

INTERNATIONAL LAW OUTLINE

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Note: All “casebook” (“CB”) references are to: Carter, Barry, and Allen Weiner. 2011. *International Law (6th ed.)*. New York, NY: Wolters Kluwer.

NATURE AND SOURCES OF INT’L LAW (Casebook 1-3; 6-20; 112-33; 146-50)

1. Public International law: The set of rules that govern the activities of governments in relation to other governments (CB pg. 1)
2. Private International law: rules that regulate the activities of individuals, corporations, and other private entities when they cross national borders (CB pg. 2)
3. International law (Restatement Section 101): *International law as used in this Restatement consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.* (CB pg. 3) It takes three forms:
 - a. Customary law
 - b. Derivation from general principles common to the major legal systems of the world
 - i. gap filling drawn from municipal (state) systems- if unsure in a case because a law doesn’t exist, they look to municipal systems.
 - ii. almost always having to do with procedure, evidence, due process
 - c. By international agreement- international treaties or conventions are agreements between states regulating behavior. They can be bilateral or multilateral.
4. Customary international law (Restatement Section 102): *Results from a general and consistent practice of states followed by them from a sense of legal obligation* (CB pg. 3)
 - a. International treaties can, in addition to creating rules, lead to the creation of customary international law.

In practice, distinction between public & Private International Law is blurred

1. Many countries formally incorporate international law within their domestic legal systems (especially in countries like South Africa, Netherlands).
2. International human rights law is meant to interpose between the sovereign and individuals. This blurs the line between public and private, and domestic vs. international.
3. WTO- it consists of member states, but what does it regulate? It regulates activities of governments, but also private entities (corporations). So the distinctions between private and public, international and domestic are blurred.

Why care about international law?

1. Some don't- They assume states are self-interested, to the extent that international law will reflect their self-interest, they will comply, if not, they won't. This is a strong realist perspective- in the end, it's all about politics, not rules.
2. Others may say that int'l law does matter somewhat, but it often doesn't effect our day to day lives.
3. Others may say that it matters, that there is an explosion in demand for it engendered by increases in global cooperation, and IL is the type of tool that will help states come together to solve collective problems. The realist view is becoming increasingly obsolete. In this light, IL can be seen as global administrative law.
4. Even if you don't believe in the enforceability of rules, states often act like norms matter. US State department headed by Howard Koh has thousands of lawyers- obviously international law matters

Natural law vs. legal positivism

1. Natural law- fundamental rules of the universe. Grotius: a more secularized version: 'law of nature' is based on the dictates of reason, on the rational nature of men as social beings (CB pg. 9).
2. Legal positivists: attach primary or major weight to customary and treaty rules, relegating an insignificant place to the law of nature (CB pg. 9)

Informal ways of enforcing the law

1. Law can be self-enforcing (people driving on the right side of the street).
2. Law can be internalized norms (people might stop at stoplight at midnight even though there is no traffic).
3. Law can be a social practice.

History of International Law

1. No system of international law during middle ages. Why? (CB. Pg. 7)
 - a. Temporal and spiritual unity of Europe under the Holy Roman empire (lesser conflict)
 - b. Feudal structure of Europe hinging on hierarchy of authority- clogged emergence of independent nation-states and prevented powers from becoming unitary actors
 - c. In short, we see inter-municipal law, but not modern-style international law.
2. 1600s-1700s: Key factor in the evolution of international law is the development of the state system. Sovereignty and secular nations (Westphalian order) created new conceptions of nation-states, which developed the idea of customary international law
3. 1800s- newfound focus on law of war and neutrality as well as growth in habit of making treaties (CB pg. 10)
4. Early 20th century: first attempts to legalize international politics
 - a. 1919- Establishment of an ineffective League of Nations (CB pg. 10)
 - b. 1921- Permanent Court of International Justice (to be succeeded by International Court of Justice in 1946) (CB pg. 10)

- c. ICJ focuses on international conventions, international customs, general principles of law, and court rulings.
- d. ILO established soon after end of WWI (CB pg. 10)
- 1. Mid 20th century: rapid expansion in international law
 - e. UN established in 1946, trying to remedy much of the defects of the League of Nations (CB pg. 10)
 - f. Also IMF and WTO (Bretton Woods institutions), as well as regional trade agreements like EU, NAFTA, ASEAN, etc (CB. Pgs. 11-15)
 - i. Some created their own courts, like the EU and the OAS
 - g. Newfound focus on the individual and individual rights and responsibilities rather than focusing solely on the state. This is often known as international human rights law.
 - i. Universal declaration of human rights was the first such document (though not binding).
 - h. Rise of international tribunals (CB pg. 16)
 - i. Nuremburg trials, International Criminal Court, the Khmer Rouge Tribunal
 - i. Domestic courts become increasingly willing to incorporate international law within domestic law (CB pgs. 19-20)
 - i. In US: Alien tort statutes- foreign citizens can bring violations of international law to court in domestic courts (usually directed against private party, not a foreign state)

Motives for Creation of International Law

5. The fact that people view law as social practice means that law is part of a whole bunch of practices that develop outside of law- especially true in international law.
6. Industrialization alters the demand for governing international rules (it's an exogenous change, not a legal change).
7. Wars often demand some rules, even if the wars weren't caused by violations of international law.
8. Increased trade and commercial activity from globalization engenders a demand for governing rules

Developing Country Perspective of International Law

1. They have a more mixed conception of international law.
 - a. For the vast majority, international law was a tool of colonial power
 - b. It's often seen as Eurocentric, Christian, and economically/culturally exploitative.
2. What's happened now is that many countries have embraced many aspects of international law in order to forward their own conceptions (CB pgs. 21-22).

Jus Cogens (or Peremptory) Norms

1. Norms that are purportedly so fundamental normatively that they bind all states and no state can derogate from them or agree to contravene them. States can't violate them or come together to agree to violate them (CB pg. 112)

- a. Vienna Convention on the Law of Treaties: first recognized jus cogens norms in Articles 53 and 64 (CB pg. 112)
 - i. Article 53: *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*
 - b. Examples: genocide, slavery, and torture
 - c. Derogable norms, such as freedom of association, are not jus cogens, and neither are most treaties
2. Problem: difficult to define or come together with certain criteria. What justifies these norms?
 - a. Defining them, and agreeing on them, is difficult, plus treaties tend to engender loopholes.
 3. There is a moral conception- jus cogens norms are above negotiations. And negotiating these treaties does a disservice to these norms- it's above states to negotiate them. What justifies them? Morality, and the development of constitutional principles.

Customary International Law

1. (Restatement Section 102): *Results from a general and consistent practice of states followed by them from a sense of legal obligation* (CB pg. 116)
2. What is state practice? Statements of policy, rules, diplomatic acts
3. What is a consistent and general state practice mean? It does not have to be universal but must reflect wide acceptance amongst states involved in the relevant activity (CB pg. 116)
4. The activity doesn't have to be exactly the same, it can be similar.
5. Opinio juris- the state's belief that a state must follow a custom out of a legal or moral obligation (CB. Pg. 116)
 - a. Problem- one often looks for practice within opinion juris- so it becomes a circular argument-it's a legal and moral obligation because it's practiced, and it's practiced because of a legal and moral obligation
6. Traditional vs. Modern customary international law (Cb. Pg. 117)
 - a. Traditional: you emphasize practice and determine a custom inductively
 - b. Modern: focuses mostly on general statements (opinio juris) and deduce what the custom is
 - i. Difference: Talk is easier... so customary international law will become easier, and the law will evolve more rapidly. It will pull, rather than be determined ex-post. It becomes easier to create new customary international law
 - ii. Problem: courts might refer to custom less because it could change quickly, and if the process is fraught (we can't define custom perfectly), so the new customs will be fraught too
 - iii. Benefits: the world is changing more rapidly, and it needs to be more nimble, and the demand is higher, so we need more rules. Plus, in human rights, since abuses occur so much, we need opinio juris focus, not just practice focus.

1. The UN General Assembly often makes statements- and the UN charter states they don't have power to make law- but many lawyers suggest that their resolutions, especially if unanimous, that they should be legally binding because they reflect opinio juris and fall under the modern customary international law conception. Non-unanimous resolution: you look at the size and composition of majority to see if necessary to treat it as custom. In this case, persistent objectors would not be bound by the custom.

