HANDOUT OF

INTERNATIONAL LAW

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INTRODUCTION

WHAT IS INTERNATIONAL LAW?

Thinking about law, think about state law
We live in states, we are citizens of states, all our human activity is regulated by state law
e.g. restrictions for Covid decided by state authority
Law is not just the one coming from the states, but there are other forms of law, such as International law
First distinction is between Public International Law vs. Private International Law

Private law: regulates the private relations between people – if there is a contract, need to know where and how to conclude the contract, perform its obligations, conclude the contract
- Connection between the law and the state
- State law governs relations

Other relations, even in the private sector, cannot be completely connected to only one state
- e.g. Contract between 2 national legal orders such as Germany and Italy

Public International Law (IL) is the law regulating relations between States
Rules regulating contacts within the society of states
Many of the rules are shaped not just between states but also involve representatives of international organizations or civil society organizations
IL affects also other subjects: International organisations, NGOs BUT also individuals, private companies, minority group ...
International society: all the relationships between the states e.g. tariffs, relations about the border, human rights protection, migration agreements between states, climate change regulations
International organizations are different from NGOs
International organization is created by states or by other international organizations
- Only states and international organizations can create these kind of subjects

NGOs are private: not connected with states or international organizations, they are independent but they play a role in international law
Indeed one of the problems in international law is who are the subjects of international law
Other subjects affected by international law: individuals, private companies, minority groups
- Human rights are about individuals
- There are some international regulations concerning minorities and private companies

IL is about the relationship between states mainly, but it is not just that – more complex international society

Dominant approach in international law: IL exists to serve peaceful relations between states and should be regarded from that perspective as a technical discipline, providing tools for statesmen
International law is not politically innocent

THE EVOLUTION OF INTERNATIONAL LAW: THE BEGINNING

IL exists since the beginning of society
Today societal organization is based on states but we can have many different forms of societal organization throughout history. These societal organizations are usually autonomous and self-sufficient.
Every time there is a type of societal organization, there is the problem of different types of societal organizations
International law: it is about in which way and according to which rules different groups and societies can interact
Current organization of international law started in the XVII century

- Peace of Westphalia 1648 and the birth of Sovereign States. From an institutional point of view there was a big change: the form of the State.
  Adoption of the cuisu regio eius religio principle: outside interferences no longer allowed and that was the birth of sovereign states
  Before there were Empires, now is the birth of National States -> sovereignty is a very important concept in IL: in the idea of sovereign state there is the end of the power above the state
  In the past there was the Church and the Emperor, and they had control
  After the war, the peace of Westphalia meant there was no superior authority above the state
  Also today we can rely on the foundations of modern IL: concept of sovereignty is also present today
  A state is sovereign and there is no authority above them. There can be an international court or international organization above the state, but it is important to stress that a state decides to be part or not of an international organization or to be under the judgement of an international court: essence of sovereignty
  A citizen cannot refuse to be judged, or to be a part of the country and pay taxes
  Under the authority of the state, law is compulsory for citizens
  States can create compulsory laws for their citizens but they are free to leave an International organization, a treaty, etc. (e.g. Brexit) – when part of a state, need to accept its sovereignty and cannot leave as you like (e.g. Scotland and Catalunia not free to leave their own country)

IL a business for states since the beginning
However, since the beginning there was the problem of trying to understand how can international law affect citizens

- Hugo Grotius, On the Law of War and Peace, 1625 recognized the right of all people to trade – not related to domestic rule, this is natural law: the idea is that there are some rights that have to be respected and recognized by all states – this right was at the roots of colonialism
  Grotius is the founding father of International law (excessive claim). He forms a bridge between classic naturalist way of looking at law and positivist theory
  Was the first lo lay down a specific set of binding international obligations, inspired by the desire to lay own the limits of proper statecraft
  Rights of the law of the sea at the basis of Dutch supremacy in the sea
- Colonialism and IL: International law born in Europe
  Subjects are the states, according to the idea of states in Europe – all the other territories of the world that can be taken
  Territories found overseas by the Europeans were terra nullius (territories belonging to no one, do not have an authority of state)
  Therefore European could proclaim that those territories belonged to them → much of the world became playground of the European powers busy dividing the non-European world
  According to Grotius, also High Seas were terra communis (common property)
  If there are some places that are not under one institutional authority, need to know which are the rules governing those territories
  Very important to understand the rules of navigation: who was the authority in the sea? Was there a sovereign state?
- In the 1950s and 1960s, Decolonisation was one of the most important event of IL for the legal implications due to the succession
  No longer accepted that there was a hierarchy between European states and colonies – right of auto determination of people, the independence of this territories and other and new international rules emerged
  Principles of terra nullius was not accepted anymore
  Rise to questions of succession, representation and substantive justice

IL AFTER THE XX CENTURY

To understand what is IL today, need to know events of the 20th century and the changes after WW2
In modern IL, the use of force was a legitimate instrument to regulate the relationship between the states
If there was a problem in the international relations between two states and no other solution could be found, the only solution was to use force
The use of force was a legitimate means also to acquire land
After WW2 the states realized that if they continued to have these rules and means to govern they would fall again in the horrors of the war and humanity would have ended because of the Nuclear weapons
Two important events shaping current international law

- Bretton Woods agreements: beginning of the Global Economy – states that won the war decided it was not possible to have the use of force working in this way – decided that a way to prevent the use of force is to improve the commercial relations between states
  Period between the two wars was a period in which there was the use of force, both military and trade wars – very strong commercial nationalism, which ended up being one of the reasons of WW2
  Change the rules and create a world in which the economic relations are improved between states, between people within the state: this is a sort of prevention
  Trade war with China: in the end threat and use of some trade weapons – impossible also for Trump, with his aggressive foreign policy, to transform the trade war in a traditional war
  The economic interests are so interconnected that if one makes war to one of its trade partners, many negative effects in the country as well
- San Francisco Conference – creation of the United Nations
  Use of force that was freely admitted before, after WW2 becomes a tool of self defence exclusively
  With the UN there was the idea of having a collective use of force: if there is a situation in which the use of force is legitimate, it is not just a decision of the state but it should be a decision of the organization as a whole

Also the individual became more important thanks to these two events: protection of human rights and because of Bretton Woods
Before San Francisco Conference, the treatment of individuals and the protection of human rights was merely an internal affair of the states
After WW2, some international law principles concerning the minimum lawful treatment of individuals and human rights are introduced: states not so free anymore
This vision has not been accepted by everyone e.g. China, all the issues raised concerning human rights protection - China replies that this is not an international issue, but something under the sovereignty of the state, a national issue

Then there was globalisation: transaction between people and legal entities multiplied
Problems of regulating these transactions: what is the role of the states, of the international organizations, of supranational bodies such as the EU?
Many change in the perception and the way international law is considered
Much of international law is related to the global economy and it regulates the global economy

INTERNATIONAL LEGAL SYSTEM

Legal system: a procedure or process for interpreting and enforcing the law.
A legal system includes rules, procedures, and institutions by which public initiatives and private endeavors can be carried out through legitimate means. In other words, is a system for interpreting and enforcing the laws. It elaborates the rights and responsibilities in a variety of ways.
But need to know what is the goal of such rules
In a state, the primary subjects are the individuals (then we can have legal persons, institutions)
Domestic legal system is one in which we have laws, institutions, in order to give a societal organization to the population living in the state
In a traditional, national legal system, need the authority – institutions can work, have an impact on the subjects if they have power over the subjects
First peculiarity of an international legal system is that the authority is in the subjects, because they are sovereigns not present
States have authority and there is no authority above them
EU legal system is between the national and the international one

National legal system: state is the authority
International legal system: no authority on the subjects

And then there is the EU, in between
There is this peculiarity in the international system: therefore, one of the common critiques to IL is that is not really LAW because it is not binding
The traditional reaction is that law needs enforcement
In order to have law respected, need an authority to enforce the law
International law is not really law because it lacks an authority enforcing international rules

In the international legal system, lack of an authority means that

- There is no legislator: there is not a Parliament writing down laws
- NO compulsory system of adjudication to assess the infringement of the law
- No police authority to enforce the law in case of infringement

Many objected that IL is not Law because there is not enforcement system
But Law is the way to enforce the social order and not only the use of force
Used to consider that enforcement is given by the use of force: but that is the last resort, not the only way
State enforcement model is not the only incentive for the respect of Law

- States themselves creates IL and they have little incentives to break it: Creation of IL is a very complex process, where States have interest to respect the laws they have created, are creating
- Reciprocity plays an important role: Reciprocity: important point when there is not a superior authority – by not respecting international law, usually do not respect the right of another state – admitted reaction in international law can be retaliation
- If don't follow the treaty, have the possibility to break other rules concerning you
- Basis of Bretton Woods: if you impose high tariffs on my goods, I retaliate by imposing them on you
- States can change IL rules instead of violating them
- States must interact with each others
- Retaliation, countermeasures are admitted in IL within the limits of the law: **inadempimenti non est adimplemendum** – if state A violates a treaty, B can do the same
- Self defence and collective security action

State law is something that has a very clear architecture
Usually there is the constitution – providing all the information on the government, the form of government, how to make and enforce the laws, and provide judicial protection
In international law, the lack of this structure is something that allows a theoretical debate on the law

Theoretical questions are interesting also today
Where does Law come from?
Is IL binding for the states?
Positive law. Traditional approach to law in Europe – consider law as something that comes from authority
    Reflects the state practice and interests
Natural law: philosophical, doesn't matter today in the law – not many debates on how ethic is a law, but only if we are violating some constitutional principles
    Naturalist: it has to serve the common good of mankind
In the International System, because we do not have so clear elements, can ask ourselves whether some things are a matter of natural or positive law: ethical perspectives (e.g. human rights, behaviour of a state within its borders)
Politics and ideology matter in the international law
In the international system, equal society: all states are equal, but some states are more powerful than others

INTERNATIONAL LAW MAKING

Define law having in mind the domestic system
Used to consider that law is an authority system of enforcement and production
In international law this is not true: peculiarity of international community and international society is that the main actors of this society are states and States are sovereign
    No authority above them
In which way can such a system create, implement and apply law?

In a state system, it is the legislative power (i.e. the Parliament) makes laws – this is power given to the parliament by the Constitution
Fundamental law saying the Parliament has the legislative power
In the International society there is no authority saying that there is a legislator – the way to produce and to make laws is through the consent of states
    Peer society – all the members are equal
    Can produce the laws only if they consent to some rules governing their relationships
International legal system is a consensual-based system
Every rule, every piece of legislation in order to be considered as law must be accepted in some way by the states

In a domestic system, there are some legislative procedures to make the laws
Only in the process of making laws there is the consent of the representatives of the people
When the law is enacted and enters in force, the people cannot refuse the law, cannot dispute the existence of the law
    This is the main feature of a domestic legal system
In International Law, because of equality of states, this consent is not just in the production phase but also during the life of the rule – a state can agree to a rule, but in IL it is possible for a State to not agree anymore on that rule
Role of consent characterises all the sources of international law

SOURCES OF INTERNATIONAL LAW

International legal system: no constitution, no basic law saying which are the sources of law
In the Italian Civil Code there is the preliminary part listing the Italian sources – leggi, regolamenti, etc.
In a structured legal system, there is a certain architecture, there are rules and structures, which are absent in IL
In order to know which are the sources of international law rely on one article by the International Court of Justice Statute – **ARTICLE 38**
Court of International Justice is the most general international court – can apply international law in a general way
There are also other courts: e.g. European court of Human rights, Tribunal of the Sea, Appellate Body of the WTO, but these are specific courts deciding on specific fields
International Court of Justice – has a general jurisdiction and competence on many decisions of international law
Statute is the legislation regulating the activity of the court – in which way to elect the judges, the characteristics to be a judge and so on
Article 38: a rule saying on what law the court has to decide
It is the same of a previous Permanent Court of International Justice, created in the early 1920s

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

Possibility for the parties to ask the court to decide ex aequo and bono – a decision not related to the court (consider only what they consider to fair and equitable for the parties)
Sources of law: First have international conventions and treaties, then are the international customs, then the general principles of law. Additionally, case law and precedence are part of sources of domestic systems
Also the opinion of academics regarding IL is taken into account
System more flexible than a domestic system

HOWEVER, there is not a hierarchy between sources
Problem of the hierarchy in a national system: need to know, if in the constitution there is a specific principle, whether a secondary sources can be considered in accordance with the principle that is hierarchical superior to that
Generally have general principles that have to be followed
On the other side, need also cooperation: there are general principles, such as the discrimination principles, and then also need some specifications – need to apply them in specific sectors
In the European Legal system, very structured hierarchical system concerning sources
In IL, the structure is completely different
The list in article 38 is not a hierarchical list
Most important sources in IL are treaties and customs, which are on the same level
There is a distinction only for the case law (judicial decisions) and the opinion of the most highly qualified publishers: they are subsidiary means according to the rule

First of all there are customs and treaties at the same level
Then other means, on a lower level

Judicial decisions are NOT a precedent: case law usually is quite binding but it is always possible to change

When a court in a system of precedent decides to change a case law, the court has to justify the different decisions taken – this is the precedent
In a system in which you always have to rely on a past decision, the system cannot change
If the court wants to change, need to provide a justification
Precedents important because they provide **certainty** for the people – can rely on a written rule when deciding how to behave, if there is not a written rule need to rely on something else i.e. a decision
In the civil law systems based on written law there is no precedence: what provides certainty is the written law and the role of the court is merely to interpret the written rule – there can be very different interpretations
In a flexible system such as international law, past judicial decisions of the courts are important, but they are not a precedent: it is always possible to change it – court is not bound to them, if they decide not to respect the precedent, the court doesn't have to justify why they changed it
In many cases, the court can follow the precedent, in others they will ignore it
In such a flexible system, the role of the court is very important

GENERAL PRINCIPLES OF LAW
General principles of law recognized by civilized nations e.g. the performance of contract
Drafted in the 1920s – in those days, colonialism: not equal society at international level

Distinction between some nations that were considered more civilized than others
e.g. UK academics had a very important role in giving opinions and also in the general principles

Still today, many of the litigations concerning maritime law are located in the UK – a lot of decisions given by domestic courts concerning application of international law
In some ways, now this is different: impossible to make this distinction – general principles of all nations can be used
At the same time, states that have more familiarity with the application of international law can be intended as the ones whose general principles are recognized in IL
This type of source was a source of fill the gap – in the past, IL was not as rich as today so does no longer need to rely on the general principles of the nations
If there is no applicable customary rule or treaty provision, then resort to a general principle of law can be helpful
Treaties and custom are traceable to a state's express consent to be bound: this is less obvious with general principles that are viewed authoritatively as general notions that form part of the legal system
General principles belong to the domestic law
In some decisions, e.g. decide a contract between two nations: need to know how domestic mechanisms work

Example of general principle: performance of contract in good faith
If there is a contract between two nations, this is a private law institute – two sovereign states, this is part of the international law
Two countries make a treaty, but maybe it is not complete and something is missing – if there is a litigation on some parts of this treaty, need to rely on the same concepts of private laws

Other examples include the idea that no one shall be judge in their own cause, that people shall not be sentenced twice for the same act and that there shall be no crime without a law
Principles are not in any direct sense adopted or legislated, instead they form part of most legal systems in the world
Since these principles are not adopted or legislated, they cannot be traced back to expressions of consent by states: ICJ has never decided a case solely and expressly on the basis of a general principle of law

CUSTOMARY LAW

At the beginning of modern IL, it was the main source of IL – the law of coexistence
There are some rules that are necessary for the cohabitation of all nations in the world
e.g. All the rules concerning the management of borders are necessary rules: there are territories and then artificial decisions between sovereign states, line of the border has to be accepted by both countries
Now in the majority of the cases there are bilateral treaties e.g. Italy and Switzerland have treaties concerning borders

In the past, wars concerning the control of territories: difficult to get a treaty
Many wars about the control of border territories

Some rules not written rules, because there was a conflict, but it was necessary – so customs are introduced

***International custom**, as evidence of a general practice accepted as law;*
Two elements are needed for a custom:

- It must be a general practice
- It must be accepted as law (opinion juris ac necessitates)

GENERAL PRACTICE

When two states behave in the same manner for a very long period of time: regional spaces that are near the borders of the state
The case of regional customs and historic rights and obligations between two States
River as the border between two states
Usually have more customs: more freedom, possibility for the people on both sides to go on the other side without control OR there might be special tariffs, the possibility to work in another state for the people leaving on the border even if it's not in the treaties regulations for the general populations

Don't have a real treaty or regulation but have the repetition of a behaviour
e.g. when there is a dispute concerning the navigation on the river – possibility to have access to the court of the other state and for the lawyer of one state to be recognized as such even in the other

Usually historical situation
There might be a change of government, e.g. with the rise of fascisms, states might stop to recognize the historical custom – international dispute: for centuries, there has been a specific relationship and the other country can no longer refuse

Practice: repetition of the behaviour and the behaviour is accepted by society
Need to state whether there is a practice or not

Possibility for the people of one state to go in front of the court of the other state with their own lawyer
In this case, it is enough that there is just for 10 years this practice to claim that there is a general practice0.

Need a certain **period of time** to assess a practice as general but there are also cases of instant customs
In some sectors, such as SPACE LAW: regulation of space is a matter of IL, area in which there is not a sovereign control at the moment
Regulation was not an issue at the beginning because only 1 or 2 states could go in the state
Some rules need to be fixed today: if there is a collision in the space, how is the situation regulated?
Instant customs: states don't have time and the context to make a treaty (e.g. Space during Cold War, no peaceful relationship to have a treaty) – they agree without saying it that some rules should be respected

When there is an instant custom, in a very short time there is also a treaty because it means there is a full agreement – the states usually try to have something written shortly after the emergence of the general practice

How many cases are necessary for something to become general practice? It depends on the context, might be several incidents, several years
There might be a repetition: might need 2, 3, 4 years of the practice to have a general practice
When there is a small society as the international community before decolonization, it was enough to have the powers to repeat the practice
Now the world has many sovereign states – is it necessary that all, a majority of them behave in the same manner in order to say that there is a general practice?
Coming back to space law: in order to have custom in the space travels, it was enough to have only 2 or 3 sates, because they are the only ones having the possibility of using space
When the use of force is concerned, instead, and this can happen in every corner of the world: need more states than the small community of the most important states

In international law there is **equality**: every state is sovereign, but for example Italy and US are formally equal but not substantially equal in their activity in the international scene
This is a problem because e.g. countries that are part of the UN Security council – their practices are more of important than the ones of other countries
Situation is not so equal also in the formation of law: some states are more important than others in the constitution of customs
Customs are not written rule: need to prove the existence of a custom, if there is a dispute
Formally every state is equal but in the substance it is not like this: power matters and the general practice is influenced by this: which states are behaving like that? It is also a matter of how many and which states

e.g. all the states in Asia decide that torture is legal
Vietnam and other countries started to use torture in their systems: they have laws saying this is legal
Can this be considered as a general practice?
Some countries might object to this practice – this can be the case of regional custom: practice accepted in a small region
But since human rights are universal issue, need to identify and weight the power of the state
If they are very small states, maybe the objection is not very important
But if the objection has been made by all the European states, maybe this is a good point to say we don't have a practice

What exactly counts as practice?
Another important problem is the **evidence:** custom is not a written rule
Can use all the material Acts of the state, legislative acts of states, statements, treaties
Treaty transforming a custom in a written rule is evidence for the existence of the custom
Controversial: do mere statements qualify as state practice?

OPINIO IURIS AC NECESSITATIS

Second condition for the existence of a custom
Customs must be accepted as law, a sense of legal obligation
Not all customs can be accepted as laws e.g. custom of putting the fork on the left is a custom, but not a law
Separate law from other normative systems, such as etiquette and morality
e.g. Diplomatic customs and Sofagate between Turkey and EU: Custom of honour the most important representatives of another country. The custom was not respected, but there was not a violation of the law
Have to prove not only the practices but also the opinio iuris: the idea of the state that the practice can be considered as a law
e.g. resolution of UN Assembly: resolutions are not binding ≠ from resolutions of the Security Council

Resolutions cannot recognize a state
But if the resolution is approved by vast majority and maybe there is more than one resolution concerning the same topic, then this can be an evidence of the opinio iuris ac necessitatis

PERSISTENT OBJECTOR

When there is a custom rule what is important in the general practice, it is also important to assess the meaning of the state that refuses the rule and behaves not according to the custom
Is it a violation of a custom rule, so of international law leading to international responsibility or is it a different behaviour performed to change a custom rule?
Law is in continuous evolution: law can be change, reformed – maybe something intervened that required to change the rule

FISHERIES CASE (1951)

First recognition of the persistent objector – state that explicitly refuses to apply a custom
Usually this behaviour is considered as illegal and a violation, but in some cases it can be considered as a way to avoid the legal application of the custom
Dispute between UK and Norway about behaviour of the Norwegian state
Norway changed the way to fix the baseline in order to determine the territorial waters
In International law of the seas there are different classifications of the seas, according to which there is a different power exercised by the state:

- Internal waters: state exercises full jurisdiction
- External zone: under a partial control of the coastal state
- High seas: different rules of jurisdiction

Usually the twelve miles from the baseline of the shore are considered under the control of the state
Norway however has a very special territorial configuration
Norway considered instead of the baseline from the shore of the continental territory, they use the little island
English fishermen were arrested for fishing in Norway's territorial sea (wider than what would have been had Norway used the normal method of delimitation): UK said that there was a violation of International Law
According to UK, have to follow the shore of the coast in order to determine the space of the control of the state, and especially the exercise of economic activities such as fishing
In territorial water, can prevent foreign people to exercise economic activities officially – big problem
In the end, position of the UK was more coherent with the general rule
General rule was made having in mind a general coastline
Norway however had issued a series of royal decrees (starting in 1812) announcing that it would draw straight baselines
Court recognizes that persistent objections can block the formation of rights vis-à-vis others: had the UK objected persistently and consistently to Norway's claims than the court could have found a historic right in Norway's position, but not a binding law on the UK
However, since states are sovereign and consent is needed, theory of customs must allow for the possibility that states do not consent and will not be bound
In the end the court decided that the Norwegian national decree and legislation was not a violation of international law

Non applicability of a custom to a specific state
In a custom what is important is the repetition of a behaviour
Law is something in evolution – law must change when the rules are not anymore accepted/suitable to the regulation of the situation
Law in a domestic context: reforms and possibility to change law with parliament
In the case of customs, change is more difficult to detect
When a behaviour is not anymore the same, and accepted, there is a violation or evolution of the law and so the change of the law becomes necessary

However, need to consider that there is also the violation of a custom: violation and change/evolution of the law are close cases

THE NICARAGUA CASE

Case of use of torture: torture is not admitted usually in all legal systems – constitutional principles are contrary to the use of torture also by the states and not only in private relations
Also in IL there was evolution of human rights: one of the first conventions ratified by the states after WW2 was a convention against torture
Torture considered as an international crime, a crime against humanity
Many states are part of the CAT but some states are not – the issue was: is the ban of torture given by a custom rule?
Is the ban of torture given by a custom rule (so a rule that is applicable to all the states) or is it just a rule in an international convention (a rule that is binding only for the states that sign that convention)?

The US were accused by Nicaragua to support a private military forces and to support the use of torture
The US were not part of the convention against torture: line of defence of the US was that the use of torture is not a custom, it is a choice of a state and so there is no violation of the custom
Since the US were not part of the CAT, they had no responsibility even in supporting the use of torture

"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."

