I. THE NATURE OF INTERNATIONAL LAW

A. History of International law
   1. Long history of peace treaties, alliances, etc.
      a) Jews and Romans
         i) Roman concept of a law of nations
         ii) Romans w/ two systems of law: one for Romans, one for foreigners
      b) Syrians
      c) Spartans
   2. Hugo Grotius – argued the law of nations established legal rules that bound the
      sovereign states of Europe
   3. Jeremy Bentham – “international law” as the law of nations

B. Rules of International Law
   1. Interaction of independent states
      a) thus, must have mutually agreed upon rules about the nature of these states and
         the fundamental rights and obligations relating
   2. Ways in which international law is made
      a) Treaties/Conventions
         i) explicit, usually written agreements states make among themselves
         ii) state consents
      b) Custom
         i) look at decisions, dicta, pronouncements, etc. to determine
         ii) state consent is implicit
         iii) ex. Flartiga, judge looks to UN Charter and Resolutions and well as
              various treatises, journals, etc.
      c) General Municipal Practices of States
         i) general principles of law
         ii) most or all states observe certain rules as part of their domestic laws so
             can tell that they are fundamental and automatically part of int’l law
      d) Statute of the International Court of Justice, Article 38: the Court, whose
         function it is to decide in accordance with international law such disputes as are
         submitted to it, shall apply”
         i) international conventions, whether general or particular, establishing
            rules expressly recognized by the contesting States;
         ii) international custom, as evidence of a general practice accepted as law;
         iii) the general principles of law recognized by civilized nations
         iv) 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 that.
         v) This provision shall not prejudice the power of the Court to decide a
            case ex aequo et bono (on the basis of justice and fairness), if the parties
            agree thereto.
            - no parties have ever agreed to abide by this provision in any
              dispute before the Court
            - Court felt is was necessary to include because the law is not
              always fair
e) case law is largely unimportant in the course of int’l law based on the fact that the ICJ is not bound by precedent

3. Ways to enforce
   a) adjudicate in an international court
      i) only states can bring cases
   b) adjudicate in a municipal court
   c) adjudicate in a regional court
   d) very hard to enforce
      i) Austin concluded that international law could be no law b/c no authority to impose sanctions for violations (19th C.)
      ii) ex. Flartiga judgment was not enforceable w/in the U.S. and damages were never paid; judgment existed mostly to prove a point – political goals and public recognition of a cause took priority over moderate remedies
   e) mobilizational shame: way to enforce international law – negative treatment by international community if a State violates international norms
   f) Then why go to int’l courts when decision may be ignored?
      i) potential to further the development of int’l law
      ii) to further a motive or purpose as a matter of principle

II. TREATIES

A. Treaties as International Law
   1. Definition
      a) under Vienna Convention, “an international agreement concluded between states in a written form and governed by international law.”
         i) excludes any agreement involving private parties or international organizations, as well as non-written agreements
         ii) in some circumstances, statements by official speaker of the state, although not written, can be enforced like a treaty, although not exactly a treaty (see Eastern Greenland)
         iii) Article 46 of Vienna Convention says that a nation 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 unless the violation was manifest and concerned a rule of its internal law of fundamental importance
      b) US Constitution, Article II provides that the President has the “Power, and with the Advice and Consent of the Senate, to make Treaties, provided that 2/3 of the Senators present concur.”
      c) Treaties can be between two states and thus be termed bilateral, or between many states and be multilateral. In addition, you may be able to have a unilateral declaration that is binding in international law
      d) advantages of treaties
         i) agreement is explicit
         ii) constitutes the most visible and dispositive evidence of consent
      e) disadvantages of treaties
         i) entry obligates a party to its terms
         ii) lock parties into firm commitments which may be difficult to get out of
2. create legal rights and duties
   a) **consensual** form of international law
   b) binding because sovereign states enter into agreement and **consent** to be bound

3. Enforcement of Treaties
   a) **pacta sunt servanda**: agreements between states are binding and should be respected in good faith.
   b) Hard law v. Soft law
      i) hard law: law meant to be followed (legally biding)
      ii) soft law: set of preferred outcomes (morally binding, but not legally binding)
      iii) ICJ believes all treaties are to be legally binding, regardless of the intent of the state when making the agreement.
   c) Treaties are generally well-respected by the parties, most likely because of the mutual benefit that is given to both sides by their reciprocal observance – mutual commitment to goals often gives efficacy to a treaty
      i) if such a mutual commitment exists, a means of enforcement is not particularly necessary
   d) Finally, if necessary, some sort of vehicle for enforcement may be necessary, such as UN enforcement
      i) rarely occurs
      ii) Under the UN, force may only be used in self-defense or in response to a collective UN resolution approving such force
   e) inter-temporal law: rather than expiring or requiring reaffirmation, apply modern law to old agreements

4. most observers assign legal rules drawn from international agreements the highest rank among all sources of international law
   a) listed first among sources ICJ consults
   b) b/c most treaties plainly show both the terms of international legal rules and the consent of states to be bound by such rules
   c) still linked to other forms of international law
      i) basic principles of treaty law may be seen either as a fundamental norm or as a rule drawn from the customary practices of states
      ii) treaties must often be interpreted in light of the rules of customary international law or of the nonconsensual sources (often rely on preexisting set of rules)
      iii) international agreements may sometimes supersede or be superceded by other sorts of international law

5. Purposes of treaties
   a) Four types of treaties
      i) **Contractual**: A treaty may accomplish some exchange or concession (i.e. the treaty by which Russia ceded Alaska to the US for $7.2M in gold).
      ii) **Legislative**: A treaty may formulate rules pertaining to patterns of regular behavior among states (i.e. Convention on Consular Relations).
      iii) **Constitutional**: A treaty may set the legal foundation for an international body, like the UN.
iv) **Aspirational:** A treaty may set goals for international society, like the *Kellogg Brian Pact* that renounced war as an instrument of national policy

b) promote trade and ward off foreign forces
   i) Convention of Establishment Between U.S. and France
   ii) Friendship commerce and navigation treaties, which facilitate mutually advantageous investments and commercial relations

c) assure international postal services, stabilize international monetary relations, set international standards for labor practices, protect patents, fundamental rights, fisheries, diplomats, women, etc.

d) codify and clarify rules already customary in international practice, ex. Vienna Convention

e) compliance with a treaty may depend on its type or purpose – ex. aspirational treaties shows a State’s hope for how the world will be – it may not live up to everything in the treaty

**B. The Law of Treaties**

1. The making of treaties
   a) Article 6, Vienna Convention: every state possesses capacity to conclude treaties

b) usually done by the executive branch of government
   i) *Curtiss-Wright* case: US SC held that the power to make treaties is one of those powers vested in the federal government as necessary concomitants of nationality
   ii) component states (ex. Massachusetts) of a country generally not entitled to make treaties

c) Under Vienna Convention, the consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.
   i) Under UN Charter, Article 13(a), the International Law Commission is charged with the task of drafting UN treaties.
   ii) once a treaty has been drafted, parties are asked to sign it, although signature has no legal significance – must ratify the treaty
   iii) Under Article 102, after entry into treaty, such treaty must be registered and published with the Secretariat of the UN (no secret treaties)
   iv) At this point, the treaty takes force and parties may accede to the treaty after it takes force.

d) **Treaty reservation** (refusals to parts): a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in the application to that State.
   i) under Vienna Convention (Article 20), a State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless the reservation is (1) prohibited by the treaty, (2) is not one of the specified permissible reservations, or (3) is incompatible with the object and purpose of the treaty
     - reservations must be specific, rather than general
ii) Belios case: ECHR found that an interpretive declaration made by Switzerland to the European Convention on Human Rights and Fundamental Freedoms Constituted an invalid reservation to the Convention.
   - The distinction is important b/c only reservations may formally limit the scope of a state’s acceptance of a treaty
   - Here, void for vagueness: did not specify whether it was specific to criminal or civil matters; did not specify that only matters of law may be reviewed by the judiciary, as opposed to matters of fact, etc.
   - Swiss Gov’t noted that other members states had been silent as to their reservation for 15 years – usually a sign of acceptance

iii) even if a reservation is permissible, other states may still object

2. The effect of treaties
   a) pacta sunt servanda: every treaty in force is binding on the parties to it and must be performed by them in good faith
   b) generally, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (Golder case – UK law invalid b/c conflicted with a treaty provision).
   c) usually not retroactive
   d) unless rebutted, a treaty is binding upon each party in respect of its entire territory
   e) Vienna Convention, Art. 31: a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
      i) context = treaty’s preamble and annexes as well as any agreement relating to the treaty which was made between all the parties in connection with the conclusions of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
      ii) subsequent agreements among the parties, subsequent practices of the parties in the application of the treaty, and any relevant rules of int’l law applicable in the relations b/w the parties may be taken into account
      iii) The Convention restricts the use of supplementary means of interpretation to those situations where they confirm the meaning resulting from the application of Article 31 or when the means used in Article 31 yield an ambiguous or obscure meaning or a result which is manifestly absurd or unreasonable
   f) Generally, a treaty does not create an obligation or rights for a third state w/o its consent (Article 34 of Geneva Convention). A third state is held to have accepted an obligation set forth in a treaty only upon its express consent, but it may be deemed to have accepted a right implicitly.
      i) Article 2 §6 of UN Charter states that member nations must pledge to ensure that non-member nations abide by resolutions of UN
      ii) built on idea that international peace is sufficiently important to bind third parties to certain treaties (ex. jus cogens)
g) Treaty interpretation (Eastern Airlines, Inc. V. Floyd, issue: whether Article 17 of Warsaw Convention allows for recovery for purely mental injuries)
   i) when interpreting a treaty, first begin w/ text of the treaty and the context in which the written words are used (including original language)
   ii) other general rules of construction may be brought to bear on difficult or ambiguous passages (ex. Treaties must often be interpreted in the context of customary international law or the nonconsensual sources of international law, as treaties often rely on preexisting legal rules.)
   iii) to interpret unclear phrases, look at legislation, judicial decisions of signatories, scholarly writing, etc. that use the phrase and negotiating history of the convention
   iv) there are risks of municipal courts interpreting the same treaty in different ways (ex. here, US and Israel)
      - different methods of treaty interpretation
      - a Court might find that a treaty provision implicitly refers to its own municipal law
   v) Treaties can be superseded by other sort of international law.

h) If a municipal law conflicts with a treaty obligation, the law may be ruled void. Ex. Golder Case – Golder was forced to go straight to the European Court of Human rights due to the fact that he had no rights under UK law. The ruling nullified the idea of complete and absolute sovereignty due to the fact that the UK could not maintain its law prohibiting contact w/ solicitors and correspondence w/ others, so long as such laws stood in contrast to the treaty entered into under the European Human Rights convention
   i) textual v. non-textual interpretation – See Ludecke v. Canadian Pacific Airlines (p. 68-9): should court stick to the strict language of a treaty (sometimes leading to harsh and seemingly improper results or dig beyond pure words?)

