be distinguished in the so-called subjective element and the objective element: the subjective element (under Article A) is the attributability or imputability **of** the conduct of the state which is allegedly committing an internationally wrongful act; while the objective element (under Article B) concerns the existence of a wrongful act.

It is very important to emphasize that the subjective element differs from the definitions of intention, *dolus* or willingness to commit something wrongful under international law: neither intention nor non-use of due diligence, which can also be defined as *culpa*.

Dolus and *culpa* are not relevant concepts in international law but nevertheless become relevant in some very specific cases.

The present international responsibility poses a violation by a State of an international legal obligation, and it does not matter to international law whether the rule violated is a rule of customary law or a rule of treaty law because in both cases the violation has the same weight.

This means that there is no classification and no difference in the severity of responsibility in the two cases.

Obviously, there are differences from a moral or ethical point of view: for example, it is worse to violate a ban on the use of force than to violate a commercial commitment. But this is irrelevant on the legal level.

In international law, therefore, a theory of strict responsibility is applied: there is no need for *dolus*, *culpa*, fault, or malicious intent on the part of the state unless the primary rule specifies that a specific mindset is required.

Few are cases in which that happens and the most important one concerns the prohibition to commit genocide: to have genocide there needs to be a **special intent** to destroy in whole or in part a group of people because of their race, religion, etc. The special intent in this case is required by the primary rule which establishes the characteristics of the obligations falling on the state.

It is important to refer to the rule of **contemporaneity**: the obligation had to be binding on the State at the time when the conduct took place (this is a general rule of law in any legal field and not only in international law).

For example, it cannot be considered that a state violated the prohibition of slavery before the First World War because at that time there was no treaty prohibiting slavery and no customary international law prohibiting slavery: in this case contemporaneity is obviously an important aspect.

Another example is that of the Chagos Islands at the time of separation from the Mauritius Islands, considering the principle of self-determination.

The issue of contemporaneity was also discussed by talking about the denunciation of treaties, in particular by discussing human rights treaties.

Note: Russia has denounced the European Convention on Human Rights, but the denunciation cannot be a strategy to avoid any kind of responsibility altogether because the conduct that has already taken place maintains the status of violation of international law because often in particular the treaties on human rights have these sunset clauses³⁵ that provide for a period in which the beneficiary State remains bound by the Treaty. Therefore, the termination of the Treaty and of any obligations arising from the Treaty arises only after the established period which can be six months, twelve months, ten years, etc. depending on what is written in the text of the Treaty.

To discuss the existence of an wrongful act at the international level, it is very important to distinguish between instantaneous and continuous violations or breaches because the consequences of these two different types of conduct are different.

In case of instant violation (for example, shooting down a plane of civilians or a member of the military forces who kidnaps and takes hostage a representative of another state), what happens after the wrongful act has been committed concerns only the impact of the violation and is not a continuation of the violation itself.

While in case of continuous violation the period of time that covers the conduct of the state is extended beyond a month, a year or even more, and therefore one should take into account the applicable law during the entire period, from the moment the violation began to the moment the violation ends, if it ever ends.

The violation of the prohibition on the use of force, for example, could be a single act or it could also consist of a continuing violation that may even turn into an act of aggression against another state (invasion, occupation of territory, etc that are obviously a continuing violation of international law).

Sometimes it is difficult to distinguish between **instant or continuous violation**, for example in the case of torture: two different cases are the use of violence used during the protest of the Genoa G8 Summit that lasted hours, where dozens of people were hospitalized following clashes with the police and night raids by the security forces on two schools that host independent activists and journalists who have denounced serious abuses at the hands of the police, and the use of violence and acts of torture committed against prisoners in Guantánamo or other prison camps such as Iraq.

Sometimes we also have some kind of violation that has a composite nature: genocide is one of them because it requires, in addition to a special intent, other different conducts that take place over a long period of time (for example, systematic rape, mass murder and ethnic cleansing).

In all these cases we are thinking mainly of conducts in which the State or the organs of the State commit an act, but the responsibility of States and international organization at the international level also arises for the lack of action against genocide. The failure to prevent genocide or the failure to prosecute someone who has committed genocide gives rise to a violation of international law.

³⁵ **Sunset clauses.** Sunset clauses in international treaties account for numerous benefits. Sunset clauses provide that a treaty lapses automatically on a fixed, precise date or after the passage of a specified, determined period of time.

For example, the International Court of Justice at the end of the 90s had to decide over a dispute concerning the Srebrenica genocide³⁶ during the Bosnian War. In this case, the ICJ established that Serbia was not complicit in committing genocide (complicity is another important conduct in establishing the violation of international law). However, Serbia had failed to prevent genocide in Srebrenica, and therefore violated its obligation to prevent genocide. Failure to act therefore represents a type of international responsibility.

The objective element concerns the obligations of conduct, result and due diligence (concepts that are always relevant to international law). Above all, performance obligations require a positive duty to achieve a specific result and to do something even if the state remains free to decide how to achieve that specific result. These obligations (of result) are particularly important in the field of human rights protection.

The part of an internationally wrongful act of a state is much more complex. Not everyone agrees that the following rules that will be described represent norms of customary law despite the codification carried out by the International Law Commission.

The main difference that is found in the analysis of the rules of attribution is a distinction between state and private organs.

For a state to be held internationally responsible of a wrongful act there should be not only a violation of a primary rule of international law, but that violation must be attributable to the state because the state is an abstract entity which can only act through its organs (those who are entitled to exercise sovereign powers in the name of the state).

The principle provides that a state will only be held responsible (in most of the cases) for the conduct of its organs that are represented by physical natural persons (the President or head of state, for example).

There are different rules of attribution for organs of state and for conducts undertaken by private individuals, because also in case of acts committed by private individuals sometimes, under very specific circumstances, the state can be held liable for an international law violation.

The conduct of private individuals (normally) cannot be attributed to the state except under very specific circumstances.

The simplest rule of attribution in the ARSIWA one is the one set forth in Article 4 of the ARSIWA.

Article 4

Conduct of organs of a State

1. **The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

The reference in Article 4 is to *de jure* organs, so the decisive criterion applied by Article 4 is that such a person exercises sovereign functions (legislative, executive, judicial, administrative, etc.) under national law.

³⁶ **Srebrenica genocide.** The Srebrenica massacre, also known as the Srebrenica genocide, was the July 1995 genocidal killing of more than 8,000 Bosniak Muslim men and boys in and around the town of Srebrenica, during the Bosnian War. The killings were perpetrated by units of the Bosnian Serb Army of Republika Srpska (VRS) under the command of Ratko Mladić.

The decisive criterion for characterising a person or entity as a state body is its formal status under the domestic law of the state (the label of '*de jure* organs' means bodies established by law).

Let us consider those who are entrusted with sovereign powers in the organizational structure of the state by law: not only the government, ministers, president, or head of state, but all those small officials who work for the state; It is important to remember that judges and Members of Parliament itself also belong to this category.

For example, if the Parliament of a state fails to establish a criminal law provision stating that torture is a crime under national law and not just international law, the state is violating its duty to criminalise torture under the Convention against Torture. The same happens, for example, for genocide.

Italy, for example, has not criminalised torture in its penal code for many years even after the entry into force of the Convention against Torture: this was a failure of the Parliament of the National Assembly to legislate in that specific case.