Use of torture, even if there is a convention and this possible rule in IL: there are so many cases of torture in the practice that we cannot consider this ban as part of international customary law
The court disagrees that this argument can be used: can agree that a murder is a crime even if there are many cases of murder, and even if there are many cases of torture by police in many countries in the world, it doesn't mean that the law doesn't exist
In a more regulated domestic legal system, there is a written rule and courts applying the law and enforcing the law
In the case of Nicaragua, according to the court, the fact of having many cases of torture is not accepted as a line of defence

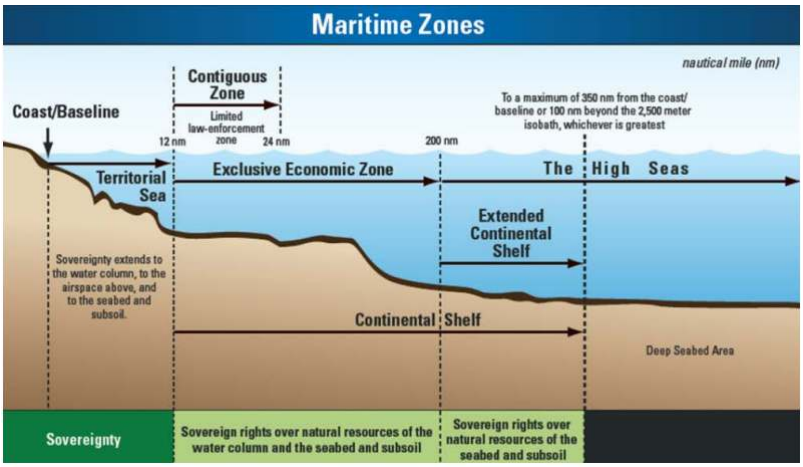
Usual attitude of the states such that "Law breaking is an essential method of law making" is no longer acceptable when the wrongful behaviour is contrary to ethic and moral behaviour and contrary to natural law
There is also natural law, the respect of some principles that might not be recognized as law as happens in the domestic system, where in the constitution is the list of basic principles
Idea of natural law: in between ethical and philosophical
If states generally proclaim that torture is illegal, if they prohibit torture in their constittuions and penal codes and prosecute those who commit acts of torture, then it can be said that torture is prohibited under customary international law
Court's approach in Nicaragua important.it deduced the existence of a rule from the existence of opinion juris and then suggested that contrary state practice was not relevant as long as states continued to uphold the rule verbally
This facilitates finding morally desirable rules that can be considered as customary international law
Custom no longer based on what states actually do but partly on what they say to do, even if they act differently

If in the case of Nicaragua it was one of the most important field of IL that is the use of force, an important topic in IL: in the past, use of force was a legitimate way to settle the dispute
Also now many cases in which states use force in order to settle disputes: conflict between Russia and Ukraine

Same problem as in the past: there is a territorial dispute (the official reason of the dispute) on the control of a part of territory that Russia claims to be its own
Risk a use of force in order to settle this dispute: according to US and EU, this is not a legitimate way for Russia to solve this dispute
When in the use of force, the use of force is about human rights
When the court has to assess if there is or not a custom, there is the parameter of the natural law
When there is a behaviour in international relations that does not involve a moral issue

CONTINENTAL SHELF CASE

It occurred before the convention about the law of the sea



How to exercise sovereignty by states and how to consider the territory of the states
In the past control of the state was on the territory and the nearby maritime sea
Custom saying that 12 miles from the shore was under the jurisdiction of the state: state has the same power on the land and on this part of the sea
When new technology allowed for the exploitation of the land below the sea to acquire natural resources, there was a new issue related to jurisdiction
At the beginning not all states could exploit this technology and so it was only for a small set of countries to decide the matters related to this sovereignty
How to regulate the situation once more states accessed these technologies?
Exclusive economic zone and the discussion about the continental shelf was initially created by the US and was a violation of the law of the seas at the time
Harry Truman issued a proclamation in 1945 claiming thar the continental shelf oof the US coast was under the jurisdiction of the US
In the law of the sea: can exercise jurisdiction only in the territorial sea, while after the territorial seas, there is the high seas and there is no national jurisdiction or sovereignty or exclusivity in the use of this part of the sea
Violation of the law of the seas: continental shelf and water above it were the high seas, and high seas are subjected to no jurisdiction
In the beginning it was seen as a breach of international law: other states could have regarded this as incompatible with their own rights on the high seas
However, other states decided that they wanted to do the same as the US and started making similar proclamations: some kind of jurisdiction was claimed by many states and then it became custom rule
Continental shelf eventually became the topic of a multilateral convention eradicating all doubts
In 1969, the ICJ went as far as to refer to coastal state rights over the continental shelf as inherent

SOFT LAW

Rules are not binding so we cannot consider them law, but in the same time there is a set of rules that is followed and respected by states
Soft law: change of rules in a sector
Used by international lawyers to denominate normative utterances (provisions) that do not neatly fit the listing of article 38 ICJ statue: but it is not only that

At the beginning a change of behaviour is given by a declaration or statement by states, that are not customs because in the soft law, differently from the customs, there is not the **opinio juris ac necessitates**: the states do not consider the rules as a binding rule
This is usually the beginning for changing an old custom or to create new customs
In the post colonial world, the international community needed new rules: at the beginning there was soft law
Current example of the Pandemic: the WHO was an important actor in the regulation of the pandemic, e.g. it is up to the WHO to decide when there is a pandemic: WHO doesn't have the power to make binding law

Declaration of the pandemic was a soft law

It was a simple declaration by the international organization not having a binding effect, yet all the states accepted it: also the US of Trump accepted the statement of the WHO (despite withdrawing from the organization)

How can we distinguish between soft and hard law?
When in hard law if you break it, there is an issue of international responsibility
When there is soft law and state decides not to follow it, then there is no issue of responsibility
Usually the attitude of international courts is in favour of hard law
Rule of presumption: International rule is binding, but the presumption can be reversed and it is up to the states to provide evidence that we are not in a case of hard law but a situation of soft law
"Presumption of binding force": normative utterances should be presumed to give rise to law, unless and until the opposite can be somehow proven.

Soft law is important part of international law, much more than other systems such as the EU one
Many examples of use of soft law in the international arena
OECD: international organization provides a lot of information and is a forum for regulating economic relations between states
Excluding the international convention the OECD promotes, all the documents and rules produced by the OECD are not hard but soft law: what matters is the implementation of the law
In many cases, states implement soft law even if soft law is not binding: they consider these rules to be good enough e.g. the international fiscal system, the accounting system – many technical rules that are not binding but the majority of the state implement and respect them

Summing up on Soft law

- The impact of new subjects involved in IL in law- making
- Rules enacted by International entities other than States (WHO and pandemics)
- How can we distinguish between law and non law ?
  From a legal point of view, the problem is to distinguish soft law from hard law – it is up to the states to decide whether to follow it or not
  When in hard law, if broken, there is an issue of international responsibility (customs are part of the binding international law)
  But when there is soft law and the state decides not to follow soft law, there is no issue of responsibility
- Soft law lacks of binding effect: does it mean that it is not law? Sets of rules that are important, followed and respected by states
- International Courts usually adopt the presumptive theory – the presumption of binding force of rules
  Attitude of the ICJ is usually in favour of hard law**:** The legal force of an instrument can be excluded only when it is clear from the text that it is in the power of the States to implement it or not

INTERNATIONAL CONVENTIONS

Article 38: provides the list of sources the court has to take into account when giving a decision about international law
Among those there are: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states
Treaties are the most important source of IL as of today

Customs are the rules of cohabitation of states: customs are the rules that states cannot avoid to have them in the international system
On the other side, treaties are the **RULES OF COOPERATION OF STATES**
When the states freely decide to cooperate and to set the rules for their cooperation, there is just one mean available, i.e. the treaty
Treaty is the legal binding source: there are other forms of rules beyond treaties

Multifunction instrument: treaties are used to make a common regulation e.g. the Founding treaties of the EU, they are the basis of the European institutions and also include many principles of law governing the relationship between the states
They might also have other objectives:

- To make deal (exchange territory, buying and selling arms):
  Treaty is also the way to regulate more private relationships between states: if France wants to sell weapons to Australia they conclude a bilateral treaty
- To adopt common "legislation" (against climate change or protecting human rights)
- To set up a common institution (such as the UN)

Instrument that can be used as a legislation or as a contract between states in a more private dimension
The treaty has become the dominant source of international law – or, if not of 'law' per se, then at least of rights and obligations.
Can use a treaty, there are many examples of treaties providing legislation and general rules between states, but there are also treaties regulating a specific issue or situation e.g. a construction or the use of a territory to exploit some natural resources
A treaty is a source of rights and obligations
Treaties can be

- **Bilateral**: more on the private side of the relations between states
- **Multilateral**: more on the legislative side

The law of treaty: about the making of the treaties, their effects and application, their validity, and their termination grew and crystallized
All these rules are custom rules but in addition there is the 1969 Vienna Convention on the **law of the treaties** codified the customary international law on treaties
Codification of IL: at the end of the Sixties, after the end of colonization there was a big problem in international community i.e. **the knowledge of international law**
Pre-WW2 international community was made of few states
Also the process of formation of customs as well as the knowledge and the assessment of customs was easier, because the subjects involved were few
A sort of tradition between the states: UK had a very big influence in determining international law and was one of the first states having studies in international law
After the decolonization, huge number of states with respect to the past and which were in some way without culture of IL, without institutions, the diplomatic experience, etc
The UN decided to enter the collection of international law to give tools for the new participants of the international community

CODIFICATION: UN started a process to codify the most important custom rules of IL and one of the most important subjects was the customary law governing treaties, to give states a precise definition and description of the rule governing treaties
When there is a codification convention, in the convention there can be codified custom rule (e.g. in Vienna convention is the codification of Pacta sunt servanda) and there can be rules or provisions that are not accepted by all the states
Need to look at the negotiations, the travaux preparatoire, all the discussion before the conclusion of the convention – have an idea of whether a rule is accepted by everybody or there is some doubts
In the end, wen possible the VCLT accepted solution that were shared by all states – use of reservations as a way for states not to be bound by a rule

- The Vienna Convention expresses a contractual outlook rather than a legislative, public law inspired outlook/approach: important ramifications as some of its rules are very useful when treaties resemble contracts, but are less useful when treaties more closely resemble legislation
  The idea of the Vienna convention is that the treaty is a contract between states in which two sovereign subjects decide to enter an agreement and assume rights and obligations – similarly to how people enter in contracts in the private law
- The rules of VCLT do not focus on the substance of treaties (the treaty as obligation) BUT on the form of treaties (the treaty as instrument).
  Content of the treaty itself is left to the states and it is about the formality of the treaties
  It is not just formal (form = rules to follow to have an efficient and legitimate instrument)
  One of the ambitions was to formalize rules on signature and ratification: but one cannot sign or ratify the obligation, but only the instrument containing the obligation
- VCLT do not cover the consequences of a breach of obligations, leaving that to the law on state responsibility.
  In private contract law there is also the liability from breaching the contract, but this is not present in the IL because this is a part of state responsibility
- Is VCLT customary law?
  It is often claimed that most od the rules of the VCLT were or have become customary international law
  Most of the rules are residual in nature, states can depart from it by mutual agreement: if they wish to create their rules on the interpretation or on how to amend their treaty, this can be done. But if they do not think of any alternative rule,, they can fall back on the Vienna Convention rules
  This means it is difficult to claim that the VCLT has been violate: parties might have contracted out of it

Treaty on the European Union is an international treaty: functioning of the treaty
e.g. Application in Brexit
Provision regulating the withdrawal of a member in art. 50 of Lisbon Treaty
First application of art 50 – many problems of interpretation of the article
Many gaps, in order to know how to deal with the issue, the ECJ had to rely on international law and on the Vienna convention on treaty law
Form of treaty –all the rules concerning the operation of the treaty are regulated by this convention
But the contents, what the states can and cannot regulate is not considered by the Vienna convention

Very similar to private contract law: usually in legal systems, parties are free to determine the content of a contract
Bu there are some limitations, such as public orde
Legal convention does not rule public order – doesn't introduce limitation on the content of the treaty, with only one exception (jus cogens)
Usually it is about the operationalization of the rule

FUNDAMENTAL PRINCIPLES OF THE LAW OF TREATIES

There are two custom rules behind treaty law

1. Free consent
2. Pacta sunt servanda: natural law – the pacts should be respected: once consent to be bound has been expressed and the treaty has entered into force, the treaty shall be kept by the parties in good faith

At the basis of natural law and at the origin of any system of law

Once consent to be part of a treaty has been expressed and the treaty has entered into force, the treaty shall be kept by the parties in good faith – pacta sunt servanda (Article 26 VCLT)

Treaties should be based on the free consent of states: all the states can enter in a treaty only on free will i.e. if they want to be part of a treaty

And that is because a treaty is a limitation of sovereignty

No authority, nothing imposed above the state

State is in principle free to do whatever it wants

EU explicit example: strong limitation of the sovereign power of its members but this is accepted by the member states

Founding law of the EU is in a treaty because in order to allow a limitation of sovereignty the only way is to have a treaty, in which give consent to the limitation itself

To regain sovereignty, need to withdraw from the treaty – the will of the UK

CHARACTERISTICS OF TREATIES

Treaties: agreements in written form, concluded between states and governed by international law, whatever the number of instruments and whatever their particular designation

1. The variety of denomination (covenant, charter, treaty, convention, pact, protocol, agreed minutes, exchange of notes, memorandum of agreement or understanding): choice of the name makes no legal difference (although it can be a political one)
   It is often said that the memorandum of understanding would signify an intention not to be legally bound (but we will return to this)
2. The written form (Article 3 VCTL): treaty should be done in a written form – the only expression of international law that are in written forms (≠ customs, that exist in a non written form and even if there is a written recognition of a custom for example in judgements, that is still non-written)
   The written form is binding for a treaty
   During the pandemic, lack of power of the EU: some tasks performed by the EU that were not real competences in the treaties of the EU
   All member states agreed during the pandemic that the Union should have had more power in health matters, it was impossible to use the traditional tools in order to have a common European policy on health matters – in order to change the system of competences of the EU, need to change the founding treaties, opening a complicated process (regulated by the VCTL) – in the end had to use other instruments of the IL
3. *"Every treaty and every international agreement entered into by any Member of the United Nations … shall as soon as possible be registered with the Secretariat and published by it."* (Article 102 of the **Charter of the United Nations**).
   Publication of domestic laws is very important e.g. for Italy is in the Gazzetta Ufficiale – publication by the government or the commission for the EU
   Publication an important part of the legislation: usually legislation is general, binding for all the members of the legal systems, be it domestic or international, need a formal way to make it possible for the subjects bound by the law to know the contents of the law

In the case of IL, this is not particularly important because in the end the treaty is binding only for the states and subjects that are part of the agreements e.g. for the case of the bilateral treaties, need to go into the domestic collection and will find the agreement published
When there are multilateral treaties, there are more people affected, more generality so it is more important to publish and know the effect of these treaties
Up to the states, not a compulsory system such as in the domestic and the European system, but usually however they do follow the rules
Publication is a condition for the applicability of a piece of legislation: if there is a regulation in the EU and the regulation is not published in the Official Journal, this is a problem that affects the legitimacy of the regulation
In the IL, the publication is not a condition for the existence and the validity of the treaty: lack of publication is not important, but it becomes important as a process of transparency of the law

4. Treaties must be governed by international law: this is useful for delimiting treaties from instruments between states governed by one or the other domestic legal system
e.g. the lease of a building by the UK in Germany for the purpose of housing the UK embassy takes the form of a treaty, but of a contract governed by German law
Such an agreement is outside the scope of Vienna Convention
In addition, states can also conclude other instruments: political agreements, morally binding agreements or soft law agreements

Since intentions seem to be relevant, states can submit their agreements either to the international legal order or to some other normative order
The case of Memorandum of Understanding: states have an agreement but they don't want it to be bound to international law
States have an agreement, but they seem to manifest a mutual intention not to be legally bound but only bound on the political or moral level
However, in some cases it is considered as a piece of international law
Have to consider the practice of the states and look at the elements connected to its publishment
In a case where the states make a statement saying the memorandum is not binding
From a legal point of view, courts still consider MoU as a binding instrument, but the states may not consider it in this way, depending on their political choices

THE CONCLUSION OF A TREATY

Who can conclude a treaty on behalf of the state? Subjects of international law are mainly states and international organizations, but the problem is who are the people that can conclude a treaty on behalf of the state or the international organization?
States are abstractions and need people to perform the legally relevant acts
Head of state and head of governments, as well as foreign ministers all have the power to bind their states
Article 7 of the VCTT also adds that ambassadors and representatives at conferences or organizations have powers to bind the state (but less far-reaching than the ones of heads of state and government 6
Subjects have a natural power of representation: do not have to demonstrate that they have the power to represent the state
A treaty is a sort of contract – when a state is bound by a treaty, this is a way to give obligations and rights to the state
UK entered the EU community in the Seventies and the process to withdraw from the treaty was vey long: take a commitment and this is supposed to last in the future – need a clear indication of who is taking the commitment

International relations are not only meetings or committees at the highest levels
Many international, diplomatic relations occur in the lower part of the administration of the state
Instrument of FULL POWERS: power of attorney
When need a lawyer to defend in court, need to give the power to represent you
What the lawyer is going to say is directly connected to the defendant
The same principle of the full power: people conducting a negotiation, being part of an international conference, if they are supposed to speak on behalf of the state they need to demonstrate they have the full powers to do so

In other words, full powers are documents emanating from the competent domestic authorities (typically the foreign ministry), specifying that the person concerned is empowered by his home state to participate in various acts relating to the conclusion of treaties.
Full powers sign/ full power to negotiate other cases it may be limited to negotiating – this depends on the degree of confidence the local authorities have in the person concerned
Can have a full power to sign or negotiate
If discussing on many treaties might also be very technical and regulating economic relations, exchanges – might need some technical person maybe not part of the government (e.g. academics, people that are not in the government)
They can participate in the drafting phase and in formulating the rules and in the phase of signing there is another subject that has the power to do so

Steps to have a treaty are negotiations, big conferences with all the subjects interested in reaching the treaties– in the situation of bilateral treaties there are only two subjects
But in the case of multilateral treaties: international organizations usually inspire treaties
When a treaty is formulated and concluded in the context of an international organization, usually it is up to the IO to try to involve the state and a high number of states
Don't know at the beginning how many states will participate to the negotiation
But when in a situation of multilateral agreements the goal is to have the highest number of states being part of treaty – also from a political point of view, the success of a multilateral convention is given by the participation of states
In all the situations in which there is a codification convention, the goal is to have the highest number of states participating: less possibility of conflict between the states in the application and interpretation of the provision
At the end of the negotiating procedure is a **draft text:** text agreed upon by the majority of the participants to the negotiation
US don't ratify many international treaties compared to the EU: that occurs because the US considers that being bound by a treaty is a huge limitation of sovereignty
Yet they do participate to the negotiation of treaties
Participate, use influence and power to make the text in the way I want and then bail out of the treaty
Not all participants of the negotiation give the final word to the draft of the treaty – final word given by the signature
Signature means that the text cannot be anymore changed
Closure of the negotiation with the signature – can be given by all the people representing the state in the negotiation
Signature is both the consent to be bound in treaties but it is also the first step towards the ratification
However, it is with the ratification that a state takes the formal commitments to be part of a treaty
Ratification process something not related to the international law: it is up to every state in the international community to decide which are the constitutional processes to become part of a treaty and to assume obligation in international relations arena
In the past, signature involved a promise to ratify
However, a duty to ratify would be difficult to reconcile with democratic considerations. At the same time, an increasingly perceived need for flexibility and speed has diminished the attraction of ratification
Today, if a treaty remains silent, mere signature probably suffices
If and when a treaty requests for ratification, this is of vital important; but if no such provision is made, then the default rule would seem to be that the signature suffices
However this doesn't mean that the state which signs can do as it pleases in the time between signature and ratification or between ratification and entry into force
Article 18: interim obligation – a state may not engage in behaviour which would defeat the object and purpose of the treaty concerned

This is different from full commitment, or ratification would be a meaningless act (and it would undermine the possibility of a state to unsign a treaty, by not ratifying a treaty such as the US does) but it does create a good faith obligation not to undermine the treaty's raison d'etre
Interim obligation works well with contractual arrangements but less with law-making treaties

Italy: ratification process is regulated by the Constitution
Power of ratification is in the end of the executive power together with the President of the Republic
For some categories of treaties, it is also necessary the approval of the Parliament
    The most important treaties need the approval of the Parliament
    In a liberal democracy, it is important to consider the balance between the different powers
If the idea that foreign relations is a power of the executive branch, in the modern liberal democracy it is also important to give the involvement of the legislative power
In some countries, for some categories of treaties in other countries might need the approval through referenda – that is the case for the treaties that limit the sovereignty of the state (i.e. different elements of the European integration process)
Usually in the constitution there is a specification with regards to which types of treaties need the ratification of the parliament and which one needs to be approved through referendum

PROVISIONAL APPLICATION

International economic law context is also important
If states wish to apply their agreement immediately, they can do so according to Article 25 VCLT
Provisional application allows for a treaty is applied even if the ratification process is not completed
    The treaty's regime will be applied prior to its entry into force

Cooperation agreement between the EU and Canada (CETA): this treaty now needs the ratification by the EU and the 27 member states of the EU: rule of the new external policy of the foreign economic relations of the EU
Problem from the technical POV is that the negotiation is carried out by EU but then the ratification has to be done by the single member states
In the case of CETA: participation of the European Parliament and when this happens the procedure takes longer
Difficult negotiation: liberalization of trade also implies the protection of worker categories
    On Canada side, the process of ratification was faster
The EU and all the member states decided that after the ratification of the EU the treaty could enter into force provisionally even if all the member states did not conclude the ratification process
Some states still today haven't ratified the treaty, but still it is being applied, even in the countries where the ratification process has not been completed

Provisional application produces a legally binding obligation to apply the treaty as if it were in force and it is typically based on a provision in the treaty itself – sometimes a state may also declare unilaterally that it shall apply the provisions of a treaty regime provisionally5
In a multilateral situation need a number of ratifications provided by the treaty itself
Need to know if the treaty is in force and how many states are part of the treaty: to look at the question and need to solve a legal issue, you need to know whether the treaty is applicable or not

RESERVATION

Possibility to be part of a treaty but to exclude one or more provisions of the treaty from the obligations of the state
Unilateral acts by which individual states wish to modify or exclude parts of a treaty
Problem of multilateral treaties having a legislative goal – there cannot be reservations on bilateral treaties
It allows states to commit themselves at no cost and to join regimes without having to make dramatic domestic policy changes if they don't want to: tool for flexibility

Before Second World War, states could make reservations to treaties, provided those reservations were accepted by all their treaty partners (unanimity requirement and veto power to partners)

However, rise of human rights treaties after WW2 suggested that there was a drawback in this way of doing things, because it might result in states not joining regimes, despite their participation being very useful
ICJ Advisory Opinion to reservations on the Convention on Genocide (1951)

Genocide Convention (1948):
Genocide crime, international crime concerning the deliberate killing of a large number of people from a particular nation or ethnic group with the aim of destroying that nation or group.
After WW2, states decided this crime needed to have a regulation indicating specifically the responsibility of the state
Genocide Convention was sponsored by the General Assembly of the UN
Successful convention: majority of the states wanted to take part in the convention as they recognized it was necessary to be hard at fighting international crimes – but some states wanted to opt out of a specific provision
Article IX of the Convention: jurisdiction of the ICJ in enforcing the convention itself
Convention provided an advisory power to the ICJ to interpret the convention itself
Some states however had never recognized the jurisdiction of the ECJ and were reluctant to grant the ICJ jurisdiction to enforce the Genocide convention
Soviet Union and other countries did not want to be under the jurisdiction of the ICJ: being judged by the international court is contrary to their idea of soveriengty
One camp favoured universality of the regime and argued for inclusion of USSR and its allies, while the other side claimed the integrity of the regime was the utmost importance
One of the flaws of international law is in the enforcement: states want to protect sovereignty and don't want to have jurisdiction above them
Vienna convention did not exist in 1951 – but then Article 19 of VCLT reproduced the decision of the ICJ