THEORIES OF INTERNATIONAL RELATIONS

1. International Relations Theory: The study of how states behave in international politics, and focuses on motivations that states have to engage in war or peace, to create international organizations or institutions, motives for alliances, to pursue national self-interests, however defined.
 - a. Stephen M. Walt article: Trying to show development and current debates of IR, and to show that all of the below theories together reinforce one another by complementing each other's weaknesses, and it's important to look at all of the theories, not just one, to develop a good understanding of IR.
2. There are 4 theories:
 - a. Realism: focused on power, the idea is that states are operating in a world without a central authority and self-interested. In this anarchic world, so what motivates states? Security motivates them, they want to ensure their own security. So you focus on the maintenance of power- expand economy, build up military. States might not focus as much on human rights because security and survival trump these concerns. Realists were most dominant during cold war.
 - b. Institutionalism: We can begin with realist assumptions, but states don't just focus on power. Institutions provide information that cut against power accretion unchecked. When states get together, they learn about one another and each other's interests, and can therefore coordinate more easily without war. International institutions like WTO and UN are good examples of institution-sharing information. There are also reputation costs to breaking agreements, so agreements are somewhat enforceable even without central enforcing authority because states care about their reputation.
 - c. Social Constructivism: Focused on the role of norms. It's not a predictive theory, but says: why do we focus on power? Why not focus on intersubjective understandings, shared norms amongst countries, norms about human rights, for example, which are internalized in domestic legal systems. SC isn't predictive but it describes how particular rules may have come about- like human rights, in which a norm developed and the norms were then codified into law.
 - d. Democratic Peace Theory: isn't predictive in all states, but focuses on regime type. If democratic, regimes respect one another, because they share similar

institutional structures, and those structures produce certain norms (peaceful resolution, preference for law over war), so among democratic countries, you won't see war. If that's right, and many statistical studies suggest a correlation. One implication: democracies want to spread democracy abroad. Problems: was the war between Russia and Georgia between democracies? The quality of democracy might matter.

- e. Why approach the study of IL through these theories?
 - a. The rules are relevant, but we need to know the motivation for state compliance with the rules
 - b. You also can't just focus on the aspirational: Are the aspirational goals relevant if the international community cannot agree on them or enforce them? So we build an edifice of international legal rules but maybe states can't agree on them or can't enforce them?
3. 4 questions one can ask to integrate IR theories with IL:
 - a. What are your assumptions about state behavior?
 - b. Given these assumptions, how do we think IL works as a coercive instruments?
 - c. Is IL always effective?
 - d. Is IL more effective for the regulation of some issues versus others?

History of International Relations Studies

1. Political realism focuses on expediency, rational self-interest and isn't concerned much about morality.
2. Early 20th century- start to develop some concept of neorealism... within that, EH Carr, Henry Morgenthau, and Kenneth Waltz, and John Mearshimer, and they are trying to create a predictive theory of state behavior.
 - a. They try to focus on level of analysis: Waltz comes up with 3: you can look at intrinsic nature of man (what is human nature? Are they good?), you can look at the regime type (democratic vs. authoritarian, military vs. civilian dictatorship). Waltz rejects both of these, so he looks to the system (taking agency away from individuals, focusing on how systems compel people to act), so state behavior is molded by structure of international system. So he is concerned with the distribution of power. Which is stronger? Which is weaker?
3. Early/mid 20th century: Split between IL and IR at this time: those who focus on self-interest go to polsci, others who focus more on morality, for example, come into law. (Realists in polsci, and idealists in law schools).
 - a. In law schools, many ridicule them, because of cold war context- how can you focus on international law?
4. Early 80s- the institutionalists started coming to the forefront
 - a. look at the EU, look at the UN, states obviously care about cooperation, institutions could work.
5. Early 1990s: End of the cold war, and you have the rise of the constructivists, and then those at the law schools were vindicated.
6. Currently: We still have realists, but you also have new theories that are also going strong.

What is a state?

1. Montevideo Convention (1933) focuses on 4 major factors (CB pg. 430):
 - a. Permanent Population
 - b. Defined Territory
 - c. Government
 - d. Capacity to conduct international relations

STATE AND GOVERNMENT RECOGNITION (Casebook 429-59)

1. How is a state recognized? (CB pg. 434)
 - a. Restatement Section 201, Comment h:
 - i. Constitutive Theory: *Whether an entity satisfies the requirements for statehood is ordinarily determined by other states when they decide whether or not to treat that entity as a state.*
 - ii. *Admission to membership in an international organization such as the United Nations is an acknowledgement by the organization, and by those members who vote for admission, that the entity has satisfied the requirements of statehood*
 - b. Declaratory Theory: State must also declare itself as a state
 - c. Restatement Section 202: Requirement to treat an entity as a state is not required if the entity “*has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter*”
 - i. i.e. if state created via violation of international law- no duty to recognize it as a state
2. In US, President has exclusive authority to recognize a state and a particular government within the state
 - a. Derived from the President’s Article II powers and his ability to receive ambassadors
3. Different potential states get different treatment: example of former Yugoslavia vs. former USSR
 - a. States originating from former Yugoslavia: there was negotiation over how peaceful the state would be and whether it would be democratic- conditions were placed
 - b. States originating from former USSR: were recognized immediately. Why? USSR was definitely more powerful, so that’s part of it. But, also, by recognizing states that came out from former USSR, there was an attempt to prevent Russia from getting them back through their recognition making it difficult to do so.
4. Entities for which statehood is unclear
 - a. State of Vatican City (CB pg. 436)
 - i. Pope is head of Catholic Church, and Holy See is its government and diplomatic agent, and Vatican City is its territory
 - ii. Is it’s population big enough? Just 900 people.
5. Rights and duties associated with state recognition (Restatement Section 206) (CB pg. 436)

- a. Right of sovereignty over own territory
- b. Status of legal person with capacity to own, acquire, and transfer property, and to make international agreements and become member of international organizations and be subjected to legal remedies
- c. Capacity to participate in the formation of customary international law

Government recognition

1. Restatement Section 203, comment a: Government recognition is “*a formal acknowledgement that a particular regime is the effective government of a state.*”
2. Usually, after an election, new government is automatically recognized by international community
3. Questions arise when a new government assumes power in a manner that violates domestic law (CB pg. 437)
 - a. Ex. After a civil war, revolution, or coup d’etat (ex. Honduras)
 - b. There are some states where if the government is not so strong the military steps in to provide stability, like Turkey in the past, perhaps Pakistan now- but these often count as within the rules of that state.

Ways to assess whether to recognize a government

1. Traditional approach (CB pg. 438)- a state considering whether or not to recognize a foreign government seeks to determine 4 factors:
 - a. Effectiveness of control (over its territory)
 - b. Stability and permanence (broadly applied- based on ability to achieve a certain measure of continuity in inter-state relations)
 - c. Popular support
 - i. Not necessarily democratic electoral support- it’s the apparent acquiesce of the people taken to denote consent
 - d. Ability and willingness to fulfill obligations (which is of comparatively recent origin)
2. Tobar doctrine: Governments that come to power via coup against the will of the people should not be recognized (CB pg. 439)
 - a. Proposed in 1907 by Carlos R. Tobar, former Minister of Foreign Affairs of Ecuador
 - b. Not very popular
3. Estrada doctrine: let’s eliminate these conditions for recognition of governments. Regardless of government change and its nature (violent, violating domestic law, or not), we deal with whoever represents them. We don’t judge (CB pg. 439)
 - a. In essence, doctrine brushes aside issue of recognizing governments- we deal with whoever is before us
 - b. Often, this actually does happen, but the difference with traditional approach is to not consider, a priori, those factors- forces government recognition
 - c. Doctrine was declared by Senor Don Genaro Estrada, Secy. of Foreign Relations of Mexico, in 1930
4. Traditional approach remains most popular- why?

- a. The Estrada and Tobar doctrines remove some leverage. The traditional approach is flexible, so it gives states some flexibility, and they can impose some conditions on governments such that they may be recognized.
 - i. Ex. US has used government recognition as a tool for our foreign policy. Woodrow Wilson used the Tobar approach (only recognized democratically constituted gov'ts). Now, we've switched to ignoring those factors whenever possible, but focus more simply on whether we want to engage in diplomatic relations or not.
- 5. Significance of state recognition in US (Restatement Section 205) (CB. 440-441)
 - a. Recognized government has access to US courts, and has access to property owned by the state in the US.
 - i. Note, however, that sometimes, Courts will give effect to acts even by an unrecognized state in domestic matters (i.e. Taiwan)

Case Study: China and Taiwan and Government Recognition

1. The significance of recognition might not always be clear, such as with US recognition of Taiwan vs. China.
2. Until the 70s, it's the nationalist government in Taiwan (Republic of China) was recognized.
3. 1972 Shanghai Communique (under Pres. Nixon) (CB pg. 443)
 - a. In the communiqué, The PRC maintained that it was the sole government of China, of which Taiwan was a province
 - b. The US continued to recognize the ROC as the government of all China, but it did affirm the idea that there was but one China and it did remove all its troops from Taiwan
4. In 1979, President Carter fully normalized relations, and recognized the People's Republic of China while withdrawing recognition of Taiwan.
 - a. Subsequently, the US though kept "non-official ties" with "the people of Taiwan" almost as if it was a legitimate government (it wasn't a government in name only). This is established through the Taiwan Relations Act (CB pg. 444)
 - i. Taiwan Relations Act: "*whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such terms shall apply with respect to Taiwan*"
 1. Taiwan received essentially all the privileges and immunities normally extended to an officially recognized government. But nobody knows what the act means vis-à-vis defense obligations. Yet we continue to sell them weapons, which does not make China happy.
5. Strategy of recognition between China and Taiwan
 - a. They are engaged in a race for diplomatic agreements. They go to other countries and provide aid to find recognition.
 - i. Taiwan even proposed paying all UN debt in exchange for recognition.
 - ii. However, China's doing so with much more success than Taiwan, largely because it is a more important player and lucrative trading

partner, so states have an incentive to enter into relations with PRC government rather than ROC government. So Taiwan is sort of stuck- it is recognized by few, and China is a growing power, so it is likely to extract recognition more successfully.