Thus, all organs of the state can by their conduct give rise to the international responsibility of their state.

There are also other circumstances that relate to entities that exercise governmental functions and this is provided for in Article 5 of the ARSIWA.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

This article refers to the conduct of persons or entities exercising governmental authority. So, in this case we do not have *de jure* organs, or organs established by law, but we have persons or entities (non-state actors) and subjects that are not recognized as organs of the state that exercise governmental authorities that are certain functions that are usually attributed to a state organ.

The idea behind Article 5 is that a state cannot escape its international response by giving the powers to do something that is of a sovereign nature to a subject that is kept separate from the organs of the state and the organization of the state.

For example, a state that gives private military or security companies the power to provide law enforcement activities or services. If you use contractors to protect and control a prison (this happened in the context of the Iraq war, for example) you cannot escape responsibility just because some kind of power that is governmental in nature is attributed to a private actor or a private company instead of giving that mandate to a state body.

Article 5 has sometimes been used to assess whether a state could be attributed violations committed by private contractors or mercenaries when asked to perform tasks of a governmental nature: for example, guards or private contractors sent to a state's border to perform immigration tasks (an example is the Mexican border).

Crawford, the special rapporteur who wrote the latest version of ARSIWA, described Article 5 as intended to consider the increasingly common phenomenon of parastatal entities exercising elements of governmental authority instead of state bodies and even to consider situations in which former state-owned companies (therefore also in the economic field) were privatized but retained some public or regulatory functions.

Thus, Article 5 is intended to address the issue of state-owned enterprises or enterprises that have been privatized but are still partly kept under government control or that continue to exercise certain public or regulatory functions.

So, what kind of functions will can never be delegated to private parties without having a responsibility for their action?

Article 6 is quite easy, and it can become relevant even in the context of the Russian scenario.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

It concerns the practise of lending certain organs to another state. The typical case is that of military troops that are state landed to another state making them at the disposal of another state. They sometimes are embedded in the armed forces of another state.

For example, a pilot or pilots of a state that are placed at the disposal of another state to carry out airstrikes in a given foreign country. It may happen in the scenario of the Ukrainian war in that case the state which is sort of lending its troops to the other one is complicit in the commission of the violation.

Article 7 refers to acts committed ultra vires by an organ of state. Ultra vires is Latin term for "excess of authority".

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

This article discusses whether a state should be held internationally liable for a violation of a rule of international law committed by an organ of the state, but in violation of national norms of international law, violation of orders or outside the boundaries of its mandate.

Does a police officer or a member of the army who contravenes a clear order not to subject a prisoner to inhuman and degrading treatment, but continues to do so at night without superior control, give rise to the responsibility of the state? What happens in case of excess of authority or contravention of instruction?

Two different aspects must be distinguished when talking about Article 7.

If a policeman on his way home I decide to kill the head of state or a minister it would not be because of his power or the public function he is exercising, but because he decided to commit a murder. However, even then, the state will still have a responsibility of an indirect nature because the state will be responsible for not preventing something like this from happening.

All states have a duty to protect foreigners in their own territory and under their own jurisdiction, so there will in many cases be a responsibility on the state arising from the fact that the state did not do everything in its power to prevent the violation from happening. Therefore, states often have a duty of prevention.

For example, it is on this basis that in a case where Mexico was held responsible for the conduct of members of its law enforcement agencies who shot and killed a citizen French whom they had stopped at night to get

money and who refused to pay. Mexico was held accountable not because of the conduct of members of the armed forces, but for not preventing this event.

Another important aspect that is relevant to the application of Article 7 is whether it is possible to distinguish whether the state body was acting completely outside its mandate as a private person or was behaving in excess of authority or contravening instructions but still representing the state.

So, if they behave as if they were exercising public functions, it differs from whether they assaulted a car at night because these people were drunk after drinking a beer with friends. And this raises a few problems with Article 7.

There are circumstances in which a state can be held responsible for the conduct of the organs of the state, even when they act *ultra vires* or contrary to instructions, but it is not always easy to assess and define when this has happened.

INTERNATIONAL LAW - Lecture 25 of April 21, 2022

The conduct of private persons in the law of international responsibility.

The very first circumstances in which a conduct of a private person can be attributed to a state is the one which is described as the *facto organs* or persons, individuals or group of persons acting in the complete dependence of a state.

This can be implicitly read in Article 4, where there is the provision that we first discussed talking about the *iure organs* of state.

Organs of state that are created by the domestic law of every state, in this case we do not have any specific domestic law provision that creates an organ, but we are in a practical situation in which there are subjects that are considered to act under the complete dependence of a state.

And this was analysed by the International Court of Justice in two different decisions:

1. One we know is a landmark decision for many different aspects of international law, which is the Nicaragua case. We have already talked about the Nicaragua case and you should probably remember the reference to the contrast and the sandinista. And the fact that the United States of America had funded, trained and provided all different kind of support for this armed force, Contra Revolutionary Force, acting in Nicaragua against the legitimate government in place, that was a government of a socialist nature, that was not really liked by the United States of America, which preferred to have another kind of government in power in Nicaragua. But we discussed the Nicaragua case before, especially talking about the relationship between customary law rules and treaty rules. But this case is also important when it comes to the law of state responsibility. In this case the ICJ was asked to assess whether this contrast, Contra revolutionary group which was against the government power, was under the complete control of the United States, so that the conduct of the contrast would be attributed to the United States and give rise to the United States international responsibility. The ICJ was asked to assess whether the attacks, the violence, the homicides, sometimes even acts that can be considered internal terrorist nature, could be attributed to the United States.

And the first question that the ICJ decided to address was to ask itself whether the contrast would be considered a *de facto* organ of the United States. → So if it was possible to demonstrate that they acted under the complete dependence of the United States.

The answer that the International Court of Justice gave in this case was that it was not possible and then it turned to a second phase in the judgement that we will address in a minute, but this was the very first case

in which the International Court of Justice tries to verify whether an individual or an entity or a group of persons, even if not formally acknowledged by the state or created directly by the state as its own organ, could nonetheless be considered understaffed and control that it couldn't be established any separation or any independence between that entity., in this case the contrast, and the foreign state.

It is a very difficult task that should be demonstrated. It is much more difficult to demonstrate a complete dependence when the conduct at stake is undertaken by a group of people. It is a little bit less difficult to demonstrate if we are talking about an individual.

Just to make an example, there have been cases in which they have basically order private sigle Individuals to place bombs or to kidnap someone in a foreign state or Embassy or in some strategical place. So those individuals could more easily be found to act under the complete dependence of the state, because they were ordered to do something, they had the state plan, the operation, the state provided weapons the state provided instructions, funding, travel plans = all the support possible for the conduct to be realised → in this case a very strong link can be established between such an individual, or very small group of individuals, and the responsible state.

But when we are talking about independentist movement, the cessationist movement, rebels or terrorist groups it is much more difficult to see and to assest this complete dependent test.

2. It will not come as a surprise the fact that in the second as in which the International Court of Justice address this topic, that Bosniac genocide case, the court was unable to establish the existence of such a strong link, of such a strong dependence. In this Bosniac genocide case (in the ex Yugoslavia), the court was asked to focus on acts of genocide, so a sort of composai breach international law rule committed by a very special group of people that was called the Bosnian Serb Army of the Republic Srpska.