Is it admissible to have multilateral treaties with different standards of obligations for some countries?
Or is it better to have a rule or proposition saying that all the states have the same obligation
Problem of the court was to detect the customary rule after the end of WW2
WW2 signed a passage from the old to the new International Law
Proves how difficult it can be to detect and fit custom rules
Problem was: is it better to have less states part of the convention having the same rights and obligations or more states and different levels of commitment? Especially in the case of genocide convention
Moral idea that it was very important to have a formal commitment from the highest number of states that genocide is a crime and that they take the commitment very seriously
During WW2 Germany did not consider genocide a crime, but as a legitimate use of force in the internal affairs
It was important to have a high number of ratification of this convention – would show that countries changed their perception on genocide

ICJ decided that unless the parties themselves agreed otherwise, reservations to treaties should be deemed permissible as long as they were consistent with the object and purpose of the treaty itself
Court decided it was better to give reservation because better to have higher participation to the treaty process than to exclude some parties
Reservations are admissible if they are consistent with the object and purpose of the Treaty
Art. 19 VCLT *"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*

a) *the reservation is prohibited by the treaty;*
b) *the treaty provides that only specified reservations, which do not include the reservation in question, may be made;*
c) *in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty"*

Treaty itself should regulate the reservations: there can be treaties saying that no reservation is admitted
It remains up to the parties to a treaty to decide how to handle reservations: if reservations are deemed intolerable, then the parties will agree that no reservations are possible
States may also agree that reservations are allowed to some provisions but not to others
Problems might arise instead if the treaty remains silent on reservations
Not all the reservations can be admitted: if the Soviet Union suggested that when you kill 10 people or some percentage of a minority it is not a genocide, this would have been inadmissible because it is contrary to the object and purpose of the treaty (i.e. to prevent and punish the crime of genocide)
Court decided it was not incompatible with the treaty for a state to be part of the treaty BUT not to be under the jurisdiction of the court: there might be other ways to enforce the convention and the convention had high expectations of the role of domestic courts
Today, art 19 is accepted as customary law

Problem of reservation is not only for the state proposing the reservation, but also for the state that is on the other side
Multilateral treaty is a source of law where every state is sovereign and in which every state is free to be part of the treaty
For some states might be ok that USSR did not go under the jurisdiction of the state
But an other states might invoke reciprocity: if I am part of the treaty and I am under the jurisdiction of the court, then also other states must be under the same oblication
In the legislative process: have an authority saying that something is admissible and need to accept that
When the ICJ decides the decision, the decision is not able to influence the position of the other states
In order for an opinion to be binding, need all the states part of the convention to accept it (the advisory opinion provided by the ICJ)

Article 20 VCTL includes a procedure concerning the reaction that the other states can have

1. *A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.*
    a. *When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.*
    b. *When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.*
2. *In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:*
    a. *acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;*
    b. *an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;*
    c. *an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.*
3. *For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later*

When a reservation is not authorited by a treaty, need to consider the different options
Acceptance: when the state proposing the reservation is acceding the treaty

Treaty was signed by other states
State proposing the reservation was not part of the negotiation or the drat text
Case that occurred after the decolonization: many new states, wanted to be part of all the conventions
Didn't participate in the formation of the text, want to be part but their conditions are different – possible that states that are already part, original members of the treaty, have to accept the reservations of the new states
Silence as acceptance: state agrees with the reservation but sees no need to spell it out
Remaining silent is considered as acceptance of the provision: if a state does not react within 12 months it is considered to have accepted the reservation
Objection BUT do not want to jeopardize the treaty relations
VCLT determines that despite the objections, the relations between the states continue to include the reservation
Reserving states gets what it wants despite the objection of the counterpart
Objection AND the objecting state does not want to have treaty relations with the reserving stat
Reservation does not have any effect
Solution of the VC is that the objection is applicable only in the relation between the state, the reserving state and the objecting state
Contractual nature of international treaty: the multilateral treaty comes to be considered as a bundle of bilateral relations
If do not accept the reservation of a state, then the treaty is not in force for you and for the reservist state.: entire treaty remains without effect between the two states
Fair assumption for some treaties e.g. a multilateral treaty on extradition which typically creates a set of bilateral relations between states
However, this is more problematic with treaties aiming to create a more or less uniform regime, such as human rights treaties
Something gets lost if the treaty is considered as a bundle of bilateral relations
Therefore, states are reluctant to indicate that they wish to have no relations at all with a reserving state, even if they feel strongly that a proposed reservation is highly problematic

Problem is that when the treaty is based on reciprocal obligation (E.G. a treaty concerning import export)
Case of the Jurisdiction of the ICJ is different because it is not reciprocal relation

Vienna Convention is tilted in favour of the reserving state: many case law reservations

- Who decides when the reservation is not compatible wit the object and purpose of the treaty?
  Advisory opinion was possible because there was the jurisdiction of the ICJ recognised by the treaty
  The effects in the practice is that states usually try to have very precise rules on reservations within the treaties so as to prevent litigation on those elements
- Is the Vienna regime in favour of reserving State the best possible solution?
  According to international lawyers it is undesirable to change the convention's regime on reservations
  Problem lies in the absence of agreement among nations: reservations are a way for state that lose out to protect themselves in the absence of agreement
  Reservations are the price to pay for living in a world of pluralism

A reservation is incompatible with the object and purpose of a treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the raison d'etre of the treaty
In addition to making reservations, it is also possible to manage disagreement by creating differentiation within treaty regimes
Different obligations for different parties are created

INTERPRETATION OF TREATIES

Problem of application of law is mainly a problem of interpretation
Much of the struggle is about the proper way of interpreting a text
Three methods of interpretation

1. Textual: interpretation is about discovering the objective meaning of a text
2. Historical: interpretation is about discovering what the authors had in mind when drafting the text
3. Teleological: interpretation concerned with realizing the goals of the authors

They are expressed by the following provisions:

- **Article 31 VCLT General rule of interpretation**
  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
- **Article 32 Supplementary means of interpretation**
  Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31

Literal interpretation main way to interpret the law: try to be as close as possible to the meaning of the sentence, need to be in good faith (many decisions in IL)
Need to read the provision within the context of the treaty, consider the context and the goals of the treaty in order to provide interpretation
Need to respect the text: natural in a context such as treaty law
When the states decided to be part of the treaty, that decision was given on a specific text
Idea is that the literary interpretation is what respects the sovereignty of the states
However, we also know that literal interpretation is a sort of wishful thinking
When there is a problem of interpretation, problem because the text is not clear
Literary interpretation is usually not enough to interpret a treaty
Drawbacks of the textual method therefore are:

- Presupposition that word have an inherent meaning of their own
- Treaties are often concluded against a background of profound disagreement, often enough the terminology used is not unequivocal

Article 32 adds another way to interpret the treaty: the historical way – this is the second step
Need to provide a literal interpretation first and then can go in the context of the conclusion of the treaty
Preparatory works very important: e.g. in the case of UN conventions, preparatory works can provide information on the ideas of the drafters
This is considered as a mix between literary and supplementary interpretation
Drawbacks:

- It is a static method: why should a treaty concluded in 1928 be interpreted in 2018 as if it was still 1928?
- Relying on legislative intent may rule out political desires and ambitions of the states that did not exist independently when the treaty was drafted and had no influence in its meaning
- Presupposed that historical record are available and that everyone agrees on what qualifies as historical record to begin with

Because of this, historical approach is explicitly relegated to secondary status

Something accepted in the EU system but not much in IL is the teleological interpretation: interpret the treaty looking at the intended goals of the treaty
ECJ: interpretation of the fundamental treaties in order to reach the goals of economic integration
Teleological interpretation needs a sort of political idea
Main drawback: an interpretation that is too teleological runs the risk of becoming unrecognizable to its parties and might lose some of its political legitimacy
In some of the ECJ interpretations there was a political idea: improve integration and support rights
In IL difficult to find teleological interpretations: need all the parties to agree on the interpretation and the political goals

In the end, if don't have a court it is really difficult to provide a teleological interpretation
Centralized form of interpretation needed to try to gain a political scope
In the International system, where there is not a common political scope, this becomes very difficult

APPLICATION OF TREATIES

Scope of application of a treaty
Need to know the subjects of the law: what are the people that are affected by the law and also the geographical scope of application i.e. where the law is applicable
Usually this part is not important in the domestic context because laws are applicable to all the territory of a state
In case of sources that are not state sources or domestic, there is always the problem of when and to who to apply the disposition
In the case of treaties, the geographical scope of application is given by the member states of the treaty
One of the principles of treaty law is that every state is free to become a member of the treaty
A treaty is a source of obligation only for the states that are part of the treaty and that have ratified the treaty, the ones that decide to join the treaty
Territorial scope: treaty is applicable on the entire territory of the member state, unless the treaty provides otherwise – it is possible that we have some treaties concerning specific parts of the territory of the state
e.g. Treaties on regulations of border relations

Treaties are only binding on the parties to them and can neither create rights nor obligations for third parties without their consent
There may be situations where the behaviour of two or more states creates a so-called objective regime that non-parties would be expected to respect, even without their consent

Example: Sometimes there is a treaty that is a codification of customs law
Commission drafting the treaty has the goal to codify custom rules
Sometimes a treaty can be called for application only by states that are not part of the treaty itself because they recognize that the treaty is a transcription of custom rules, which are applicable to every member of the international community
This is not a direct application: if you have a treaty, even if not ratified by all the states, but there is a recognition that the provision in the treaty is the expression of a custom, it is possible that the treaty is used also by states that have not ratified it

Regime relating to the working of treaties overtime: usually there is a presumption that treaties have no retroactive effect unless the treaty provides otherwise

TREATIES CONFLICT

Relationship between treaties: issue present also in internal legal system
There can be conflicts between legislations and it is possible to have conflicts between two treaties
Need some indications to solve this kind of problem
It is possible to treat the conflict of norms as a matter of successive treaties – indeed the Vienna Convention focuses on the temporal aspect
Alternatively it is possible to approach the issue as a matter of substantive conflict

Case 1: Treaties having the same parties and the same object

Identification between the two treaties
In this case there are two principles

1. **LEX POSTERIOR will prevail**: when there is a more recent law, it will prevail over the older one
   This is a way to reform the legislation
   Don't need to eliminate or abrogate the legislation – the procedure can take a long time
   If there is a new legislation covering the same object of the older legislation, the new will prevail

2. **Lex specialis derogat lex generalis**: Another important principle that needs to be applied together with lex posterior
   Can have a general regulation, such as a treaty concluded within the WTO e.g. GATT
   But if the WTO decides to have a more specific treaty concerning goods in agriculture (same party, and same object i.e. the trade of goods), then the more specific treaty will prevail

How is it possible to determine which is the special one and which is the general one?
In case of a subsequent general treaty, the interpreter who is requested to apply the treaties is requested to compare the two treaties to try and understand what was the idea of the two parties: if to change everything and give precedence to temporal rule or to maintain the specific legislation agreed before

Case 2: Treaties having the same object but different parties

If the parties are completely different there is no problem of treaty conlict
But if you have a treaty concerning trading goods between Italy, Germany and France and one between Germany, Poland and Italy, can have the same object but what are the relevant provisions for Italy and Germany? The first or the second ones?
Interpreter needs to look at the content of the treaty, the will of the parties and try to understand which would prevail

Case 3: Treaties having the same parties but different object

When there is a contrast between different types of legislation (**issue of fragmentation of IL**)
Very different sectorial regulations: e.g., in WTO can have different interpretation of treaty law and the law of the sea
Problem is for the interpreter how to combine these two: the general and the special regime
Should we consider in the system the specificity and so disapply a provision given by the general regime OR should we consider the general rules to read and interpret the special regime according to the general one?
In treaty law, we are mainly in the field of interpretation

VALIDITY AND INVALIDITY OF TREATIES

Approach to treaty law can be a private approach
Rules inspired by public law (e.g. legislation and way to legislate), but treaty law is also highly influenced by the contract approach to treaties
This combination of approaches is given by the sovereignty of states – freely agreed by sovereign parties When you are free, there are not many problems and states can decide their own constraints
Also in contract law there are rules concerning validity and the determination of free will of the parties

Art 52 VCIL: Coercion of a state by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations
Will of the state is not given freely, but there is use of force to oblige a state to give its consent
If there has been a use of force, the treaty can be considered as not valid – military invasion to procure consent

There has been an evolution in the meaning of coercion: there is a new initiative by the European Commission to regulate economic coercion
Idea that a treaty or domestic legislation that is given under the economic pressure cannot be considered as valid
Coercion is not just about the use of force (cases easier to detect and analyse)

What about peace treaties? They are almost by definition the result of coercion
To argue that peace treaties are invalid in view of the use of force is unsatisfactory. The answer international lawyers usually come up with relates to the legality of the war that gave rise to the peace treaty
If force is used in violation of the UN Charter, then the results are invalid

If force is used in conformity with the UN Charter, the resulting peace treaty will not be regarded as having been concluded by means of coercion

Art 53 VCIL: Treaties conflicting with a peremptory norm of general international law ("jus cogens")
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
No hierarchy in IL between custom and treaty law: it is possible that a treaty can have provisions that are contrary to custom law – this is accepted and it is the consequence of having a community of sovereign states
After WW2, with the evolution of IL and the fact that the use of force was no longer considered as a way to solve international disputes, there was the idea that there are some customs in international law that are peremptory and cannot be violated by treaty law
States cannot avoid the application of these peremptory norms: JUS COGENS
Superior principles that cannot be ever derogated by a treaty
This is an exception to the fact that there is no hierarchy in the sources of international law
The problem was that at the beginning Jus Cogens notion was not accepted as a custom from everybody
Jus cogens is today accepted by everybody – many evidences of this trend
Concept of Jus Cogens is not formally disputed anymore but the problem remains to determine which customs can be considered as Jus Cogens
Some norms are universally accepted (e.g. the sanctity of diplomatic mail) but are not seen as peremptory – states are free to contract out such norms, while others might have a higher chance of being seen as peremptory (e.g. human rights norms) but may not be accepted by jus cogens by the international community as a whole
Use of force, the principle concerning the legitimacy of the use of force can be considered as jus cogens
Acceptance that slavery can be considered as a behaviour against the norms of jus cogens
Many other principles can be debated

Jus Cogens is controversial because it introduces a vertical element (public law) which can interfere with sovereignty
Sovereignty: the state is completely free to do whatever it wants, there is no authority imposing the respect of any superior principle
ICJ until recently did its utmost to avoiding using the term, despite having several opportunities to do so
Thinking about the Ukrainian crisis and the position of Russia – Russia is trying to justify a possible use of force in the respect of International Law
Not an aggression with respect to the interpretation of IL in Russia
Russia might not agree about the degree of limitation of the use of force in international relations, but still there is a general acceptance of the principle: in order to use force, need to have a legal justification and Russia is indeed attempting to give legal justifications to the possible use of force in resolving the Ukrainian crisis

Precise consequences of the characterization of a norm as jus cogens remains unclear
It is clear that a treaty concluded in violation of jus cogens will be void, but IL so far has not spelled out any other consequences
The Court has also consistently refused to base its jurisdiction on a jus cogens norm, maintaining a clear distinction between the legal character of a rule and the court's own jurisdiction
Court has also been unwilling to allow jus cogens to take priority over jurisdictional immunities

SUBJECTS OF INTERNATIONAL LAW

If we consider international law as a legal system, it is important to understand what are the sources (rules) governing the legal system, but also who are the subjects of the legal system
Domestic legal system: subjects are natural and legal persons (public, private persons)
When you are the beneficiary of a provision of international law, you are object of a legal system
Subject can enforce the provision: the legal system provides instruments and tools to enforce the provision
Animals cannot go to court to enforce the provision
Need a human being trying to enforce the provision on behalf of the animal (the object) against another human being
Children are the subjects of rights and obligations: they cannot directly enforce the provisions, but the system recognizes that someone else can be a substitute for them
Legal person: need a natural person in order to represent and enforce the rights of the legal entity
Until now, for the animals, there is not such a thing
If someone makes violence against my cat, I can try to do something, but it is about my position: I do not have the power of representation of the cat given by my cat

In the classic IL, the only subjects were states – this focus on states still applies
Now there are other subjects: intergovernmental organizations (UN, EU, IMF, WTO) are to be regarded as subjects as well, as confirmed by the ICJ: they are the legal persons of IL
As a checklist, one may ask oneself whether an entity enjoys direct rights or obligations under international law: if so, it can be ranked as a subject of international law, at least to the extent of those same rights and obligations
Individuals are therefore seen as subjects of international law. They enjoy rights under international law, international humanitarian law and refugee law. In addition, they owe obligation under international criminal law
Importantly, individuals do not always ac alone and tend to organize themselves in all sorts of political, social or economic groups: minorities, indigenous people, companies that operate globally or NGOs
Recognition as a subject of international law or recognition of a group's legal personality amounts to a certain degree of acceptance of its goals
Being accepted as a subject implies recognition of political legitimacy
The very exercise of legal rights may constitute subject status while being simultaneously evidence of it
There is also the problem of the role of individuals

STATE

States are the main subjects of international law and are generally considered to be sovereign
Sovereignty itself does not give rise to rights or obligations
State is under rights and obligations provided by the international legal system
We have rights and obligations recognized by international law but does the state enjoy direct rights and obligations under international law?
What is relevant is not just to have rights and obligations, but the possibility to enforce rights and obligations, which is sometimes difficult in the IL because of the absence of a superior authority over the state
Ukraine claims violation of territory by Russia, but there is not a direct system to guarantee enforcement

Which are the conditions necessary to have a state, to say that an entity is a state or not?

- Population: citizenship determines the legal connection between an individual and a state
  What mainly matters is citizenship
  State has obligation towards people under its jurisdiction but that do not have citizenship status
  Maybe don't speak the same language: usually this might impact the issue of population
  Irrelevant whether the population is large or small

- Territory: in a peaceful cohabitation of the world, every state has a defined territory accepted by all the other states
  In some cases there are disputes on the territory and the exercising of sovereignty in a specific territory
  Core territory suffices even though the boundaries remain disputed
- Effective government: exercise of government on people living inside a territory+
  A state can be accepted as such only when it is in a position to guarantee the law and order will be upheld
  Executive power is the most important institution representing the state
  As long as law and order cn be guaranteed, IL is satisfied: no specific form of government prescribed
  Nasty dictatorships are treated in the same way as enlightened democracies
- Capacity to enter into international relations:
  This is a consequence of colonization, going on in the 1930s: colonized territories might have enjoyed considerable autonomy but they were typically not considered capable of entering into relations with other states without consent from the mother country
  Nowadays the requirement that a state must have the capacity to enter into international relations is not considered relevant: it provides services with respect to federal states making it clear that while the US is a state for purposes of IL, its component elements are not
  Partitions of domestic systems are not relevant in international relations
  In the federation, can have the federate states and the Federal states: the inner states have not the power to conduct international relations

Statehood requirements: need all of them to be considered a state

RECOGNITION OF STATES

In the subject of statehood, there is the Montevideo Convention, concluded in the Thirties
A regional convention between states in America: exception – most important region for treaties is usually Europe for the effect of the two WWs
Nowadays there is a global system in which the main areas of treaties and regulations is Europe - all the relevant treaty law sources are in Europe
Important treaty, because it is a codification treaty, outside the UN system
Accepted as a codification of custom law on statehood: it listed the 4 criteria to be recognised as a state

Recognition: the most complicated and politicized aspect of statehood
In order to be a state, is it enough to have population, territory, effective government OR is it necessary to also have the recognition of your statehood by the other members of the international community?
Issue that there is every time there is the formation of a new subject: unclear what the precise legal effects of recognition are
Not debatable that there is a US and that it is a state
But have a situation in which a previous state can change OR can have new states, such as Daesh
IS had the control of a territory and exercised a government power on the population living there
Daesh had in theory all the elements for being a state, but no one recognized or accepted them in the international community
Ukrainian crisis: dispute on the control of the newly recognized republics
If all the community recognizes the situation, even in a very short time we can recognize a new subjects
e.g. East and West Germany – after the fall of the Wall they decided to merge
Extension of the Western Germany system on eastern Germany
This peaceful process was immediately accepted by the international community
The birth of the new subject was accepted and recognised
So, what is the legal effect of recognition?
There are two theories:

- Declarative
- Constitutive

Declarative theory: recognition is not a legal condition for the existence of the state
It is enough to have population, territory and effective government in order to have a state
Recognition should be merely useful to specify that in the opinion of the other states, state X meets the requirements of statehood
An act of recognition can declare that entity X is a state, but given that state X meets all the requirements, such a declaration is unnecessary

Constitutive theory: You need a recognition in order to have a state: legal condition for the existence of the state
Membership of the community of states is dependent on acceptance by the existing members
Recognition from the majority of the international community: it merely depends on the number of recognizing country, on their political strength and also on the strength of the diplomacy of the state that wants to be recognized

Montevideo Convention accepts the Declarative theory
In the past, when the use of force was admitted, the position of the state was to accept that if there were all the conditions there is a state, even if it is not recognized
Lawyers tend to prefer the declaratory theory (strip the law from political elements)
But in the end, while it is formally true that the declarative theory is a theory more legally acceptable (very difficult to formalize what is a recognition), in the current state of international relations it is very difficult to exist without recognition – entity that is not recognized will have a hard time existing
Some reason to believe that in practice, the constitutive theory may be the stronger one: recognition is essentially a politically act
    It can be given or withheld for political reasons
States will not decide on the basis of legal criteria whether or not to recognize a state: legal criteria can be a guidance, but decision to recognize is merely political and often what really matters is the type of government a state has

Recognition can be de jure or de facto
- De Jure: government has risen to power in a legitimate way
- While a government may be in power and thus constitute a negotiating power, the recognizing state is not very please with the way the government came into power

Usually start off with a de facto recognition and then it is formalized
All in all, the recognition is symbolic: in practice, it may not have all that much effect on relations between states as intergovernmental relations also occur without recognition
Many states have treaty relations with states that they are reluctant to recognize

Recognition is a unilateral act of State: a state is free to recognize or not another entity
In the current state of international relations, international collective acts are also important
Admission in the UN is considered as a collective recognition: even if the admission cannot be formally considered as recognition because recognition is a unilateral act of each state, the position of organizations such as the UN and the EU is very important
In the case of Ex-Yugoslavia, Germany decided unilaterally to recognize the states created after the dissolution of Yugoslavia: Croatia, Slovenia
This was considered negatively by international observers: recognition considered as a reason for conflict
A recognition transformed a civil war in an international conflict: nations one against the other

To conclude, the legal effects of recognition do not extend the level of intergovernmental relations
Recognition and non recognition mainly affect the lives of individuals: South Sudanese passports might not be accepted as valid by other states
When an entity is not recognized, it is in a phase of evolution that we can say there is a state – but the entity is not yet recognized: this affects individuals
When need to travel, need a passport – provided by the state

It is not enough that the state provides a passport, need that the document is accepted and recognized by the other states
As citizen of a state that is not recognized, cannot travel or cannot travel abroad + can have many other problems in having a life outside the borders of the state

Recognition is mainly a political act: when in the past you didn't want to recognize a state because the formation of the state is contrary to some of the values of the state or because it is a dictatorship and so on
Also in the political evaluation, cannot consider only the effects on the government but also the effects on the people
Not recognizing a state, you don't recognize the human rights of people that are citizens of that state
If there is a person going abroad and it needs support, it is important to have a status given by citizenship
This can be a motive in order to decide to give recognition to a particular state

ACQUISITION OF TERRITORY

Conditions of the existence of the state are population, territory and a government exercising jurisdiction over the territory
In which way can say that a state is part of a territory of a state?
Two ways to acquire territory: discovery or occupation

Discovery

Discovery is more related to the past: all the territories are today allocated to the jurisdiction of some states
Discovery worked on the presumption that the discovered territory was uninhabited or that the original inhabitants were of lesser status than European discoverers
Special situation concerning some territories
The Arctic and the exercise of sovereignty in some of those parts: states in some cases decided to exercise a collective control of some territories in order to conduct common research, to have exploitation of these territories and for the possibility of sharing the benefits through all the international community

Occupation

Occupation something that we can see in the relationship between states
Some forms of occupation that last for very long time and they are sources of disputes in international law

- Disputes between Israel and the occupied territories in Palestine
- Cannot say there is a full sovereignty of Israel over the occupied territories