3. The Subject of treaties
   a) Treaties may: (1) embody or codify custom; (2) crystallize custom; or (3) contribute to the subsequent development of custom.
   b) Generally, states can make treaties on whatever they want, but the VCLT and Verdross in his article hold that there are some norms that can’t be contracted around via treaty.
   c) Verdross holds that there are groups of jus cogens norms that cannot be violated in treaties.
      i) first group consists of different, single, compulsory norms of customary international law (like don’t disturb others on the high seas).
         - thus, a treaty b/w two or more states tending to exclude other states from use of the high seas would be in contradiction to a compulsory principle of general international law
         - treaty binding the contracting parties to prevent the exercise of sovereignty would also be against the law of nations
ii) second group constitutes *jus cogens* -- consists of the general principle prohibiting states from concluding treaties contra bonos mores (against good morals).

d) Verdross holds that there are three types of immoral treaties:
   i) Treaties binding a state to reduce its police or reorganize its courts in such a way that it can no longer adequately protect the life, liberty, and honor or property of the people in its territory
   ii) Treaties binding a state to reduce its army such to render it defenseless
   iii) Treaties binding states to close hospitals or schools, kill kids, or in other ways expose its population to distress, etc.
   iv) For example, the treaty between Chamberlain and Germany to leave Czechoslovakia dismembered and defenseless would be immoral.
   v) because all organs of int’l law have to apply int’l law, they cannot order a state to do something that is forbidden by international law.
   vi) important step in the development of Article 53 of the Vienna Convention on the law of treaties.

4. The amendment, invalidity, and termination of treaties
   a) the terms of a treaty may be altered or amended by agreement b/w the parties [Vienna Convention Article 39]
      i) such amendments are treaties in their own right and are themselves governed by the law of treaties
   b) amendments
      i) treaties often have terms providing for their amendment
      ii) an amendment does not bind any state already a party to the treaty which does not become a party to the amending agreement.
      iii) it has been argued that customary international law knows the possibility that a treaty may be amended or modified by the tacit consent of the parties which is shown by a pattern of consistent and accepted practice by the parties at the variance from the treaty’s provision.
   c) Invalidation
      i) a treaty is void if it conflicts with a peremptory norm of international law (*jus cogens*).
   d) Termination
      i) treaties are commonly terminated by the explicit terms of a new agreement, negotiated and concluded by parties to the original convention
      ii) only a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or part. The violation of other treaty rules may justify the taking of certain measures by the injured state, but it does not constitute a ground for termination under the law of treaties
      iii) *Case concerning the Gabcikovo-Nagymaros Project* – Hungary/Czech Dam; court found termination invalid – didn’t meet any criteria for termination: ↓
          - *rebus sic stantibus*: changed circumstances justifying denunciation of a treaty
- Vienna Convention limits the use of *rebus sic stantibus* – “A fundamental change of circumstances which has occurred w/ regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties, may not be invoked as grounds for termination or withdrawing from the treaty unless:
  o the existence of those circumstances constituted an essential basis of the consent of the parties to be bound and;
  o the effect of the change is radically to transform the extent of obligations still to be performed under the treaty
- a severance of diplomatic or consular relations b/w the parties does not effect the duties and obligations b/w them
- **termination by necessity** only if can show grave and imminent peril; necessity is rarely grounds for termination – usually only exonerates a State from its responsibility; here, environmental concerns did not suffice
- **impossibility of performance** requires the permanent disappearance or destruction of an object indispensable for the execution of the treaty

4. **Examples of Treaties**
   a) **Kellogg Briand Pact**: This is an example of a treaty that tries to be like international legislation. It tried to formulate rules pertaining to going to war. It’s also aspiration in that it sought to outlaw war. We accept now that war can be justified. The pact failed in part because it had no enforcement mechanism. It is an example of **soft law**: it laid out norms meant to merely set out preferred outcomes
   b) **Hull-Lothian Agreement**: A contractual treaty. Great Britain gives the US military bases in the Pacific. We give them 50 destroyers. Some argued that this treaty was invalid because it violated the constitution. Even if that is so, the US was still bound by the agreement.
   c) **Peace of Westphalia**: Aspirational and legislative in nature. This treaty set up a modern mechanism for international relations. It had incredible influence and claimed to end war in Europe. Under this treaty, states had to agree to limit their sovereignty in order to assure their own sovereignty.
   d) **Treaty of Paris**: Contractual treaty. This treaty granted sovereignty to the 13 colonies to the US and established US boundaries.
   e) **UN Charter**: Constitutional in character

### III. CUSTOM

#### A. Customary International Law

1. Custom as international law
a) used by the Romans
b) useful to fill in blanks in treaties
c) usually generally applicable
d) Asylum case – HELD: A State may not be bound to even general customary international law if they have expressly dissented to the rule’s formulation
   i) A rebellion leader in Peru wanted political asylum in the Colombian embassy in Peru, but Peru rejected Colombia’s assertion of diplomatic asylum and refused to give him safe passage out of the country. The court tried to find existence of a regional custom of States granting asylum to such people as this military leader
   ii) held that even if Colombia could prove a customary American regional rule that a state granting asylum in its embassy was legally competent to qualify the refugee as either a common criminal or political offender, such custom could not be invoked against Peru, which, far from adhering to it, has repudiated by refraining to ratify the Montevideo Conventions
   iii) Moreover, Colombia had also failed to show there even was a customary international law

2. Determining customary international law
   a) The Paquete Habana
      i) Facts: 1898, at outset of Spanish-American war, two Cuban fishing smacks were fishing on high seas, unaware of hostilities. The two ships were captured by US warships and brought to Key West to be sold at auction as prizes of war. Cuban masters of vessels argued that the capture of the ships was a violation of customary int’l law.
      ii) SC: ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of int’l law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as a prize of war.
      iii) Rationale: looked to early examples of English, French, German, and Netherlands. References made from 1400’s – 1890s.
      iv) Where there is no treaty and no controlling executive or legislative act or judicial decision, must resort to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators. . .
   b) Flartiga -- Judge Kaufman noted that torture had been prohibited by several international conventions and banned by more than 55 countries. This general practice was used to establish a customary law.
   c) Evidence of practices of international organizations -- much for controversial. In particular is the practice of the UN General Assembly. General Assembly resolutions are frequently used as evidence of customary international law.
      i) ICJ in Western Sahara relied heavily on General Assembly resolutions to establish customary law on the right of people to self-determination. The court used General Assembly resolutions as one way “the development of international law may be reflected.”
ii) It is true that such resolutions reflect the contemporaneous agreement of a number of states concerning a specific legal issue. The voting of the states in the General Assembly may indicate consensus or lack thereof about a certain customary rule.

iii) *Texaco/Libya*: Tribunal used general assembly resolutions to establish customary law

- Libya had a contract with Texaco and a couple of other oil companies. The contract stated that the rights expressed in the agreement could not be altered except by mutual consent of the parties. A law in Libya nationalized the totality of the properties, rights, assets and interests of the oil companies.

- Two conflicting UN Resolutions. The case went to arbitration. Arbitrator looked to GA resolutions to show the majority consensus, even though they are only recommendations. The Resolution that was “assented to by a great many states representing not only all geographic areas but also economic systems” was deemed to control. The tribunal found that the General Assembly resolution had taken the form of customary law. Libyan law was applied to the extent it did not contradict customary law (Libya allowed to control its natural resources). This judgment could be enforced in American courts.

iv) To the extent the ILC reports reflect long-standing practice, it is taken to be a “codification” of international law.

d) *Lotus*: PCIJ held that state practice and the opinion of publicists was not settled enough to find a customary rule.

i) A French ship cut a Turkish ship in two. The French ship officer was arrested by Turkish police and sentenced to prison and fined. The French objected that the Turkish government didn’t give notice to the French General Counsel and they wanted the officer transferred to French Courts.

ii) Court held that France must produce a law that forbid Turkey from asserting jurisdiction, a positivist approach. This is a high burden. France argued for nationality jurisdiction, Turkey argued for effects jurisdiction.

iii) There is no occasion to have regard to preparatory work if the text of the convention is sufficiently clear in itself.