Government Succession and Obligations from Previous Regime

1. Traditional theory: changes in government or ideology of a state do not change the state or affect its international rights and obligations (Restatement Section 208, comment a) (CB pg. 447).
 - a. In practice, it might be hard to force a government to honor the obligations of the previous one.
 - b. In essence, traditional theory favors continuity
2. Odious Debt Repudiation: when a new government (usually a democratic one following a dictatorial one) states it repudiates past debt accrued by an evil past government- it's an odious debt because it is done without the consent of the people and not to their benefit.
 - a. Ex. USSR and old Czarist debts, new Iraqi government vs. Saddam Hussein regime
 - b. Justification: when a democratic government succeeds a dictatorship, you don't want to burden that government with all the debts of the previous dictatorship, because you can guarantee the failure of the democratic government and recidivism into dictatorship
 - i. Irony of US position vis-à-vis odious debt in new Iraqi government: Well, when Iraq fought Iran in the 80s, so much of Iraq's debt was accrued to benefit US foreign policy (we pushed Hussein to fight a war with Iran), but when Saddam was overthrown...

State Succession: What happens to property and contracts?

1. State succession: one state replacing another state with respect to the territory, capacities, rights, and duties of the predecessor state. This is different from government change within a state (CB pg. 451).
2. Restatement Section 209 (CB pg. 451-452):
 - a. Regarding transfers of property
 - i. If part of territory of a state becomes territory of another state, property of the predecessor state located in that territory passes to the successor state
 - ii. If state is absorbed by another state, property of the absorbed state passes to the absorbing state
 - iii. If a state becomes a separate state, property of predecessor state located in the territory of the new state passes to the new state
 - b. Regarding contracts, they remain with the predecessor state except in the following 3 cases:
 - i. If part of the territory of a state becomes the territory of another state, the local public debt and contractual obligations are transferred to the successor state

- ii. If a state is absorbed by another state, the public debt and contractual obligations of the absorbed state pass on to the absorbing state
- iii. If part of a state becomes a separate state, local public debt and contractual obligations of the predecessor state pass on to the new state
- c. Regarding private property rights: in general, they are not affected by a change in sovereignty over the territory in which the property is located or in which the owner resides (CB pg. 452)

State Succession: What happens to international agreements

1. Restatement Section 210 (CB pg. 452)
 - a. When part of the territory of a state becomes the territory of another state, the agreements of the predecessor state cease to have effect and agreements of successor state come in force over the new territory
 - b. When a state is absorbed by another state, international agreements of the absorbed state are terminated, and the agreements of the absorbing state come to have force there
 - c. If part of a state becomes a new state, the new state does not succeed to the agreements of which the predecessor state was a party, unless it agrees to this explicitly
2. Baseline rule- we want continuity. We don't want agreements torn up every time there is a succession, it creates stability in expectations.
 - a. But there is some "clean slate" language in the Vienna Convention depending on the type of predecessor government. There is a question over state property, and how enforceable the Convention is (it is not in force, for not enough states ratified it). (CB pg. 453)
3. Clean Slate often offered to newly independent states with respect to treaty obligations (CB pg. 453)
4. There are questions over membership in international organizations (CB pg. 455-457)
 - a. Ex. When USSR collapsed, US and other UN security council members were happy to give Russia the USSR's seat (because otherwise you'd open up questions over changing the composition of the Security Council, which opens up caustic political issues- if India is recognized, Pakistan is unhappy, if South Africa is recognized, Egypt is unhappy, what about Japan...).
 - b. But if Russia gains USSR's seat, does Serbia get Yugoslavia's seat? No. Why? Russia composed a majority of USSR's territory, whereas Serbia only composed 44% of former Yugoslavia's territory. Also, Russia more powerful than Serbia (realist argument).
 - c. In the end, recognition in international organizations is determined by organization's internal rules.

INTERNATIONAL ORGANIZATIONS (Casebook 133-46; 463-78; 479-501)

1. IOs are created via treaty

- 1) Origins: Despite the fact that most of the most important institutions got started in 1940s, the explosion of interests really started in 1980s and flourished post-Cold War
 - i) End of Cold War: we see the explosion of democratic governments and rise of US as superpower, which meant some statement that democracy and capitalism had won over authoritarian rule (Fukiyama's end of history). So since democracies don't fight one another, then power is no longer the only motive of international relations.
 - ii) If power doesn't matter as much, international regulatory systems could replace it to constrain state behavior, and IOs were the best way to do so.
- 2) Evaluating success: how successful have they been in achieving their goals stated at the organization's founding?
 - a) To figure out if they are effective, we start at the UN and especially the UNSC and if its efficacy would improve with enlargement.

How do IR Theories View International Organizations?

- 1) Realists would say that IOs can't encourage true cooperation, because they reflect interests of powerful states in international politics, since those are the countries that create them and maintain them. If so, there is no reason to focus on IOs as significant actors. IOs, like international law, *don't have any independent effect or coercive capacity on state behavior*, according to realists.
 - a) Further, *states still negotiate outside IO frameworks*, undermining the idea that they matter
 - b) Realists would counter that *surplus economic gains will be converted into military spending/expansion, and that it's hard to communicate one's intentions* (signaling is difficult). Realists say you cannot overcome these problems.
- 2) Institutionalists believe that IOs can influence international politics. They are the mechanisms to *address cooperation problems* arising from competing state interests, relative power concerns, and these concerns produce problems in making and solving agreements and determining interests of other states. (See prof. Alvarez: CB pg. 134)
 - a) *IOs reduce transaction costs*- US can sit in General Assembly with all other states to vote, or talk to each state individually (more costly).
 - b) *IOs also reduce uncertainty*, meaning that states might disagree, they know they do, and are more aware of each other's interests and if they have hidden intentions.
 - c) *So IOs encourage transparency*.
 - d) *IOs also create reputation costs* through multiple iterations. If we know a state keeps violating UN agreements, this is a cost, and nobody would want to deal with you.
 - i) Big problem with this assumption is that we don't know where this reputation latches on- the state, the leader, or the parliament?
 - e) *IOs provide better monitoring opportunities*.
 - f) *IOs help legitimate action* (when states act within the framework of an IO), because the IO seal of approval suggests there was some compromise on substance, even by powerful states. If that's the case, there is some legitimacy to the process and its outputs. So we should be very interested in IOs and their institutional arrangements.
 - i) This is a more positive view of IOs, and a more constructivist approach.

g) *IOs are information providers for member states*

3) Constructivists- IOs create rules that shape norms and behavior.

- i) *legal rules have cultural content*, you don't appreciate that IOs have normative components/justifications,
 - (1) Constructivists challenge the realists/institutionalists' approach that IOs only matter so long as they produce more economically efficient outcomes.
- ii) *IOs have their own interests and personality* independent of those the states give them, through the interests of bureaucrats, and these factors govern behavior and shape state interests. Constructivists acknowledge that states create IOs, but they say once created, these IOs create personalities of their own.
 - (1) Thus IOs are not empty shells for the furtherance of state interests, to aggregate preferences, and organize strategic interactions. They don't fit under a principal-agent model.
- iii) *The larger cultural environment shapes the interests of IOs and member states.* This environment may change, and may alter the interests of IOs and the states.
- iv) *IOs derive their power from the legitimacy of their legal authority and control over technical expertise and information.* And the IO is depoliticized, technical, and neutral.
 - (1) How do IOs exercise power? Through classification and organization of knowledge. Defining who is a refugee, for example. Defining the term affects how we think about them, and thus how we act. Defining who's an enemy combatant, who's a prisoner of war. These definitions matter.
 - (2) IOs also fix meaning. What does security mean? Is the environment included in security concerns? What is development? Is it only economic? IOs spread models of behavior and good governance. Human rights regime expansion as prime example. Defining human rights. The idea of rule of law.