This was a group of ex military or people that took arms with that intent to control a part of the territory in ex. Yugoslavia that at that time was part of the territory of Bosnia-Erzegovina and was inhabited by Bosnian Muslim.

This military group, the Bosnian Serb army of the Republic Srpska, wanted to occupy and obtain control of this piece of land, so that It could be merged with the Serbia and

Montenegro, (so it was in the context of the ex Yugoslavia war, this part of Bosnia Herzegovina was at the centre of the war between Bosnia Erzegovina on one side and Serbia and Montenegro on the other).

The fact that Bosnian Muslims lived there was used as an excuse to purify that part of the territory so that it could be occupied and appropriated by Serbia and Montenegro.

But this was not done by the official military troops of Serbia, Montenegro, this operation was mostly undertaken by this independent army, "self-made" created group of people that together decided to take arms and weapons and pursue their goal.

And in order to pursue this goal, they also perpetrated a genocide of more than almost 10,000 Bosnian Muslims, mostly men and boys.

But they were killed with the special intent required by the crime of genocide.

So the question before the International Court of Justice was can the conduct, the genocidal conduct, of the Bosnian Serb army of the Republic Srpska could be attributed to Serbia and Montenegro? (name at the time then the name changed because at that time it was Federal Republic of Yugoslavia, then later they became

Serbia and Montenegro, then they split in Serbia alone and Montenegro alone independent. = history is complicated in the succession of state.)

The name "army" will not be enough to establish a relationship, because we can create an army in the Republic Srpska, there was no state thereof it.

it's like a it was like a the Independent army of Trentino Alto Adige

But it was established not by a state, they were not created by a state, they were autonomously and independently created.

They were on the same side of, at the time, the Federal Republic of Yugoslavia, but they were not the official army of the Federal Republic of Yugoslavia, they're completely separate.

But they acted somehow going in the same direction.

So the question was could the crimes committed by this army be attributed to a state which is their own official state.

And the ICJ again asked itself if it could demonstrate this complete dependence of the Bosnian Serb army of the Republic Srpska on the Federal Republic of Yugoslavia that later became Serbia and Montenegro.

And again, the ICJ, as it did in Nicaragua, conducted this test, and said that in the case of and could not be demonstrated.

And in particular, in the Bosnian genocide case, the ICJ affirms:

"to equal persons or entities with state organs, when they do not have that status under internal domestic law, must be exceptional or it requires proof of a particularly great degree of state control over them. A relationship with, as the ICJ itself describes Nicaragua, a complete dependent."

So since the Boston Army of the Republic Srpska's service did not have this complete dependence, they still had margin of autonomy room for maneuver, they could act independently, even if in the same direction, but they still could decide what to do, when to attack, what kind of activities to undertake or not → they ICJ couldn't find that this complete dependence was established.

So to assess the existence of a de facto organ the individual or the group of person could lack any real autonomy and close political, military, economic, cultural ethnic relation and even the provision of logistical support in the form of weapons, training financial assistance (that was very clearly established for the contrast, for example, from the USA, provided all those kind of support to the contrast) are not enough to establish a relationship of complete dependence.

The Test required to have a de facto organ can be inferred from the fact that the state has conceived, created or organised a group of people or provided direct instruction, very specific instruction to an individual.

And this strict control should cover all the different activities undertaken by this group of people. It's pervasive and very precise, so that there is no margin of autonomy left in order to have a de facto organ.

= This was the first test adopted by the International Court of Justice to verify, whether for the contrast and Army of the Republic Srpska, if their conduct could be attributed to a state and so it's like going through a ladder of different levels of control.

Having excluded the complete dependence of the Contrast and the Republic Srpska from the United States and the Federal Republic of Yugoslavia, ICJ moved to a second level, which is the 2nd circumstance, the second situation under which the conduct of private parties can be attributed to a state.

And which is described in the ARSIWA Article 8.

So if there is no complete dependence, we should still assess and verify if at least people acted under the direction or control of the state.

So not like a puppet, even if complete dependence seems more like a puppet, but at least under the direction or control.

And this attribution ground is very important in international law for a number of situations: for paramilitary groups, successionist movements, rebels, secessionist groups and even terrorist groups.

Very important to see whether all these different kinds of groups which are made of private individuals, not official organs of state, can be nonetheless linked to a given state. And Article 8 is definitely the most contentious provision in the ARSIWA, creating a split in the jurisprudence of international courts and tribunals, because the International Court of Justice interpreted this test, direction and control, in one way.

And the International Criminal Tribunal for the Ex Yugoslavia interpreted it in another way, so we had for a period of time, a split in the international jurisprudence.

The ICJ addressed this question again, in the Nicaragua case, back in 1986 so having excluded the complete dependence of the contrast from the United States.

The ICJ is now asking itself, if at least could be proved the United States has effective control over the operations of the Contrast.

So, the interpretation given by the International Court of Justice is read control as effective control.

In the view of the International Court of Justice in the Nicaragua case effective control meant control over any act performed by the contrast. Again, it was not sufficient to provide training, support, funding weapons to the Contrast.

The ICJ considered it necessary that the United States had effective control on any single conduct of the Contrast.

So that the United States could be directly linked to the fact that the contrast one day after a village and the following day kidnap someone. So for any of these different conduct there should have been a clearly established link with the United States that demonstrated the effective control of the United States over the paramilitary group of the Contrast.

As you can imagine the scenario in Nicaragua, in the 80s, was not like today with the same kind of communication and technologies and satellites, whatever form of technological health that paramilitary groups have today.

It was very difficult to demonstrate the wrongful involvement of the United States in the conduct of the Contrast, in fact the ICJ could not establish either the existence of effective control: so the countries were neither de facto organs nor they could be considered to be directed or controlled by the United States.

(If you remember, the International Court of Justice nonetheless found the United States responsible for having interfered in the internal affairs of Nicaragua, a violation of a different international law rule. The fact that the United States provided all this sort of assistance to the Contrast amounts itself to a violation of the principle of non interference in the internal affairs of another state.

What the ICJ couldn't establish was the United States international responsibility for the violent acts of the contrast itself.

So there is a very very strong difference: the USA were responsible for their own conduct, but they couldn't be found responsible for the activities of the Contrast.

So we are back at the end of the 80s where the CJ requires this very strong degree of effective control to attribute responsibility for the conduct of a person or a group of people.

The case of the genocide in the ex Yugoslavia comes back again, this time not directly in front of the International Court of Justice, but in front of the International Criminal Tribunal of the ex Yugoslavia. → This is a tribunal that was created by the UN Security Council through a resolution adopted under chapter seven of the UN Charter, providing for measures consisting in the use of force, that were aimed at maintaining peace and preserving peace. The prosecution of criminals of war, those that committed war crimes and crimes against humanity and the crime of genocide during the war of the ex Yugoslavia, could be prosecuted before the International Criminal Tribunal for the ex Yugoslavia (ICTY).

We are now discussing a decision of a tribunal over individual criminal responsibility. We are talking about a tribunal which has the power to assess individual conduct, conduct of those soldiers, generals and heads of State or Government, which had a role in the atrocities committed during the ex Yugoslavia war.