At the same time, this situation is not solved: there is always a diplomatic activity to try to have a definition of the borders between the two states
Occupation in the past was a legitimate way to change the borders of states
After the WW2, use of force was prohibited, no longer admitted as a way to solve disputes in international relations: now it is no longer legal to extend the territory by occupation
Military conquest is today unlikely to result in title to territory: it will not be immediately accepted, although overtime acquiescence may come to do its legalizing work – a conquest that has met with general acceptance tends to harden into title
There are still territories over wich sovereignty is uncertain, but in most cases there will be some form of governmental authority on display

This is the situation in the Ukrainian case: fear is that Russia wants to extend its territory beyond its borders

- In order to extend the territory of Russia, there is an extraction of territory from Ukraine

If there is an occupation based on an agreement, this is a legitimate way of acquisition of territory
If use force, this is not considered admitted and it is a violation of international law

Some examples of occupation in a peaceful way include:

- Cession - The sale of Alaska by Russia to US: an agreement – one state gives up a part of a territory in exchange for a payment by the other state, similar to a private contract
- Lease - UK leased Honk Kong to China: case of international tension between HK and China – China supports the idea that its state has the power to exercise sovereignty on China and impose also the way of government, how to deal with human rights and democratic liberties
  On the other hand, the international community supports the idea that there is no full sovereignty of China on HK because of the agreement with UK
- Land-grabbing by way of private investment: practice that is performed by China and by western states as well – go into low income countries and the state gives money and economic support in exchange for the control of land and assets
  For China there is the fear of not being able to have autonomy for e.g. guaranteeing food in the country: when there are some climate problems, can exploit and have a control on the territory of other states, using these territories for your exclusive benefit
  Different from occupation as the state uses legitimate tools, in particular Foreign Direct investments, following all the regulations – formal legitimate way to interact with the other states
  At the same time, there is a form of coercion: use economic power as a way to exploit other countries
- Territorial disputes and Court adjudications: might be given by a change in the territories or different control or when you have a part of territory in which the people that live there do not speak the language of the state
  This is the case of minorities, a very peculiar case in Europe
  The minorities and the problem of minorities was the motive for many wars in the European soil in the past
  Can have situations in which there is a different perception of the control on territories and the best way is to have a court deciding on the control of the territories
  Can have this problem when there is a control of islands in the high seas or whenever it is difficult to adjudicate who has the jurisdiction over a territory
  e.g. Falklands case: which state has the control on this remote island? In that case there was ultimately a war on that issue between UK and Argentina, but the best way would have been having a judicial decision

Many of the cases can be simply solved by decisions of the international courts
Need for the states to agree to bring the dispute in front of an international court in order to have adjudication

STATEHOOD: CONTINUITY AND CHANGE

In which way the exercise of statehood in a territory can affect the existence of a state
The rule is that there is the presumption of continuity of statehood: once a state exists, there is a very strong presumption that it will continue to exist
The reduced effectiveness of government does not affect its statehoods: the possibility in which we don't have for a very long time the lack of government control in some areas does not lead to loss of statehood

e.g. Syria or states in which there is a civil war, in which there are two different forces
One has the control on one part of territory and not on the other

e.g. in Libya, where there are many different military forces that are not the expression of state
The problem is not from the outside: it is not another state that wants to control the territory, it is within: the government does not have anymore the control of the state and the people
Continue to consider Libya a state even though we know that in reality there are different governments exercising power on different parts of territory
This is has repercussions at the international level
e.g. Libya and migration: no control on the people coming illegally from Africa to Europe
One of the solutions of the EU is to try to have some agreements with Libya in order to exercise control on immigration
Need to identify who is the person in control on the territory

In the diplomatic conferences sometimes there is one general, sometimes another one
There is a whole dispute within the formal government – don't know if the government actually has control on the full state or because there is a political influence in the other states to recognize some person instead of others – difficult to have certainty of who is in power
Libya for a long time had a situation of exercising control of the territory – there is only a problem with the ineffectiveness of Government, only in one of the conditions of statehood
From an international point of view: consider the state existing even if one of the conditions of statehood+ is not real – don't have an effective government
Have diplomatic relations with Libya
There is an embassy in Italy – we are not sure that the people working in the embassy are effectively representatives of the government
But there is an presumption of accepting e.g. the passports given by the embassy to Libyan citizens
However, these situations can create in the long run international problems and effects
This is why when there is a civil war within a territory and there is no international implication, if the civil war is not solved and there is not an authority winning the war there is a problem at international level
Problem of disaggregation of the state: this is the point of state seccession
If there is no longer a government, in the end will have dissolution of the state
New subjects will arise
e.g. Ex-Yugoslavia – at the beginning one subject: the Republic of Yugoslavia
Then there was a civil war the effect of which was a dissolution: many states coming from Yugoslavia
There are also some problems in some territories that are not fully recognized: e.g. Kosovo
From one state there is the creation of different entities

Change in statehood can be given by

1. Secession: this can be done peacefully or as a consequence of civil war
2. Decolonisation: creation of many states with the end of the control from the colonial powers
3. Distinction from secession is in that the former colonies are based elsewhere and are not contiguous with the metropolitan area
4. Unification: Germany
5. Dissolution: Yugoslavia, USSR

Situations are relevant also with respect to the treaties: important to know which treaty is bound for new subjects
When it comes to human rights treaties, it would be awkward to assume that people are protected on Monday but no longer on Tuesday because a state succession has occurred
On the other hand, assuming continuity of treaties would mean that new states would be under legal obligations to which those states have never consented
This less justifiable with respect to substantive obligations
Detailed and complicated cases

The Vienna Convention 1978: codifying codification on succession of States in respect to treaties
Convention, contrary to the convention of 1969, is not so coherent with customary law – codification was the intention of the states, but then can have different practice in the actual treaty

- Newly independent states: can start their existence with a clean state. Treaties do not devolve upon them merely because they were in force for the metropolitan state
- In case of merger or unifications: existing treaties continue to remain in force, unless the parties concerned agree on a different solution

Vienna Convention concluded in 1978: important practice on state succession after that – unification of Germany, explosion of Ex-Yugoslavia, the end of URSS
In practice, there has been the evidence that not all the provisions of the Vienna convention were translated in the practical solution of the problem

It remains uncertain for example whether Security Council sanctions would devolve upon a new state or even whether a newly independent state remain bound by customary human rights obligations resting on the metropolitan state

Example of succession on the treaty: problem of the seat in the security council after the end of the Soviet Union
All the states accepted that Russia took the seat of the URSS: it was really important at international level and in the international relations
A permanent member of the security council has the veto power – Security Council is the only body in the UN that has the power to produce binding decisions for all the members of the UN
Succession of Russia from URSS was a very important point

Once a state ceases to exist, so does its nationality
e.g. since there is no URSS any longer, neither can there be Soviet citizens
What happens to citizens of a state that becomes subject to a succession? No general multilateral convention exists yet
Main political impetus is to prevent statelessness from occurring: individuals will have nationality of the state on whose territory they habitually reside
Therefore, former Soviet citizens, will have acquired Ukrainian nationality if they live in Ukraine, Moldovan if they live in Moldova and so on
This and the practice of Russification has given rise to a backlash in the Baltic states, which claimed to have been illegally annexed for 50 years

INTERNATIONAL ORGANIZATIONS

As important as states in the international relations
They are defined as intergovernmental organizations created by states, usually by means of a treaty in order to exercise a task or a function that states themselves are unable or unwilling to perform
Many of the issues concerning the international organizations will be in the analysis of the EU
The most important international organizations are UN and EU

What is important to say is that international organizations are created by states: they are legal persons of international law – if states are the natural persons, the IOs are the legal persons
In order to create an international organization, need a treaty
All the power of international organizations derives from a treaty
All the rules concerning treaties are the ones in the convention

JURISDICTION

In the domestic arena, use jurisdiction to indicate the power of adjudicatrix bodies to decide legal questions and to give binding decisions, having the same form of law
In international law, two different meanings:

1. Jurisdiction as the power of the state to exercise its sovereign authority on a territory and on subjects, as well as the legal system that must be obeyed
2. The authority that a particular Court or official organization has to make legal binding decisions and judgments on a dispute

STATE JURISDICTION

States can do whatever they want in their territory – idea of sovereignty is the idea of sovereign control in internal affairs
Something influencing the conduct of the states within its territory
The human rights convention had the goal to impose on the states to treaty the population in the respect of the human rights

International obligation taken by becoming part of a treaty but at the same time this obligation is not reciprocal towards the state but it is an obligation to exercise the statehood according to the respect of human rights
From a geographic point of view, need to determine which is the scope of application of the sovereign power of the state
State is a subject that has governmental control over a territory and can say that a state as a sovereign power is between the borders of a territory
Normal to consider that a state exercises jurisdiction within a territory
e.g. If in Italy need to have a court that has the power to decide legal issues in a binding way, the court will be created according to the Italian legal system
In the part of Italy where there are minorities speaking German and having a different language compared to the rest of the Italian population – constitution recognizes special regimes in these areas, it is possible to use German before the authorities and courts
Even in this case all regulations of the German minority is provided by Italian law
This is exclusive and unlimited: it is not possible for a person living in Alto Adige to go directly to a court in Austria asking for some public service

Jurisdiction can be claimed by the state on the basis of 5 overlapping principles
They are not recognised in a Treaty or in domestic law – there is no codification
Principle not binding: a state can choose not to respect one of these principles in exercising jurisdiction
Jurisdiction is a power of the state that is not compulsory: a state can decide also not to exercise jurisdiction – in specific case, not always a state is interested in exercising jurisdiction and sovereign power
Usually a state exercises statehood and jurisdiction within its territory but outside of it is up to the state to decide to exercise it or not
Treaties on coordination in case of jurisdictional conflicts exist
The first 3 principles roughly correspond to the 3 defining elements of statehood: jurisdiction enables a state to exercise authority over territory, population and to protect its government
Since some territory is outside the jurisdiction of a single state, some ideas had to be developed to cover events happening in the interstices between state jurisdictions: this led to principle of universality, the principles that on board ships or aircrafts, flag-state jurisdiction applies
Some states have also accepted a principle of passive personality

FIVE PRINCIPLES:

1. Territoriality: a state exercises jurisdiction within the borders of a state
   States can exercise authority over all acts that take place on their territory through legislation and prosecute all those who violate the laws in force on that territory
2. Nationality: another custom recognized by international law – a state can exercise jurisdiction on its population, even when its people are not on its territory
   e.g. Regeni case: in Italy there is a process against some Egyptian members of the secret service
   Italy decided to exercise jurisdiction against a foreign official because there was an Italian citizen that was victim of a crime in another country
   Crime was not committed in Italy and the people accused are not Italians, they are Egyptians
   According to the principle of nationality, Italy exercises jurisdiction
   Accepted that a state can exercise jurisdiction over its own citizens
3. Protection: not so accepted – no connection between the case and the state apart from a threat that the situation
   States can claim jurisdiction over activities that endanger them, even if those activities take place elsewhere and are ascribed to non-nationals
   e.g. if there is a crime of producing false dollars by Russians in Germany, here US has no jurisdiction according to nationality and territoriality – the crime has been committed by Russians and the territory was Germany

But in this case the US is the only state or the state having the major interest in prosecuting this crime, so it can exercise jurisdiction in order to protect its economic interests
Very weak connection, sometimes it is accepted, sometimes not

4. Passive personality: a state can prosecute anyone who harms its nationals, no matters where this occurs
   Nationality principle is based on the nationality of the suspect, passive personality takes the nationality of the victim as a starting point
   It has resurrected the idea that injuring a citizen of a state is akin to injuring that state
   Highly controversial: sends the message to the other state that its legal system is not good enough
   Therefore, principle not generally accepted
5. Universality: a state can exercise jurisdiction in a case that is so relevant for the international community that even though there is no tie between the country and the crime, the country believes there is a general, universal need to prosecute the crimes
   Some crimes are considered so abhorrent that all states can legislate and prosecute, regardless of the involvement of their territory and nationals
   Filartiga vs. Pena Irala – US Court: Dr Filartiga's son had been tortured and killed in Paraguay by the then chief of police Pena-Irala
   Filartiga moved to New York and Pena-Irala was also there, as an illegal alien
   Filartiga tried too interest the US authorities in prosecuting Pena-Irala, but they declined, claiming that US courts would lack criminal jurisdiction over crimes committed in Paraguay by Paraguayans against a Paraguayan
   Filartiga resorted to Alien Tort Claims Act that provided for jurisdiction over torts committed in violation of the law of the nations: Court of Appeal decided to apply this and therefore it exercised universal jurisdiction
   Torture considered a violation of the law of nations

e.g. Jus Cogens and crimes against humanity: in case of crimes against humanity, the state committing the crime against population, cannot have protection against the state
These usually are internal affairs e.g. Rohingya case and violations against this religious minority in Myanmar
Impossible for the Rohingya people to have protection from Myanmar
Since the situation is within the country, no one has ties with that – in some cases, there are rules between the states saying that in front of international crimes and crimes against humanity, can have jurisdiction exercised by everyone
A state is free to decide to give jurisdiction or protection according to the principle of universality: not binding to have universal jurisdiction
However, there are drawbacks:

- Many of the cases are brought against individuals or regimes already ousted from power: universal jurisdiction runs the risk of becoming an exercise of looking back in anger
- Practical concerns: field trips might be required, thus wealthy countries might be able to afford running such processes, but not other poorer countries – risk that rich Western countries prosecute those individuals who offend the standards of those rich Western states
- Few treaties make universal jurisdiction compulsory

JUDICIAL CONTROL OVER STATES

Look at the other meaning of jurisdiction, that is **judicial control over states**
Sovereignty of states provides a limit for the judicial control of states, the structure of the international legal system is characterized by the lack of a superior authority above the state.
It is difficult to have a judicial control, i.e. that the behaviour of the state is under the control of a court.
In general, the states cannot be under the decision of a court. This is a general principle.
There is a sort of immunity of states, known as diplomatic immunity, the special status that a state has outside its borders.
Usually, a foreign state cannot be under the jurisdiction of another country

Today this principle is not the same as in the past. We have cases in which a state can be adjudicated by a foreign court

In case of litigation in some specific disputes concerning a consular entity – for example if there is a problem in the contract between a state and foreign people working for the embassy or the consulate, in this case this litigation goes under the jurisdiction of a domestic court
When a state operates in a foreign country exercising the power of the state, in a public way, usually the state is immune and it cannot be under the jurisdiction of another state court
So there is the diplomatic immunity: states cannot be prosecuted before the courts of other states

On the contrary, the Act of State – when states behave in a public manner in the international scene, can be adjudicated by the international tribunals
It is possible to have control on the behaviour of the states before an international court
Nevertheless, the states have been reluctant to submit themselves to the jurisdiction of international tribunals and continue to be reluctant to do so as they tend to prefer diplomatic means to settle their disputes

Need to consider that since the beginning of the current structure of the international community (the Westphalian system), we had disputes between states, litigations
In the classic international law, the main way to solve disputes was war
After WW2, tentative to create a rule-based international order
Need to move from the use of force and power of states to solve disputes towards another rule -based way to solve disputes
Some articles in the UN charter regulate this shift towards the peaceful settlement of disputes
Charter also lists a series of ways to settle the disputes peacefully, mostly involving diplomacy and negotiation rather than application of legal rules

Article 2.3: *"All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"*
This is the statement of the shift from the use of force to other ways to solve disputes
Article 2.4: *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state …"*
Article 33: *"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice"*
Cannot use the force to solve dispute – states involved in a dispute should use other means
What matters is when a dispute can be a threat to international peace and security
Russia's invasion of Ukraine is considered a threat to security by other states – example of a violation by the Russian federation of the basic principles of the UN Charter
The Russian federation is a special member of the UN – permanent member in the Security Council
Violation is a threat for the international community considering the role of the state violating the international law

In article 33 there is a description of the means indicated to provide alternative peaceful solutions to disputes
The first: enquiry, mediation and conciliation are diplomatic means of dispute resolution
When there is an intervention of the diplomatic subjects in order to solve the dispute
    Even in this situation can say that we have diplomatic means that continue to be used
    As of yesterday, there was a mediation by Macron
Can consider this kind of intervention as a diplomatic way to try to solve the dispute
What is interesting for the definition of jurisdiction is to understand the meaning of ARBITRATION

ARBITRATION

Article 33 distinguishes between arbitration and adjudication
In general, the classification of the jurisdictional way to solve a dispute in IL is given by one of the two
Both methods are based on the consent of states: maybe the best explication of sovereignty
A state is sovereign because the state cannot be under an arbitration or a court without its consent
This is the peculiarity of the international legal system, compared to a domestic legal system
In a domestic legal system, the subjects of the system cannot escape the jurisdiction/adjudication

If there is a dispute, we cannot agree on an agreement
In the end decide to go to court and enforce the contract, asking for the judicial protection of one's rights
Individuals can decide not to go to court, but cannot decide not to be under the jurisdiction of the court
One can decide not to participate to the court trial, in the end the decision will be taken without my presence, and when that decision is taken cannot escape the jurisdiction of the court – ruling in absence

But states can escape jurisdiction – they can be under an arbitration or a court jurisdiction only if they agree, they give their consent
Arbitration is by definition ad hoc: arbitral panels are set up to decide a single case or a set of related cases

A way that is agreed after the disputes
Agreement between the states in giving the power to decide the dispute to an arbitral tribunal
Agreement concerning where is the place of arbitration, who are the arbitrators.

Ad hoc agreement for the solution of the specific dispute
On the contrary courts by definition are meant to be permanently available
Idea is to have a court which has the power to adjudicate all the disputes concerning the treaties or some obligations and rights recognized by treaties
In the arbitration it is clear that there is the will of the state to go under the jurisdiction of the treaty

1794 Jay Treaty between US and UK
1872 Alabama Claims arbitration between US and UK

The Permanent Court of Arbitration (PCA)

- It is not a Court: it is an administrative organization providing what is necessary for the state when they decide to solve a litigation by way of arbitration
- International Organisation administering the process of arbitration

It does so by keeping a roster of available individuals ready for appointment in advance
Arbitration leads to final and binding awards
Arbitration more common in the private international relations: there are two alternatives

- Ad hoc arbitration: agree on all the terms
- Rely on an arbitration institution: in the private sector the International Chamber of Commerce is very popular – all the disputes in the interpretation of a court will be solved according to the ICC rules – external administration: don't need to have a specific, ad hoc agreement, but the institution will provide arbitrators, the seat where to have the hearing and so on

Similar institution concerning private international law concerning private litigation
If there is a dispute, to solve it peacefully, can go in front of the Permanent Court of Arbitration and ask for proceeding: but need the consent of both states

Iran-US Claims Tribunal

An Arbitral Tribunal set up in 1981 to address the claims arising out of the taking of American hostages in Tehran following the Iran's Islamic Revolution
During the revolution of 1981, government of the Revolution – Islamic regime did not accept the agreement
The tribunal consists of 9 arbiters, 3 appointed by the US, 3 appointed by Iran and 3 neutrals and decides its cases in chambers of three arbiters (one from each group)

Problem in the arbitration – jurisdictional claim: case of refusal of the consent
Some reasons to say that you are no longer bound by a treaty because some things changed: so can contest the jurisdiction of a state
Usually in arbitration/the current practice the use of arbitration is more in ad hoc arbitration
Examples are quite old, also Iran-US Claims Tribunal was the last famous case decided by an arbitral tribunal
Usually now the trend is to have judicial clauses more than arbitral clauses in treaties

ICJ – INTERNATIONAL COURT OF JUSTICE

First ever international court i.e. a judicial body set up for an unlimited duration with the task to apply international law) was the Central American Court of Justice
The first more or less universal court was the PCIJ, predecessor of current ICJ
ICJ is the most relevant international tribunal: universal in terms of states whose disputes it can settle
It has a general jurisdiction: states can ask for a decision from the international court of justice for any matters concerning public international law – jurisdiction is substantively unlimited

Can have other international courts: but these would be system of courts within a treaty – created in order to provide a judicial review within the system of the treaty to which only some states are part e.g. the European Union and the ECJ or the European Court of Human Rights
In the EU, the ECJ has jurisdiction only on subject matters concerning the application of the EU legal system
Impossible to ask to the ECJ to decide on the litigation of Russia and Ukraine
BUT it would be possible if there is a consent for both states to ask for a decision by the ICJ – they can intervene in all the subject matters, all the litigations in the international community
ICJ is a universal court + It is one of the organs of the UN: created by UN Charter and on par with the General Assembly and the Security Council
Before the ICJ – Permanent Court of International Justice
In order to study IL, it is important to know the cases and the decisions provided by the General Court
    Many case law also from the previous Permanent Court
    Case law important because it is important to find out the content of customary law
Many decision of the court stating what is the content of customary law in the moment in which the decision is given
Judges are appointed by the General Assembly and the Security Council following a complicated and highly politicized procedure
Individuals chosen tend to be male and of an advanced age: the five permanent members of the Security Council usually have a judge of their nationality on the ICJ

ICJ can only hear cases between States: other entities may well be considered as subjects of international law but have no access to the Court
Cases between the international organizations cannot be adjudicated by the ICJ
Reason of the limitation is that in 1948 the subjects of international community were mainly states
The UN was the first tentative to have international organization that had more power compared to the international organizations before WW2
Difficult to imagine how the international community would have evolved until today
Nevertheless, after NATO bombed Belgrade to stop the ethnic cleansing in Kosovo, Serbia could not start proceedings against a number of NATO's member states individually

Article 35 ICJ Statute specifies that the Court is open to parties to its statute
Nevertheless, thi8s provision has lost relevance now that membership of the UN is close to Universal

No truly compulsory jurisdiction in IL: need the consent of states to have jurisdiction of international courts and tribunals
    In some cases, they do so by joining a regime that has a court with compulsory jurisdiction

Exceptions ECHR: European Court of Human Rights

Part of the Council of Europe: it has the power to decide on the application of the European Convention of Human Rights
In IL there is no compulsory jurisdiction, but this is an exception: to be part of the European Convention of Human Rights need to also accept the jurisdiction of the ECHR
In most cases joining a regime does not automatically subject a State to the Jurisdiction of a Court operating in that regime
The case of Genocide Convention and Soviet Union: URSS wanted a reservation not to be under the jurisdiction of the ICJ and in the end this was allowed
The obligations under the convention are binding under international law, but cannot be enforced by international tribunals unless the state itself consents to that tribunal's jurisdiction

Usually in the international system need to have a consent in order to be under a court
Need a specific consent on the jurisdiction of the court and usually that is not enough to be part of a treaty
In the EU, to be a member of the Union need to accept all the legal system and especially the jurisdiction of the ECJ

ICJ JURISDICTION

All cases which the parties refer to: Voluntary way to give power to the court to solve the litigation
Parties agree to submit their dispute to the ICK

All matters specially provided for in the charter: it was thought useful if the Security Council could order states to submit their dispute to the ICK
Dead Letter provision: There was also a provision that was article 36 of the Charter: try to give a general jurisdiction of the court of Justice to decide all the possible disputes concerning the interpretation and application of the Charter
In the end, very few states accepted this: giving this power to the court means giving a general jurisdiction to the court
There is nothing in the Charter providing the Court with Jurisdiction to decide contentious cases

All matters specially provided for in treaties and conventions in force

Quite a few treaties envisage that when a dispute arises concerning the interpretation of the treaty in question, the ICJ may be seized
e.g. Article IX of the Genocide Convention which provides in relevant part "Disputes between the Contracting parties relating to the Interpretation, application or fulfilment of the Convention… shall be submitted to the ICJ at the request of any of the parties to the dispute"
Led to debate about whether reservations on jurisdictional clauses are admissible
Article 3 provides that the jurisdictional clause must be embedded in a treaty or convention in force
Obviously, a clause in a treaty that has never entered into force is regarded as invalid and cannot be held against a state
Sometimes, a treaty clause is the oly way to seize the Court even if the underlying wrongful act has little directly to do with the treaty concerned
The cases of Russia and Georgia and Ukraine: after Russia invaded Georgia in 200/, Georgia brought a case to the ICJ, but since there was no jurisdictional connection, it did so on the basis of the Convention on the Elimination of racial discrimination, containing a jurisdiction clause
Thus, Georgia complained about the invasion and the use of force as a series of acts of racial discrimination
Nevertheless, the court found it could not exercise its jurisdiction
On the contrary, in 2019, the Court found it had jurisdiction on the basis of racial discrimination convention in *Ukraine V. Russia*, in the context of Russia's annexation of Crimea

In the end, do not have a system such as the European Court of Human Rights
There is also the possibility of expulsion from ECHR: problem of the presence of Turkey and Russia that do not uphold to the provisions in the treaty

During the Brexit debate the position of the government was to also withdraw from the European Convention of Human rights
One of the problems for UK was the adjudicate power of the Court of Justice – they chose not to be under the jurisdiction of any international court, including the ECHR

THE USE OF FORCE

War traditionally intended as the continuation of policy by other means
War conducted without many legal obstacles being placed in its way and there was a strong sentiment that going to war was perfectly legal
Warfare is nowadays prohibited

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THE PROHIBITION OF THE USE OF FORCE

KELLOGG-BRIAND PACT between Germany, France and US: first legal system to outlaw war
Parties condemned "recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another"
Pact aspired to a total ban on war, quickly became very popular attracting many instruments of ratification
One of the legal basis for holding high-rankings Nazis responsible for crimes against peace
- Basis of the UN Charter is there
- Big shift in international relations

Until that moment, conquest was a legal way to obtain territory
With the Kellogg-Briand Pact that became illegal, and this concept remained in the UN Charter

Basic Principle: total ban on the use of force, with the only exception of self-defence
Not only prohibition on the use of force, but also centralization of the use of force in the hands of the Security Council of the UN
When speaking of institutional design, there is not a perfect solution that works every time in a perfect way
UN Charter envisaged several provisions that however never entered into force
The UN Charter envisaged the creation of a standing UN army that never took place
- Member states would allocate armies that would always be ready for the Security Council to use
- Didn't happen because of the context of Cold War

Always have to distinguish what is written in the Charter and what happens in reality
Main role of the Use of force devoted to the Security Council, also the General Assembly plays a crucial role

General Assembly Resolutions:
2625 (XXV) on Friendly Relations
3314 (XXIX) Definition of Aggression
Peacekeeping missions are not mentioned in the UN Charter – there is not written legal basis for this
Created by the means of practice – IL written in books, but always important to look at the practice of states and customary law

Role of the UN today and the role of the General Assembly
Revitalization of the UN after the cold war: big hope
Theories on **global constitutionalism** based on the UN Charter: global constitution of the world
UN Charter is actually too much divisive

Three main sources of the principle of prohibition of the Use of force in modern IL

- UN Charter (article 2(4))
- The General Assembly Resolution 2625(XXV) on Friendly Relations
- The International Court of Justice - Nicaragua case (1986)

UN Charter, article 2(4)

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
Purposes of the United Nations are included in Article 1 of the UN Charter

In the provision it talks about the use of force NOT war: it is the mere use of force to be illegal: provision broader
This is a JUS COGENS norm: cannot be violated – prohibition of the use of force is a perentory norm
Cannot write a treaty that goes against the provision of the prohibition of the use of force
A way to go around this provision is to say that we are attacking a state that is part of the territory of the attacking state – so that it becomes an internal matter and not an international one
Two exceptions that are made to the use of force: self-defence and the authorization of the security council
Another way to bypass it is to define in different ways the use of force: sanctions, economic coercion, etc. can these be considered use of force?