4) What renders IOs efficient?

- a) *Centralization*: Centralization allows IOs to manage operations, distribute consequences across organization, so you can pool risk and assets.
 - i) And then (constructivist) there is norm creation in IOs (like responsibility to protect) and assisting in coordination.
- b) *Independence* could legitimate state actions, encouraging centralization. Some institutionalists believe independence provides some form of neutrality or impartiality, some form of arbitration
- c) *This achieves operational autonomy.*
 - i) Institutionalists thus think of IOs as independent of the states that created them

Role of International Non-Governmental Organizations (CB pgs. 136-139)

- 1) Corporations and NGOs are increasingly playing a role in international law.
- 2) Slaughter (CB pg. 136)- a strong proponent of democratic peace theory- she says we have a new world order in which states are disaggregated
 - a) Individual entities within the state are forming networks, and these networks, people with shared interests, can in turn bind the states they are in (so states being

bound by internal, not just external, sources). These networks are also transnational.

- b) The question is what is the evidence that this is actually working? Slaughter wrote in the 1990s, when there was an explosion in NGOs, but is there any evidence that they are doing things to bind states? There is no question of the general decrease of sovereignty of nation-states, but that's not necessarily due to non-state actors.
- 3) NGOs (CB pg. 137-138)
 - a) *Some view them as just agents of the states*, and many states are actually organizing NGOs (GONGOs- Government Organized NGOs), and in such a case they may lose their legitimacy or effectiveness.
 - b) *But NGO involvement may produce productive conflict* (like over human rights protection) or destructive conflict.
 - i) Matthews (NGOs and climate change) and Boyle and Chinking (CB pg. 139): they seem to be very optimistic of NGO ability to influence/shape international law.
(1) But when state interests are locked in, it's hard for NGOs to dislodge them- just look at the lack of progress vis-à-vis climate change since 1997.
 - ii) *NGOs also diffuse information and make the world aware of violations of int'l law*

The United Nations (CB pg. 465)

- 1) UN founded in 1945, successor to League of Nations- international governing body for world affairs.
 - a) *Membership*: Starts with 61 signatories and five permanent UNSC members, now we have 192 members, and functions through contributions.
 - b) *Organization*:
 - i) 5 principal organs: General assembly, Security Council, International Court of Justice, Economic and Social Council, and the Secretariat.
 - ii) 15 specialized agencies (WHO, UNICEF...).
 - c) *Purpose/function*: To maintain international peace and security, take effective collective measures, suppress acts of aggression, bring about peace in conformity with principles of justice, and mitigate conditions that may lead to war.
 - d) How would they do that? Chpt. 1, Article 2: settling disputes peacefully, states should refrain from threat/use of force against territorial integrity of another state in a manner inconsistent with UN. All members shall give UN every assistance in any action it takes in accordance with the UN Charter. (Response to failure of League of Nations to take actions against Italy and Germany).
- 2) General Assembly: Main deliberative organ (CB pg. 466)
 - a) *Membership*: representatives of member states (each with one vote)
 - b) *Voting*: important questions require 2/3 majority to pass, otherwise simple majority
 - c) *Functions*:
 - i) To consider and make recommendations on cooperation/maintaining int'l peace and security
 - ii) To discuss any question relating to int'l peace and security
 - iii) To initiate studies and make recommendations to promote int'l peace and security
 - iv) To receive and consider reports

- v) To consider and approve the UN budget
 - vi) To elect non-permanent UNSC members
 - vii) To elect, jointly with UNSC, judges to the ICJ
- 3) Economic and Social Council: principal organ to coordinate the economic and social work of the UN and its family of organizations/agencies. (CB pg. 470)
 - a) *Membership*: The council has 54 members.
 - b) *Voting*: Voting is by simple majority.
 - 4) Secretariat: Carrying out the UN's day-to-day activities, it is composed of int'l staff working in duty stations around the world (CB pgs. 470-472)
 - a) *Membership*: 25,000+ staff members
 - b) *Leadership*: UN Secretary General heads the Secretariat
 - i) Elected for a 5-year, renewable term
 - ii) Equal part diplomat and advocate, civil servant and CEO, the *Secretary General* is a symbol of the UN and a spokesman for the interest of the world's peoples, in particular the poor and vulnerable. He can help take public and private steps to mitigate the emergence of conflict
 - 5) International Court of Justice: The principal judicial organ of the UN. It settles legal disputes between states and gives advisory opinions to the UN and its specialized agencies. (CB pg. 470) (more on the ICJ on page 83 of this outline)
 - 6) United Nations Security Council- responsible for maintenance of peace and security among countries. UNSC makes *binding decisions* that member states have agreed to carry out via *resolutions*. (CB pg. 467-469)
 - a) *Membership*: 15 member states: 5 permanent members (UK, US, Russia, China, France) and 10 non-permanent members (rotating on 2-year terms).
 - i) 5 permanent members hold veto powers over substantive but not procedural resolutions. They can block adoption of a resolution, but not debate of that resolution.
 - ii) *If there is no veto, a resolution is passed with at least 9 votes.*
 - b) *Election to UNSC*: Non-perm. members are voted in by GA on regional basis, and presidency of council is rotated each month.
 - c) *Peacekeeping function*: The UNSC often sends peacekeepers to enforce cease-fire or peace agreements or mitigate rising tensions.
 - i) These are not soldiers of the UN- these are volunteered by members of UN with goal to prevent war/make future wars impossible.
 - ii) Peacekeeping was very ineffective during the Cold War. Following end of Cold War, there is an explosion in idea of using them.
 - 1) Assessing the UNSC
 - a) *Why is UNSC membership reform difficult?* (CB pgs. 475-478)
 - i) 5 permanent members will likely veto it (need their unanimous support).
 - ii) It's also hard to figure out who the new members would be (and this would be a caustic issue).

- iii) There is a risk of gridlock with a larger membership. Plus, the more you add veto countries, the gridlock would possibly be extreme.
- iv) Further, UNSC permanent membership was never about regional representation- it was about who would be most able to maintain int'l peace and security
- v) Who exactly should join? It might provoke a bitter debate that could infuriate some (ex. If South Africa gets picked, Egypt will be resentful...)
- b) *Is the UNSC used when it would really matter?*
 - i) It's not always clear that the world uses the UNSC when its interests were at stake (especially when the big powers' interests is at stake).
 - (1) Marshall plan was not done through UN.
 - (2) EU was not negotiated through UN.
 - (3) US-Israel relations are conducted outside UN.
 - (4) G20/G8 meetings occur outside UN framework.
 - ii) So the cynical story is that the UN and UNSC is used when the powerful states want to use it.

2) Assessing the UN

- a) *Is there a tension between the politics and ideals of the UN?*
 - i) Perhaps: Diplomats understand goals need to be more moderate/pragmatic. But the ideal is that of collective security and dispersed risk and equality of interests/shared interest.
- b) *Why did the US back the creation of the UN?*
 - i) Some speculate that it was strategic: US knew its power would decrease over time, so it set up institutional structures to stay powerful (exploiting the resulting path dependency)
 - (1) There is an argument that it should favor lots of international agreements/reform now before the rise of, say, China.
- c) *What assumptions are necessary for an organization promoting collective security to function?*
 - i) All states must agree that peace is valuable
 - ii) States, through the organization, have the ability to act, and all states must be willing to act even when their interest isn't at stake, and even contrary to their interests, states must be willing and able to determine who the aggressor is (it's very hard to define the 'crime of aggression' under international law)
 - iii) We must assume that the aggressor is weak enough that the collective is able to stop it,
 - iv) We must assume that states are just as willing to push their friends as they are punishing their enemies
 - v) States must be willing to provide troops under the command of another country
 - vi) We also assume that public debate is preferable to discrete, secret negotiations (maybe it raises the stakes and promotes transparency).
- d) *What is the impact of globalization on the UN's mission?*
 - i) Benefits: converging self-interest, diffusion of norms, the fact that because of more integrated economies, costs of war spread outside a country's borders, information sharing.

- ii) *Negatives*: We have new problems from transnational non-state actors (terrorists), and the UN is not designed to address issues to non-state actors. (pg. 477).