So it has to be underlined that this is an International Criminal case, so the individual criminal responsibility of a single person. I'm not talking about the international responsibility of a state.

And the decision that is relevant in the interpretation of Article 8 is a decision against Tadic, who was the President of the Federal Republic of ex Yugoslavia, that later became Serbia and Montenegro, who was indicted and prosecuted for acts of genocide and for ordering and contributing to genocide, especially the genocide in Srebrenica.

And the question before the ICTY was: is Tadic as president of the Federal Republic of

Yugoslavia, also criminally and individually responsible for the Bosnian harms of the Army of Republika Srpska? Even if that military group, that we discussed before, that was not an official part of the Army of the Federal Republic of ex Yugoslavia, was an autonomous independently self created group of people who were the ones responsible for the genocide in Srebrenica .

In this case we are not talking about the responsibility of the Federal Republic of Yugoslavia for the conduct of the army of the Republic Srpska, we are talking about the individual criminal responsibility of the President of a foreign state for its involvement in directing or controlling the activities of the army of the Republic Srpska.

And here ICTY adopted a different test, so the text adopted in this case by ICTY is not one of effective control, but one which is called overall control.

According to the ICTY, the threshold, the level of control, is different and is broader. It's not effective control on any single conduct, but it's an overall control.

So that planning, training, providing support, instructions, maps, whatever you imagine, was overall enough to establish the individual criminal responsibility of Tadic, also for the atrocities committed by those taking part in the genocide of the Srebrenica.

The overall control means that it is not necessary to prove that Tadic order members of the Army of the Republic Srpska to commit certain murders or conduct of ethnic cleansing one day and the following day something else and the day after raping and torturing those that were still around.

It was enough to have established this overall control so that involvement in the planning, in the supervision of the military operations was overall enough, even if it was not so detailed to go through the details and the elements of every single act.

And we can understand why the ICTY decided to follow this path, because it was not going after the responsibility of a state, but it was trying to demonstrate the international individual criminal responsibility of a single person that, because of its power position, as President of the Federal Republic of Yugoslavia, could have exercised over this otherwise totally independent military group.

So, the ICTY found Tadic responsible and established this link between Tadic and the army of the Republic Srpska.

But the test, relied on by the ICTY, was very criticised by a number of scholars, by a number of states, by judges of other international courts and tribunals.

So for a while for a long period of time, we had this split in the jurisprudence with the ICJ sticking to the effective control test and International Criminal courts and tribunals adopting instead a broader test, the overall test.

The ARSIWA chose to not define and to apply an objective to describe the level of control necessary and basically left the question open.

But then International Court of Justice again in the Bosnian Genocide case and address the question again and come back to the effective control test, so basically reaffirmed its own position, it didn't move and didn't follow the path adopted by the ICTY, and establish again the fact that in order to have international responsibility, it has to be demonstrated an effective control over the group of people committing the fact.

And the ICJ did so exactly on the same circumstance, because the ICJ was asked to decide on the responsibility of the Federal Republic ex Yugoslavia, later Montenegro, over the genocide in Srebrenica, so the conduct of the army of the Republic Srpska.

So we have the same circumstances that are analysed by the ICTY, under the lenses of the individual criminal responsibility of a single person and the ICJ, on the other side, looking at the international responsibility of a state, the abstract entity of a state.

ICJ couldn't establish the direct responsibility of the state for what happened in Srebrenica through the atrocities committed by the army of the Republic Srpska

Nonetheless, the ICJ decided that the Federal Republic of Yugoslavia still had an international responsibility for not having prevented genocide to happen. Even if it could not be proved that it was directly involved in the genocide, it could be proved that it was responsible for not having done any effort to prevent this genocide to happen in Srebrenica.

I described to you the evolution of the law of international responsibility when it comes to the conduct of private person that can be considered a de facto organ, or at least under the direction or control of a state.

And as you could have understood, we are still in a scenario in which the test is very tricky, so it's not so easy to establish the international responsibility of a state for the conduct private, especially if there are groups of rebels or paramilitary groups or terrorist groups or irregulars or armed bands. It is still very contentious.

I referred to 3 circumstances under which the activities, the conduct of private person can be attributed to the state.

We have analysed a de facto organ and persons under the effective control of a state, we should now the third case, which is articulated by Article 11 of the ARSIWA

And this is defined as a conduct which is acknowledged and adopted by a state as its own.

Provision, Article 11, was introduced in the ARSIWA by the special rapporteur James

Crawford, after a very famous case that happened back in the 80s and was discussed by the ICJ. So basically we had the ICJ addressing this issue first and then it was translated into a codification provision by the International Law Commission.

(Question from the chat: could the rule of lack of prevention also apply to the conduct of the state of Myanmar in the Rohingya case?)

Certainly because we know that the obligations falling on states deriving from the Convention on Genocides include also the obligation to prevent genocide and punish genocide and certainly Myanmar is not preventing genocide nor punishing those who are committing genocide.

And we have seen in the exercise that the military troops of Myanmar are involved in the genocide against the Rohingya people, but these are official organs of the state so what rules of attribution should we apply? There is no necessity to look at Article 8 or other rules of attribution that we have discussed because they are plain vanilla organs of state.

The rule of attribution that we apply in that case, it's article four of the ARSIWA.

Could have been different if genocidal acts were carried out, for example by contractors In that case, we could not rely on the rule of attribution or Article 4, because contractors. are private subjects and sign contracts with the state.

So we should at least discuss whether they were contracted to exercise elements of governmental authority. If this could not be proved, then we could move on to see whether It could be considered a de facto organ in the complete dependence of Myanmar or under the effective control of Myanmar under Article 8.

→ Whenever we are in front of a violation of international law, we should ask ourselves what are the applicable rules of attribute ability and depending on the nature of those committing, in practise, in the field, the violation of international law. We should decide whether to apply Article 4, Article 5, Article 8 or Article 11 that was the one I was going to discuss):

Article 11: this article was introduced in the ARSIWA by the International Law Commission. after the question was addressed by the National Court of Justice and other very important aid Tehran Hostages Case. (Movie "Argo")

The case had to do with the revolution in Iran and the fact that Islamic students back at the end of the 70s occupied the United States Embassy in Tehran.

And they took hostages, for a few months, members of the American embassy, they considered the US embassy as the center of espionage, spies and conspiracy. They consider that the US was behind a movement that fronted part of the population to contrast the power of the Ayatollah Khamenei.

But they were a group of Islamic students, so they were private individuals, not members of the army, not officials, not organs of the state.

Their actions could not be directly linked or attributed to Iran, even if we all know that occupying a foreign embassy, taking as hostages all the people working for the foreign embassy is obviously against the rules of customary nature on diplomatic and consular relations between states. One of the things that clearly cannot be done in the realm of international relations.

At a certain point, it happened that what started as an occupation of the US embassy done by a group of private citizens, was knowledge and adopted by the state of Iran as its own. Because Iran not only formally and publicly approved what the Islamic students were doing, but even used hostage prizes to put pressure on the United States in the course of diplomatic negotiation.

So that the State of Iran started to negotiate with the United States, the release of the hostages that were taken by this group of citizens, only if the US could have met some demands, some requirements, and requests of Iran.