The General Assembly Resolution 2625(XXV) on Friendly Relations

"The principle that States shall refrain In their International relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations
Resolutions are not binding per se but they can reflect principles that are common in international Law

The International Court of Justice - Nicaragua case (1986)

"The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." para. 188

BASIC PRINCIPLE

'All member states shall refrain in their international relations'
Inter-States use of force: prohibition only affects activities of states in in their international relations
It does not cover civil conflicts and the use of force by the State on its own territory: use of force within states is not captured and this state of affairs can be ascribed to the view (still prevailing in 1945) that whatever happens within a state is not the concern of IL
It covers the use of force to recover what states claimed to be their own territory otherwise the principle would be useless i.e. you cannot use force and invade a territory claiming that you are recovering your former territory
e.g. is when Argentina invaded Falklands in 1982, with the aim of recovering a part of its territory
Iraqi invasion of Kuwait in 1992 was another example
States always try to justify what they do on the basis of a legal argument from International law

'from the threat or use of force'
Use of force means hard force as well as the threat of force
It covers any use of armed force, any military action, from a reconnaissance incursion without a single shot fired to a full-scale invasion – everything is included in the provision
It may cover cyberattacks: however, not all of them – it needs to have the effects comparable to an army attack e.g. blocking an hospital, the crucial infrastructure of the state, etc.
    Just blocking the access to a website cannot be considered use of force
    How even to recognize a cyberattack? Law here is still in development
It does not cover economic pressure or hostile propaganda
    Developing states more subject to economic coercion
Economic sanctions that affect the state are not considered use of force – they are not an armed attack
However they might violate a different primary obligation: prohibition of non-intervention in internal affairs, i.e. interfere with the internal affairs of another state, taking out the will to do something different from a state and it has to be within the sovereignty of the state
    So it is more difficult to be proved under International Law: need to prove it is coercive
    Also, it has to be under the domain of a state, not in international relations

'Threat' not clearly identified
    There is not enough practice to clarify this
Russia was building an army at the borders of Ukraine before the invasion: can that be considered a threat? If so, activate the response of other states
ICJ, Legality of Nuclear Weapons, 1996: possessing nuclear weapons does not amount to threat
Not clear of what threat entails in the international law, but drafters were keen on creating as comprehensive a prohibition as possible

'against the territorial integrity or political independence of any State,'
A lawyer might say that intentions are not to change the independence and use of the state – not change the government, so it is legal to invade a territory
Integrity covers everything, it means 'intactness' of the sovereign state
Political independence is sovereignty, and it covers the monopoly on the use of force on its territory and the right to exclude aliens
Doesn't matter the intention or the will, independence and integrity means anything
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 19 Dec 2005, para 163
"the obligations arising under the principles of non-use of force … were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war"
Not legally entitled to enter states to secure your zone even if the aim is not against the state itself, but against an armed group that is part of the state
Provision does not allow the use of force by a state to protect perceived security interests beyond the wording of Article 51: Uganda had violated the principles of non-intervention and the prohibition of the use of force

'or in any other manner inconsistent with the Purposes of the United Nations'
Provision also covers extraterritorial acts against the State – any action that implicates the non-maintenance of peace and security
It covers attacks on any of the organs of the state abroad i.e. the use of force against a ship of the state which is not in territorial waters is illegal
It does not cover extraterritorial acts against nationals and private entities of the State
It does not cover force in pursuit of self-determination, democracy, or the implementation of Human Rights (i.e. they should be allowed BUT read →Humanitarian intervention)

SELF-DEFENCE

Charter envisioned the creation of a system of collective security, headed by the Security Council
Permanent members of the Security Council were given a veto
Some of the smaller states, in particular Latin American feared that the big neighbour state could abuse its privilege by returning to the 19th century Monroe Doctrine
Smaller states sought some guarantee that the collective security system would not make it impossible to act in self defence

Only provision that a country can employ force even without the authorization of the Security Council
Always used by States: every time force was used there is an attempt to frame it as self defence

UN Charter, article 51
"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Inherent right: reflects a natural right, something that is not based on a treaty but is there before the existence of a legal instrument
Individual or collective self-defence: can ask and obtain help from other states
Article aims to find a balance between collective and individual security

if an armed attack occurs: strict condition for exercising self-defence
One can hardly expect states to wait until an armed attack occurs before defending themselves
Customary right to self-defence would be broader than the right formulated in Article 51 UN
Need an ongoing attack according to the ICJ – but what do we have to wait for an invasion to occur?
Cannot do anything if the other state is clearly planning an invasion?
One of the problems of self-defence is that it was used according to the idea of **anticipatory or pre-emptive self-defence**: self defence in anticipation of an attack that is about to happen

A different norm under customary international law changed this provision of the UN Charter so that it works in a wider way
The main crisis that happened around the notion of Self-defence: Intervention of the US against Saddam Hussein
- Go in Iraq to get rid of the weapons because he might potentially use them
- Pre-emptive attack was used to phrase the attack

What is possible is to use force when the attack started but still haven't reached the border of the state
- Convoy is there and is just coming to the territory of the state
- Missile strike: what can do once the strike started? How can you act in self-defence at that point?

It is debatable and discussed
According to the ICJ, need a hard attack to occur for the state to be able to engage in self-defence

There are certain elements of customary law that are relevant to interpret self-defence
There are customary restraints to self-defence, so as to limit what is in the UN charter
Necessity: can use force only to repel an armed attack, no alternative is available to the use of force – if the hard attack took place, and the attack is concluded, then there is no self-defence need anymore: if the armed attack took place and was concluded, then there is no more a right to self-defence and it would be a reprisal, which is unlawful in international law (or a countermeasure involving the use of force)
Difference between reprisals involving the use of force (ILLEGAL) and other reprisals, diplomatic and economic actions – which are not illegal

If it involves the use of force it is illegal
Proportionality: degree of force proportionate to the attack – Russia claims to act in self-defence of the Russian speaking minorities in Ukraine, but invaded the whole country – that is not a proportionate response
Continuous: if a state stop responding to the attack for a significant period
Self – defence cannot be punitive and its aim is to repel an attack, not to pursue the attacker
Self-defence may justify a temporary military occupation, but not long-term occupation or annexation

Self-defence might also be directed against less large-scale events
Can be used against intrusions of airspace by military aircraft and against aggressive behaviour from warships
More controversial is whether a state has the right to defend itself if merchant ships under its flag are the subject of an attack, but most observers would probably accept this

Attacks that can be attributed to a state: narrow reading coming from the ICJ in the Nicaragua case
Court formulated in this case the idea of effective control: need to prove that the activities of the group were effectively controlled by the US, then the latter would incur responsibility and Nicaragua would be justified in self-defence against US
In Armed Activities however, the court concluded that providing training and military support to a group might violate a series of other provisions
In the Tadic case, the ICTY (International Criminal Tribunal For the Former Yugoslavia) posited that the effective control was too strict a test and that the overall control would be more appropriate
States can be held responsible for groups acting on behalf of and with the connivance of the state
The ICJ however declared the overall control unsuitable: it stretches too far the connection between the conduct of a state's organ and its international responsibility

Is it self defence to attempt to rescue nationals abroad?
According to this view, self-defence is justified not only when a state's territory is under attack but also when its nationals residing abroad are under attack
Others claim that rescuing nationals abroad would be an independent's right under customary international law
Matter is controversial and the law unclear: sometimes huge objections, others acquiescence
Much depends on the specific circumstances of the case

TERRORISM

Charter of the UN was not drafted to face terrorist groups that are not attributable to the state
When the provision was drafted, it included interstate relationship only – no right of self-defence to go against a terrorist group or paramilitary group that has nothing to do with the state
Since state responsibility can only be triggered by an act attributable to a state, it can be claimed that aggression by non-state actors could not activate the right to self-defence
This conception would be plausible only by linking the conception of self-defence to the law on state responsibility
It could be equally possible to regard self defence as a right belonging to the state no matter whether the aggressor is actually a state – article 51 at no point limits the right to self defence to being applied only to attacks by states
After the actions of 9/11 norm started to change in terms of customary law, practice to confirm this last view: start discussing the possibility of an exception
Security Council recognized that staes have a right of individual and collective self-defence against terrorist attacks
Self-defence seems to be also allowed against states harbouring terrorists or complicits in terrorisms
If and when self-defence is necessary, it can also be exercised against a state somehow collaborating with a terrorist group

At the same time, if the state concerned does its utmost to track down and prosecute terrorists, then acts of self-defence are not acceptable

Allowed to act in self-defence against a terrorist group?
There is not a clear answer to that: ICJ would say there is not enough opinio juris to say that one can act in self-defence against a non-state actor and terrorist group
Speaking with states such as the US or the UK, they would tell that the practice of the state is evolving, so that cannot be included in the provision
There is not a clear answer to the question
Unwilling and unable theory: if a state is unwilling or unable to deal with terrorists within its territory and it doesn't want to do anything or it cannot do anything against them – if these conditions are met then the state in danger does have a right to self defence

There is a risk of abusing the provision

Take advantage of the ideas of unwilling an unable theory: difficult to design who is unable and unwilling + would give extra advantage to the more powerful states that are just going to act as sheriffs in the international arena

Corollary on non state-actors

Self-Defence covers the involvement of the State in the attack carried out by non-state actors

Definition of Aggression, art. 3(g)

'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [an armed attack conducted by regular forces, or its substantial involvement therein'

Allowed to use force against a state that doesn't send troops directly but is sending armed bands, groups, irregulars or mercenaries
How to prove that a state is sending irregular groups and mercenaries?
If you can prove it, it is covered by the definition of aggression

Is attribution of conduct to the State necessary to act in Self-Defence against the state?

Yes, if you consider General Assembly Resolutions and the case law of the ICJ
e.g. need to attribute the conduct of Al-Qaeda to Afghanistan
DRC v. Uganda: "The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC." para 146
However, looking at the practices of US and UK, do not need the attribution conduct

Two exceptions that are debated not concerning self-defence but to the prohibition of the use of force

- Use of force to protect citizens that are abroad: use of force can be anything from a trespassing Is it legal to enter the territory of a state just to rescue citizens of a state? Nope, it is still a violation of the prohibition of the use of force
- Humanitarian intervention

HUMANITARIAN INTERVENTIONS

Whether it is possible to use force as a way to impede the grave violations of human rights
Speak of contexts where there is not the Authorization of the Security Council
Even though the Charter does not specify it in so many word, states are nonetheless entitled to use force for humanitarian reasons as NATO did in the former Yugoslavia in 1999, to compel Serbia to stop committing atrocities against Kosovo population
Threat or use of armed force against another State that is motivated by humanitarian considerations: it is an exception to the prohibition of the use of force to deter Genocide or other grave and massive human rights violations
In general, humanitarian interventions are highly controversial

- Impossible to design guidelines to justify the intervention
- Few states have the capacity to intervene for humanitarian reasons
- Humanitarian reasons can become the prerogative of powerful states, providing them with an excuse to exercise domination

- Is humanitarian intervention a right that states possess or a right that belongs to oppressed populations OR an obligation on states that have the capacity to intervene

Most commentators have nonetheless described this type of intervention as illegal
In the absence of the authorization of the Security Council, the general position seems to be that humanitarian intervention is prohibited
But if it occurs and seems morally justified or legitimate, the world community is willing to accept it
There is not a general opinion iuris agreeing on the legality of this kind of intervention

Interventions of NATO: security Council was blocked, NATO members intervened in Serbia claiming they were doing so under an exemption that would be the "humanitarian intervention"
International Law claims this act is unlawful: it is not an exception to use force – a relation of force, is just that
Can use the media or anything else to demonstrate that there is a risk of genocide: there is not a way to control an abuse of the Humanitarian intervention
Then it will end up being a right of the powerful states: it would not be a prerogative of the developing states to do so
Many say it is illegally but morally justified

Another theory came about in the context of the International commission on Intervention and State Sovereignty: Responsibility to Protect
States have a responsibility to protect oppressed people including against their own government
Different form an humanitarian intervention because it focus on prevention and reconstruction of communities
Poses an obligation to the Security Council and the international community to act
More difficult to implement, especially if the Security Council is blocked
2011 Intervention in Libya: authorized by the Security Council to implement the responsibility to protect
Responsibility to protect is considered as a legacy of colonialism: it will always be the former colonial powers to claim responsibility to protect
Cannot intervene without the intervention of the Security Council, but still it is debated

SECURITY COUNCIL

Collective security: goes hand in hand with collective sanctions and the discouragement of war
What is the role of the Security council? How can we use force in a legal way?
The Security Council has been called on to provide collective security: it can work to take on various different dimensions – broad range of action
Procedural and Non procedural questions: veto power applies only on NON procedural issues, the substantial ones
On Procedural issues the V5 do not have a veto right

Article 24 (1), UN Charter

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
Primary responsibility does not mean exclusive: there is also the General Assembly that can intervene in matters concerning international peace and security

Article 25, UN Charter

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
Decisions of the Security Council are under Article 25 of the Charter, binding on the UN member states – still it is unclear whether this refers to all the decisions of the Council or not

Bind the member states: myth is that only Chapter 7 (Action with respect to threats to the peace, breaches of the peace, and acts of aggression) resolutions are binding by themselves: they have a special force, but reading Article 25 it can be understood that the decisions are not limited to a specific chapter, but apply to the entirety of the Charter
Two obligations of the member states: to accept and to carry out the decisions of the Security Council
Obligations arise from being a member of the UN

Chapter VII - Article 39

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
What triggers the action of the Security Council include: threat to peace, breach off peace, act of aggression
Security Council has to first and foremost determine there is a breach of one of these 3
Council has the discretion to identify or not identify an article 39 situation and non-identification can occur as well, e.g. if one of the permanent members of the Security Council is involved
Once this is recognized, it can use measures not involving the use of force (article 41) or involving use of force (article 42)
Only if the Council identifies a threat to peace, breach of peace or act of aggression the system is activated
Veto right of the 5 permanent members is often what blocks action here
Charter is not precise on what constitutes Security Council enjoys great latitude under article 39
e.g. peace is not just the absence of armed conflict
Council proceeded by suggesting that also non military sources of instability in the economic, social and humanitarian fields have become threats to peace and security
So far no Council determination has ever been declared invalid or legal
Difficult to make the Security Council accountable and to claim that one of its resolutions is void because unlawful, but there are ways for it to occur

Threat to the peace
Not the same of article 2(4) and the use of inter-state force
Includes domestic situations: civil war, apartheid, collapse of states, etc that can cause a threat to international peace and security: it is broader than simple use of force
Most frequent formula used by the Security Council as it is easier to find political agreement
Health crisis can be called a threat to the peace: Ebola, Covid, HIV
There has been some discussion on claiming that climate change is a threat to the peace – resolutions have been vetoed
It is a way to open the way to the powers of the Security Council

Breach of the peace
Related with armed forces and covers the same situations of the prohibition of the use of force under article 2(4)
Used in case of inter-states conflict (1990 Iraqi invasion of Kuwait)
These are the two main triggers used by the Security Council

Act of aggression
GA res 3314 (XXIX), Annex ('Definition of Aggression'): flagrantly unlawful use of interstate force, but difficult definition – International community has attempted to give a definition for a century, but no success
Definition of the General Assembly was never formally employed by the Security Council to trigger article 39 – more politically difficult to prove it
Becomes relevant in the last years for the International Criminal Court, judging individuals and not states for the crimes of aggression
Only recently, the court received jurisdiction also on the cases of acts of aggression

Under Article 40 UN Charter the Council can take provisional measures in order to safeguard the rights of the parties
Did not have much impact

Article 41 UN Charter
"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
Measures not involving the use of armed forces
This list is non exhaustive: not only the elements listed here can be used
International Criminal Tribunal in Yugoslavia was created by the Security Council using this article
Economic sanctions and sanctions against individuals (such as in the context of terrorism) are implemented under this article

Article 42 UN Charter
"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."
Allows for forcible measures
Original idea (expressed in Article 43) was that member states of the UN would place troops at UN's disposal
UN Charter not fully implemented, article not completely applied and fulfilled
It makes sense to give to the security Council the powers to act only if it has the means to do so

Article 43: the one asking states to make armies and military equipment available to the UN was never applied
States never wanted to share their own military forces with the UN
Even if the context reached an agreement, the Security Council has to ask who is willing to adopt some countermeasures – Coalition of the Willing
Practice changed: from the original idea, the Security Council started to authorize single states to intervene
Institutional practice developed without a proper legal basis
1950, establishment of a UN force in Korea
1990, Operation Desert Storm authorized after the Iraqi invasion of Kuwait
Repeated several times since then: Somalia, Yugoslavia, Haiti, Libya – institutional practice
In all these situations, there is an agreement to declare a situation of threat to peace and especially among the V5

GENERAL ASSEMBLY

In case the security Council is blocked by the veto of a member or because a veto player is involved in the conflict, the General Assembly can take matters in its own hands
Uniting for Peace Resolution (November 1950): a mechanism to step in when the Security Council is stymied by the veto of a permanent member
Not based on law or the UN Charter
General Assembly can call a special session and act in accordance to its power, authorizing the use of force against the aggressor states
Since the powers of the Assembly are limited to recommendations, the Assembly cannot propose, recommend sanctions, a military mission – it is still a recommendation, not binding resolution
The Council can by virtue of article 25 impose operations against a member state even against that state's will; on the contrary, Assembly operations need the consent of the state concerned

United for Peace resolution: based on the consent of the warring parties, peacekeepers have been active all over the globe
Defined as a temporary action to be carried out in complete impartiality, without the 5 permanent members of the Security Council delivering troops, under unified command and requiring the consent of the host state
Impartiality requirement has been difficult to maintain, especially as it is difficult to stay impartial in the face of naked aggression
First step for Peacekeeping missions in the 50s: the first mission was in the 1956 Suez Canal
To call for the Uniting for Peace Resolution, still need a vote by the Security Council to ask the General Assembly to reunite – but that is a procedural vote, for which there is not the veto power
This has been challenged before the ICJ: creation of military mission is subsidiary organ of the UN, based on the budget of the UN
Two of the permanent members of the Security Council claimed that the operations were ultra vires as they went beyond the powers explicitly granted to the General Assembly: don't pay for peacekeeping missions with the regular UN budget if they have been adopted not respecting the UN charter
A member state could not carry the burden for invalid action
States asked to ICJ to decide whether these actions are lawful or not
ICJ concluded that

6. The Council has primary responsibility for the maintenance of international peace and security, but other organs can act as well
7. Assembly decision to act was not beyond the UN scope at large

Peacekeeping legitimately part of regular UN budget

Peacekeeping missions through time

Developed during the cold war to challenge the Security Council inactions and establish a partial substitute to authorization to the use of force
The General Assembly took a fundamental role to create the notion of peacekeeping
UNEF mission in Middle East (1956-57), with the consent of the host state and with the authorization to use force only in self-defence
ONUC mission in Congo (1960), allows use of force beyond self-defence
Institutional practice accepted by the ICJ in the Advisory Opinion Certain Expenses
In the end, the Security council appropriated this organ, expanding their power
Over 50 new peacekeeping missions, most within States: ambitious operations going beyond military intervention, focus on national reconciliation and international administration of territory
We are now moving from peacekeeping towards peacebuilding
UNMIK mission in Kosovo, UNTAET in Timor East
Formally setting up an administration of the territory

INTERNATIONAL RESPONSIBILITY

System of norms to enact primary obligations exists in the international arena: what to do once a violation has been established? How to deal with that?
Possibility of being held responsible is the price to pay for being able to participate in International law
This seems that all subjects of international law can be held accountable for their behaviour, not just states, but also international organizations, NGOs and individuals
Nevertheless specific responsibility regimes have only been developed with respect to states, international organizations and individuals

Introduction

3 notions that are usually used in a similar way in the public discourse, but are actually very different

- Responsibility is a legal notion entailing the breach of an obligation attributed to a subject of law
- Accountability is not a strictly legal notion, although it might also be used in the legal context
  It has more of a practical and political relevance. It entails explanation and justification for a certain behaviour (not necessary a violation of a legal rule) to someone law.
  Always need the violation of a primary obligation to talk about responsibility
  Sometimes it might overlap the responsibility definition as accountability could involve the realization of responsibility through procedural mechanisms.
- Liability: usually denotes the existence of a financial obligation under national contract law
  States can act as a private subject in a domestic market e.g. they can loan/buy buildings in which the government operates
  They use national law: as private subjects they conclude contracts of national law – they engage in a form of liability involving financial obligations, within the context of the domestic legal system

Need to distinguish between international responsibility and national responsibility – the two might be together, but still they will be part of two different legal systems
International responsibility does not deal with whether a state or an international organization owns the obligation in the first place: do not discuss here whether there is a customary law or a treaty being enforced – there are other areas of international law to discuss that
There could be overlaps between the three: there might be financial liability also in the context of international law – thus a finding of responsibility might come together with a finding of lability
e.g. X is responsible for wrongdoing and thus liable to pay compensation
Not always responsibility entails liability

Don't deal with whether an obligation exists in the first place but simply with what to once an obligation has been breached
It doesn't even deal with whether there is a forum, a judge or an adjudicative system
There is a difference in establishing whether there is responsibility and what are the subjects that can claim the existence of international responsibility e.g. what is the system to adjudicate the dispute
The latter is part of international law, not of international law concerning international responsibility

RESPONSIBILITY

Responsibility is a legal notion entailing the breach of an obligation attributed to a subject of law
An international obligation: primary obligation, whether based on a treaty, customary norm, general principle, unilateral declaration – can be any source of international law establishing the primary obligation
It doesn't change which kind of obligation we are dealing with – there is only one exception: grave breaches of perentory norms, in that case nature of obligation matters i.e. violations of jus cogens such as the prohibition of the use of force

Violating certain perentory norms there are additional consequences, otherwise international obligations don't matter to establish responsibility itself
A subject of international law can be:

- All states. Principle of sovereign equality of states
- International organizations enjoying international legal personality can assume primary obligations
  Legal personality i.e. the capacity of bearing rights and obligations
  Debated in international arena whether the legal personality is a necessary element to be called an international organization and whether it is the states that confer legal personality to international organizations
  In general, international organizations can assume obligations of international law e.g. signing a treaty
  Consequently, if they can assume rights and obligations, there must be a system of responsibility to make them accountable in case of breach of an obligation

All states are sovereign, but not all international organizations are created equal
Not the same rules can apply to them in case of violation of international law
International organization is such if:

- it is created by states by the means of treaty or instruments of international law
- It has to possess an organ of its own, autonomous from the states

Need these three elements to be an international organization and to decide whether it has a legal international personality or not

Two main principles of the law on state responsibility

- States can be held responsible for acts that are attributable to them
- States can only be held responsible for internationally wrongful acts

HOW TO DEAL WITH INDIVIDUALS?