The World Trade Organization (CB pgs. 490-491)

Until 1995, the WTO was known as GATT

- 1) Criticism: There is a theory in IR that many free trade agreements require some sort of hegemonic power that wants free trade and can enforce free trade. So when we have free trade movements there is usually a strong hegemonic power behind it.
- 1) GATT: General Agreement on Tariffs and Trade (pg. 491)
 - a) *Purpose*: to promote trade liberalization through the elimination of both tariff barriers and nontariff barriers (such as quotas and quantitative trade restrictions)
- 2) GATT's (flawed) dispute resolution mechanism
 - a) No timetables for resolution
 - b) Rulings were easy to block (rulings were adopted by consensus, so a single objection could block a ruling), and there were limited rules of dispute settlement, so often they were settled bilaterally.
 - c) The system was nullification and impairment driven. The idea was that if a state violated GATT, some country will feel screwed over and would bring the case to GATT.
 - d) This dispute framework involved a multilateral resolution of disputes (all get involved)- this makes it hard to come to a resolution, especially if you need consensus.
 - e) This mechanism did not include separate judicial arm- all matters were within the powers of the GATT contracting parties. The original GATT system was established before we thought about the role of international courts.
 - f) Over time, the system developed a little more formality, procedures developed, formal panels were designated, and would rely on rules from other agreements and come up with guidelines for guidance.
 - i) Problem is that this system still retained an important diplomatic character, and panel recommendations still did not have binding power. So it just added a level of bureaucracy.
- 3) Why the move to the WTO?
 - a) There was a growth in importance of intellectual property and other new economic areas that showed GATT was not suited to address these new important problems, so WTO was established.
 - b) Desire to strengthen the dispute resolution mechanism
 - i) The principles of a rule-based systems were lost with GATT. Under GATT, it was mostly a story about politics and power.
 - c) Key difference between GATT and WTO:
 - i) *The WTO's dispute settlement body is strengthened under WTO*
 - ii) *WTO much more ambitious than GATT*

- 4) The WTO: It builds on the same assumption of GATT that trade is good. Why? You lock in countries, cost of war goes up, etc. GATT was much less ambitious, however. The WTO came out of the 86-1994 Uruguay round of negotiations. Why is trade good? Story of comparative advantage.
- a) Key Functions of WTO: (CB pgs. 496-497)
 - i) Reducing discrimination and furthering market-access opportunities in international commerce
 - ii) Formulating rules for the conduct of international trade
 - iii) Promoting transparency in national trade laws and regulations
 - iv) Settling commercial disputes
 - b) Key foundations of WTO (and requirements for membership) (CB pg. 491)
 - i) To apply trade barriers on a non-discriminatory basis
 - ii) To limit tariffs
 - iii) To refrain from circumventing trade concessions through the use of other barriers to trade
 - iv) To settle trade conflicts through its own dispute resolution process
 - c) *Some trade behavior is outlawed*:
 - i) States cannot engage in dumping- subsidizing goods of a company, then the company sells it overseas below market price and kills other businesses.
 - d) *WTO regulations also do not invalidate regional agreements/barriers* from, say, EU to ASEAN.
 - e) *WTO rules also include exceptions*: There are health and safety limitations and exceptions. These are measures to protect the environment, people, and animals. There needs to be sufficient scientific evidence to prevent a good from going to market, and through the least restrictive means.
 - f) *Decisions are by consensus*.
 - g) *Joining WTO requires 2/3 votes*.
- 5) The WTO's Dispute resolution mechanism:
- a) *Negative consensus*- Need everyone to overturn a decision, as opposed to one vote.
 - i) This changed the calculus. Rather than needing one vote to block a decision, you need everyone to come along in blocking it, which is almost impossible.
 - b) *It created a fixed timetable*- 60 days to discuss, 45 days for a dispute panels, 6 months for a final report, 60 days for the appeal to the report, and 120 days for the appeal process to end and the adoption of a solution.
 - c) *Provisions in case of non-compliance*: If another state refuses to abide by a decision, then *limited trade sanctions* in the same sector as the violation can be imposed. There body can also *authorize retaliation*.
 - d) *How is it working?* It is working pretty well, as most cases settle. And there are also some examples of countries losing a case before the WTO, including the United States.
- 6) Current issues regarding WTO (CB pgs. 495-496)
- a) We have a *Doha round of negotiations, that's been going on for over a decade, without no settlement*.

- i) Most countries agreed that primary focus of round should be on improving the economic situation in developing states
 - b) *Rise of regional trade agreements* and a substitution effect away from the WTO
 - c) *The rise of developing countries*, so it's not just the US, EU, and Japan (who created the WTO in 1994, mostly) dictating terms. They no longer have the capacity to pass their preferences- we see the rise of China, Brazil...
 - i) it's also a problem within developing countries. Brazil, China, and India have different economies, so even their interests vary. For Brazil, it's agriculture, for China, it's manufacturing goods, whereas India is focused on services. These are different areas.
 - ii) So we see a more powerful developing country block, yes, but with fractured interests.
 - d) Another problem- *past rounds dealt with low-hanging fruit, and now you have the more difficult problems.*
- 7) What are the likely future challenges facing the WTO?
- a) *Challenge of linking trade with other issue areas*: Using trade to leverage change in other areas.
 - i) US does this with China- linked amount of trade allowed to China with human rights.
 - ii) This politicizes trade and renders it a more contentious subject
 - b) *Another is harmonizing free trade with environmental protection.*
 - i) Desire for more environmental regulation, but also more trade liberalization. Concern: that there be a race to the bottom vis-à-vis environmental regulation (Delaware effect).
 - c) *Another issue is harmonizing free trade with labor protections*
 - i) Low wages give developing countries comparative advantage. They can't be paid to raise wages- that's what's making them better off! So often the only thing one can do is that NGOs name and shame the low wages.
 - d) *Another issue is untangling the link between free trade and corruption/human rights violations*
 - e) *Another issue is linking trade to better health standards*
 - f) *Another issue is linking free trade with anti-trust activities/competition law, and even investment arbitration.*
 - g) *The issue of the increase in non-trade barriers*, like selling products below cost in US market because it's being subsidized by home government, putting US companies out of business (dumping).
- 8) Common Criticisms of WTO:
- a) *Rich countries and double standards*: Rich countries have been able to maintain quotas in some areas, and manage to do so for goods coming from developing countries like textiles.
 - b) *Another issue is that rich countries have wanted to maintain protection of agricultural market while asking developing countries to open theirs.*
 - i) Issue of Brazil: wants access to US market, but they're closed, so why should we open ours?

- ii) Case of the Common Agricultural Policy and its protectionism in the EU
- c) *Many developing countries also don't have the capacity to follow negotiations or lack the resources to be actively involved, providing rich countries with an advantage*

The Bretton-Woods Institutions: The IMF and the World Bank (CB pgs. 479-489)

1. Background/overall structure:
 - a. *Founding:* In a 1944 wartime conference in Bretton Woods, New Hampshire, representatives of 44 countries formed the IMF and World Bank to promote economic cooperation and development (CB pg. 479)
 - b. *Membership:* Both started with 44 members, now up to 185.
 - c. *Both are supposed to be apolitical.* The World Bank Charter, for example, specifies that "Only economic considerations shall be relevant to their decisions." (CB pg. 479)
 - d. *Leadership:* The Head of the World Bank is usually American, and the Managing Director of the IMF is usually European
 - e. *Voting structure:* US has 16+% of the voting weights in IMF and World Bank. IMF usually works by consensus, so US sometimes has veto power.

The IMF

2. History and changing functions of the IMF:
 - a. In mid 20th century, the issue of greatest concern was stability of exchange rates- exchange rates were fixed, and the IMF was created to manage these.
 - b. Over time, with movement away from fixed exchange rates. By 1973, all major currencies were floating in value (CB pg. 482)
 - c. Then the IMF goals began to change (Constructivists would argue that this is an example of how context shapes the character and function of an international organization)
3. Current IMF functions
 - a. Now, the IMF provides funds and encourages new private bank lending to heavily indebted countries in exchange for IMF-supervised economic restructuring within those countries (CB pg. 483).
 - b. The IMF provides liquidity (funds) for states to finance their deficits. They also provide policy advice. They also monitor for risks in the world economy. States make contributions to IMF, based on quotas pinned to the size of their economy (CB pg 484).
 - c. IMF conditions to qualify for loans: usually focus on increased taxes, reductions in government employment, reduction in subsidies, sale of government enterprises, devaluation of currency, and limitations on the importation of luxury goods (CB pg. 485)
4. IMF Criticisms
 - a. *Washington consensus promoter-* privatize everything, cut gov't spending, increase taxes- this can often aggravate a crisis. (CB pg. 485-486)
 - i. Asian Financial Crisis example: In Asian financial crisis, it made things worse. Before that, concerns from developing countries that conditions for loans were too stringent. Too much focus on austerity.

Too much lending could also be a problem- it creates bubbles- so you can have bubbles like property booms.

- b. *Double standard*: many of the IMF's conditions are things that developed countries don't do themselves
- c. *Creation of bubbles*: When the IMF lends too much, it creates bubbles- so you can have bubbles like property booms.
- d. *Creating a moral hazard*: If countries know they can always get finances from IMF, they won't be as responsible in their monetary policies. A further moral hazard: who loans to states when they need to finance their deficits? They loan to banks. Banks feel the IMF will bail out a country (really, the banks), so the banks give loans even when conditions are too risky. Thus, banks may make some bad loans, because they're not concerned, because they know they will be bailed out.
- e. *Lack of legitimacy/domination by US and western powers*: Because of voting structure based on a small set of powerful countries.