3. Evidences of International law

a) *opinio juris*: belief that states act a certain way because legally bound to do so

i) states feel like they have to conform to a legal obligation

ii) usually from the writings of judges and scholars rather than pronouncements of states

iii) opinio juris is essential if custom is to be deemed the implicit agreements of states

b) judges and jurists are often the more helpful source for expressions of opinions that international practice has at some stage become customary int’l law
c) US Dept. of State lists sources of int’l lawmaking as including: treaties, executive agreements, legislation, Federal regulations, Federal court decisions, testimony and statements b/f Congressional and Int’l bodies, diplomatic notes, correspondence, speeches, press conference statements, and internal memoranda.

d) Evidence of State Practices
   i) Constitutional, legislative, and executive promulgations of states
   ii) Proclamations, judicial decisions (federal court decisions), and arbitral awards
   iii) Writings of specialists on international law, international agreements (treaties, executive agreements), and resolutions and recommendations of international conferences and organizations.
   iv) Speeches, press conferences, internal legal memos.

e) In addition, soft law is sometimes believed to harden into customary law

4. 2 Requirements for a Practice to be Considered (or Become) Customary Law:
   a) **The practice has become more or less uniform.**
      i) Practice need not be unanimous, just consistent. It also need not be ancient. *North Sea Shelf*: the “passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law” provided the practice is “both extensive an virtually uniform.”
   b) There must be a **sense of legal obligation**: *opinio juris* vel necessitatis.
      i) ICJ in *North Sea*: “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.”
      ii) So ask if the states acted out of convenience or if they did so because they felt obligated by international law.
   c) Often jurists and judges are more helpful sources to determine if international practice has in fact become customary international law.

B. Nonconsensual sources of international law
   1. Consent moving to consensus (treaties $\rightarrow$ custom, practice, *jus cogens*)
   2. General Principles of Law
      a) A frequently relied upon non-treaty, non-customary source of international law is termed *general principles of law*, i.e. the general principles of civilized nations
      b) definition: some proposition of law so fundamental that it will be found in virtually every legal system
      c) sort of implicit consensual agreement among sovereign states to permit general principles of law to be used as a source of int’l law
      d) Also included in ICJ statute
      e) also argument that if various states have a certain norm common to their national legal systems, they do not object to seeing the same norm applicable to their international relations
      f) *AM & S* case: European Ct. of Justice had to decide whether certain company documents sought in an investigation of economic competition were protected from discovery as privileged lawyer-client communication.
         i) Ct. looked at the regional laws and concluded that despite differences in each of the rules of the Common Market members, there were common
criteria protecting in similar circumstances the confidentiality of written communications b/w a client and lawyer.

ii) looking at national laws here meant not to import national laws into Community law, but to use the search as means of discovering an unwritten principle of Community law

iii) only the minimum content of rules found in all relevant municipal legal systems (in EC) were presumed to exist in EC law – lowest common denominator approach – which excluded the protection of some lawyer-client communications (ex. In-House Counsel)

g) usually used as a gap-filler rather than a way to reverse or modify existing rules of international law

3. Natural Law

a) for many years, natural law was thought of as the principle source of international law

b) idea that there is a law so natural that it is to be found in any community, including the community of states

4. Jus Cogens

a) a norm so fundamental that it even invalidates rules drawn from treaty or custom; a preemptory norm

b) usually presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis.

c) over time, a practice gains such universal disdain that it attains such classification

d) appears in the Vienna Convention of the Law of Treaties as a peremptory norm

e) examples

i) ban on torture

ii) pacta sunt servanda

e) if a treaty violates a norm of int’l law (jus cogens) it is void.

i) Verdross granted that the ethics to base this on should be an ethical minimum so to encompass the ethics of democratic, fascist, and socialist regimes

ii) However, in South West Africa case, Court held that humanitarian considerations are not sufficient in themselves to create rights and legal obligations. Since it is a court of law, it can take account of moral principles only so far as these are given sufficient expression in a legal form.

f) obligations erga omnes – obligations of a State toward the international community as a whole – includes: international legal proscriptions against interstate aggression, genocide, slavery, and racial discrimination.

i) there are certain norms which are so fundamental that violations of such norms subject the violator to jurisdiction anywhere

ii) related to jus cogens

iii) International Court has seemed more willing in recent times to recognize concept of obligations erga omnes

iv) perhaps if occurred today, different result in South West Africa case.

5. Often cases confuse what the source of the rule is – custom? Natural law? Jus cogens?
a) United States v. Smith – Def. questioned whether a law defined under “the law of nations” could be enforced in US law or if it was not specifically defined enough for enforcement.

i) HELD: General practice of all nations in punishing persons who have committed this offense against any person is conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations for its definition and punishment

ii) not made clear whether it was looking for a rule of customary int’l law, general principles of law, natural law, or jus cogens, but its language looked for some universality

b) same problems in Flartiga; Paquete Habana and AM & S are more clear

C. Equity and International Law

1. Although equity is not explicitly mentioned as a source of law in Article 38(1) of the Statute of the International Court of Justice, international lawyers and tribunals -- including the ICJ itself – sometimes apply equity

a) equity can mean many different things ranging from economic equity and new economic world order to use in international arbitration.

2. Equity as a form of judicial discretion (procedural side)

a) definition (Aristotle): the corrective of what is legally just

ii) numerous 19th and 20th C. arbitration treaties have provided for the application of “principles of int’l law and equity.” – something more than strict law

b) distinction b/w equitable principles and decisions taken ex aequo et bono, by what is fair and good

i) judges allowed to use principles of equity when making decisions in international law

ii) under Article 38(2) of ICJ statute, parties must give permission for the use of an ex aequo et bono power

- in actual practice, however, there is no substantive difference b/w Article 38(1)(c) and 38(2) which may be the reason that parties have never expressly approved the use of ex aequo et bono

iii) The application of equity in the ICJ is authorized under the general principles of law provision of Article 38(1)(c)

iv) use of ex aequo et bono allows a judge to use whatever avenue he sees fit (natural law, custom, equity)

c) equity intra legem, praeter legem, and contra legem distinctions

i) intra legem – within the law; when equity is applied to specific cases in such a way as to achieve the law’s intent, but without exceeding the law’s formal language

ii) equity praeter legem – beyond the law; bolder use of equity since the judge is then called on to fill in gaps and supplement the law w/ equitable rules necessary to decide the case at hand
iii) equity *contra legem* – against the law; where the rules of law are disregarded and the equitable result achieved despite the law’s explicit injunction

iv) employed to attack a judge’s use of discretion

d) *Meuse case* – “he who seeks equity must do equity”

i) recognized equity as a general principle of law recognized by civilized nation; part of int’l law which is in no way restricted by the special power conferred upon the court to decide a case *ex aequo et bono* if the parties agree

ii) Article 38(1)(c) allows the court to look to municipal examples to establish equitable principles in int’l law and found: where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party

iii) found equity in Anglo-American law, Roman law, German Civil Code, etc. and used as basis for determining general principle of int’l law


e) *North Sea Continental Shelf cases*

i) dispute came to the Court by special agreements among Denmark, Germany, and the Netherlands, asking which principles and rules of int’l law were applicable to the delimitation b/w the parties of the areas of the continental shelf in the North Sea. States were unable to negotiate.

ii) example of equity *praeter legem*; there was no relevant int’l law and the court used equity to go beyond the law

iii) court examined the existing rules and found that there was a gap in the rules binding the three states.

iv) Since there was no explicit *ex aequo et bono* permission, the Court held that it was unable to further assist in the delimitation of the shelf but ordered it be done in accordance w/ equitable principles and gave some suggestions

v) use of equity b/c not given permission for *ex aequo et bono*

f) *The Cayuga Indians Case*:

i) The court decided to uphold a treaty between the Cayuga Indians and the state of NY.

ii) The tribunal doesn’t even look to see if the treaty would be valid under international law. The court applied equity intra and praeter legem and found that equity required that the Canadian Cayuga Indians be given the money to which they were entitled via the Treaty, regardless of whether or not the treaty was valid in international law. The panel looked behind the “legal person” of the Cayuga National so it could protect “human individuals who were the real beneficiaries” of the treaties.

3. Equity as a form of distributive justice (substantive side)

   a) distributive justice (Aristotle): the just share which must be given on the basis of what one deserves, though not everyone would name the same criterion of deserving
b) *North Sea Continental Shelf* case: court decided that the length of Germany’s coastline, not the coastline’s concavity, should be given effect as the decisive measure
   i) could have chose another criterion as the crucial equitable measure for delimiting the shelf
c) ex. Call for new economic world order by developing nations (New International Economic Order) is a push toward equalizing the distribution of wealth throughout the world
d) If equity is located in an international agreement, source of “hard law.” Otherwise, the application is controversial

D. The Role of Judges and Publicists
   1. Article 38(1)(d) of the Statute of the ICJ lists judicial decisions and the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of the rules of law
      a) int’l conventions, int’l custom, general principles of law are given more weight than judicial decisions and the opinion of publicists
      b) *The Paquete Habana*: the works of jurists and commentators, who by years of work and research are well acquainted with the subjects, can be sued to determine the customs and usages of civilized nations.
      c) Judges also have aspirational goals – judge or scholar frames a principle that should be adopted.
   2. Although ICJ decisions are not binding, the ICJ as well as other international tribunals and municipal courts rely heavily on precedent and makes references to prior holdings.