Through history, responsibility has mostly been limited to conduct on the battlefield
When states commit an internationally wrongful act, it is possible to single out the responsible individuals and try them as individuals
Brought to the extreme, there are few wrongful acts that cannot be traced back to individuals
Aggression is the result of commands from a political leader: try the leader
Ideally, individuals will be held directly under international law, without domestic law as an intermediary
Individual responsibility presupposes by definition the existence of courts and tribunals: these exist but mainly in the sphere of international humanitarian law and criminal international law
Other bodies of international law have yet to develop
There is not an international responsibility for individuals
Keep separated the criminal responsibility for the violation of criminal international law with the responsibility of different subjects of international law such as states and international organizations
In particular, in that the distinction between primary and secondary rule hardly works
May of the rules on individual responsibility are to be found in primary rules; requirement of mens rea (criminal intent) is to be found in international criminal law
There are no secondary rules on individual responsibility: individual responsibility is often based on a drive of the moment assessment rather than following a well-established set of rules
Impression further strengthened by the fact that many tribunals are ad hoc, typically created in the aftermath of an humanitarian crisis

There is not at the moment a responsibility for multinational corporations, despite being important in the international relations arena
They are not subjects of international law, they do not have international legal personality, therefore they cannot bear rights and obligations and therefore they cannot be held responsible for the breach of some obligations: problematic for the case of business and violation of human rights

SOURCES OF INTERNATIONAL RESPONSIBILITY

For the Law of Treaties, discuss the Vienna Convention on The Law of Treaties
There is not a binding instrument per se concerning international responsibility, but there has been a process of codification of the law of international responsibility – after WW2 it was thought that it might be a good idea to codify the customary rules on state responsibility
Process entrusted to the International Law Commission, a subsidiary organ of the UN General Assembly
Indeed among the purposes of the UN there is the maintenance of peace and security as well as the progressive development of international law
The UN has as an objective the one of proposing and maintain the relevance of International Law
UN created an organ, composed by people that know about international law e.g. professors, lawyers
Initially this organ composed only by males, white old males – discussion of making it more open to international society: still a long way to go to make it more representative of the different people in the world
Organ meets several times in Geneva every year and produces different DRAFTS articles or set of articles on the topics of international law
Vienna Convention, before becoming a Convention, was a process of this commission: wrote down the articles on the law of treaties, then once the process was finished, they gave it to states and states, in a conference, signed the Vienna Convention on international Treaty Law

The project to codify the international responsibility started in 1949 and took 50 years to complete
Idea of actually codifying the rules and concluding a convention has been abandoned
States and International Law Commission did not ask to transform this project in a convention
Once the project was finished in 2001, a conference was never called
That happened because States negotiate within an international conference, making the provisions and the set of articles laid down by the International Law Commission are debated and changed
Risk that the final product of a convention is not as authoritative and stable as the one of the international Law Commission
Therefore the ILC has brought the rules on state responsibility to the attention of the General Assembly, which has in turn formally endorsed them
Set of articles is not per se binding – by itself, it is a soft, not binding law, because produced by a not-legislative international organ
Nevertheless, some norms were reflecting international customary law even before – the International Law Commission simply wrote down customary law, so these norms are binding because they were customary law already
Then, the work of the Commission itself helped making the new norms customary international law – authoritative organ, constantly applied by the International Courts and tribunals
So it is binding, even if the text per se is not
As of today, the majority of provision are binding as matter of customary international law
The first project concluded in 2001 dealt with the responsibility of states
After that they started a new project on the Responsibility of International Organizations concluded in 2011
Took much less time, because it was mostly a copy paste work, with slight modifications

Structure of the Projects of the International Law Commission on International Responsibility
Part I - The International Wrongful Act

1. General Principles
2. Attribution of Responsibility
3. Breach of an International Obligations
4. Responsibility of a State/IO in connection with another State/IO
5. Circumstances Precluding Wrongfulness

Part II – The Content of Responsibility (what happens after the responsibility has been claimed)

1. General Principles
2. Reparations

3. Violation of Jus Cogens norms

Part III – The Implementation of Responsibility

1. Invocation
2. Countermeasures

Part IV – General Provisions

ASR: Article on state responsibility
ARIO: Article on Responsibility of International organizations

ASR	ARIO
X	1. INTRO (scope and definitions 1, 2)
1. International Wrongful Act of a State	2. International wrongful act of an IO
1.1 General Principles (1-3)	2.1 General Principles (3-5)
1.2 Attribution of Conduct (4-11)	2.2 Attribution of Conduct (6-9)
1.3 Breach of an obligation (12-15)	2.3 Breach of an obligation (10-13)
1.4 Responsibility of a State in connection with another State (16-19)	2.4 Responsibility of an IO in connection with an act of a State or another IO (14-19)
1.5 Circumstances precluding wrongfulness (20-27)	2.5 Circumstances precluding wrongfulness (20-27)
2. Content of the International Responsibility	3. Content of the International Responsibility
2.1 General Principles (28-33)	3.1 General Principles (28-33)
2.2 Reparation for injury (34-39)	3.2 Reparation for injury (34-40)

For a long time, it was thought that responsibility regime for international organizations was not really necessary
People started to understand the relevance of international organizations only in the Eighties/Nineties
Until then, organizations were considered a "salvation of human kind"
When people started to realise that organizations are not just benefactors that do good by people but can also cause severe harm, start to debate ways to make them accountable – this created a series of issues

In 201, the ILC adopted a set of articles on the responsibility of international organizations (ARIO)
The articles follow those on State Responsibility, they are authoritative and have the force of customary international law
In general provisions in both the projects, there is a provision regarding LEX SPECIALIS
The articles being discussed are the general: they apply in all circumstances and are the broadest regulations available – but states can decide to agree on different, more specific rules: those will apply because they are more specific
States can derogate from this set of articles – often this is the case of international organizations
Most active organizations in the international legal order would much prefer to carve out a separate niche
EU can design a system of responsibility that is completely different from the international one
General principles in theory usually stable – are going to remain the same

The concept of international responsibility

Distinction between Primary and Secondary norms of international law
Present in every legal system: the origins of this are to be found in the philosophy of law
There is a distinction between primary obligations (obligations of conduct, what can and cannot be done) and secondary obligations that are crucial because they tell how to enact primary obligations
International responsibility has the character of secondary obligation: doesn't tell whether there is a primary obligation concerning the use of torture – it just tells how to establish responsibility
Primary rule: substantive obligations of the state e.g. the prohibition of genocide, the prohibition of an aggression, etc.
Whether or not a state is in breach of an obligation is a question of primary rule
Secondary rules: rules on state responsibility
Whether the breach actually depends on the state, is a matter of secondary rule

The reason for the ILC to make this distinction is to allow to focus on responsibility itself or its project would constantly have been diverted by attempts but states on how to enforce obligations but also to tell them what those obligations were

ILC's articles are of general scope: they are without prejudice to the possibility that special regimes have their own rules on what to do in cases of violation

THE INTERNATIONALLY WRONGFUL ACT

GENERAL PRINCIPLES

Article 1 ARSIWA (article 3 ARIO): *Every internationally wrongful act of a State entails the international responsibility of that State.*

The same for ARIO: substitute the State with International organizations
Doesn't really matter who is the subject: formal equality in the international legal system
Rules on responsibility for the international organizations must follow the rules on state responsibility, and it would be awkward to have two completely different responsibility regimes
    Commission criticized for this choice

Article 2 ARSIWA (article 4 ARIO) – IF IN THE EXAM YOU ARE ASKED TO WRITE THE DEFINITION OF INTERNATIONAL RESPONSIBILITY, USE THIS

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

1. *is attributable to the State under international law; and*
2. *constitutes a breach of an international obligation of the State*

States (and international organizations) can be held responsible for acts that violate their international legal obligations
In the case of an allegation of a treaty violation, this presupposes that the state is a party to the treaty in question
States cannot be held responsible for activities that are harmful or cause damage if no legal obligation is incumbent upon them

Important to notice that it can be an action or an omission: even the state refraining to do something if there is an obligation to follow violates that obligation
Attribution and breach of an obligation are the other two elements
In criminal responsibility there is the element of fault: did the individual do something on purpose?
In international responsibility do not have to prove fault in the case of breaching a law
It doesn't change if the president of a state was violating the obligations on purpose or by accident – this is missing from the norm: the fact that a State is willingly violating an obligation or not here doesn't matter
Still there can be something like that depending on the primary obligation: if the primary obligation tells that fault is relevant, then it is relevant – important for due diligence obligations
    Quite important in topics like the environment
    What states have to do is to maintain a level of conduct – it is not an obligation of result (whether you have to do things or not) but just whether you maintain a certain standard of conduct: in this case, fault matters

Also, don't need to prove damage: don't need to provoke a particular damage or loss of things because moral injury also applies
Damage or harm is not treated as a precondition: what matters is the violation of an international obligation whether this entails material damage or not
Violation of obligation is enough to claim responsibility
Breach of an obligation that doesn't cause damage still entails international responsibility
    Do not have to prove causation – which is difficult in the international arena
    Proving causation would be necessary in case reparations were to be paid

Don't have to prove the exact cause effect between the violation of the obligation and the procurement of damage: this makes the system easier to apply

In addition: absence of circumstances precluding wrongfulness
There are excuses for certain circumstances
Negative element, so not indicated – need not to have circumstances precluding wrongfulness such as self defence, countermeasures

Article 3 ARSIWA (article 5 ARIO)
The characterization of an act of a State as internationally wrongful is governed by international law. (Such characterization is not affected by the characterization of the same act as lawful by internal law.)

Responsibility is determined on the basis of international law and domestic law considerations are not decisive
A state cannot hide behind its constitutional provisions for escaping responsibility for the acts of constitutionally independent organs

Cannot claim you breached international law because the act was in compliance with domestic law
The concept of "internal law" does not apply to international organizations
It is difficult to claim that General Assembly resolutions are internal law: cannot do this analogy – on the project of responsibility of international organizations, the last sentence in brackets is not present
It applies only to states
What international organizations do is between internal and international law
But what if the Security Council applies sanctions that violate people's human rights? If it is legal internally, why is it not legal under international law?

Summary: The general principles are exactly the same between the two projects, except for the last sentence of article 3 of ARSIWA

ATTRIBUTION OF CONDUCT

States are held responsible for activities that can be attributed to them – as a matter of principle, states are not responsible for the activities of private parties
If an action bears no relation to the state, the state cannot be held responsible
States and international organizations act through their own organs: need some rules to link the conduct of the individual that materially commits the wrongful act to the state/international organizations
Discuss whether a specific conduct counts for purposes of international law as conducts of an entire state or international organizations
Normative operation: state will be held responsible for the acts of its organs and officials, even those who act outside their proper competences (ultra vires)
State must control its officials and organs

International rules, but national law might be relevant: have to look at it to understand whether a specific agent is an organ of the state or not: many borderline cases exist
Also need to distinguish between international responsibility and criminal responsibility of the individual
Attribution of conduct to a state is without prejudice to potential criminal responsibility of individual officials under international or national law

Possibility of dual attribution: possibility that the same act is attributed to more than one subject
More than one subject responsible
Possibility of Lex Specialis is also there

ATTRIBUTION OF CONDUCT FOR STATES

Article 4 ARSIWA

1. *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
2. *An organ includes any person or entity which has that status in accordance with the internal law of the State.*

Act of State doesn't depend on the function that organs of the state have: it can be of any type
e.g. Judicial organs are independent – they do not depend from a government, but still they are organs of the state and so they can be the responsible of the actions of the state
It doesn't have to be the action of the executive government
e.g. Judgements of Italian Courts concerning the responsibility of Germany for the Facts of WW2
Germany claimed the responsibility of Italy as a state for breaching the rules of immunity of the states but the actions were conducted by judges, not by the executive

An organ can also be any person or entity
Need to distinguish with private parties: there is not direct attribution of conduct to the state if you are a private subject
e.g. Public owned companies: corporations might be technically private subjects but if fully owned by the state they would end up being organs of the state
e.g. Marò case: Italian military escorting a commercial vessel – seemed to be performing private security functions
Arbitral Tribunal claimed they were organs of the state and that had consequences concerning their immunity
Another thing that might be difficult to distinguish is whether organs of the state are acting in private capacity or not:
e.g. a policy officer that is in theory an organ of the state on holiday violates a norm of international law, then it would not be the state's responsibility. But if he was acting in full uniform, then it would not matter whether he was claiming to be acting in private capacity or not
Frictions in the law on whether to determine whether you are an organ of the state or not

Second paragraph: look at the internal law to decide whether an agent is an organ of the state
It is also possible to have a de facto organ – organ of the state even if there is not a clear provision that claims they are organ of the state in the internal law
There are ways to make private entities attributable to the states

Article 5 ARSIWA

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance

States cannot avoid responsibility by privatizing elements of governmental authority
Difficult to define governmental authority: while theoretically the division between public and private act is fluid, nonetheless conduct will be attributable to the state if a person or a group of people is acting on the instruction of the state – this may cover the activities of state companie
But in some states, the prison system is privatized: managing a prison system is a matter of governmental authority – the actions of these actors would still be considered acts of the state even if in theory they are private companies
Don't need to prove that the state is controlling the act of private entities
It is just the fact that it is exercising governmental authority (e.g. the control of the prison) that makes it an act of the state

Article 6 ARSIWA

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Excludes dual attribution in the application of this article
If an organ of a state puts in the disposal of another state a group of militaries or armed forces and they are completely under the command of the other state, they became its organ – exercise of the governmental authority of the state at whose disposal the military is placed

Article 7 ARSIWA

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions

One of the main justification that can be claimed is that the acts of the organ of the state could have been ultra vires: the state ordered something, but then the organ contravened the instructions of the state or went beyond the instructions
Still the conduct is attributable to the State – especially for military actions
General that goes beyond the actions are still attributed to the state
This is frequently applied

Article 8 ARSIWA

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct

Something that is way more controversial and relevant for international law is how to deal with non-state actors and terrorist organizations – often states do not act directly with their organs and try to conceal their actions through other persons or entities
There are means to attribute the conduct of non-state actors to the state – de facto organs of the state
The problem is that the article is in the sentence "the person or group of persons is in fact acting on the instructions of, or under the direction or control of the State"
How to apply the article? Huge consequences in international law

The first part of the discussion started with the **Nicaragua case**: case concerning the involvement of the United States in overthrowing a regime in Nicaragua
Did not do it directly, but through a militia trained in El Salvador and then went in Nicaragua
Armed group clearly not an organ of the US, but there was proof they were trained and financed by the US
Two different things to distinguish: the act of training and assisting might violate the prohibition of interfering in internal affairs – the ICJ said that by financing and training a group you interfere with the internal affairs of the state
Another question is whether the US violated the prohibition of the use of force – the state entering the territory of another state
The problem of attribution of conduct concerns the prohibition of the use of force: whether it is no longer the armed group acting but the state that is acting
In the Nicaragua case, the court argued this was not the case because need the so-called **effective control:** Nicaragua needed to prove that for all actions of the armed group there was a specific indication or instruction coming directly from the United States to perform that specific actions and operations
General financing and assisting was not enough

Other courts reacted to the need of effective control, deeming it a too strict requirement
Another court, the Criminal Tribunal for the former Yugoslavia (dealing with international criminal responsibility), in the Tadic case said that effective control is too much – a general knowledge of the circumstances, overall control is enough
Context of genocide of Srebrenica: non-state actor was the Army of Republika Srpska
    Later attributed to Serbia
    Non state actor attributed to the State
Tribunal pushed for the idea of overall control
In 2007 the ICJ fought back on the case of genocide in Serbia, in which they established the occurrence of the genocide
They did not establish the direct responsibility of Serbia – the actual actions on the ground of the state was not to be attributable to them, because of the absence of effective control
More or less established that need the effective control to attribute international responsibility to the state

Article 9 ARSIWA

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10 ARSIWA

The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9
Insurrectional movements are not state organs: their very aim is to overthrow the state or to secede
Conduct cannot be attributable to the sitting government representing the state
The state will be responsible should the insurrection succeed: if they manage to take over the state, the state will be responsible for their acts
State would be responsible for what the insurrectional movement did before and during the fight before becoming the new government of the state
Matters unclear for conduct of unsuccessful insurrectionists: possibly will incur state responsibility, but on a different basis

Article 11 ARSIWA

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own
There are also cases in which a state acknowledges the conduct in question as its own
e.g. Iran v. US case concerning the taking of American hostages in Teheran
Initially the act was performed by a student militia, entering in the US embassy and taking hostages
At a certain point, the State clearly aided and finally acknowledged the act as its own
Acknowledging means that the conduct becomes its own

ATTRIBUTION OF CONDUCT FOR INTERNATIONAL ORGANIZATIONS

Organizations responsible for the internationally wrongful acts that are attributable to them
International organizations nevertheless are composed of states and perform functions delegated by states, but they are not identical to states
They do not have territory of their own, they lack sovereignty jurisdiction and officials whose acts give rise to responsibility

Article 6 ARIO

1. *The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.*
2. *The rules of the organization apply in the determination of the functions of its organs and agents*

International organizations are parties to only a few treaties, hence it may be difficult to accuse an organization of committing an international wrongful act as this presupposes the existence of binding legal obligations

Article 7 ARIO

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.
Possible dual attribution: how to apply effective control to international organizations
Organizations have limited functions: e.g. UN doesn't have an army, but relies on the states to function
Who is responsible? The organization or the member state?
e.g. the Security Council issues sanctions against a state
States can only apply sanctions, they are under an obligation as members of the UN – but then who is responsible, the UN or the States?
Organ that materially commits the act is an organ of the state, but these organs are obliged by an organ of the state
Not a clear definition on that yet
In general, when the organization has effective control over a conduct, then the action is the one of the organization
But in theory it is still possible to have dual attribution between the organizations and the state

Attribution problematic because do not have their own troops or officials
Different interpretations given by the European Court of Human Rights on different cases
e.g. Behrami and Saramati case concerning the territorial administration of UN and NATO mission in Kosovo brought in front of the ECHR
Responsibility for conduct of UN troops in Kosovo, which had led to some human rights violations
The conduct was not attributed to the state but to the international organizations
Organization has an overall control over the mission, so it bears responsibility even though the military on the ground is part of different states
Nevertheless, the Court also had to find the case inadmissible: UN is not a party the ECHR and thus the Court has nothing to say on its conduct
Lack of justice: attributing the conduct to the organization and not to the state, they claimed the states were not responsible
Case of violation of human rights, specifically the right to life that was committed by militaries of the state under the umbrella of the organization: overall control is relevant "ultimate authority and control"
The decision is considered to be a denial of justice, because there are no other remedies, as international organizations cannot be held accountable

Then the jurisprudence of the European Court of Human Rights changed on different cases to make the states accountable as well even in the context of international organization up to the point that if a

state has to comply to an obligation without much of a leeway (e.g. the Security Council decides to put an individual suspected of terrorism in a black list and apply sanction against them), the member state has an automatic responsibility to apply the decision
Attribution of conduct is with the state even if the control of the UN is there

e.g. in the Dutchbat case: inaction of the Dutch peacekeepers in front of the genocide
Article 7 ARIO used to attribute the actions to the state excluding the idea of dual attribution

Still, looking at the article it doesn't state that an organ of the State is no longer responsible because placed at the disposal of an international organizations
It says that it shall be considered as an act of the international organization, but it doesn't mean that e.g. a military is no longer your military
Putting at the disposal of a peacekeeping mission an army, they still maintain the role of state organs
It is also a matter of adjudication: there is not a court that can establish the responsibility of United Nations or any other international organization
To give reparations for violations of Human rights, need to find a state that is responsible – there is not a norm that allows to hold accountable the international organization

CIRCUMSTANCES PRECLUDING WRONGFULLNESS

There are two positive elements of international responsibility: attribution of conduct and violation of primary obligation
There is also a negative element
For the aim of the discussion from now on, no difference between states and international organizations: difference is vital only in the phase of attribution of conduct

It is possible for states to contract out from the rules that will be discussed: if the states decide a different way for attribution of conduct, they can opt out of these principles according to the idea of **lex specialis**

Rule that is more specific to the fact of the case is applied rather than the general project

Circumstances precluding wrongfulness do not annul the primary obligation: treaty is still in force
It is an excuse for non performance while this particular circumstance of the case is present
There is a difference between the existence of a circumstance precluding wrongfulness and the rules of validity of treaties

CONSENT

Article 20 ARSIWA (20 ARIO): *Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.*
Important for transit of air space, internal waters or location of military bases within the territory of the state: rule that is applied frequently
More complicated to discuss consent – valid consent: how can we assess whether consent is valid?
Consent might be tacti but cannot be presumed, should not be obtained by fraud, corruption
Consent on the use of force: military operations conducted in the territory of the state with the consent of the state itself
In that case, it is not clear whether consent can be given to conduct acts of use of force in one's territory: prohibition of the use of force is a peremptory norm, cannot be derogated
IN theory even this consent should have a perentory character, but de facto in a lot of cases, consent was given to conduct military operations

SELF DEFENCE

Article 21 ARSIWA (21 ARIO): *The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.*

Project of the ILC refers to the Charter of the United Nations, Article 41
Self-defence does not preclude wrongfulness for all obligations: certain obligations are still there
e.g. Cannot claim self defence for breaching of the law on the treatment of prisoners
Customary norms concerning necessity, proportionality, ongoing armed attack also applies here

COUNTERMEASURES

Article 22 ARSIWA: *The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.*
Decentralized system of enforcement in IL: every state has a power to enforce the obligations and the rights that it has – private system of enforcing obligations is regulated by international law
Countermeasures are measures of self help that an injured state can take to enforce the obligation that has been breached
Measure with very strict conditions to apply: the first fundamental condition is that you cannot react with the use of force, i.e. an armed reprisal (unlawful), to the breach of an obligation
If an injured state suffers the violation of an obligation by another state then you can suspend (not terminate), certain obligations in order to force the other state to comply
Friction between international law and international relations in the study of politics: this measures are similar to sanctions – sanctions are measure to force the implementation and the compliance to certain rules
However, under sanctions there is still the idea of an authority that issues sanctions – it is not a decentralized system
Countermeasures are a private system, something done by a state against another in a decentralized way
Not in violation of IL if you apply valid countermeasures