The World Bank

1. World Bank History and Changing Role (CB pg. 481)
 - a. The creation of the International Bank for Reconstruction and Development (IBRD- also known as the World Bank) was designed for rebuilding of postwar Europe.
 - b. With time, as reconstruction in Europe became less necessary/important, its role changed
 - c. The World Bank developed into a more comprehensive development and social organization, looking to developing world.
2. Current Function/Role of World Bank
 - a. The World Bank now promotes economic and social progress in developing nations by providing financial and technical assistance
 - b. How does it do this? Project financing (building dams, massive structures, assisting in getting the necessary investment- they essentially are guarantors)
 - c. The World Bank borrows money from the private international capital markets, backed by guarantees of its member governments
 - i. Thus, when a private bank lends to, say, Nicaragua, it knows loan is backed by member states of WB)
 - d. World Bank loans are often at low interest rates.
 - e. The World Bank's institutional structure is similar to the IMF: weighted voting, funds through quotas, head of WB: norm is US, IMF head: norm is European.

FORMS OF JURISDICTION (Casebook 637-670; 671-698)

1. 3 types of jurisdiction:
 - a. *Jurisdiction to prescribe/legislative jurisdiction*: The authority of a state to make substantive laws applicable to particular persons and circumstances (CB pg. 638)

- b. *Jurisdiction to enforce*: The authority of a state to use the resources of government to induce or compel compliance with its law (CB pg. 639)
 - c. *Jurisdiction to adjudicate*: The authority of a state to subject particular persons or things to its judicial process (CB pg. 639)
- 2. Nations can, by international agreement, decide who has jurisdiction independent of the above bases, because states can override customary international law via agreements (except for jus cogens norms))
- 3. The types of jurisdiction are customary- How are they enforced in the US?
 - a. Whether these limits get enforced in a nation's courts depends on the status of customary international law in domestic system.
 - b. *In US, statutes supersede inconsistent customary international law* (but not jus cogens norms). As a result, if Congress clearly intends to violate international law governing prescriptive jurisdiction (extraterritoriality), it can do it and US courts must enforce the statute. That's the general rule
 - c. *Charming Besty Canon* (a canon of construction)- Courts will try to interpret statutes, if possible, so as to not violate international law. If Congress is clear that it will violate international law, there isn't much the charming Betsy cannon can do. But if statute is ambiguous, then the canon of construction does some work, because it can be read consistently with international law.
 - d. *Presumption against territoriality*: Assumption that Congress statutes are usually intended not to regulate behavior abroad.

Prescriptive Jurisdiction

- 4. There are five customary bases of prescriptive jurisdiction:
 - a. *Territorial jurisdiction*
 - b. *Nationality*
 - c. *Protective principle*
 - d. *Passive personality*
 - e. *Universal jurisdiction*
- 5. Restatement Section 403: *The exercise of prescriptive jurisdiction must be reasonable* (CB pg. 659)
 - a. Factors to assess reasonableness: comity factors.
 - b. *Comity*: states paying respect to other sovereigns, doing things to ensure a frictionless international environment. There is a question about whether comity is part of customary international law or not.
- 6. Territorial jurisdiction: The exercise of jurisdiction by a state over property, persons, acts, or events occurring within its territory is clearly conceded by int'l law (CB pg. 640)
 - a. *History*: In 19th century, states were seen as having near-absolute territorial jurisdiction within their borders, with perhaps exception to acts of aggression warranting response. Over 20th century, became accepted that

territorial jurisdiction could be extended beyond borders if actions have effects within borders.

- b. Subjective Territorial Principle: States arrogated to themselves a jurisdiction to prosecute and punish crimes commenced within their territory, but completed in the territory of another (CB pg. 641)
 - c. Objective territorial principle (sometimes known as effects doctrine): states apply their territorial jurisdiction to offences or acts commenced in another states, but a) completed within their territory, or b) producing gravely harmful consequences to the social/economic order within the country (CB pg. 641)
 - i. Example: someone stands at border, and shoots someone within.
 - d. It has been customary to assimilate to state territory:
 - i. The maritime coastal belt or territorial sea
 - ii. A ship bearing the flag of the state wishing to exercise jurisdiction (see *Lotus* case below)
7. Nationality Jurisdiction: Another well-accepted basis for prescriptive jurisdiction- a state generally has the sole authority over its nationals, even when they are in other countries or effect foreign states. It may be exercised on the basis of one of the following principles: (CB pg. 643; 670)
- a. Active nationality principle- Jurisdiction can be assumed by the state of which the person against whom the proceeding are taken, is a national.
 - b. Passive nationality (or personality) principle: Jurisdiction is assumed by the state of which the person suffering the injury or a civil damage is a national.
 - i. Historically less accepted, asserts criminal jurisdiction over aliens who injure nationals abroad. This is generally thinking about terrorism. Ex: American killed by Afghani terrorists while in Germany.
8. Protective Principle Jurisdiction: Another fairly well-recognized basis for jurisdiction- each state may exercise jurisdiction over crimes against its security and integrity or its vital economic interests (CB pg. 643)
- c. One objection: this is completely subjective, and that state can determine what is going to harm its security. The devil's in the details.
 - d. Restatement Section 402, subsection 3: "*A state has jurisdiction to prescribe law with respect to... (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.*" (CB pg. 684)
1. Universal Jurisdiction (CB pgs. 694-696)
- a. Restatement Section 404: "*A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.*" (CB pg. 694)
 - b. *Examples*: Spain relied on this in its attempts to bring Pinochet to justice in Spain (this could also be characterized as passive personality principle).

Grounds for British not to turn him over to Spain: House of Lords- he was old and sick. Belgium also asserted universal jurisdiction for war crimes and genocide that led to high profile investigations. Some treaties appear to allow for universal jurisdiction, but those treaties only apply to parties to treaties.

- c. *Universal jurisdiction in the US* (CB pg. 694-695): Several human rights/terrorism related statutes that invoke a form of universal jurisdiction *criminalizing* aircraft hijacking, hostage taking, committed outside the US by citizens of other countries as long as the offender is found in the US (CB pg. 695).
 - i. There are a few instances of US engaging in criminal prosecutions based solely on universal jurisdiction. In response to the crimes occurring in Darfur, Congress did enact an extension of a federal genocide statute to make it universal, so we could prosecute people who commit genocide if they ever got into the US. For the most part though, most federal prosecutors don't invoke cases based on universal jurisdiction.
 - ii. Now, *there are civil cases based on universal jurisdiction*, namely based on the Alien Torts Statute- which allows aliens to bring civil suits in US courts against private parties for violation of customary int'l law and treaties to which the US is a party.

- d. *What are the costs/benefits of Universal jurisdiction?*
 - i. *Benefits*: Universal jurisdiction is set up especially for cases where no domestic legal redress for a heinous crime is possible. Not every state could reach a wrongdoer, and at least in principle, they could now, which might increase the likelihood of prosecuting egregious crimes. There might be some deterrence value, but it's unclear how it would work. Moving beyond general principles of int'l law (like universal jurisdiction) is costly when 192 parties are involved. How do we know what type of international terrorism rises to universal jurisdiction? What about genocide? Codifying universal jurisdiction beyond a principle of international law could be costly.
 - ii. *Costs*: In practice, the exercise of universal jurisdiction has been fraught with politics. Plus, this reinforces a practice of litigation rather than plaintiff diplomacy- the latter might work better in many cases, and litigation is costly. In South Africa after apartheid, a truth and reconciliation committee was established, but many didn't come forward to reveal wrongdoing to commission because of fear of liability in US courts. Additionally, not many countries have passed universal jurisdiction statutes. Belgium does, UK sort of does, US sort of does.

TERRITORIAL JURISDICTION CASES (CB pgs. 641-668)

1. Recall: The exercise of jurisdiction by a state over property, persons, acts, or events occurring within its territory is clearly conceded by int'l law (CB pg. 640)

Lotus case (1927)

(Since this ICJ case, it's been accepted that on some instances, nations can regulate extraterritorial conduct with if it produces domestic effects, though there remain questions about how substantial and intended the effects should be (here, the Court invokes the effects doctrine, also known as the objective territorial principle), finding that national ships count as an extension of domestic territory). (CB pgs. 641-642)

1. International Court of Justice, 1927
2. *Facts:* French mail steamer, the *Lotus*, collided at sea with a Turkish collier, and the Turkish ship sank and eight Turkish nationals died
3. *Claim:* Turkey instituted proceedings against the *Lotus* officer of the watch, basing the claim to jurisdiction on the fact that the effect had occurred on the Turkish collier, which was a portion of Turkish territory. France protests and initiates proceedings before ICJ: France argued that the event occurred on the French ship, which is its own territory
4. *Decision:* The ICJ, by majority opinion, held that the action of the Turkish authorities was not inconsistent with international law, since Turkey can have extraterritorial jurisdiction because of domestic effects. So ICJ said France must show that jurisdiction was unjustified, not on Turkey to show that it could exercise jurisdiction.
5. *Outcome:* Since case, it's been accepted that on some instances, nations can regulate extraterritorial conduct with if it produces domestic effects. There remain questions about how substantial and intended the effects should be.