IV. INTERNATIONAL LAW AND MUNICIPAL LAW

A. Monism and Dualism
   1. Dualist
      a) views any national or international legal system as a separate and discrete entity, each with its own power to settle the effect of any outside rule of law might have within it
      b) Thus, international law is not self-executing in a domestic legal order; must be explicitly incorporated into municipal law in order to be applied
      c) Under this view, municipal law does not impose itself on the international legal system
      d) it is possible for an obligation to be legally binding in international law and have effect in the int’l legal system (i.e. before an international court), but have no legal force in one or another municipal legal system (i.e. before a domestic ct.)
      e) more common system
   2. Monist
      a) view that the international legal order and all national legal orders are component parts of a single universal legal order in which int’l law has a certain supremacy

B. Treaties in Municipal Law
   1. Treaties in U.S. law
International Law Outline
Mutharika, Fall 2004

a) US Constitution mentions treaties several times
   i) Article II(2): President is granted the power by and with the advice and consent of the Senate, to make Treaties, provided that 2/3 of the senators present concur.
   ii) Article III (2) extends judicial power of US to all cases in law and equity arising under the Constitution, and the laws of the US, and treaties made
   iii) Article I (10) restricts states from entering into any treaty, alliance, or confederation
   vi) Article VI (2): “… and 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 thereby.”

b) supremacy over state law: self-executed and legislatively executed treaties have supremacy over state law
   i) Missouri v. Holland (A treaty cannot be the supreme law of the US if an act of a state legislature could stand in its way)
      - Pres. negotiated treaty w/ Canada for migratory bird regulation. MO challenged the statute.
      - SC hinted that Congress may enact laws pursuant to int’l agreements which would otherwise infringe upon the residual power of the states
   ii) No treaty, however, can be in direct contravention with the Constitution
   iii) Crosby: MA passed an act that barred state entities from buying goods or services from any business identified as doing business in Burma. Three months after the MA law passed, Congress passed an act imposing a set of mandatory sanctions on Burma. The MA law was found to be invalid under the Supremacy Clause b/c it conflicted with Congress’ specific delegation to the President of flexible discretion to develop a Burma strategy. States cannot interfere with federal foreign policy.
   iv) States do have at least some role in foreign policy. Many states have passed buy American Acts for example. They can also enter into agreements with parties overseas.

c) conflict b/w treaty and federal law
   i) US federal law and treaty law are on equal grounds.
   ii) in conflict, US courts will try to reinterpret the treaty to avoid the clash
   iii) or, Last in Time Doctrine, the treaty or statutory law later in time controls
   iv) PLO case
      - Suit brought by US DOJ seeking to close the PLO’s UN observer mission in NY under the anti-terrorism act, even though it would probably violate the int’l obligations of the US under its treaty as a host country for the UN.
      - HELD: there must be a showing that the later in time law was intended to supercede the earlier law, in order to do so
- the statutes and treaties are both the supreme law of the land and the constitution sets forth no order of precedence to differentiate b/w them. The text and the legislative history of the anti-terrorism act failed to disclose any clear legislative intent that Congress was directing the Attorney General, the State Dept., or the Court to act in contravention of the Headquarters Agreement

v) Whitney v. Robertson: (Treaty) Under treaty w/ Hawaii, no tariffs on sugar imports. Plaintiffs wanted the same treatment for sugar imports from the Dominican Republic. Treaty w/ Dominican stating that no higher or other duty shall be imposed on the importation into the US of any article grown in the Dominican. But later federal statute passed imposing taxes on sugar imports from the Dominican. Last in time so the tax was levied. HELD: When federal statutes and treaties conflict, courts will “always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided the stipulation of the treaty on the subject is self executing.”

e) Presidential Power to make agreements
    i) Youngstown Sheet and Tube – SC noted three alternatives that gave the president power to enter into agreements:
       - Express/implied Congressional authority – strongest case
       - Silence by Congress – middle case
       - Against Congress’ will – weakest case

f) Executive Agreements and Statutory Agreements in Int’l law
    i) only about 6% of all treaties are sent to the Senate for its formal advice and consent. 7% were executive agreements. 86% were statutory agreements.
    ii) A statutory agreement occurs when the President acts pursuant to ordinary legislation – statutes passed by Congress.
    iii) An executive agreement occurs when the President concludes agreements alone, without any congressional participation. The basis for these agreements is not found in the constitution. They do however bind the US without the advice and consent of the Senate.
    iv) There is much unsettlement as to whether executive agreements may trump municipal law. Courts are generally okay with such incursions when the President is acting pursuant to international agreements, and particularly when he acts with the implicit or explicit consent of Congress. (i.e. Dames & Moore Case)
    v) US v. Belmont: (Case supports the validity of Exec. Agreements). Supremacy of an executive agreement between the President and the USSR questioned. Pl (US) wanted to recover funds deposited w/ Belmont’s bank by a private Russian co. that was later nationalized by the USSR. However, the funds were included in amounts assigned by the
USSR to the US in the executive agreement to help satisfy the outstanding claims of private Americans against the USSR.
   i) The Supreme Court held that the compact was the supreme law of the land, as the federal government has complete power over international affairs.
   ii) “Don not pause to inquire whether in fact there was any policy of the State of NY to be infringed since we are of opinion that no state policy can prevail against the int’l compact here involved”
vi) *United States v. Alverez-Machain*
   i) Mexican citizen kidnapped by agents of US gov’t
   ii) Kerr-Frisbe Doctrine states that once a foreign national is w/in the jurisdiction of the US, he may be charged and tried for all the appropriate crimes, regardless of how he came to be w/in such jurisdiction
   iii) HELD: b/c the extradition treaty did not say anything specific about kidnapping, it did not apply. The language and history of the treaty does not support the proposition that the treaty prohibits abductions outside its terms.

2. SELF – EXECUTING TREATIES
   a) A treaty is self-executing if its provisions require no act from the legislature in order to operate.
      i) becomes internal law in the US immediately upon entry into force of the agreement
      ii) Supremacy Clause: The Constitution and the laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . .
   b) non self-executing treaties require legislation to implement them in the US
      i) for such agreements, it is the implementing legislation, not the agreement itself, that becomes the rule of decision in US courts
      ii) Predominant view is that UN Resolutions and even Security Counsel Resolutions are not self-executing
   c) How to tell if a treaty is self-executing?
      i) intent of the parties
      ii) language of the treaty
      iii) subject of the treaty
      iv) does the treaty attempt to regulate a matter over which Congress has sole authority to legislate?
      v) Does the treaty purport to create a private right or action? (If not, maybe self-executing)
   d) *Foster & Elam*
      i) sought to determine the rightful owner of land in the territory that had been known as W. Florida and then became part of the state of Louisiana. B/w 1800 and 1821, the land was transferred back and forth b/w Spain and France and eventually to the US, but the treaties were ambiguous.
ii) 1819 Spanish-American treaty provided that all grants of land made b/f Jan. 24, 1818 by the King of Spain were ceded to the US, and shall be ratified an confirmed to persons in possession of the lands to the same extent as the same grants would be valid had the territories remained under Spanish control.

iii) Pl. claimed land under a grant from the Spanish king in 1804. Def. alleged that the grant was void b/c in 1804 the land had been ceded by Spain to France.

iv) HELD: a legal rule drawn from a treaty may be applied in a case by the US courts w/o any legislative act so long as its provisions are interpreted as being aimed directly at the courts and not at the Congress, requiring legislative action.

- in the instant case, the provision was aimed at the lawmakers, and thus unenforceable w/o legislative action

e) Asakura v. Seattle

i) facts: Seattle city ordinance prohibited licensing of pawnbrokers that were aliens. The ordinance was challenged as a violation of the 1911 Friendship treaty b/w the US and Japan, which granted citizens of the contracting parties the liberty to enter, travel and reside in the territories of the other to carry on trade upon the same terms as native citizens or subjects.

ii) HELD: the 1911 treaty operated of itself w/o the aid of any legislation, state or national, and it will be applied and given authoritative effect by the courts.

iii) the business of a pawnbroker is a trade, and thus, the ordinance violated the treaty.

iv) example of a state law being trumped by a US treaty

v) cited Foster & Elam for proposition that if a treaty operates w/o the aid of any legislation, state or national, it will be applied and given authoritative effect by the Courts

f) Treaties which state general purposes and objectives are not self-executing – Sei Fujii v. State of California

i) Pl. argued that the UN Charter should invalidate a state law barring certain aliens form owning land

ii) Cal. S.C. held that the Charter’s Preamble and Article 1 were not self-executing b/c they state general purposes and objectives and do not purport to impose legal obligations on the individual member nations. Articles 55 and 56 require legislative action b/c they are pledges to cooperate with the international organization; legislative action is necessary to carry it out

4. In civil law countries, treaties, once incorporated into domestic law, are treated as higher than federal statutes.

A. Customary International Law in Municipal Law

1. The Law of Nations as common law
a) rule dates back to a number of cases decided by English Courts in 18th C. Blackstone stated that the Law of nations, in 1769, was adopted in its full extent by the common law and was held to be part of the common law.

b) In the U.S., the principle that the law of nations was the law of the land took hold b/f ratification of the Constitution – *Respublica v. De Longchamps* (1784)
   i) assault on the French consul general in Philadelphia was held to be an infraction of the law of nations
   ii) the law of nations was declared, in its full extent, to be part of the law of the State and is to be collected from the practice of different nations and the authority of writers

c) *Curtiss-Wright*: (Exec. Agreement)
   i) appellees were convicted of conspiring to sell guns to Bolivia which was engaged in war in violation of a Joint Resolution of Congress and the provisions of a proclamation issued by the President. The Joint Resolution had given the President power to issue such a proclamation banning the sale of weapons.
   ii) Plaintiffs argued that the President does not have the power to legislate as he did here, that Congress unlawfully delegated its legislative functions.
   iii) Court said delegation was fine. The President is better situated to deal with external affairs. This was, in effect, executive law making in the international realm.
   iv) Court advanced the idea that the federal government had special powers in international affairs that might be extra-constitutional. Such a grant of power is not in the constitution, but in the “law of nations” (directly from King to Federal Gov’t)