So in this way, Iran used the occupation of the US Embassy for its own sovereign purposes and what started as a completely private dynamic became attributable to the state. So at a later stage, what was happening in the US embassy became attributable to the state of Iran.

But this at least is what the ICJ established back in 1989 in the case which is titled "United States diplomatic and Consular Staff In Tehran" and was later translated in Article 11 of

ARSIWA.

This kind of situation would be interpreted in a narrow way: it is not like every time a state or head of state or government approved or expressed sympathy or even authorised support to the activities or acts of a group of private subjects, non state actors, is enough to make the actions of these non state actors attributable to the state. BUT There is a need for a stronger level of involvement and the threshold that was used in the Tehran case is the one that is still applicable today. = not only acknowledging but using its own benefit, at the benefit of the state the situation created by this group of private individuals.

It is interesting to see how a creation of jurisprudence case law is, after a few years, translated into a customary rule of international law, codified even by the international law Commission.

So you see the difference between all the various rules of attribution, the main distinction between organs of state and private individuals.

And it's not always easy to establish which one of those rules of attribution should be applied.

CIRCUMSTANCES PRECLUDING WRONGFULNESS

We can move to another section of the ARSIWA, in Chapter 5 and from the articles from 20 to 25 which is a very important part of the law of international responsibility which describes a series of circumstances, defenses, excuses or even exceptions that exclude responsibility for conducts that otherwise would have been considered wrongful under international law.

The title that the ILC used in the ARSIWA is misleading, basically means wrong.

Because what we are talking about are not circumstances that exclude the wrongfulness of a given conduct. The conduct remains wrong, remains a violation of international law, but in a set of given circumstances that wrongfulness is excused.

So from the violation of international law does not arise responsibilities.

The title should have been, in my opinion, "circumstances excluding or precluding responsibility" not wrongfulness per se.

The Act remains wrongful, and remains inconsistent with an international law obligation.

But because there are these specific circumstances, there is no responsibility.

I still commit a wrong, but I cannot be considered responsible for that.

And states cannot be considered responsible for their violations of international law.

1. if they have committed this violation with the consent of the state towards the obligation to which it was owed.
2. If the state had acted in self defence.
3. If the act amounts to countermeasures.
4. If the state acted in force majeure.
5. Or in a situation of distress or in a situation of necessity. = Circumstances limiting responsibility.

1. The simple one is consent.

A state can consent to the conduct of another state that otherwise would amount to a violation of international law.

Classical example: peacekeeping operation the blue helmets of the United Nations that are made of military and civil components.

But we think especially the military troops of which peacekeeping forces are made, It is quite clear that they cannot operate on the territory of another state without its consent.

So the presence of military forces on the territory of a state is usually considered a violation of the sovereignty of the state, unless the state itself provides its consent.

This goes for a peacekeeping operation, it is a necessary requirement to establish a peacekeeping operation, but also for the establishment of foreign military bases.

For example, the US military bases that are all around European states.

The territorial state should provide its consent to the presence of foreign military troops.

So the consent should be validly given, prior before the act concerned.

Obviously consent should be given by someone who has the authority to provide that consent, someone who has authority to represent the will of the state.

(The Minister of foreign relations or the government).

Once a consent is given, obviously consent is given under certain limits, under certain boundaries.

So that the conduct of another state should stay within those limits and boundaries. If it exceeds then, It will not be covered anymore by a circumstance precluding wrongfulness.

Ex. the presence of foreign military troops in the territory of state.

2. Self defence:

We have already addressed the question of self defence quite extensively when we discuss the prohibition of the use of force talking about the United Nations.

We made reference to Article 51 of the United Nations Charter. We talked about individual and collective self defence.

We mentioned the issue of anticipatory self defence.

And you can go back to your notes taken at the beginning of the course on that issue.

The self defence should always be exercised respecting three requirements:

- the necessity,
- the proportionality,
- the immediateness of the reaction.

So I can use force in self defence only if this is strictly necessary ,so that there are no alternative peaceful means to solve the issue or to reach the same objective → so a strict necessity.

Proportionality means that the use of force allowed in self defence to be proportional to the gravity of the attack.

What is a proportional enough answer to the attack, should not be above and beyond the level necessary to counter the attack.

Also in this case there is an organ of state that provides self defence.

And so for self defence will not apply, for example, if Italy becomes the target of an act of war of aggression, and twenty of us decide to answer in self defence → it is not valid for a private citizen to answer in self defence, it is only up to the state to reply in self defence.

3. (countermeasure will be explained in the lesson after this one)

4. Force majeure

under Article 23 which can be invoked when an irresistible force or an unforeseen event that is beyond the control of the state, makes the performance of the obligation materially impossible.

So the conduct of the state, that's why it relies on a rule of international law, is completely involuntary and does not depend on the willingness of the state. The state cannot do anything else that breaches a rule of international law.

But there is no free choice,, so this happens only in case of natural disasters, such as earthquakes, hurricanes or sometimes in case of human intervention but this is mostly the case of military intervention or foreign occupation or even an insurrection.

Not very often that a violation of international law occurs in a scenario of force majeure.

The examples have to do with the violation of the territorial base of a state: a flight, an aeroplane violating the airspace of another country because of a hurricane or bad weather or circumstances like this for what concern territorial sea. Questions concerning borders mostly.

5. distressed

Involves a choice, the possibility to adopt a conduct that will be consistent with international law rules, but will put at risk the life of people.

Or otherwise, the opposite situation, saving lives, but violating international law.

Here again, a situation where, for example, the main focus would be life. Ex. in an aircraft, there is someone who's dying on the airplane and therefore the pilot can either follow his path and land where it is supposed to land or otherwise violate the territorial boundaries of state, enter the territory of another state without its consent, but because it is necessary to save him. → a very limited scope of application and it has been broadly applied, even in international case law.

6. state of necessity or necessity.

This is provided by Article 25.

Necessity applies to exceptional situations in which the violation of an international obligation is the only way for the state to safeguard an essential interest against a grave and imminent peril.

What is at stake here is the "survival" of the state as itself, so usually necessity is referred to National Security, International Security, but even economic necessity, a situation which is of great danger for the state itself, for the subject of international law and the state cannot do anything else then breach some previously entered international obligation to save itself to protect its essential interests.

So this can be explained easily by making reference to the concept of economic necessity. For example: a few years back, Argentina was in a grave economic crisis and to preserve its economic resources, the only thing that they could do was to violate all the commitments they had to pay creditors, the foreign creditors of the state, so they repudiated their certain debt and all the kind of different debts they had towards foreigners.

They violated the economic obligation to protect the survival of the state and the capacity of the state to keep paying pensions and providing services to its citizens.

So these are circumstances that affect life and the survival of the state, could be a necessity concerning national or International Security but also economic necessity.

Argentina also blocked the private bank accounts of citizens and for a period of time some people in Argentina had, especially in some regions of Argentina, to go back to barter. Barter= you do not have currency means of payment available, you cannot resort to pay, buy something in exchange for money, for your national currency. But you have to exchange for something else. Ex. I go to have a haircut and I pay with apples growing in my garden, so not using money.)