Hartford Fire Insurance Co. v. California (1993) *(dealing with Jurisdiction to prescribe-weakens presumption against extraterritoriality and assigns less weight to comity concerns)* (CB pg. 661-664)

1. SCOTUS, 1993, Justice Souter delivers majority opinion
2. *Facts of Case:* Group of states, as well as private parties, allege that a group of London reinsurance companies conspired to restrict type of insurance packages available in US (provided by primary insurers in the US). The London reinsurance companies wanted to offer only claims made coverage made during policy period, not occurrence coverage (risk coverage).
3. *Issue:* Does the US Sherman Antitrust act applies to London Insurance companies?
4. *Majority Opinion* (CB pg. 661-662)
 - a. What does the majority say about presumption against territoriality?
 - i. Here, *majority argues that it was clear Sherman Act is intended to have extraterritorial application.*
 - ii. Is the extraterritorial application is reasonable? to do so, we focus on whether there is conflict with British law. How does majority assess this? It looks to see whether one could comply with both laws: majority says you can, because:
 1. That is, Britain may not criminalize a behavior Sherman act does, but Britain doesn't require criminalization- so you can

comply with both. This shows scope of US law abroad is pretty broad.

- b. Court leaves open question of whether comity is ever an appropriate measure of determining extent of extraterritorial jurisdiction of Sherman act.
 - c. *Consequences*: overrules *American Banana Co. v. United Fruit Co.* (SCOTUS, 1909) case- that case suggested there was a strong presumption against extraterritoriality. Harford fire: more permissive vis-à-vis extraterritorial application
5. *Scalia's Dissenting Opinion* (CB pg. 662-663)
- a. Is there clear congressional intent to apply act abroad? Not in the act itself, but it's been well settled that it is.
 - b. Step 2: Charming Betsy must be taken into account- we must read the Sherman antitrust act in a manner that does not violate international law, given that it doesn't explicitly do so.
 - c. Reasonableness- not met by majority opinion: The case concerns British companies, and the acts took place in Britain, in compliance with British law. The British have a more permissive regime. So extraterritorial application of Sherman act in this case could cause conflict. Thus, the jurisdiction exercise here is unreasonable.
 - d. Scalia's approach is much more territorially friendly, and it grants more importance to Comity than the majority opinion

F. Hoffman-La Roche Ltd. v. Empagran S.A. (2004) (*moving away from majority opinion in Hartford Fire case towards Scalia's dissenting opinion- more weight given to comity concerns and reasonableness of extraterritorial reach*) (CB pg. 665-668)

- 1. SCOTUS 2004, Justice Breyer delivers majority opinion
- 2. *Facts*: There is an international price-fixing conspiracy outside US that at least in part effects within the US.
 - a. Foreign and domestic vitamin manufacturers and distributors had engaged in a price fixing conspiracy allegedly in violation of Sherman Antitrust Act- conspiracy allegedly raised the price of vitamin products to US and foreign customers
- 3. *Question*: Does the Sherman Antitrust Act capture this activity, given that the people involved were foreign and effect is mostly foreign?
- 4. *Majority opinion*: Actions are not covered by Sherman antitrust act.
 - a. The question is whether foreign plaintiffs, alleging effects occurring outside the US, could bring suit in US courts (CB pg. 667)
 - i. If domestic plaintiffs had brought suit, then the actions could have possibly been covered by Sherman Act
 - b. Court essentially adopts a Scalia approach, rejecting a class of cases, based on independent foreign harm that won't be covered by Sherman antitrust act.
 - i. Reasoning: We don't want to leave Courts to adjudicate on a case by case basis. In this case, adjudicating on comity considerations case-by-case basis would be too complex.

Morrison V. National Australian Bank (2010) (*Case where Court strongly reaffirmed the presumption against extraterritoriality*) (CB pgs. 650-657)

1. SCOTUS 2010, Justice Scalia delivered majority opinion
2. *Facts*: National Australian Bank's security shares are traded across the world, but not in US. However, NAB has a home mortgage subsidiary based in Florida. Foreign investors file suit in US Court alleging misconduct in connection with securities traded on foreign exchanges.
3. *Question*: Does the 1934 Securities Exchange Act cover the actions by NAB and its subsidiary?
4. *Majority Opinion*: Court declared that is lacked jurisdiction for foreign claimants that bought shares in a foreign exchange. That the conduct was US based by the NAB's subsidiary was not enough to claim jurisdiction.
 - a. To come to this conclusion, the Court would usually consider a two-part cause-effect test:
 - i. Cause-effect test: Was there enough domestic action, and enough domestic effect, for jurisdiction? The Court decides to reject the conduct and effect test- it is too difficult to calculate effects.
 - b. Instead, the Court argues that we need to move to a stricter transaction test:
 - i. Transaction test: Where was stock purchased? It was purchased in Australia. We can't turn to the fact that stock manipulation occurred in US- it is not sufficient to grant jurisdiction. The relevant transaction is purchase of securities, and the purchase occurred outside the US.
 - c. *Consequence*: Strong presumption against extraterritoriality.
5. *Steven's Concurrence with judgment*: Stevens agrees with the final judgment but disagrees with reasoning. He says why reject two-part test? It works. This new transaction test is too narrow. (CB pg. 654-657)
6. Takeaway Post-Morrison Case:
 - a. When interpreting statutes, US Courts will apply *presumption against extraterritoriality*
 - i. The presumption is that a statute does not regulate conduct abroad, absent clear indication from Congress that extraterritoriality was its intent.
 - ii. Even when presumption is overcome, and Congressional intent is clear, the statute might not be specific about extent of its extraterritorial reach.
 - iii. In considering the extent of the extraterritorial reach, we look to the *Charming Betsy Canon*- interpreting statutes such that they don't violate international law..
 - iv. Courts will look to the *reasonableness* of the extraterritorial reach
 1. Warranted under spirit of comity, even if not required under int'l law.
 2. These would be voluntary determinations (non-binding considerations meant to alleviate int'l frictions)

- b. *With regards to both securities and anti-trust cases, when action is brought by foreign claimants alleging foreign independent harm, there is no extraterritorial application of US law*
- c. *When a statute is clear, courts will apply it, regardless of customary international law or presumption against extraterritoriality*

NATIONALITY JURISDICTION CASES

Recall: Another well-accepted basis for prescriptive jurisdiction- a state generally has the sole authority over its nationals, even when they are in other countries or effect foreign states. (CB pg. 643; 670)

Societe Fruehauf Corp. v. Massardy (1968) (*Case in France: The outcome was that US nationality jurisdiction cannot include a US-majority-owned foreign subsidiary, because that would mean that the subsidiary would be subject to dual regulation*) (CB pg. 671-672)

1. Court of Appeals of Paris, 1968
2. *Background:* The International Emergency Economic Powers Act (IEEPA), passed by US Congress, vastly expanded the US's extraterritorial jurisdiction (CB pg. 671).
 - a. Goals of regulations: Foreign subsidiaries of US firms prevented from activity that would go against US foreign policy- foreign subsidiaries prevented from exporting equipment and technology to US enemies even if it was completely of foreign origin, so long as the products happened to have technology covered by a licensing agreement from an American company (perhaps that owns a patent over a small part).
 - b. The EU reaction? Negative- unbelievable expansion of extraterritoriality. After all, technology has no nationality, and neither do goods. Why would US and EU countries disagree about building of Soviet pipeline from US to Western Europe?
 - c. In the end, the US ended up rescinding the regulation
3. *Facts of Case:*
 - a. Fruehauf-France, a company based in Paris, was 70% owned by Fruehauf Detroit. So this is a case of an American company that controls a French subsidiary, 70-30. Five of Fruehauf-France's directors are American, 3 are French.
 - b. French subsidiary signs contract for tractors and trailers later disclosed to be going to the People's Republic of China.
 - c. The US Treasury wants Fruehalf-France to cancel their order, under consequences of heavy criminal penalties. Thus, the Treasury pressures Fruehauf Detroit to cancel deal, alleging that it would violate the Foreign Assets Control Regulations
 - d. The directors of the French subsidiary petition to appoint a temporary director to actually carry out contract.
4. *Decision:* The Court of Appeals of Paris upholds the appointment of a temporary administrator