2. US courts tend to group together customary law, general principles of law, judicial decisions and the opinions of scholars are one body of international common law
   a) *Flartiga*
      i) held that having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – torture is prohibited by the law of nations
      ii) looked at affidavits of int’l legal scholars, UN Charter, US judicial decision, UDHR, General Assembly resolutions, the opinions of publicists, the European Human Rights Convention, constitutional provisions of over 55 nations, etc. – potpourri approach is typical whenever it is argued that int’l law is part of common law
      iii) jurisdiction based on the Alien Tort Statute of 1789, giving jurisdiction over an civil action by an alien for a tort only, committed in violation of the law of nations

b) International customary law is considered part of the law of the land, and enforced accordingly, but only to the extent it does not conflict with Acts of Congress or prior judicial decisions

3. Pursuing violations of int’l law in US Courts
   a) Foreign Sovereign Immunities Act provides the sole basis for suing foreign governments in US Courts
b) Alien Tort Statute establishes district court jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States
c) *Amerada Hess v. Argentine Republic*: neutral ship attacked by Argentina during Falkland Island dispute b/w Argentina and UK.
   i) District court recognized the long-standing principle of the right of a neutral ship to free passage on the high seas.
   ii) District Court held that both the FSIA and ATS gave jurisdiction but Supreme Court overturned and said that only FSIA gave such jurisdiction and did so in this case

V. THE INTERNATIONAL COURT

A. Public International Arbitration

1. International Arbitration
   a) advantageous b/c it can be tailor made to fit specific cases
   b) mixed international arbitration = arbitration involving both public and private parties (ex. *Texaco Libya Arbitration*)
   c) Why go to an int’l arbitrator?
      i) Generally, parties get to choose their arbitrators
      ii) more flexible – sometimes arbitrators are less bound than judges to apply strict rules of law to the case before them, although other times arbiters are just as rule-minded as judges
      iii) better way to settle disputes than war
      iv) more neutral venue than local cts in either of the countries in dispute
      v) allows for a greater level of expertise by the judge in matters of fact in law in reasonably technical areas (ex. in *Dogger Bank*, all of the arbitral body was composed of all admirals)
      vi) no rule of evidence in arbitration
   d) Why follow decision of international arbitrator?
      i) reassure investors in economic issues
      ii) diplomatic pressure
      iii) fear of actions taken on the basis of the arbitral judgment in third countries – ex. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (in force for 123 countries as of June 2000) does provide for the recognition and enforcement of many foreign arbitral awards and is widely used in commercial cases.
      iv) Generally, parties get to chose their arbitrators
      v) more flexible – sometimes arbitrators are less bound than judges to apply strict rules of law to the case before them, although other times arbiters are just as rule-minded as judges
      vi) better way to settle disputes than war

2. Permanent Court of Arbitration (PCA)
   a) hailed as greatest achievement of the first Hague Convention
b) predicated that the nations will, with greater frequency, carry their differences to the Hague, appealing to reason and international justice for the protection of their international rights.

c) adhered to or ratified by 44 states
d) by 1914, more than 120 arbitration agreements had been concluded.

e) Dogger Bank case
   i) PCA commission of inquiry composed of admirals from the British, Russian, U.S., French, and Austrian navies reported that the Russian fleet’s attack on English fishing vessels (wildly mistaking them for Japanese torpedo boats in the North Sea) was not justifiable
   ii) Russia agreed to pay about $300,000 in damages

f) demise
   i) most int’l disputes were never submitted to any form of int’l arbitration, usually resulting in war
   ii) since 1914, the PCA has sponsored only 10 arbitrations, and only 2 after 1945.

3. Other Arbitration Tribunals
   a) 2 Types of Arbitration:
      i) Private Arbitration: Between two companies usually. Each will appoint an arbitrator and also one jointly. These arbitrations usually take place in a particular country. Courts in the country where the arbitration takes place play a big role. That court sets the rules.
      ii) Public Arbitration: Parties pretty much set up the rules themselves.

b) Rainbow Warrior Case (Non-PCA Arbitration):
   i) French secret service agents sunk the Rainbow Warrior, a Green Peace vessel used to disrupt and protest French nuclear testing.
   ii) The France – New Zealand arbitration tribunal first ruled that France should pay NZ $7M and confine the two French secret service agents for three years. When France released the agents early, the Tribunal met again and ordered France to pay $2M.
   iii) In this case, Greenpeace couldn’t have gone to the ICJ for this claim because they are a private party. However, NZ and FR could have gone. It was taken to the ICJ, but FR withdrew from the ICJ treaty. So the only alternative was to have separate arbitrations: Greenpeace v. France; NZ v. France. It was actually more akin to a mediation.
   iv) the arbiter noted that commonly, in this matter of public state dispute, the most common and appropriate remedy is satisfaction. Here, such satisfaction took the form of a declaration of an international tribunal attesting to the unlawfulness of the state’s action and recommendation for monetary compensation.

B. The Foundations of the International Court
   1. History
      a) history’s first permanent int’l law court, the Permanent Court of Int’l Justice, was established under the League of Nations, but collapsed during WWII
      b) International Court of justice was formed as judicial branch of UN in 1945 – more or less identical to the PCIJ
2. Two inherent problems plague the ICJ
   a) How can ICJ decisions be effectively enforced?
   b) how does the ICJ fit into a int'l system characterized by many int’l courts?
3. Today, alternative regional and specialized courts see a lot of action

**C. Role of the International Court**

1. Basis of Jurisdiction and Powers of the ICJ
   a) Article 36 of the Statute of the ICJ
      i) jurisdiction comprises all cases which the parties refer to it and all matters specifically provided for in the UN Charter or in treaties and conventions in force
      ii) State parties may declare at any time that they recognize compulsory jurisdiction w/o special agreement, in relation to any other state accepting the agreement, the jurisdiction of the court in legal disputes concerning the interpretation of treaties, questions of int’l law, existence of any fact that would constitute a breach of an obligation or agreement, and the nature of reparation to be made for a breach
      iii) Such declarations may be made unconditionally or on condition of reciprocity
      iv) declarations shall be deposited w/ UN Secretary General
      v) declarations made under Article 36 of PCIJ statute still in force
      vi) disputes as to whether the court has jurisdiction shall be settled by the Court
   b) Article 65
      i) The Court may give an advisory opinion on any legal question at the request of any body
      ii) Questions shall be laid b/f the Court by means of a written request containing an exact statement of the question upon which an opinion is required and accompanied by all documents that will shed light on the question
   c) Article 96
      i) the General Assembly or Security Council may request the ICJ to give an advisory opinion on any legal question
      ii) other organs of the UN and specialized agencies which may at any time be so authorized by the General Assembly may also request advisory opinions of the Court on legal questions arising w/in the scope of their activities
2. Specially Conferred (Ad hoc) Jurisdiction
   a) under Article 36(1) of the Statute of the ICJ, jurisdiction is conferred upon the Court in all cases which the parties refer to it
      i) court receives its grant of jurisdiction by way of a special agreement, a *compromis*
      ii) the *compromis* itself is a treaty and normally not only confers jurisdiction but also exactly defines the legal question set before the judges. It may also indicate the rules of law to be applied by the Court, though Article 38 directs the Court to sources of international law
   b) *The Minquiers and Ecrehos* case.
i) in a special agreement, the UK and France sent to the Court a question regarding whether the sovereignty of the islets and rocks of the Minquiers and Ecrehos groups belongs to the UK or French Republic
ii) there has never been a definitive determination of their true sovereign
iii) Court poured over historical facts
iv) judicial weighing of evidence in which the answers were decisive to the issues made it a good case for arbitration
v) the resolution of the dispute was not so crucial to Britain or France that a settlement of it by the Court contrary to either country’s wishes would prove to be politically unacceptable. They could accept an adverse decision. The low political cost made it an attractive case for arbitration.

3. Compulsory Jurisdiction
   a) when the ICJ hears a case pursuant to a form of compulsory jurisdiction, it acts more or less like any ordinary municipal court where parties are subject to jurisdiction w/o their immediate consent.
      i) still, states must have originally consented to the Court’s jurisdiction
   b) Article 36(2): the state parties to the present statute may at any time declare that they recognize as compulsory ipso facto and w/o special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the court in all legal disputes concerning:
      i) the interpretation of a treaty
      ii) any question of international law
      iii) the existence of any fact which, if established, would constitute a breach of an international obligation
      iv) the nature or extent of the reparation to be made for the breach of an international obligation
      v) States can still attach conditions to their 36(2) declarations; concerns about reciprocity have led the Court to allow a respondent state to invoke the reservations attached to an applicant state’s declaration to deprive the Court of jurisdiction, even if the respondent state’s own 36(2) declaration would otherwise subject it to jurisdiction
   c) The ICJ has compulsory jurisdiction of all matters “specially provided for in the UN Charter or in treaties and conventions in force.” So if a treaty says that any disputes will be submitted to the ICJ, and you are a part to the treaty, you are subject to this part of the court’s compulsory jurisdiction.
      i) So even if you refuse to accept Art. 36(2) compulsory jurisdiction, you are still subject to 36(1) jurisdiction.
      ii) For example, the US Diplomatic and Consular Staff Case was brought by the US against Iran under 36(1) because the two countries had signed to multilateral agreements and a bilateral accord which provided for dispute resolution via the ICJ. The court accepted the case even though Iran refused to appear before the court. The Court ordered the immediately release of the hostages, which Iran ignored.
      iii) As a general matter, cases brought on the basis of 36(2) or 36(1) are likely to be ineffective anyway. This is because such forms of compulsory jurisdiction usually involve recalcitrant states which are unlikely to
comply with unfavorable court decisions. In some cases like this, the court has refused to render a judgment

- For example, South West Africa Case: Two former members of the Leagues asked the ICJ to rule that South Africa had violated its legal obligations under a League conferred Mandate for South West Africa. The Court reversed an earlier ruling and decided that South Africa need not answer for its conduct as Mandatory to individual states, and that the two complaining nations had “no legal right or interest appertaining to them in the subject matter.”

iv) The Court at times has reused to decide cases when a decision would not be “capable of effective application.”

v) There is concern that use of the Court as a public forum may hurt the ICJ’s reputation. Perhaps the court should stick to cases where it is sure that it’s judgments will be enforced.

d) Note UN Charter Art. 94(1): A member of the UN is obligated to “comply with the decision” of the ICJ. So Art. 94 gives the Sec. Council the power to enforce the judgment of the ICJ.

e) UN Charter Art. 94(2): “If a party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

i) So the winning party can appeal to the Security Council to take measure to enforce the Court’s judgment, but not its Order.