FORCE MAJEURE

Article 23 ARSIWA (23 ARIO)

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.*
2. *Paragraph 1 does not apply if: (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring.*

A turn of events beyond the control of the state that make the performance of an obligation impossible
Something that is entirely outside the control of the state
To claim force majeure need something outside the control of the state that is unpredictable and irresistible, doesn't involve an element of free choice
Pandemic, earthquake, floods are examples of this
The state cannot invoke force majeure if it has in some way provoked the event
It doesn't include those situations in which it is still possible to apply the obligations but it is more difficult

DISTRESS

Article 24 ARSIWA (24 ARIO)

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.*
2. *Paragraph 1 does not apply if: (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the act in question is likely to create a comparable or greater peril.*

In this case the obligation is theoretically avoidable
Alternative courses of action exist, but would demand the sacrifice of the actor concerned
Could respect the obligation but at the cost of saving lives
Violation of the obligation is the only way for the state to safeguard human lives

Some examples: an aircraft or ship entering the national space because of motor problem: this would be illegal, but it becomes legal due to the aim of saving human lives

NECESSITY

Article 25 ARSIWA

1. *Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
2. *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.*

There is a risk of abusing this provision
If the only way to safeguard an in essential interest of the state, then the provision can be violated
Usually International Courts use this very narrowly
Employed in the case of economic defaults of States: Argentina claimed necessity to not repay the debt to foreign investors
Use necessity based on economic crisis: violate obligations towards investors because of a state of necessity inside the country
Arbitral tribunals did not apply the necessity idea, because there was a way to foresee the even, somehow it was provoked by the state itself
It is generally difficult to apply the provision: article 25 claims that the national interest at stake must be essential and under grave and imminent peril. Similarly, the conduct concerned must be relatively harmless towards the state to which the obligation is owed or the international community as a whole
Invoking necessity as a justification, according to the ICJ, implies that the behaviour would be wrongful to begin with, would trigger the responsibility of the state concerned and possibly give rise to a valid claim for compensation

JUS COGENS

Article 26 ARSIWA (26 ARIO): *Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.*
Cannot claim circumstances precluding wrongfulness for situations violating jus cogens norms
Cannot claim that you are torturing an individual to prevent a terrorist attack: jus cogens norms cannot be derogated

SAVING CLAUSE

Article 27 ARSIWA (26 ARIO): *The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:*

1. *compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;*
2. *the question of compensation for any material loss caused by the act in question.*

This is not a way to invalidate the treaty: obligation is still there, it is simply suspended when these circumstances arise
However, if you provoke material loss as a consequence of wrongfulness (even if you will not be held accountable), it will be necessary to provide compensation for material losses

CONTENT OF INTERNATIONAL RESPONSIBILITY

What is the purpose of responsibility in international relations?
With IL, state is concerned that the breach of an obligation does not happen again: it I s about the future, not the past

How to maintain relations between states after the breach of an obligation is what we are concerned with

Article 28 ARSIWA (28 ARIO): *The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.*

GENERAL PRINCIPLES

Article 29 ARSIWA (29 ARIO): *The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.*
Still have an obligation, even if you breach it: its not that if you breach it, then it is done

Article 30 ARSIWA (30 ARIO): *The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require*.
Once you have responsibility, immediately assume another obligation (different from the primary obligation breached): guarantee of non-repetition in the future
If the wrongful act is continuing, have an obligation of cessation of the wrongful act
There are a lot of cases concerning the obligations of non repetition: this is what states want when states invoke responsibility
e.g. LaGrand Case: German citizens in the US sentenced to the death penalty. According to Consular Relations is a rule saying that he had at least a right to consul assistance
As foreigners, the LaGrands should have been informed of their right to consular assistance, under the Vienna Convention, from their state of nationality, Germany. However, the Arizona authorities failed to do this.
US were in violation of this obligation: Germany was seeking provisional measures to stop the death penalty (eventually failed, despite the ICJ ordering to "take all measures at its disposal to ensure that [the German national] [was] not executed pending the final decision in [the] proceedings"
However, the two German nationals were executed by the United States
Order however did have a binding effect: it created a legal obligation for the US, which the US had not complied with
Germany requested an assurance that the United States would not repeat its unlawful act
Nevertheless, the Court added that if the United States, notwithstanding that commitment, were to fail again in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned had been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States, by whatever means it chose, to allow the review and reconsideration of the conviction and sentence taking account of the violation of the rights set forth in the Convention

Article 31 ARSIWA (31 ARIO):

1. *The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
2. *Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*

Principle established by the Permanent Court of Justice, old principle
All tribunals have the jurisdiction to provide with questions of reparations: e.g. if ICJ has jurisdiction to hear the case, then it also has jurisdiction on reparations
In general, injuries are not an element of international responsibility
Damage is not irrelevant: injuries can also be moral injuries and thus open to compensation
Complicated from a legal point of view to demonstrate the link between the injury and the act of the state

REPARATION

Article 34 ARSIWA (34 ARIO) – Full reparation:

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter

Three forms to have full reparation: restitution, compensation, satisfaction
Reparation is not a form of punishment nor deterrence: the function is to repair
Here causation becomes relevant

Article 35 ARSIWA (35 ARIO) - Restitution:

a) *A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:*
b) *is not materially impossible;*
c) *does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.*

Restitution is a way to re-establish the situation as it would have existed without the wrongful act
Rare in practice: almost impossible to give restitution AND it depends on conjecture
Need to imagine what would have happened had the wrongful act not taken place
Therefore, opt for restoration of the status-quo ex ante
But it is a starting point: need to check if it is possible to give a full restitution e.g. prisoners detained can be released

Article 36 ARSIWA (36 ARIO) – Compensation:

1. *The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*
2. *The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.*

When loss and injury can be monetized, this is the way to go: address the actual losses incurred as a result of the internationally wrongful act
If it is a relationship between states, countries do not care much about compensation, there are not even many cases brought in front of the ICJ
Once a responsibility is established, then it is just a matter of negotiations to agree on the amount of compensation, which is usually more symbolic than a real compensation
Also in Human Rights disputes, the amount of compensation given to individuals is very limited
Astonishing difference with Investment disputes: disputes between a state and a foreign investor investing in a country on the basis of treaties
Clauses allow investors to sue state in case of mistreatment of investors
In all these cases, compensation is really high and has been condemned and discussed: this system is forcing and coercing specific policies in developing states – protect investments even disregarding more pressing issues
In theory, compensation covers also the loss of profits, that need to be compensated

Article 36 ARSIWA (36 ARIO) – Satisfaction:

1. *The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.*
2. *Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.*
3. *Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.*

Declaration and acknowledgement of having violated IL: can be used in combination with restitution or compensation – mostly considered useful in connection with moral damage that cannot be quantified

Important because it is vital in the continuation of the relationship with the state
Punishment of the individuals that performed the wrongful act is an example
Genocide case in Bosnia: remedies at the end of the day was in itself a form of satisfaction

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF IL

What will deal with serious breaches of peremptory norms?
Primary obligations do not play a role in international responsibility, except for the case in which peremptory norm was involved

Article 40 ARSIWA (41 ARIO):

1. *This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.*
2. *A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation*

Peremptory norms violations make a treaty invalid: additional important consequences in place
Article 41 ARSIWA (42 ARIO):

1. *States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.*
2. *No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.*
3. *This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law*

Responsibility is for all the international community to bring an end to a violation of peremptory norm
Used by the ICJ when dealing with the legality of Israeli action in Palestine: ICJ claimed the violation of peremptory norms and invited the international community to cooperate to bring this to an end
Two main consequences: cooperation and not recognition of the situation

IMPLEMENTATION OF RESPONSIBILITY

Need to focus on two distinct elements: the invocation of responsibility and countermeasures
Countermeasures are a means to implement responsibility

INVOCATION OF RESPONSIBILITY

Injured state is entitled to invoke responsibility

Article 42 ARSIWA (43 ARIO):

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

a) *that State individually; or*
b) *a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.*

Special obligations (**erga omnes**) that can be invoked also by other states, not just the directly injured state
Difference between erga omnes and jus cogens provisions
Within customary laws, there are erga omnes obligations and within erga omnes are jus cogens provisions
Erga omnes include all jus cogens but are also broader

Erga omnes provisions: obligations that are not just owed towards one's treaty partners or other individual states under customary intenraitonal law, but also owed towards the international community of states as a whle
e.g. obligations not to hold people in slavery or engage in racial discrimination

A breach of these can be invoked by any other state in the international community: important because it affects the relationship between international communities and because it can be used by a state to enforce particular obligations
One of the last cases in front of the ICJ is the one between Myanmar and Gambia for a genocide committed in Myanmar
Gambia does not have a specific interest, it is not the directly injured state, but under the erga omnes situation invoked the responsibility of Myanmar
ICJ accepted the invocation of responsibility

Article 48 ARSIWA (49 ARIO): invocation of responsibility by state/IO other than the injured state/IO

1. *Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.*
2. *Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.*
3. *The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.*

Law of state responsibility thinks primarily in terms of bilateral obligations but sometimes this is not the case
The above logic does not apply to human rights treaties and other treaties that are based on some kind of consideration of the interest of the international community
Where the common interest of the international community is at stake this article also allows others to invoke responsibility of the state carrying out the wrongdoing
Any state, whether injured or not can act against the state carrying out the wrongdoing

Procedural elements

Article 43 ARSIWA (44 ARIO) – Notice of claim

1. *An injured State which invokes the responsibility of another State shall give notice of its claim to that State.*
2. *The injured State may specify in particular: (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing; (b) what form reparation should take in accordance with the provisions of part two*

Not necessarily an issue of responsibility ends up in front of a court

Article 45 ARSIWA (46 ARIO) – Loss of right:

The responsibility of a State may not be invoked if: (a) the injured State has validly waived the claim; (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

COUNTERMEASURES

A way of implementing the law in a decentralized system, a system of private law
Three conditions to accept a valid countermeasure

Article 49 ARSIWA (51 ARIO)

1. *An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.*
2. *Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.*
3. *Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.*

There is a general system of countermeasures, as well as IOs dealing with specific issues that have their own system of enforcement: sanctions issued by the EU, WTO
Sometimes, sanctions by themselves can be lawful or unlawful: they are lawful if they don't violate the obligations of international law
When they do violate obligations, they are accepted only as a form of countermeasure
General assembly several times repeated that coercive economic sanctions are illegal, because they go against the free will of the state – interfere with internal affairs of the state
Countermeasures are valid only in response to the breach of an obligation and only for the time in which the violation stays in place
Cannot use countermeasures for reasons other than inducing the state to comply
If they do not respect this procedural element, countermeasure themselves are internationally wrongfully act
There are some obligations that are not affected by countermeasures, that cannot be used against violating this kind of obligations

Article 50 ARSIWA (53 ARIO) – Obligations not affected

1. *Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law.*
2. *A State taking countermeasures is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure applicable between it and the responsible State; (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.*

All these norms have the aim of continuing the relationship between states

Article 51 ARSIWA (54 ARIO) – Proportionality:

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.
Point of proportionality is very much discussed in front of ICJ

Article 54 ARSIWA (57 ARIO) – Procedural requirements

1. *Before taking countermeasures, an injured State shall: (a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two; (b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.*
2. *Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.*
3. *Countermeasures may not be taken, and if already taken must be suspended without undue delay if: (a) the internationally wrongful act has ceased; and (b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.*
4. *Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith*

First, have to claim that the other state is responsible of a breach of obligation; only then can countermeasures be applied

Article 54 ARSIWA (57 ARIO) – countermeasures taken by state/IO other than injured

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Acting as collective countermeasures against the responsible state is a way to go behind the block of the security Council
Decentralised system of enforcement works to induce compliance
Countermeasures are essential and sometimes can find them within the international system

WTO: outcome of the trade dispute is to allow countermeasures on other states
This is allowed by a central institutional body

THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

Look at what happens in practice when there is a violation of IL
Role of consent: what characterises IL from domestic law
In domestic law individual is not allowed to refuse jurisdiction of the national courts; but states have to give consent to jurisdiction

INTRODUCTION

Parallel is needed with the prohibition of the use of force: conflicts and disputes should no longer be played with the force of arms but with peaceful dispute settlements – this is listed as one of the founding principles of the UN
Need to underline what is the difference between a legal and a political dispute and what is the role of law in a political dispute
It is debated whether in the end the law is effective, whether it actually plays a role or is it just a matter of politics
In the end, will always find certain limited points that should be defined by law and legal questions
There is a difference between a general situation (Arab – Israel) and several legal disputes that can be distinguished
What is there before courts and tribunals is a legal situation: always have to phrase a political situation under a legal dispute – identify the obligation breached, prove how it was breached
Several examples of highly difficult political situations that under legal disputes become solvable
Ukraine asked a few days ago before the ICJ against Russia: huge difference between the legal matter and the political question
Always possible to go back to a legal point whenever there is a political dispute

General principle in Chapter VI of the UN Charter – Article 33

1. *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*
2. *The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.*

Difference between diplomatic (negotiation, enquiry, mediation, conciliation) and legal means (arbitration, judicial settlement)
States are also free to determine their own way to settle the dispute, as long as it is a peaceful mean
Security Council shall ask the parties to use peaceful means to settle their disputes
Under Chapter VI of the Charter, the permanent members do not enjoy veto: right now Russia should not be entitled to cast a veto to block a resolution concerning the peaceful settlement of disputes, as the veto would only be on Chapter 7 and non procedural matters

However, this provision is no longer applied: for more than 2 decades now the permanent members have ignored the difference between Chapter 6 and Chapter 7 and they apply the veto in any possible way
There is not now to claim the validity of a decision by the International Organization and therefore by the Security Council
There are certain ways to bypass them but there is not a proper judge to deal with these things
There is not a tribunal as it would be for a state – there is not even a constitutional court that could declare a decision of the Security Council invalid: there is a way through the ICJ but it has ever been used
In the end everything proceeds by institutional practice

DIPLOMATIC MEANS OF DISPUTE SETTLEMENTS

NEGOTIATION

It does not involve third parties: it is just between the two states, negotiating to solve the dispute
End of the negotiation is not per se legally binding but parties can decide to make it binding
It is not incompatible with judicial means: at a certain point they can decide to go in front of the ICJ
This is the most widely used means: in certain cases, before ending up in front of the court there is a negotiation procedure
In certain cases, states have an obligation to negotiate according to the treaty provisions (ICJ, North Sea Continental Shelf para 85)
Nevertheless, there is no particular expectation that such disputes will be settled on the basis of the law alone
Negotiation presupposes that you would like to move from a position: if there is not such will, then will have to refer to other means of dispute settlements

ENQUIRY

If the two parties are incapable of reaching an accommodation, they may try to enlist the services to a third party
This can be a third state, but it can also be a trusted individual
It may be the case that there is not jus a disagreement about the alleged violation of a legal rule, but that they cannot even agree on what actually happened
One of the main problems in dispute settlements is how to prove facts: evidence are just produced by states
It is possible to call experts in international courts but they are rarely used
A third party may be entrusted with fact-finding task, trying to present an authoritative version of the facts that lead to the dispute
One of the most difficult things is to settle down the facts of the case
Conflict between Russia and Ukraine (2014) – taking down of the civil airplane in the territory of Ukraine
There was some accusations: who was actually shooting down the airplane?
All the parties tell their own story, it is difficult to settle down what actually happened: the only way is often to set up a commission of enquiry
International organizations play a relevant role: set up a commission to deal with the facts of the case
However, since this power for the security Council is in Chapter 7, this is not binding on the states – always need their consent

MEDIATION

If the parties refuse to communicate directly with each other, the third party might propose its good offices and offer itself as a channel for communication
When the third party becomes actively engaged in negotiations and assumes a role by submitting possible solutions, we speak a mediation
It involves a third party, the Mediator, who is an active participant of the Mediation
Often, the UN Secretary General provides good offices and mediation

Active participant because it has to propose a solution and actually try to provide a solution
Also NGOs, such as the ICRC, alternatively it can be the Pope or an influential head of state

Difficult role of the mediator: one of the mediators on the Palestinian conflict was actually killed by a right extremist group

CONCILIATION

It involves a third party, but, differently from mediation, a Commission is set up to define a solution of the dispute that would be accepted by the parties
The third party acts almost like a tribunal, hearing evidence, hearing memorials and presenting a recommendation based on the evidence presented
Third party is not actually a court and its recommendation is not binding
The outcome should be accepted by the parties: there is a preliminary understanding by the parties that the outcome will be accepteD

Environmental treaties: purpose of international responsibility can be a deterrence, but most importantly that a state complies with its obligations
Non-compliance procedures in environmental treaties impose different forms of conciliations
Procedure to help the state that violated the obligations to comply with the treaty: often the state does not have the means to comply with environmental obligations – purpose is compliance, not punitive responsibility

REGIONAL AGREEMENT

Reference to Chapter VIII UN Charter, article 52
Sometimes regional organizations are well placed to offer good offices or mediate between neighbouring states
Established by International Organizations
Often encouraged by the Security Council

LEGAL MEANS OF DISPUTE SETTLEMENT

More interesting methods of peaceful settlement are judicial means of dispute settlements, involving a judge, an arbitrator etc
They are based on the consent of states: the sovereign states need not to accept any authority from above, unless it has itself consented thereto

Outcome is binding for the parties, not for the entire international community: strictly speaking there is not a rule of precedence, but still is quite important what the judges decide as it will be referred to by future judgements
Argumentative role of rhetorical importance if not legal
In general, there is a lack of compulsory litigation: i.e. the act of taking a state forcibly in front of a court, as consent is fundamental
Fundamental difference between disputes, broadly considered, and legal disputes.
From time to time, states have tried to claim that the legal question is one, but the political question is a completely different one, so the court is not giving out a decision that solves the dispute, but only a small legal detail
Legal dispute: disagreement on a point of law or fact, a conflict of legal views or interest between two legal persons
ICJ or other courts will never say that they are not entitled to hear the case because it is a political dispute: will always try to look at the legal angle, even if one of the two parties will always try to claim that we should not be in front of the court as it is a political dispute and it is an abuse by the other party to rely on the court

ARBITRATION

Oldest form of disputing settlement: can be traced back to Jay Treaty of 1794

Following the peace treaty between Great Britain and the former US Colonies

Some of the questions that had not been dealt with should be submitted to peaceful settlement by a commission consisting of three members, one appointed by the UK, one by the US and one by the two commissioners together. Also parties agreed to accept the awards as final and binding

International community began to think Arbitration could become useful

Permanent court of Arbitration was created: not really a court, but it keeps a roster of available individuals ready for appointment as arbitrators

Ad Hoc Tribunals for specific disputes (or set of disputes) created by the party to issue binding decisions

The parties have total control on the arbitration procedure, on every aspect of how to solve the dispute: they can decide the matter of the case, what the states ask, they can even decide the law that is applicable

They are the masters of the procedure: they also exercise influence on the arbitration panel's composition

In theory, they write an agreement, the compromise – on the basis of this agreement, the arbitrator plays his role

Arbitration leads to binding and final awards, although sometimes the parties attempt to contest the award before the ICJ or even domestic courts

Also established by general provisions in treaties

1982 UN Convention on the Law of the Sea

1992 Convention on Conciliation and Arbitration within the CSCE – which then created the OSCE

States are free to decide what to write in their treaty: it can be optional to recur to an arbitration, it cn be a compulsory procedure

Today in particular arbitration is used for investment claims – based on treaties concerning the protection of investments

Usually they are between developing and developed countries: idea is to protect the investments of developed countries investors INTO developing countries

Heavily criticized: imposes a heavy agenda on the developing countries, by imposing a limit on the sovereignty of the developing country that has to adopt a whole set of policies not to damage the investors

When investors find there has been a breach of treaty, parties can defer the situation to an arbitration

Set up an arbitration between the state and private entities

Who has the right to trigger this procedure is also a private subject, an investor

This is a problem because of the amount of money that these type of arbitration involves

Private party- state ('mixed') arbitration: 1981 Iran-USA claim Tribunal

Advantages

- Control over the entire process
- Relative absence of delay: light in terms of administration, faster

Limits

- Agreement
- Expensive (cost reduced through use of permanent venue): a lot of disparity between developed and developing countries or between a multimillion investor and developing country
- Difficult to enter the circle of professional arbitrators: people elected several times in different disputes

  There is also an issue of independence of the arbitrators

  Everything is decided by states, so states know the legal views or one or the other arbitrator and can decide who to appoint

  Independence is no longer there, it is not the independence of a judge

  Arbitrators expect to be re-elected and they have to please the parties somehow

- Definitely unfair for developing countries – greatest problem of arbitration: a lot of talks on how to reform it
- No general commitment to dispute settlement
- Problems of Enforcement: what to do after – set up an arbitration, reach a judgement, but then what to do with that? There are conventions that oblige states to apply the arbitrations outcomes within the national jurisdictions – under that there are different problems, difficult to have clear enforcement

Still, arbitration is widely used

JUDICIAL SETTLEMENT

Binding adjudication according to international law by a permanent tribunal
Creates more legal certainty: there is not the problematic issue of arbitrators expecting to be re-elected
There is usually a dialogue between Permanent Court of International Justice and International Court of Justice
Discussion on how to apply the different principles: different perspectives on the matters of law

Specialized jurisdictions – different areas of IL that have their own judicial systems
These include:
Universal courts

- International Tribunal for the Law of the Sea
- World Trade Organization Appellate Body Regional

Regional courts: jurisdiction limited to issues arising under their constituent treaties, to which only the signatories countries are part

- Court of Justice of the European Union
- Court of Justice of the Economic Community of West African States
- East African Court of Justice
- Caribbean Court of Justice
- Andean Court of Justice

Between the courts, there is usually dialogue: there tends to be coherence between the different systems
When there is not cohesion, we talk of fragmentation

- International human rights courts:
- European Court of Human Rights
- Inter-American Court of Human Rights
- African Court of Human and Peoples' Rights
- International criminal courts – deal with the actions of individuals
- International Criminal Court

Various ad hoc international criminal courts and tribunals
Several courts dealing with violations of international law

INTERNATIONAL COURT OF JUSTICE

Principal judicial organ of the UN – status of the court is part of the Charter
Consent to jurisdiction is fundamental even in front of the ICJ
UN Charter, art. 92: 'the principal judicial organ of the United Nations'
ICJ Statute annexed and integral part of the UN Charter
Open to all states parties to the Statute (All UN members ipso facto parties to ICJ Statute)
This does not mean that you consented to its jurisdiction
It is possible for states that are not parties to the Statute to go before the Court (art. 35(2) ICJ Statute): one of the most important cases was brought by Palestine against the US on the movement of the American embassy from Tel Aviv to Jerusalem and Palestine is not a member of the UN
No individuals or international organizations in the ICJ
IOs can use advisory opinions on the matters of law, but cannot be brought in front of it

COMPOSITION

Art. 2: " *The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.*"

Until few years ago, every permanent member of the UN Security Council also got a member there

At the moment however there is not a judge from the UK – they are usually professors of IL

Art. 3: " *The Court shall consist of fifteen members, no two of whom may be nationals of the same state.*"

Art. 16: " *No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.*"

Judges must be of high moral caracter: usually nominate lawyers with vast experience in their foreign office

The Court as a whle should reflect the main forms of civilization and the principal legal systems of the world

Individuals chosen tend to be male, of a somewhat advanced age

Art. 31:

1. *Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.*
2. *If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.*
3. *If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article*

Parties can elect ad hoc judges: when there is not a judge of the nationality sitting in the 15, a state can nominate an ad hoc judge

They can nominate anyone, in that case, adding one judge – if neither party has its own titular judge, then both can appoint an ad hoc judge, so that the maximum number of people on the bench at any time can be 17

Usually, might also be the case that ad hoc judges do not vote in favour of the state that elected them

ELECTIONS OF THE JUDGES

Art. 4: " *1. The members of the Court shall be elected by the General Assembly and by the Security Council [...]*"

They are not elected all at the same time: elections are every 3 years when some of the judges are replaced or reappointed – so as to have a constant jurisprudence and continuity

Judges are appointed for a period of 9 years and reappointment is possible: two terms are not rare, some judges have been on the bench for over as quarter of a century

Art. 8: " *The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.*"

Art. 10: " *Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.*

JURISDICTION

In most cases, joining a regime does not automatically subject a state to the jurisdiction of a court that may operate within that regime

Competence, where does the power of a court derives from?