Necessity presupposes a very dire scenario and excuses violations of international law obligations, but only for a limited period of time, so as soon as the situation comes back to normal, the state should also start complying with its international law obligation again. And the requirements set by Article 25 are not easy to satisfy, the only way is a very strict requirement, so violating an international obligation is the only way for the state to safeguard its essential interest.

What the state does should not impair concession interests of other states, in any case the state should compensate for damages created, (this is written in another article a few lines back).

Most importantly, a state can not involve necessity, If it has contributed to create the situation of necessity.

The main issue for economic necessity is exactly that, applying it to Argentina: Argentina did not create itself the situation of economic necessity in which it found itself?

Was it not responsible for wrongdoing, from management of the economy by the government that he found himself in such a situation in the end? It really had the only possible way to stop paying foreign creditors?

Not always easy to apply necessity as a circumstance precluding wrongfulness.

→ Think about this situation, proposed by the teacher:

If we have a treaty containing a safeguard clause or derogation which says that in case of necessity, the state parties are allowed to protect the essential security interest.

if this clause is written in the text of a treaty and it is worded in very similar terms as Article 25 of the ARSIWA. Are these the same? Or is it different?

We interpreted this pretty clause, applying the requirements set by Article 25, like the only way not contributing to the situation etc or is this a different rule of international law? Yesterday we described the Law of international responsibility as secondary rule, not primary rule.

The two elements that need to be satisfied in order to have international responsibility is violation of an international law obligation and attribibility to a state.

Is a treaty safeguard clause a secondary rule or a primary rule?

What is the order of the analysis that should be applied?

A state violates a physical commitment, a trade treaty commitment, but the trade treaty contains a safeguard clause, so that, for example, the state can apply import duties in specific circumstances, when it is essential for the state to protect its economic interests.

Do we need to apply Article 25 or It is not enough to apply the safeguard clause?

Do we have a violation of international law?

We look at the treaty rules, so the violation concerned the violation of a treaty So we look at the text of the treaty and see if the Treaty itself does not provide for any exception, any derogation.

So in this case, if there is a safeguard clause, already at that level, analysing the treaty text, there is no responsibility, there is no violation of international law. Because the conduct is allowed by the safeguard clause contained in the treaty.

It is not a violation of a treaty obligation.

We do not need to reach the level of seeing if that violation was committed under a state of necessity.

The safeguard clause is a primary rule in international law which prevents the application of the circumstance precluding wrongfulness of necessity.

So the relationship between primary rules and the secondary rules of the Law of international responsibility.

And when we need to trigger the circumstances precluding wrongfulness as necessity or force majeure.

Even conduct is already excused by a safeguard clause contained in the treaty, there is no violation.

If there is no safeguard clause, then there is a violation of the treaty and then. We can go to the secondary rules of international responsibility and see at that point, whether despite the violation, the state would be blamed for having undertaken the violation because, in a state of necessity or applying another circumstances precluding wrongfulness,.

It is a question of order in which you analyse the things, the different elements, the different rules of international law.

Rules about international responsibility apply at a second step.

INTERNATIONAL LAW - Lecture 26 of April 22, 2022

The circumstances precluding wrongfulness: name the circumstances precluding responsibility, because the wrong-doing remains and from that doesn't follow responsibility on the part of the state

> among the circumstances precluding wrongfulness, one of the most important is: necessity => we were talking about a specific case in which necessity was relied on by a state, and it was the scenario of Argentina crisis, back at the beginning of 2000-2001-2002

> it was a period of time in Argentina, during which there was a very strong economic crisis with a situation of hyper inflation => it isn't very common in industrialised states, but in many developing states, inflation is usually very high

=> it could be the consequence of many different causes, and for example in Russia, now, there's an inflation rate very high that increase week by week, that with the same amount of money one week you can buy 1K of bread, and the next week you can only buy, let's say, 800 grammes of bread

= hyper inflation really affects life of the population and it's a very difficult phenomenon to counter when the state doesn't have the proper economic condition to control hyperinflation

> Argentina was in a bad economic crisis, there was hyperinflation very high, you couldn't even find the price of goods written in the shops, because they were subject to change every day => there was no point in writing down price

> yesterday we refer to the fact that money wasn't used anymore as a means of payment => in Argentina the government had to introduce very restrictive measures and some of those measures affected the investments made in Argentina by foreigners

=> foreign investments in a state are usually protected under a field of international law, which is called "international investment law", and in particular by treaties that are called "bilateral investment treaties" (BIT)

> reference to this very specific type of a treaty, because I would like to point your attention to Article 11 of the Bilateral Investment Treaty, between Argentina and USA => this bilateral investment treaty aimed at providing protection to all US investments in Argentina

=> for example, the state of Argentina wouldn't expropriate, or nationalise, or limit, in other ways that could amount to creeping expropriation = this is a term that is sometimes used: the investments made by foreigners coming from the USA

> but because of the crisis, this is exactly what Argentina decided to do: to limit, to impose restrictive measures on investments made by foreigners, also, investment made by US person => Argentina, therefore,

immediately found itself in the middle of a very huge number of legal distance, because the restrictive measures Argentina adopted, in principle couldn't have been adopted

> there was a question of Argentina being responsible, on the international plane, for a violation of a series of treaty provisions, those in particular provided in the Bilateral Investment Treaty => Argentina affirms that it was exempted from responsibility relying on necessity

My question to you yesterday was: what is the relationship between a safeguard clause, that you can find in the text of the relevant applicable treaty, in this case the BIT between Argentina and the US, and the circumstance precluding wrongfulness of necessity the Art. 25 of RSIWA, a customary law rule

1. Was Argentina responsible of a violation of international law?
2. Was Argentina excused from its responsibility, because of Article 11, because of Article 25 of the RSIWA, or because of both? Are they the same or do they apply at a different level?

Was Argentina allowed to adopt this kind of restrictive measures? Answer is: no, it wasn't allowed to do so, because there is a treaty provision, the BIT provisions, that forbid Argentina to do so

> in principle there is a violation of a treaty provision = 1st level of the analysis

> 2nd level: does the treaty itself, the primary rules that we should apply to verify if there is a

violation, in principle, of international law, provide for some exceptions, from some derogations, from excuses => answer is: yes, because the treaty itself, the primary rules applicable in the case we are discussing, provides an Article 11 that the state party can adopt all the necessary measures for the maintenance of public order, for the maintenance or restoration of international peace or security, or for the protection of their own essential security interests

=> Article 11 of the US-Argentina BIT was interpreted quite broadly, in a wide way, to also cover economic essential security interest => the economic crisis Argentina was of such a gravity that it was really put in a risk the very existence of the state, and the ability of the government to keep ruling the country providing essential services, paying pensions, paying their public officials, and of keeping in place the entire economic system

= it was of such a gravity that Argentina could invoke the safeguard clause of Article 11, to adopt restrictive measures impacting on the investment of US investors that, otherwise, would have been illegitimate under treaty law

> we look at the rules of international law that are applicable in the case we have in front of us, and we already find at the level of primary rules an exception that says that Argentina isn't responsible for a violation of the BIT

> it's already the primary rules that contain a solution of our case, there is no need to look at the circumstances precluding wrongfulness, that are established by the secondary rules of the law of international responsibility

When can we be called to apply state of necessity as circumstances precluding wrongfulness?