3. Advisory Jurisdiction

a) ICJ is competent to give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the charter of the UN to make such a request. Pursuant to the UN Charter:

i) the General Assembly or Security Counsel may request the Int’l Court of Justice to give an advisory opinion on any legal question

ii) other organs of the UN and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising w/in the scope of their activities

b) Western Sahara

i) the UN General Assembly asked the Court to advise it as to the legal status of the Western Sahara at the time of its colonization by Spain and as to the territory’s legal ties to Morocco and Mauritania

c) advisory opinions of the Court are not legally binding

i) imposes no legal obligation on the parties or requesting organization

ii) in practice, however, states have treated the authority of the Court’s advisory opinions in much the same fashion as they have accepted (or not) the Court’s authority to settle contentious cases

4. Chambers
a) **Art. 26**: The ICJ can “at any time form a chamber for dealing with a particular case, the number of judges to constitute such a chamber to be determined by the Court with the approval of the parties.” This is a manifestation of the ICJ’s role as arbiter.

b) Chambers will be used if requested via a compromis. There are 3-5 judges. Chambers are advantageous because the parties can pick their own judges more or less.

c) **The Elsi Case** (US v. Italy)

   i) dispute arising out of the requisition by the Gov’t of Italy of the plant and related assets of Raytheon-Elsi, an Italian company which was stated to have been 100% owned by 2 US corporations, which the US claimed violated the Treaty of Friendship, Commerce and Navigation b/w the US and Italy

   ii) US and Italian gov’ts agreed to have Court form a special Chamber of 5 judges to deal with the case

   **look at Janis book here!**

5. **Development of International Law**

   a) Court’s capacity for developing international law stronger than its role in settling disputes (b/c States can easily ignore decisions)

   i) role restricted by the limited number of cases that have come to it

   b) not legally binding precedent

   i) Article 38 of ICJ Statute: instructs court to apply . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law” – so past decisions can be considered (as subsidiary means)

   ii) in practice, the Court repeatedly refers to its own decisions

   iii) held that Italy did not breach the treaty – the US could not establish a plan of orderly liquidation that would have worked

6. **Weaknesses in the Court**

   a) The standing of only states before the court seems antiquated. Now individuals are commonly seen as both objects and subjects of international law, and some hold that the weakest feature of the ICJ is it’s closure to private parties.

   b) Some say the court should be opened to giving preliminary rulings to municipal courts deciding international law matters. This would be one way to get private parties into the ICJ.

   c) Can the judges of the court really be independent? No judge has ever voted against his country. Maybe we need to reform this. Currently, the 15 judges are elected by the General Assembly for terms of 9 years.

**VI. INDIVIDUALS AND INTERNATIONAL LAW**

A. State protection of the individual

   1. Traditionally

   a) seen as objects of international law b/c could be object of state versus state litigation
b) Thus, needed doctrines of state protection of individuals and state responsibility for injuries done individuals

2. Limitations to the traditional doctrines of state protection and state responsibility
   a) individuals may only be protected by their national states and national links may be elusive
      i) *The Nottebohm Case*: Nottebohm had citizenship in German and Liechtenstein. He wanted to file a suit against Guatemala and Liechtenstein agreed to espouse his claim before the ICJ. The ICJ held that Liechtenstein was not eligible to espouse the claim even though Nottebohm had Liechtenstein citizenship because there was no genuine link. Nottebohm had no real link to Liechtenstein – he didn’t really live there, he didn’t have his business there, etc. They considered the center of his interest, his family ties, his participation in public life, attachment shown by him for the country, etc.
      ii) HELD: The rights of state protection are limited. The ICJ insists that a private party be protected only by a state with which it has a *genuine link*. The court concluded that there was an “absence of any bond of attachment between Nottebohm and Liechtenstein, the protecting state, and refused to permit it to sue on behalf of Nottebohm.
      iii) provides way for private parties to address wrongs by another country – as long as their State will bring case to Court. For example, *Mavrommatis Palestine Concessions Case* – Greek Gov’t sued the UK for denial of contractual rights of a Greek national to operate public works in Jerusalem and Jaffa in British mandate of Palestine.
         - in response to the British objection that Mavrommatis was a private person, the PCIJ held that when the Greek gov’t took up the case, the dispute entered a new domain: the domain of int’l law where the dispute became one b/w two States.

b) when the notion of national links is extended to corporations, even more confusion can result
   i) *Barcelona Traction*: BT was a holding company incorporated in Canada. It’s principle shareholders were in Belgium. Three Spanish holders declared BT bankrupt and the receiver seized all the assets. Belgium wanted to submit a claim against Spain for the wrongdoings against the Canadian company. The court held that Belgium could not espouse this claim because there was no genuine link between Belgium and the company. The court held that Belgium could not assert the rights of the shareholders unless they were erga omnes rights, which they were not. A treaty with Belgium and Spain allowed the action to be brought to the ICJ. Canada did not have such a treaty with Spain
   ii) HELD: the general rule of international law authorizes the national State of the company alone to make a claim

b) objective view of individuals leaves nationals open to abuse by their own states, since it is impractical to conceive of a state protecting its own national against itself in international law
3. A state, while allowed to protect its nationals, has no legal obligations to espouse the claims of its nations – it’s a matter of discretion
4. Stateless persons – how to pursue claims against states for violating their rights?
   a) *Trop v. Dulles* (U.S. S. Ct): Court found that depriving a military deserter of his US citizenship was a violation of the 8th Amendment’s protection against cruel and unusual punishment
   b) the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime.
   c) Article 15, UNDH – everyone has the right to a nationality and no one shall arbitrarily be deprived of his nationality not denied the right to change his nationality

B. Attribution
1. State is responsible for the acts of all of its organs – executive, legislative, and judicial
2. Can a state be held responsible for the actions of individuals or groups?
   a) *Yeager v. Iran* (Iran-US Claims Tribunal): Iran was held responsible for the actions of Revolutionary Guards when they harassed U.S. citizens out of their employment in the country
   b) tribunals have sometimes relied on notions of due diligence to find states responsible for failing to prevent individuals from harming foreign nationals, or for failing to apprehend or punish the perpetrators
      i) *Janes (U.S.A.) v. United Mexican States*: an international arbitral tribunal found Mexico responsible for the failure of Mexican authorities to exercise due diligence in their efforts to apprehend a mine company employee who in 1918 shot and killed a US citizen who was a superintendent of mines.

C. Reparation
1. Every breach of a state’s legal obligation gives rise to a duty to make reparation. Can take the form of:
   a) guarantees against repetition of the illegal conduct
   b) in combination, restitution, compensation, or satisfaction
   c) *Rainbow Warrior*, ex, satisfaction may take different forms, including apology and a declaration that a responsible state engaged in wrongdoing.

VII. STATES AND INTERNATIONAL LAW

A. Sovereignty and International law
1. State Sovereignty v. International law
   a) notion that the state ought to be able to govern itself, free from outside interference, States are also subjects of international law: those entities or legal persons entitled to rely upon legal rights, obliged to respect legal duties, and privileged to utilize legal processes.
      i) conflicts with notion underpinning int’l law that external rules ought to be able to limit state behavior
      ii) in practice, neither one wins out
   b) must strike a balance between the two
2. Sovereignty
   a) Sovereignty was a crucial element of the *Peace of Westphalia*. The treaties of Westphalia enthroned and sanctified sovereigns, gave the domestic powers and independence externally.
   b) Four essential Elements of a State (defined in the Montevideo Convention)
      i) a defined territory
      ii) a permanent population
      iii) a government
      iv) the capacity to conduct international relations
   c) recognition is not required by the Montevideo Convention, although it may be implicit in the fourth condition, requiring the capacity to enter into relations with other states
   d) If you have these four elements, you are a sovereign state, free to independently govern your own population and territory and set your own foreign policy
   e) Sovereign states are equal in that each has an equal right to be free from threat or use of force against its territorial integrity. In addition, any state may be entitled to an equal voice or vote in international organizations, for example, the UN General Assembly.
   f) Sovereign states can defend themselves, recognize other states, and participate in international regimes.

3. Forms of States
   a) **Micro-States**: Like Liechtenstein which delegates to Switzerland much responsibility for its defense, custom affairs, etc.
   b) **Subjugated States**: Such as the Navajo Nation. The Navajo have their own constitution and exercise self-governance within their own boundaries.
   c) **Failed States**: Like Somalia, the central government has collapsed leading to widespread fighting.
   d) **States in Economic and Strategic Unions**: Like the Commonwealth of Independent States, made up of former Russian Republics. According to the Alma Alta declaration, the CIS is neither a State nor a supra-state entity.
   e) **Federal States**: Can component states themselves be under international law?