Within the ICJ, there are various ways in which parties can accept the Court's jurisdiction and therewith accept that the Court has the power to render a decision

ICJ Statute, Art. 36: *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*

First problem: a state raises a preliminary objection and contests the jurisdiction of the court

Court itself has the power to decide whether or not they have jurisdiction

ICJ Statute Art. 36(6): *In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.*

Three basic ways to consenting:

1. **Art. 36 (1): "all cases which the parties refer to it"**
   If the parties can agree to submit their dispute to the ICJ they conclude an agreement to do so
   Sometime sone of the parties brings a case to the Court, claiming that an agreement exists which suggests that the other side has accepted the Court's jurisdiction
   If the other side objects, the court will have to verify the reality of both states' acceptance of its jurisdiction and it tends to err on the side of caution
   If the court is not certain, it dismisses the case: if a state is not convinced that the matter should go to the ICJ they will not be very inclined to respect any judgement, especially one that goes against them
   Might be better to have no judgement than one that will be disrespected
2. **Art. 36 (1): "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force"**
   When UN Charter was drafted it was thought to be useful if the Security Council could order states to submit their dispute to the ICJ
   This idea ultimately did not receive enough support
   Nothing in the Charter providing the Court with the jurisdiction to decide contentious case
3. **Art. 36 (2):** "The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation ; d. the nature or extent of the reparation to be made for the breach of an international obligation.**"**

Several treaties envisage that when a dispute arises concerning the interpretation of a treaty, the ICJ may be seized
While two parties may have a dispute under a convention, the dispute does not concern interpretation or application of that convention
Sometimes the jurisdictional clause is laid down in a substantive treaty provision, sometimes also It can be part of an optional protocol

Agreement of the parties

This is something that happens after the dispute: partis can decide to write down a compromise and defer the situation to ICJ
This is the majority of cases, especially for boundary questions and sea law
Special Agreement: Art. 40 "Cases are brought before the Court, as the case may be, either by the notification of the special agreement [...]"
Scope of the decision of the court is very limited: states ask to solve the dispute, court decided what law should be applied and how

Forum prorogatum: when it is clear that there is no room for writing a special agreement, a state can try to write a special application addressed to the Registrar (i.e. the secretary of the court) claiming that they have the will to settle the dispute pacifically and inviting the other party to join and do the same
It is possible therefore to start a proceeding against a state that has not yet accepted the Court's jurisdiction: if the respondent state accepts the invitation, the Court can exercise its jurisdiction based on this ad hoc acceptance
Very difficult – this move is very political
Attempted to use in the Marshal Islands case: islands that suffer a lot due to climate change and the nuclear tests done in the pacific, so they push a lot for the banning of nuclear weapons
Tried to send an application to the ICJ against all states possessing nuclear weapons to ask for a rule on whether the possession is legal or not

Compromissory clause

The provision is contained within the treaty
In bilateral or multilateral treaties: Art. 40 "Cases are brought before the Court, [...] or by a written application addressed to the Registrar"
Need to look at ways in which the compromissory clause can be invoked
Commonly contested by the responding state: No legal dispute between the parties; dispute not one on the interpretation of the treaty
Ukraine tried to look for a compromissory clause within treaties and found it in Genocide convention: Ukraine asked for provisional measures (i.e. that the invasions stops)
Looked at fact that Russia justified the invasion on the grounds of self defence, i.e. that they were intervening to prevent a genocide from happening
Ukraine did not say that Russia was committing a genocide, but rather claimed that no genocide was happening in Ukraine, so there was no legal basis justifying the Russian aggression
Russia decided not to show up, but it is difficult for the court to accept jurisdiction: Russia never mentioned Genocide convention, they can always claim that they were referring to customary norms and not to the Convention in which is present the compromissory clause that opens up the doors to the ICJ
States can go back even to treaties signed more than 40 years ago to claim jurisdiction
No need to have the explicit consent of the state in this case, because the consent is in the treaty

Optional clause

To limit the idea that jurisdiction is based on consent, try to draft the statute by claiming that consent can be given at the beginning for any kind of disputes and in a reciprocal way
If you consent to jurisdiction in any possible case, then also other states should consent
Declaration that some states made of going in front of the ICJ no matter what happens

Drafters of the Statute in the early 1920s were convinced that it would have been better if all states were to accept the ICJ's jurisdiction as compulsory
All states were invited to declare their acceptance of the Court's jurisdiction as compulsory
If it then happened that a dispute was brought involving two states that had both issued such a declaration, the Court would have jurisdiction without anyone having to go to the trouble of taking further steps

Art. 36 (2): "*The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*

1. *the interpretation of a treaty;*
2. *any question of international law;*
3. *the existence of any fact which, if established, would constitute a breach of an international obligation;*
4. *the nature or extent of the reparation to be made for the breach of an international obligation."*

US drafted declaration with some reservations: they were sued by Nicaragua under an optional clause
After that, the US withdrew this declaration
What states can do with optional clause is to put some reservations. This might have led to the diminished importance of this mechanism
Art. 36 (3): "*The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time."*
Nevertheless, states were allowed to insert all sorts of conditions and clauses
States made declarations but asking reservations on any part of IL
Since the state works on the basis of reciprocity, ICJ can only work on the basis of the lowest common denominator

There are different types of optional clause declarations:

- Reservation rationae temporis: excluding specific years and events

- Reservation rationae personae: excluding specific situations and individuals from a certain country
- Reservation rationae materiae: exclude from certain areas of law e.g. environmental law

These reservations make the system not useful
Can claim the reservation also of the other state: court doesn't have jurisdiction because the other state has a reservation – reciprocal in nature

US in Nicaragua had an optional clause with a reservation on Multilateral treaties: any multilateral treaty would not fall under the jurisdiction of the court unless all the states part of the treaty would be part of the proceeding as well
Since the case was about the prohibition of the Use of force contained in the UN Charter (a multilateral treaty), the reservation would have applied
Court decided that rather than applying UN Charter it would have decided on Customary international law

States may be inclined to exclude issues that they anticipate to be controversial
Automatic reservation: clauses in a declaration by which a state claims that it will accept the jurisdiction of the ICJ except for matters falling within that state's domestic jurisdiction or related to its national security
This grants to the state concerned an enormous discretion: it could hypothetically invade another state but escape scrutiny claiming that the matter was related to its national security or domestic jurisdiction
Reciprocity applies here as well: a state with such an automatic reservation, should it bring a case against another state, cannot prevent that other state from invoking its own automatic reservation against it

PROVISIONAL MEASURES

Something that you ask to stop a situation immediately, as a matter of urgency, so as to reach an agreement with the counterpart
Court might be asked to order a state to stop behaving in a certain way, so as not to endanger any rights prior to a final decision of the court
ICJ Statute, Art. 41 (1): "*The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party*"
Under a purely textual interpretation of the provision, it seems that the measures are not binding ("indicate", "ought to be taken") – this seems to point out to the fact that these are only mere recommendations
Nevertheless, functional approach suggest that the article is concerned with protecting the rights of the parties during proceedings: therefore these should be by their very nature compulsory
Provisional measures are legally binding (LaGrand, para 102, 109)

Indicate is not a binding term: states claim that provisional measures are not binding
Ukraine wants now provisional measures and claim that Russia violated provisional measures
Court does not have to give a final ruling on jurisdiction: for the moment, it is possible to give provisional measures
Nevertheless, when the court is doubtful about jurisdiction, it also tends not to emit any provisional measure (an order of interim presupposes authority)

MERITS

Decision is binding between the parties and sometimes it is not clear what is binding and what is not
ICJ Statute, Art. 59: "*The decision of the Court has no binding force except between the parties and in respect of that particular case.*"
Art. 60: "*The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.*"

Parties can ask for an interpretation of the judgement

There is a problem of enforcement for arbitration (rely on the losing state)
However, reputational costs of not complying with a decision of the ICJ is quite large, so countries tend to comply
UN Charter, Art. 94:
Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
If any 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.
In theory there is a procedure: they can defer the matter to the Security Council and ask them to take action on that – never been used.

ADVISORY PROCEEDINGS

International organizations can ask non binding opinions to the ICJ
ICJ Statute, Art. 65: 1. *The Court may 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 United Nations to make such a request.*
The reach of these requests is limited to legal questions related to the activities of international organizations or their organs
UN Charter, Art. 96:

1. *The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.*
2. *Other organs of the United Nations 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 within the scope of their activities*

This is how bypass the fact that IOs do not have a place in the ICJ system, but may still be confronted with legal issues relating to their work
Much of the law of international organizations has been flashed out precisely by means of advisory opinions

Despite being non-binding, advisory opinions can be highly authoritative
This has prompted international organizations to request also opinions on issues that are not immediately related to the position or status of the organization itself, but come close to being in the nature of disputes involving states that would be unwilling to accept the court's jurisdiction

Non Binding, even for the parties that requested it
States may agree to make it binding
Distinction between opinion as such and law elaborated in the opinion: the law defined above the advisory proceeding IS binding

ICJ Statute, Art. 68: *"In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."*

INTERNATIONAL ECONOMIC LAW

Really important to understand the European Union and the European integration
International Law changed after WW2
The three pillars of international law after WWI

1. Illegality of use of force
2. International Human Rights: international law is not just an issue for states, but it is also about the people living in the states – some international obligations to provide a fair treatment of the people within the jurisdiction of the state
3. Free trade as incentive to peaceful relations between States

Result of the end of WW2 was the understanding that the trade wars that occurred before the Global conflicts and the adoption of protectionist policies by the State had a negative effect on the relationship between states – the effect was the war itself
Realization of the existence of an interconnection between free trade and peaceful relationships between states
Strong impetus for the creation of new institutions that could control the economic system
These values influenced the system of International Law: from a global governance system point of view

- **Institution of the UN:** organization in charge to ensure implementation of human rights and the use of force
  UN is a universal organization: all the states of the world are part of the UN – in the post-war agreement between the superpowers (especially US and USRR) there was the idea that within the Security Council and the structure of the UN there was a governance of the international relations
  War is a negation of the international system by one of the superpowers that built this system
  UN completely unable to govern this situation: do not have an independent institution that can govern or intervene in this crisis
- **Bretton Woods System:** reconstruct international economic relations between the states
  Used to consider globalization as a new thing as compared to the way in which the states related economically between them in the last century
  Looking at the past, the ancient period, we can see that trade was international
  In the history of humanity, trade was not just in one limited territory, in a determined jurisdiction
  When humans travel, travel is linked to trade – economic relations between people in every period of history
  Many of the international relations were between traders that were citizens of different jurisdictions – what changed was the creation of the Westphalian idea of sovereign state
  It is up to the state to regulate not only the economic relations within the territory of the state and within the population of the state, but it is up to sovereign states to agree among themselves the rules for trade

Since after the war we had the same Westphalian system (and in some way globally we still are in the Westphalian system). The state is sovereign and the economic relations are in the hands of the state
Idea of free trade was especially supported by the US: idea to restore a Liberal international economic order
However, after the war we have the division of the world in two parts: one part of the world ideologically dominated by the US (liberal capitalistic system); on the other side, the USSR (economic system based on the control of the state and the economy)
In the liberal system the role of the state is a role of control, support of private economic activity
In the communist system, no recognition of the private property – a fundamental right in order to have liberal free market and liberal economy
Soviet Union did not approve the system of free trade – world divided in two parts: one part under the influence of the US model, on the other side, many states under the influence of the communist model

When the US and the winning powers of WW2 decided to build a global governance of the economic relations, they built up a system known as **Bretton Woods system**
Agreement on what the international free trade should have been
Idea was somehow similar to the constitution of the UN from a structural point of view: international organization having some specific tasks
In the case of economic relation, there was the creation of three institutions:

1. The International Monetary Fund (IMF): fund that could provide monetary stability
2. The World Bank: help devastated European nations in trying to reconstruct themselves and develop
3. The General Agreement on Tariffs and Trade (GATT)

System is still in place: both IMF and World Bank are still working
IMF has the task of intervening in case of monetary crisis of the states, while the World Bank collects money to support countries in a poor economic conditions
Some international organizations to decide how to intervene in case of monetary problems in a state or in the case of poverty issues in the real economy of a State

General Agreement on Tariffs and Trade (GATT) – not an institution, despite there was an attempt to build that
Agreement on customs, tariffs and in general trading rules

Universal system: IMF and World Bank open to all states – division of the world in spheres of ideology
Countries under the Eastern Bloc did not become part of these institutions
But still, they were meant to be universal organizations
Both institutions work on the basis of the capital poured into them by member states: states that contribute larger sums have the larges number of votes

US supported also the regional economic cooperation
Economic support of the US was the main reason for the development of the European Economic integration
Marshall Plan aimed at Western Europe
However, also in the East there was a big economic support by the US: countries that were supported by the US developed a liberal system, both in the economy and the democracy e.g. Japan (funding directed to Japan during the Korean War)

In 1973: first crisis of the system
Economic development for countries participating in the free trade agreement after the war
But then in 1973, there was a monetary crisis, connected to the US of the US currency as a general currency
The only currency to use in the international transaction was the US dollar, but it was no longer possible for the US to support the system
Crisis: first moment in which the US currency started to lose supremacy

On one side, global system in the Western part of the world; on the other side the experiment of the European economic integration, strongly supported by the US

In the Bipolar world, trade was regulated by the **GATT** (General Agreement on Tariffs and Trade - 1947), treaty that regulates main principles regulating trade
Also includes principles that would be founding the European Community and the European union
GATT didn't enter into force: many states signed it, but didn't ratify the treaty
Even if there was a formal entry into force of the treaty, the same treaty was provisionally applied: the states in any case based their trade relations according to the GATT
Unregulated international legal order: consensus between the states not to ratify the treaty but just to follow the rules
Idea of free trade was an ideological one, especially during the Cold War (a war between two econpmic models, propaganda): idea of a system in which there was no private property and a formal economic equality, idea that all the people are equal and have the same position in the economic

system VS idea of free trade, free economy, that you can become very rich by exploiting the system, free to decide where to produce, where to good
States didn't want to enter this ideological debate: not sure to have the support of parliaments
This situation changed when the bipolar world ended – fall of the USSR was something unexpected
Long term effects of what happened at the end of the Eighties still felt today
Immediately after the fall of the USSR, there was the idea that the liberal economic system (model of free trade) prevailed: possible to extend the model all over the world
Some evidences of this trend: on one side the Financial Institutions became really global: all the states, not only the Western ones, became part of the system
Important step was also the Creation of the World Trade Organization in 1994
Realization of a goal that was not reached in 1947
With the Bretton Woods Conference, no creation of International organization devoted to the regulation of trade because of lack of political consensus
In 1994, finally, there was consensus at a global level on the economic principles guiding an institution that has the role to govern economic relations between states
In 1994, multilateral agreement – a framework agreement – creating the WTO
Global organization: right now, 164 Members – 97% of world trade
All the economic powers are part of the WTO, including China, Russia, as well as Arab states
Acceptance of the economic foundations of the WTO by all the states in the world: not just the established liberal democracies and rule of law states, but also the autocratic systems (now very important from an economic point of view)
Many states that are very important economic powers that do not share with the western countries the same political values
From an economic point of view, convergence between all the states on what should be the rules regulating trade
This was the basis of the evolution of globalization: strong development from China and emerging economies, but at the same time this was possible because of the existence of a global consensus at least on a base of economic rules accepted by everybody even if the country has a different rule of law system
From a legal point of view, framework agreement at the basis of the WTO
This framework includes a single package of trade agreements

- **Goods (GATT 1947/94):** transformation and evolution of the old GATT – now ratified and formally enforced by all members of the WTO
- **Services (GATS)**
- **Intellectual property (TRIPS):** mentioned many times during the Covid-19 crisis – regulation of intellectual property also for the production of vaccines: many of the big issues we are dealing with right now are in part related to the application of this treaty

BASIC PRINCIPLES OF WTO

Multilateral regulation of world trade: equal treatment (MFN, National Treatment, Regionalism)
Trade between states should be based on equal treatment
Idea coming from WW2: in the relations of the states between the two World Wars, the states became closed so they developed a close economy, they protected their market and at the same time created preferential relationships → creation of blocks
If the aim is to have real free trade, not conditioned by the political relations between states, to develop this system there was the creation of the MFN clause

MFN = Most Favoured Nation

According to this rule: if you extend a beneficial treatment to the trade coming from one country (e.g. a reduction of tariffs), need to extend this benefit to all the states part of the organization
General reduction of the trade barriers in the commerce: not connected to political decisions – have to extend it to everybody
Trade Wars by Trump – constituted a violation of this rule

Sanctions not used to react to a violation of the international law – but this could create tensions between states, leading to wars: WTO promotes the use of tariffs only for minimum economic reasons and not as weapons

National treatment

Typical barrier to trade is tariff: if you have internal regulation saying that an imported good has a different treatment compared to a national good, you have the same effect of a tariff
No international regulation, but a domestic one – same effect of a trade barrier
Treat the goods coming from abroad in the same way as you treat goods coming from your territory
Cannot have more taxes on a car coming from Japan relative to a European one

Exceptions to this rule exist: the most important is given by regionality
It is admitted that in order to have a more integrated area states can derogate to these rules
This is why it is possible to have a custom union in the European Union: no tariff barriers, the market is open for goods, but at the same time the union is compliant with the WTO
EU is the principal example of regional economic integration created within the rules of WTO
Idea was to also create a form for the states in order to adopt a general policy of reduction

Progressive liberalization through the "Rounds" – conferences in which the goal was a general reduction from all state of trade barriers
Reduction of public border barriers (tariffs, quotas): successful at the beginning of the history of the WTO, but now the recent rounds were not so successful – difficult to have even more reduction today
Market Access and regulation of relevant domestic barriers are still an issue
e.g. the EU has regulations concerning environmental standards or health standards, as well as the quality of food
These kind of regulations can be seen as barriers: if you have to produce stuff accepting certain environmental standards, it is possible to refuse goods that are not produced in compliance with the standards
These are PUBLIC standards: why a product produced in China should respect rules of the EU?
WTO: agreement on global standards so as to have a rule based set of standards

No regulation of private barriers (cartels) in the WTO: barriers to economy are not just the effect of public policies but can also be the effect of private actors
Considering multinationals, the possibility of having cartels – can control and have a control of the market and can create a barrier to others exporting to your country
In the EU there is a tentative to have a regulated open market: not only public economic regulations, but also regulation of the behaviour of private companies (competition policy)

WTO dispute settlements

One of the weaknesses of the Treaty systems is that it is usually difficult to create compulsory dispute settlements within a treaty
Case of the convention against the genocide: reservation by USSR and the Russian Federation concerning the jurisdiction of the ICJ to provide opinions on the interpretation of the Convention against Genocide
In the Genocide Convention, there is not a dispute settlement – e.g. litigation started by Ukraine against Russia, but court has a merely interpretative power (≠ from adjudication)
When providing an opinion, don't have the power to sanction: this is instead one of the main features of the EU – have a compulsory dispute settlements that the states cannot evade (states cannot say ECJ doesn't have jurisdiction on them) as well as the possibility of formal sanctions and to implement them
Usually in the treaty, especially in the global treaties, it is very difficult to find a uniform consensus on being under the jurisdiction of any court – Many treaties have no compulsory dispute settlement
Rules concerning the WTO and the regulation of trade are not just rules concerning the behaviour of the states, but that are important also for the people and the individuals operating in the global trade system

- It is not about just adopting tariffs and sanctions
- But there is a whole set of economic actors subject to these rules

Beneficiary of these norms are not only the states in themselves but also the individuals
Very important to have a system where it is possible to provide a certain interpretation: certainty important for real global trade, for globalization
States know this is an important condition for the application of the treaty. On the other side there is always some resistance from the states to be under a jurisdictional system
In the 90s, the WTO was created with a dispute settlement system: the characteristics were:

- Adjudication
- Reversed consensus
- Law-based decisions

ADJUDICATION

Distinction between the diplomatic way to solve a dispute (negotiation, discussion, no authority) and the existence of a system (arbitration, permanent court) that guarantees the solution of a dispute
"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." (Art 3.2)
Adjudication is compulsory-exclusive-binding decisions
When the dispute system is compulsory: states cannot avoid being under the jurisdiction of this court
Even if you decide not to appear under the court, in any case the court can give a decision against you
Exclusive: there is only one jurisdiction – this kind of issues can be decided only by this system
If you have many different jurisdictions, might have possible conflicting decisions
Decision should also be considered binding: if the decision is binding, it means that not following the decision is the violation of an international obligation
Take an obligation to be bound by a decision
Violation of international law

"All Members will engage in these procedures in good faith in an effort to resolve the dispute' (Art 3.10)

Prohibition of unilateral enforcement (Art 23): system regulating enforcement
There is also the possibility of Appeal

REVERSED CONSENSUS

Adjudication system when we have judicial institution having the power to decide
In some cases, such as the WTO, there is a mixed system
There is a decision by an independent and autonomous body but you need also the political approval of the decision: this was a sort of compromise
Also the UN Charter doesn't have a compulsory system of dispute resolutions
Compromise in the WTO was to have a decision by two jurisdictional body
In the first decision, need also a political approval
Problem is: what kind of majority in an international system?
In international system, sovereignty of states prevails as idea
State can choose not to be under any obligation unless it agrees
In this case, instead of having unanimity supporting decision (a way to paralise an international body), the reversed consensus was introduced: instead of having all the consensus of the state on a decision, you need to have the consensus of all the states NOT to adopt the decision
States involved are not part of the decision, but all the others should be unanimous in rejecting the decision taken by the judicial body
In this way, it is very difficult to overturn a decision taken by the judicial body

LAW BASED DECISIONS

Decisions are not political but based on the application of all the WTO system of rules and international law
WTO was considered a big achievement: system worked until the end of 2010
Now the system entered into a crisis: first episode was the financial crisis of 2008

In the post-war economic order, it was the first financial crisis having a global effect
Involvement of the US, the Western World in particular
One of the problems of the WTO was also the rising economic power of China
China became a member of the WTO not as a market economy but as a developing country: for the way in which the economy in China is controlled by the state, it is very difficult to recognize that China is a market economy + difficult to open the economy more that it is now
important problem that United States before Trump tried to solve within the WTO system – but WTO system is too weak in this instance

Sovereignty is still important in taking decisions

Starting point of Trump's trade war: when he chose to change the foreign policy of the US, Trump concentrated the criticism in the multilateral system and the functioning of the WTO
For many reasons, now the WTO is completely freezed, unable to operate
Many of the economic disputes in the past, resolved in the multilateral legal system of the WTO, are now dealt in a bilateral way – without the application of law
Pandemic had an effect on the economy
Now, there is the Ukraine invasion by Russia
Many of the debate now is about the return of multilateral system: living in a real crisis, at least in the economic governance, because we don't have common institutions that the states can go to solve their disputes
System of the WTO, the governance of economic relation at universal level, is based on the idea that it is important to respect some basic economic rules concerning how to trade

It is not important the rule of law within the system

i.e. not important the states participating are liberal democracies

The evolution of economic integration is completely different in the EU, where we also have a rule of law crisis: some countries are not respecting the principles concerning democracy, respect of law, respect of institutions - this might also be a problem in the international arena
System accepted that there is no connection with the lack of democracy or the use of force within and against other states
Question is: is it possible to have a global economy without some common rules concerning rule of law and respect of some basic principles, like human rights?

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