Going back to our case: if the BIT didn't contain a safeguard clause, like Article 11, and therefore the restrictive measures adopted by Argentina would have been considered a violation of the primary rules => then, and only in that case, we should have, also, taking into account state of necessity as a circumstance precluding wrongfulness, as provided by the secondary rules of the law of international responsibility

> in that case, considering the scenario in which there is no Article 11, there is no safeguard clause in the applicable treaty, therefore, considering state of necessity then there are certain limitations that could be applied => because to apply state of necessity under the RSIWA, for example the state should not have contributed to the situation of necessity

=> this is a requirement, together with the the only way that isn't included in the safeguard clause of the BIT

= the phases that you should follow to provide a solution to this case: is there a violation of international law? We should look at the applicable primary rules, then we should also verify if there is a derogation of safeguard clause, an exception that is also applicable to the case

> if there is an exception applicable, there is no violation of international law, it is not satisfied the 1st element, that is necessity to have international responsibility

=> if there is no safeguard clause, no exception, then we should apply the rules of the law of international responsibility, to see weather the actions are attributable to the state and see if we can apply a circumstance precluding wrongfulness

> state of necessity, under the law of International responsibility and safeguard clauses included in treaties that make reference to necessity, to essential security interests, or to restoration of international peace or security, are not the same thing as circumstance precluding wrongfulness of state of necessity

= 2 different things => you cannot interpret 1 applying the requirements are necessary for the 2nd one

Other circumstances precluding wrongfulness: countermeasures

> countermeasures are very useful tool in international law and we're in a current situation, especially thinking about the Russia-Ukraine war, in which countermeasures have been involved, quite a number of times already

> countermeasures are an unlawful reaction by a state to the breach of an international law, obligation by another state => a state violates a rule of international law, and the injured state, the one towards which the obligation was owed, can reply by adopting another unlawful major = another violation of international law directed at the state that 1st started the violation of international law

> there's a way to react to a wrongdoing made by another state, and the fact that this is a reaction to another state international violation, is considered a circumstance precluding responsibility => because I was attacked, I can react and my reaction, even if otherwise would have amounted to violation of international law, doesn't create international responsibility

> why international law allow this to happen: countermeasures can also being described as a sort of self-measure = a way of doing justice by itself => this is a considered legitimate and lawful, under international law, because there is not a supreme organ, or a court or police force, in international law

= there is no one really capable to make the rule of international law enforceable => there is no power of an international law supranational power that can oblige a state, or an IO, to comply with the obligations arising from international law

= there is no judge, there is no court, there is no police force

=> then states themselves are allowed to react to the violations of international law, made by other states

=> these reactions, counter measures, can be adopted fulfilling some requirements and also procedural requirements, but they are legit

= they make a violation of international law, legitimate because it's a conduct aimed at stopping another state to keep violating international law

We should distinguish the concept of countermeasures from few other notions and terms

(1) Reprisal: is a concept that was used during the 19th cent., before the WWI-WWII, very similar to countermeasures

> reprisals were considered legitimate even if they included conduct that consisted in the use of force => states were allowed to react to a violation of international law, even with the use of force > this was done, for example, in the relationship between states, when a state was unable to repay the debt it hold to another state, and the creditor state couldn't force the debtor state pay, but he could use force to put pressure on the debtor state to pay

=> this happened multiple times, especially in Latin America, and the relationship between, for example, Caribbean States and European states, with the UK, for example, France, but also Italy, when they didn't get repaid send military ships to the debtor country, to force the it to pay = it was a very unbalanced way to use military power against a developing country or an excolony, force them paying their international debt

> reprisals are very similar to countermeasures, but they also included the use of force => something that we know, from the WWII is considered entirely illegitimate = the prohibition on the use of force is one of the fundamental rule of international law

=> it's a jus cogens rule, even of an erga omnes character = it's one of the basic norm of international law

> one of the 1st requirement, today, for a countermeasure to be lawful is not to include the use of force => usually countermeasures amount to measures of an economic nature, like embargoes or target sanctions

(2) Retorsions: are measures of discourtesy, or unfriendliness towards another State => in themselves don't amount to a violation of international law

= they aren't unlawful in nature, but they affect the normal international relationship between states => it's a 1st method/tool with which to react to the wrongdoing of another state

> classical example of retorsion is the interruption of every diplomatic relations with another state => there is no obligation for a state to entertain diplomatic relations with all the other states in the international community

=> it's a question of neighbouring relationship, political relationship, international relations, but there is no obligation => the interruption of the diplomatic relations: calling back ambassador, calling back council isn't a violation of international law, but certainly gives a signal to the host state that the relations aren't good anymore, that you want your ambassador to come back home > these are retorsions = measures that are lawful, but are adopted to signal the wrongdoing state that its conduct is giving rise to a reaction, even if not of the same gravity as the adoption of a countermeasure

(3) Sanctions: it's a word that is being used every day in the newspapers, and it has been used sometimes in a improper way

> the real sanctions are those adopted by the UN Security Council under Chapter 7, amounting to measures not involving the use of force, like trade embargoes, or other targeted measures that are not directly targeting the state, but they are targeting individuals => for example some members of Al Qaeda or other terrorist groups

> these measures are the proper sanctions and are adopted by the UNSC with binding resolutions, binding on all the Member States of the UN, adopted for the purpose of preserving peace and security = they are collective in nature

What we are used to talk about these days are: individual sanctions => individual sanctions doesn't mean that they are targeting individuals, but means that these measures are adopted by individual states without the backing of the UNSC

=> it's exactly what is happening in the context of Russia-Ukraine, war: the UNSC is unable to adopt any kind of resolution on the basis of Chapter 7, because Russia is a permanent member of the UNSC = it has veto power and it's blocking all the activities of the UNSC

> we don't have collective sanctions adopted at UN level against Russia => we have a coordinated group of sanctions adopted by individual states, each under their own legal order => US. sanctions are adopted on the basis of the national rules, establishing the power of the President to adopt UN sanctions => the EU is coordinating the answer of EU states, every one of them adopting individual sanctions

=> also states that have been neutral for a very long time (ex Switzerland, Canada, Australia) are joining, adopting individual sanctions against Russia = a very huge number of countries, most of them, all the G7 countries and also the other one are joined

> individual sanctions aren't necessarily countermeasure => it's not really the same, the concept is different: when individual sanctions are adopted, in reaction to international wrongful act of another state, in that very case they can be considered to be also countermeasures

= in the case of Russia: all the sanctions that are being adopted, a huge number of different sanctions, ex:

- travel ban, asset freeze, prohibition to provide funds,
 - targeting oligarchs and certain very specific group of people, or natural or juridical persons like companies => the number is raising: 1091 individuals and 80 companies
 - a number of sanctions that, instead, are directed against Russia, for example the prohibition concerning the measures, the Russian central banks
- => there's a very huge number of sanctions, in all different sectors, (energy sector, transport sector...) => dual use goods and technology = (dual use) items and technologies that can be used both for civil purposes and for military purposes.