B. State Recognition
   1. Who decides whether a particular entity is a state?
      a) recognition does not give you statehood.
      b) Estrada Doctrine: recognizing new gov’ts is insulting b/c it offends the sovereignty of other nations and implies that judgment may be passed on the internal affairs of other governments. Recognition does not give legitimacy. It’s already there
         i) Mexico has stated that it will no longer engage in the insulting practice of recognizing new governments: (statement above)
      c) Montevideo Convention, Article 3: The political existence of the state is independent of recognition by other states. Even before recognition, the state has the right to defend its integrity and independence
i) States, as well as gov’ts of states, may be recognized by other states and gov’ts. Recognition of a state is the act by which one state acknowledges that another state possesses the essential elements of sovereign statehood.
d) The **constitutive theory of recognition** holds that a state does not exist as a subject of international law until it has been recognized by the other states participating in international relations. This theory doesn’t hold much weight anymore.
e) The **declaratory theory of recognition** holds that states, when they recognize another state, simply declare what is already both a political fact and a legal reality: that the other state has real existence and that the recognized state is already a subject of international law.
f) Unrecognized states have often been denied access to US Courts (ex. N. Cyprus gov’t in *Goldberg* case). Although other times the US has, for example, with Iran. This is b/c the US sometimes refrains from announcing recognition of a new gov’t b/c grants of recognition have been misinterpreted as pronouncements of approval.
  i) Additionally, the power to deal w/ foreign nationals outside the bounds of formal recognition is essential to a president’s implied power to maintain int’l relations. As part of this power, the Executive Branch must have the latitude to permit a foreign nation access to US courts, even if that nation is not formally recognized by the US gov’t
  ii) Recognition by the executive branch is usually a prerequisite for the establishment of diplomatic relations.

2. De facto and de jure recognition
   
a) **De Jure Recognition**: The government is recognized to be constitutionally and rightfully in power.

   b) **De Facto Recognition**: The government is simply in control of a state in practice.

   i) Taft, in *Tinoco Arbitration*, looked most at the facto of popular acquiescence to determine whether the Tinoco regime was the *de jure* gov’t of Costa Rica

c) The *Goldberg* opinion talks about two kinds of de facto governments:

   i) **One kind of de facto government** is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places so as to represent in fact the sovereignty of the nation. This kind of de facto government is treated as in most respects possessing rightful authority, and its legislation is generally recognized.
   
   ii) **The second kind of de facto government** exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State and its citizens or subjects depends entirely upon its ultimate success. If it succeeds and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. But simple longevity is not ultimate success.
iii) In *Goldberg*, 6th C. mosaic in Cyprus; N. Cyprus occupied by Turkish Cypriots; looted Church and destroyed mosaic. Mosaic bought in France by US woman. Issue: Did N. Cyprus have the authority to transfer title to the mosaic to someone who in turn sold it to Goldberg? HELD: No. Because N. Cyprus was not a legitimate government, they had no right to transfer property of Cyprus.

d) States for political reasons sometimes refuse to recognize foreign governments. Such states not recognized by the US may be denied access to courts and rights to property otherwise belonging to that foreign state in the US. (*Sabbatino*)

e) Non recognition of a government or state usually reflects disfavor with a foreign regime. The establishment of diplomatic relations implies recognition.

f) *Kadic v. Karadzic*: Victims of the Bosnian atrocity sued the leader of the Bosnian Serb forces under the Alien Tort Act in the US. Karadzic was the self proclaimed president of Srpska. Srpska does exercise actual control over large part of the territory of Bosnia and Karadzic possesses command over the Bosnian Serb military forces. The Court recognized Srpska as a state for purposes of pursing these causes of action that required state action. However, it clearly would not be a state for purposes of entering the UN or succeeding to Yugoslavia. It did not matter that Sprska did not have statehood in all its formal aspects. The customary law of human rights that proscribes official torture applies to both recognized and non-recognized states.

i) perhaps recognized state here and not in *Goldberg* b/c sometimes the evidence of the existence of a state may be sufficient to enforce some rights (human rights such as torture) but insufficient to enforce others (confiscation of property)

ii) means to an end

C. Succession

1. States, not governments are subject of international law, so as long as the state remains the same, a succession of governments does not affect the state’s international legal rights and duties. New States may be able to avoid some of the international legal obligations of a predecessor state. New governments of the same state inherit the legal commitments of their predecessors.

a) As long as a state’s territory and population remain more or less the same, a new political party in power or a new constitution in place merely indicates a succession of governments.

i) Successor states are usually entitled to the foreign property of their predecessor states, but they are also usually responsible for many of their predecessor’s obligations to private parties.

ii) Successor governments are responsible for the obligations of the prior governments. Successor states may not be.

b) *Tinoco*: Now, when you have successor governments, as rule of international law, the new government is bound by the legal commitments of the old government. It is hard to see how there could be any legally binding commitments of states if international obligations could be repudiated simply by forming or declaring a new government
i) The president of Costa Rica fled and Tinoco assumed power. He called an election, was elected and then established a new constitution. He governed for a while then left. Then a new government came in and the old constitution was restored. That new government nullified and invalidated all contracts between the executive power and private people that had been entered into while Tinoco was around.

ii) GB is espousing the claim of its Royal Bank of Canada and another British Corporation. They argue that the new government could not nullify the debt. The Costa Rican government argued that the Tinoco government was not a government de facto or de jure and therefore any obligations made were in violation of the Costa Rican constitution.

iii) When there is a succession of government, the subsequent government are generally responsible for the acts of the earlier governments. If you have state succession the question is harder. Taft as arbitrator found that the subsequent government was responsible for the acts of Tinoco. The court there found that this was a change in government, not a change in state. Therefore the new government is bound by outstanding debts. It does not matter that GB itself did not recognize the Tinoco government.

2. determining succession
   a) Sometimes the UN will recognize a state and allow it membership and that will be a good signal. To be a member of the UN you must be a peace loving country and have adopted the principles of the Charter. No one has been expelled from the UN.
   b) It can be hard to tell if there’s a state succession: USSR to many republics; Yugoslavia to many new states; Czechoslovakia to the Czech Republic and Slovakia. These are easy cases. What about a revolution? From the Shah to the Muslim Clerics in Iran? Unclear. South Africa changed from Apartheid to a new government, that is a change in government, not a change in state. Some think that when a democratic government succeeds a more oppressive government the successor government should not be responsible for the earlier obligations.
   c) Greek Church v. Goldberg: (Recognition/State Succession) Question as to whether the Federal Republic of Northern Cyprus was a state. Turkish invaders in Northern Cyprus took a mosaic from an Orthodox church and sold it. The Cypriots in the South managed to find it several years later and wanted it back. The buyer argued that it was hers because the FRCN had passed legislation authorizing such sales. Recognition doesn’t create a government, moreover, FRNC was recognized only by Turkey. The 7th circuit here decided that the FRNC was not a state. The sale was not valid.
   d) Republic of Croatia v. Bank of Austria:
      i) This case involved the break up of Yugoslavia and who should succeed to Yugoslavia’s assets. After the breakup there was no clear successor to Yugoslavia, so it is hard to know where the assets and liabilities should go. One way to do this is to get an agreement between all the successor states to decide who gets what. But that didn’t happen here.
      ii) The court held that the assets should be distributed to all successor states based on equitable principles.
iii) Interplay of International and municipal law: The court used Austrian law to judge the rights and obligations under the banking contract. It referred to the municipal law of Yugoslavia to define what “state property” constituted. In fashioning a remedy the court used Austrian law, which led to a remedy similar to what international law would have fashioned. International law was used to determine whether Yugoslavia had dissolved into new states or whether the new Republic of Yugoslavia was the successor states.

e) Sabatino: The Supreme Court held that “we are constrained to consider any relationship short of war with a recognized sovereign power as embracing the privilege of resorting to the US courts.”

D. Self-Determination

1. The principle of Self-determination
   a) gained prominence in international relations at the Paris Peace Conference at the end of WWI. Pres. Wilson thought that national self-determination was important in maintaining a peaceful international society. For Wilson, self-determination had two aspects:
      i) external – freedom from alien rule
      ii) internal – promotion of democratic institutions
   b) Lenin’s view of self-determination had an anti-colonialist emphasis, arguing that people under colonial rule had the right to gain their independence.
   c) UN Charter specifically mentions self-determination in Article 1(2), providing that one of the purposes of the UN is “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.”
      i) phrased as a general goal
      ii) linked to the more fundamental goal of strengthening friendly, peaceful relations among states.
   d) deals w/ groups – not individuals

2. Forms of Self-determination (from article)
   a) fighting colonial status – usually permitted
   b) fighting foreign occupation – usually permitted
   c) internal occupation; groups that feel oppressed and not treated the same as everyone else in existing States

3. Limits on Self-determination
   a) Positive International law does not recognize the right of national groups to separate from the State of which they form part by the simple expression of a wish.
   b) Generally, the grant or refusal of the right to a portion of its population of determining its own political fate is exclusively an attribute of the sovereignty of every state which is definitively constituted.
   c) Aaland Island case: Aaland Islands want to be part of Sweden but historically part of Finland, which was under Russian Control.
      i) HELD: Court said that usually the domestic country should decide whether group is entitled to self-determination Here, League of Nations
decides b/c Finland a new country, just asserting independence from Russia, so question should not be left to their jurisdiction.

ii) The dispute b/w Sweden and Finland did not refer to a definitive established political situation, depending exclusively upon the territorial sovereignty of s State. Instead, arose form a de facto situation caused by the political transformation of the Aaland Islands

iii) Finland lacked certain elements essential to the existence of a sovereign state
- political life and social life was disorganized
- authorities were not strong enough to assert themselves
- civil war was rife
- the gov’t had been chased form the capital and forcibly prevented from carrying out its duties
- the armed camps are police were divided into two opposing forces

d) Reference re Succession of Quebec
i) advisory opinion with respect to the potential secession of Quebec from Canada
ii) The Court first determines that Canadian constitutional law did not permit unilateral secession and also that international law does not allow Quebec to secede unilaterally
iv) must balance right to self-determination against territorial integrity of states
v) the right to self-determination is usually fulfilled through internal self-determination – a people’s pursuit of its political, economic, social, and cultural development within the framework of an existing state.
vi) The right to develop a sovereign international state (external self-determination) only is present in the most extreme situations
- Right to external self-determination only in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to gov’t to pursue their political, economic, social and cultural development
- In all 3 situations, the people in question are entitled to a right of external self-determination b/c they have been denied the ability to exert internally their right to self-determination
- Here, Canada has granted full rights to internal self-determination; French as national language; many French-Canadians in government, etc.