=> for example, the reference here is made to drones, which can be used for evil purposes, maybe to save someone hiking on a mountain, but also for military purposes => they are under a very special set of rules and regulations, because they can be used for war and as weapon => they can be exported only under very specific types of controls => for that very reason they are also subject to sanction

= individual sanctions: when they are adopted, following the violation of an international law rule by another state, can also be considered countermeasure => therefore, they are protected, they don't give rise to international responsibility

> the issue is open in international law: if otherwise sanctions are entirely legitimate or not, without the backing of the UNSC

> if the US decide for its own geopolitical interest and security interest to apply a very huge number of sanctions against Iran, for example, because Iran is considered a terrorist country in the blacklist of the US

=> even when Iran is doing what it was required to do, by the international community, to stop producing nuclear power, and it was part of a programme

=> in this case, when there is no proof that Iran is committing a violation of international law, and the US still decide to apply sanctions against Iran, are they legitimate?

=> they cannot be considered countermeasures, because we don't know if there is a 1st violation of international law, coming from the state being targeted by sanctions

> these kind of sanctions are individual sanctions: there is no UNSC backing => sometimes US sanctions have extraterritorial nature = give right on a number of issues, because their impact reach, not only Iran, but also all the other countries still keeping their relationship with Iran

> individual sanctions: the same goes for Europe, and other countries => the US, for example, keep targeting Cuba with sanctions since the 50s => years and years that the US are doing that > in international law, the question is really open: many consider individual sanctions that cannot be considered to amount also to countermeasure to be illegitimate, unlawful, because, 1st of all, there's an issue of balance of power

= sanctions are usually used by the strongest powers against the developing countries, or weaker countries, even in terms of economic power => most of the time, individual sanctions are justified by the sanctioning state as a reaction to a behaviour on the side of the targeted state, that affect the security, specially the national security, of the sanctioning state

> sometimes the government of the sanctioning state claim that there's a violation of international but until there's real proof, evidence, that the violation was committed, it's not easy to admit resorting to individual sanctions without having a 3rd party assessing the existence of the violations

> individual sanctions can really have a very strong impact, not only on the targeted country, but also on the populations = people living in the targeted country, and on all those outside the sanctioning state that if the economic relations with the targeted county.

> they have a strong impact on the international community: for example UN Special Reporter on sanctions and human rights, has a recently affirmed that the resort by a major power of its dominant position in the international financial and economic arena against its enemies aimed at causing hardship to the economy of sovereign states, is contrary to international law as it inevitably undermines the human rights of the population of the targeted state

> the question isn't only about the legitimacy of the power to adopt individual sanctions, but also the fact that they have a very strong impact on human rights of the population of the targeted state => the question is open, but it's much less open when those individual sanctions are aimed at stopping a very grave violation of international law, like an aggression, the use of force by a state against another one

Requirements

Now we should look at the conditions that should be made when a state apply a countermeasure, or claim to have applied a countermeasure

(1) under the ARSIWA the reference is made, 1st of all, to the injured state = the only the directly injured state can in principle adopt a countermeasure => in principle because it really depends on the nature of the rule of international law that the violating state has violated 1st

> in the case of Russia: Russia has violated the prohibition of the use of force, started a war of aggression = it violated a rule of jus cogens = a peremptory rule of international law

=> it also violated an erga omnes obligation, owed not only towards Ukraine, but towards the entire international community => this allow not only the directly injured state to react, but also other states => in principle, the injured state is the one that can take countermeasures

> the main issue is always when the existence of an international wrongful act is disputed => when there is no certainty that at the beginning of everything there was a violation of international law

=> the state acting countermeasure would always bear the risk of adopting a conduct which amounts to a violation of an international obligation, that isn't excused by circumstances precluding from = always be very careful in what it does

(2) the countermeasure should have a clear goal => the measure should be directed at putting pressure on the wrongdoing state, that it will comply, it will stop violating international law

> the countermeasure adopted should have his main goal: forcing the wrongdoing state to stop => it shouldn't be a punitive measure, should always be proportionate to the aim that the measure wants to achieve => proportionality is 3rd requirement

(3) Proportionality: has to be assess on the basis of the nature of the violation => if a state violate a trade treaty commitment, the countermeasure should be balanced and most often they will concern trade relation

> in the case of a war of aggression: countermeasure can have a stronger impact on wrongdoing state, at least this is what is usually maintained by scholars of international law

(4) countermeasures should be reversible => they should amount to measures that can be stopped and revert, as soon as, the wrongdoing state start complying with the international obligation again

> economic embargoes, economic sanctions: are of a nature that can be immediately interrupted and revoked => they should be of such a nature to be legitimate.

Then a number of procedural conditions:

- the applying stage to 1st request the wrongdoing state to fulfil its obligations - there is a requirement of notification
- even a requirement to offer to enter into negotiations => this isn't always possible, and when this isn't possible and the request obtain no answer, then countermeasure can be immediately applied

3rd-party countermeasures

= countermeasures adopted not only by the directly injured state, but also by other states of the international community => they can be justified when the violation concern an erga omnes obligations

[> the question of countermeasure is topical today, because all what is happening in relation to Russia and Belarus, is being justified in terms of countermeasures => we can ask ourselves which point all the sanctions targeting Russia Belarus and individuals and companies coming from Russia and Belarus as well, are legitimate and are proportionate

> we have a growing number of sanctions, it's true that in front of us we have a great violation of a jus cogens rule, but which point all these sanctions remain proportionate as countermeasures? => unfortunately there is not really a court, a tribunal judicial organ that can do that]

The consequences of state responsibility

> Article 30, this part concern the provisions of the ARSIWA of chapter 1, part 2

> unfortunately, the consequences of state responsibility, again, are one of those field of international law, in which international law is not very effective and doesn't really make good for the victims of a violation of international law => the duties of reparation aren't usually able to really compensate the victims of a violation of international law

> these rules apply in the relationship between states => it's the wrongdoing state that is under a duty to, 1st of all, sees the internationally wrongful conduct and to offer assurances or guarantees of no repetition (Art. 48 ARSIWA)

=> this is the list a state and do, for example violation of the territorial integrity of another state:

- they can admit and offer assurances or guarantees to not repeat the same conduct = nonrepetition
- reparation: includes very different elements as it happens in the civil law, under the domestic law of states => and the duty to make reparation doesn't absolve the state from performing, comply with the obligation => reparation includes: any damage either of material or moral nature that is caused by the internationally wrongful act of a state => here the question is the causal nexus

=> it's not always easy to establish the link between the violation of international law and the damages that result from this violation, because only when there is this proof of the causal nexus, then the ICJ, for example or another court, can order the state to pay compensation

> when it is possible to establish the causal nexus, then reparation (1) can be made in 3 different ways, that can be combined in the form of restitution => from the Latin word "*restitutio in integrum*" = means recreating the situation that existed before the wrongful act

=> this isn't always possible, when isn't possible the state will be obliged to provide compensation (2) and these require establishing a sum of money that also includes loss of profits (3) last form of reparation is: satisfaction = a way for the state to recognise, to admit its wrongdoing, making excuses, and sometimes providing an apology

=> or a classical thing, that happens in the international relationship, is a tribute to the flag

> satisfaction is very ineffective and doesn't really provide any good for the victims of the violation => this is so because the dispute about reparation is a thought to be part of the international responsibility => concerning the relationship between 2 states

> it doesn't really take into account people, the citizens, the individuals that have suffered from the violation to occur => this is again another field of international law which is really not satisfying in its state of development