VIII. INTERNATIONAL LAW AND THE USE OF FORCE

A. History
1. **Jus in bello** *(international humanitarian law)*: The rightful manner of war. Modern day humanitarian law strives to mitigate unnecessary human suffering once war has begun. Jus in bello addresses how war should be fought.

2. **Jus ad bellum**: The rules prescribing when nations could rightfully go to war. This is the idea of a just or unjust war. Jus ad bellum addresses when you should initiate war.

3. **Uti Posidetis**: Principle used mostly in war time, boundaries pre-war should be retained after the war.

4. Concept of a “just war” – war pursued to avenge injuries against an enemy that has neglected to punish wrongs committed by its own citizens or to restore what has unjustly been taken by it.
   a) stressed the need for both humane means and right ends in the prosecution of war
   b) fell into disfavor in int’l legal circles. In the 19\textsuperscript{th} and early 20\textsuperscript{th} C., commentators regarded interstate war – a war that depended on the declaration or intention of one of the parties – as a legitimate exercise of sovereign power

**B. Use of Force**

1. What is the “use of force”?
   a) originally, only thought of as crossing the border of another country to attack
   b) now, other things included
   c) U.S. has interpreted it to include certain terrorist activities
   d) when, would it ever, be permissible to use nuclear weapons?
      i) in advisory opinion to UN General Assembly, ICJ concluded that the threat or use of nuclear weapons would generally be contrary to the rules of int’l law applicable in armed conflict and in particular the principles and rules of humanitarian law
      ii) However, in the current state of int’l law, the Court could not conclude definitely whether the threat of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense

2. When is the use of force permissible?
   a) **Art. 2(4)**: Prohibits the “threat or use of force against the territorial integrity or political independence of any state.” Applies to member states.
      i) has become *jus cogens* and may also be used against non-member states
   b) It is unlawful to either threaten or use force against the territorial integrity or political independence of any State. Unless you can argue one of the exceptions.
   c) Hague Convention No. II -- parties agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.
   d) UN Charter Article 51, “Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations until the security Counsel has taken the measures necessary to maintain international peace and security”
   e) UN Charter Article 2(6) holds that the organization is authorized to ensure that states which are not UN members act in accordance w/ these principles so far as may be necessary for the maintenance of international peace and security
   f) Brezhnev v. Reagan Doctrine
i) idea that use of force is permissible in order to aid and support either socialism (Brezhnev) or democracy (Reagan)

ii) a particular socialist state, staying in a system of other states composing the socialist community, cannot be free from the common interests of that community. The sovereignty of each socialist country cannot be opposed to the interests of the world of socialism, and the world of revolutionary movement.

iii) underlying problem w/ these doctrines are the value judgments upon which they depend. To whom should we accord credence in regards to their values?

3. Exceptions
   a) Self-Defense
      i) A sovereign state is entitled to defend itself, to protect its territorial integrity. There is a right to self-preservation. This is one exception to the 2(4) prohibition on the use of force.
      ii) A state’s right to self defense is articulated in Art. 51 of the UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN.”
      iii) Self defense generally cannot be unilateral, except in extreme cases. Art. 51 grants an inherent right of self defense to anyone. Contrast with 2(4) that appears to look to the prohibiting of the proactive threat or use of force by member states
      iv) Self defense must be: (1) necessary and (2) proportional.
      v) In the case of individual and collective self defense, the state must have been the victim of an armed attack.
      vi) Caroline Case: Necessity standard for self-defense is articulated. Some US citizens in Buffalo agreed to fight with the Canadians against the British. They took an island in Canadian waters which they used as a base to attack British ships. The Caroline, a privately owned American ship, delivered ammunition and supplies to the island. The British set fired to the ship and killed one person. The US doesn’t refer to where it got this necessity standard. But there are three factors that necessitate force: Must be (i) instant; (ii) overwhelming; (iii) leaves no moment to think about it – leaves no choice. If you show those four things, then you show that self-defense was necessary

b) Collective Self-Defense: A state which is the victim of an armed attack must form and declare the view that it has been attacked. (That is, a country can’t make its own assessment of a situation and lend defense.

c) Henkin’s view
   i) takes a strict approach and says that 2(4) is pretty much an absolute prohibition. The only exception would be in the most rare and exceptional of circumstances:
   ii) humanitarian intervention: legal community has widely accepted that the Charter does not prohibit humanitarian intervention by use of force strictly limited to what is necessary to save lives
iii) intervention to support self-determination in some circumstances has received support (to be free from colonial domination)
iv) self defense, subject to the limitations of necessity and proportionality
v) could probably send military assistance to an incumbent gov’t, but the use of force in support of rebels against an incumbent gov’t would be against the territorial integrity of a state and against its political independence – impermissible

d) Reisman’s takes a more liberal approach. He sees 9 exceptions to the use of force and believes there is room for use of unilateral force in certain situations and certain higher values that justify use of force. 9 exceptions are:
   i) self defense (broadly construed)
   ii) self-determination
   iii) decolonization
   iv) humanitarian intervention to replace an elite in another state
   v) uses of the military within spheres of influence and critical defense zones
   vi) treaty sanctioned interventions within territory of another states
   vii) use of the military for gathering evidence in international proceedings
   viii) use of military to enforce international judgments
   ix) counter measures such as reprisals and retorsions.

4. Self Help
   a) Probably All Outlawed Now by 2(4)
   b) Reprisal: A state act taken in response to another state’s internationally wrongful act.
      i) Reprisals would themselves be illegal acts, except for the prior illegality of the other state.
      ii) Reprisals may or may not involve the use of force.
      iii) only permissible after an unsatisfied demand
      iv) must be proportionality b/w the reprisal and the offense
      v) limited by considerations of humanity and rules of good faith
      vi) Provisions of the UN Charter today call into question the legality of reprisals involving force.
   c) Retorsions: An act that, though unfriendly, would have been entirely legal even if not taken in response to another state’s action. For example, if one state cut off longstanding economic assistance to another state or publicly condemned certain political practices of that other state, the offended state might reply by withdrawing its ambassador from the first state.
   d) Countermeasures: Basically another word for reprisals or retorsions.
      i) Air Services Agreement Case: France would not allow air passengers traveling from the US to disembark in Paris because the airline, which traveled from CA, stopped in London and changed to a smaller plane. In response, the US prohibited certain flights by French airlines to the west coast. The US argued this was a valid counter-measure, even though it violated an earlier 1946 agreement. The tribunal found that the US was not prevented from taking countermeasures before concluding an arbitral compromis.

5. Cases
a) **Naulilaa Case**: Naulilaa was a Portuguese colony in Africa. There were a series of misunderstandings concerning the importation of food into South West Africa, which was a German colony. The led to the Portuguese garrison killing three Germans and confining two others. In retaliation, the Germans sent troops to attack Naulilaa and other Portuguese outposts, resulting in casualties and property damage. The court held that the German act of violence was not a valid reprisal. The original deaths of the Germans were not the result of any act contrary to the law of nations. A neutral state has the right to disarm and intern armed belligerents who enter its territory. In addition, Germany failed to make a demand on Portugal. Thus, the use of force was not justified by necessity. Tribunal accepts that you can engage in reprisal. However, the country you are retaliating against must have committed an illegal act, and the reprisal must be proportional, and you must demand reparation.

b) **Nicaragua Case**:

i) Nicaragua filed an application at the ICJ against the US, contesting the legality of the US support for rebels attacking the Nicaraguan government, as well as US acts of laying mines in Nicaraguan territorial waters and attacking ports and oil installations. Nicaragua also argued that US actions amounted to an illegal invention in Nicaraguan affairs and an illegal use of force. The US argued that this was collective self defense, that it was assisting Honduras, Costa Rica and El Salvador in their fight against Nicaraguan backed rebels. The ICJ looked to customary law and ruled that 2(4) in fact codified the accepted rules of customary international law regarding use of force. Here there was a jurisdictional issue that prevented the ICJ from applying 2(4) to the US actions in Nicaragua.

ii) The court held that the arming and training of contras can certainly be said to involve the threat or use of force in violation of 2(4). The mere supply of funds, however, is an act of intervention in the internal affairs of Nicaragua but is not a use of force. However, the court leaves unclear whether the supplying of arms is enough to constitute armed attack under customary law.

iii) The laying of mines and attacks on Nicaraguan ports, oil installations and naval bases constitute a use of force that is prohibited unless justified by circumstances which exclude their unlawfulness. The court notes that the existence of military maneuvers held by the US near Nicaraguan borders do not constitute a threat of use of force in this instance. However, they left open the possibility that such act might be a use of force in the future.

iv) The court found that neither Honduras nor Costa Rica nor El Salvador requested aid. El Salvador did ask the US to exercise its right to self defense, but this occurred on a later date than the beginning of US activity. In addition, at no time did the US address the Security Council in connection with its alleged acts of collective self defense, as required by art. 51. Moreover, the US was not responding to a state of necessity, and at the very least, the mining of the waters is not proportional. The so
called self-defense also continued long after the period in which any presumed armed attack by Nicaragua was contemplated.