- a. It argues that there was a social interest such that French subsidiary doesn't go out of business (loss of jobs, etc.) and to help it honor the contract.
- 5. *Outcome:* The US Treasury doesn't do anything- it recognized that the extraterritorial application of the IEEPA in France would be met with resistance. The idea: *US nationality jurisdiction cannot include a US-majority-owned foreign subsidiary, because that would mean that the subsidiary would be subject to dual regulation.*

Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V. Case (1983) (*Case in Netherlands: The US IEEPA regulation is not justified under the nationality principle so far as it brings within its scope companies of other than US nationality.* (CB 673-675))

1. District Court of the Hague, 1983
2. *Facts:*
 - a. Sensor is a Dutch 100% subsidiary of Geosource International, a Texas-based corporation.
 - b. Sensor enters into negotiations with French company (CEP) regarding Sensor supplying it with some products (Soviet union lurking in the background. The contract is concluded. Then, the US IEEPA regulations come in.)
 - c. Sensor pulls out of contract because of US's IEEPA regulation, and French company sues.
3. *Decision:* Dutch district court decides that Sensor could not be excused from performing a sales contract under Dutch law because of the U.S. *IEEPA export regulations* *The US IEEPA regulation is not justified under the nationality principle so far as it brings within its scope companies of other than US nationality.* (CB pg. 677)
 - d. Court references the 1956 Treaty of Friendship, Commerce, and Navigation between US and Netherlands that states that a company organized under a country's territory under that country's law having its administration in that country has that country's nationality.
 - e. The protection principle also can't be invoked, because US security isn't being threatened by a pipeline- it might be different if we were talking about warheads.
 - i. (US was concerned that the USSR was building a natural gas pipeline to Europe- US wanted to harm USSR economy by preventing pipeline from being built)

The Helms-Burton Act and Cuban Nationalization (CB pgs. 678-682)

4. The 1996 Helms-Burton Act allows civil claims by US nationals whose property was nationalized by Cuba under Castro against anyone who traffics in that property- selling, buying, leasing, or engaging in any commercial activity using said property.
 - a. For example, the land might be a hotel now, and if you stay in it, you could be sued in US court. Obviously, proving that you stayed in the hotel would be difficult, but it's possible.
 - b. *The act is an example of the extraterritorial application of law for foreign policy ends. This is the use of torts for social and foreign policy.* It's an attempt to embody property with nationality, property that is now public property.

5. Primary vs. Secondary boycotts
 - a. A *primary boycott* prevents your own nationals from trading with some country- this is perfectly legal.
 - b. But the Helms-Burton Act is a secondary boycott- It forces foreign countries and their nationals not to trade with an individual country
 - i. Andreas F. Lowenfeld argues this is unreasonable (CB pg. 681)
 - ii. IN this case, the harm was caused by government of Cuba, not the foreigners that are 'trafficking' or benefitting from the property that a long time ago was under private American ownership.
6. *State Department Position*: The US interest here is as great as any country, because majority of relevant nationals whose land was expropriated live in the United States.
 - a. Problem: State Department doesn't take into account stronger bases of jurisdiction.
7. Ultimately, the Helms-Burton Act has not become a problem, because every 6 months the president waives this part of the bill.

PROTECTIVE PRINCIPLE CASES (CB pg. 684-686)

Recall: Restatement Section 402, subsection 3: "*A state has jurisdiction to prescribe law with respect to... (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.*" (CB pg. 684)

United States v. Romero-Galue (1985)

(Case affirming the protective principle: Ship seized outside US customs waters carrying marijuana. Was there a treaty with Panama that permitted US to board ships outside 12 mile waters? There was no treaty. Does the statute (Marijuana on the High Seas Act) allow the extension beyond 12 miles? Yes, if a treaty is present. Despite the lack of treaty, the Appeals Court invokes the protective principle) (CB pgs. 684-686)

1. US. Court of Appeals, 11th Circuit, 1985
2. *Facts*: January, 1984: US Coast Guard, patrolling the waters about 350 miles off the US Coast, cited a shrimp boat having engine trouble. The Coast Guard suspected the ship was a vessel used to smuggle drugs to the US, as the waters were a regular thoroughfare for smuggling from Columbia to the US. The Coast guard boarded the ship to determine her identity, and discovered the ship was carrying four and a half tons of Marijuana. They determined the ship was Panamanian. The State Department communicated with the Panamanian gov't, and presumably with its authority, seized the ship and its crew and took them to Key West for prosecution.
3. A district court indicts the crew for violating the Marijuana in the High Seas Act of 1980. It then found that the crew did not violate the act because the possession of marijuana had taken place on a foreign vessel beyond US territorial waters.
 - a. The custom waters of the US under the Marijuana in the High Seas Act of 1980 are defined as within 12 miles of the coast.
4. US gov't appealed the decision.

5. *Decision*: Appeals Court reverses decision, finds that the crew did violate the Marijuana in the High Seas Act.
 - a. *“Even absent a treaty or arrangement [...] protective principle permits a nation to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security or could potentially interfere with the operation of its governmental functions.”* (CB pg. 686)
6. *Consequences*: Was there a treaty with Panama that permitted US to board ships outside 12-mile waters? There was no treaty. Does the statute (Marijuana on the High Seas Act) allow the extension beyond 12 miles? Yes, if a treaty is present. Despite the lack of treaty, the Appeals Court invokes the protective principle.
 - a. Note: In subsequent cases, the SCOTUS began interpreting communication between the US coast guard and the Panamanian government as constituting an arrangement sufficient to extend jurisdiction from 12 miles to farther out at sea.

United States v. Columba-Colella (1979)

(Case dealing with the protective principle, and somewhat also to the passive personality principle: namely that a state may apply law, particularly criminal law, to an act committed outside its territory by a person not its national where the victim of the act is its national. Decision is that without conspiracy, a single act by a single individual abroad does not threaten the security of the US, and isn’t enough of a basis for jurisdiction under passive personality either.) (CB pgs. 687-690)

1. US Court of Appeals, 5th Circuit, 1979
2. *Facts*: Here, the defendant, Columba-Colella (British national residing in Mexico), met a man named Keith, who wanted to sell a car, and Columba-Colella said he knew someone who was interested in buying it. Keith then informed him the car was stolen from the US, and offered Columba-Colella half of the proceeds from the sale. Columba-Colella took the keys, and agreed to meet Keith the next day. Instead of meeting Keith, he was arrested by Mexican police and brought to the US for prosecution. He was committed to Attorney General custody for 5 years. He entered a guilty plea in District Court after his motion to dismiss the case was denied.
3. *Decision*: Appeals Court reverses the District Court’s judgment that entered the guilty plea, given that *the District Court lacked jurisdiction over the case*. The Court argued that *the protective principle could not be evoked*, given that there is no threat to security of the US when a single citizen is affected. *Neither could the passive personality principle*, the Court argued that the defendant “did not conspire to steal the car, and the theft in no way depended on any act or intent of the defendant.” (CB pg. 689)
4. *Consequence*: In 1984, Congress amends a previous statute to read “whoever receives, possesses, conceals [...] any motor vehicle [...] which has crossed a State or US boundary after being stolen, knowing the same to have been stolen, shall be fined.” The act states that it applies both inside and outside US (it’s explicit), so it might have changed the ruling had it been in effect at the time. This was meant to make it more easy to prosecute cases similar to Columba-Colella. (CB pg. 691)
5. *Discussion*: Why is the act of hostage taking different from the stolen car example when we think of grounds of prescriptive jurisdiction? The arguments for protective

jurisdiction, and also passive personality, is stronger- a US citizen is directly affected.

SOVEREIGN IMMUNITY (Casebook 535-69)

1. It is widely accepted that governments have some form of immunity within the Courts of other nations.

The Absolute Immunity Era

1. Absolute sovereign immunity can be traced to the *1812 Schooner Exchange Decision* of the SCOTUS (CB pg. 536)
 - a. The US seized a French warship in 1812 while in US waters. The ship was seeking shelter in US port. US citizens stated that it was their ship that had been seized by France.
 - b. SCOTUS unanimously decided that the French government should be immune from the jurisdiction of US courts and should therefore be able to retain the vessel. (CB pg. 537)
 - c. *Outcome:* Foreign immunity applies as a matter of international custom- the armed ships of a foreign power are immune, even when in US ports. While the decision applies only to armed ships of a foreign sovereign, it was interpreted more broadly to encompass any suit against a foreign sovereign.
2. Until 1976, nothing in US statutory law required the grant of foreign sovereign immunity in US courts. It was based on common law doctrine based on international comity as interpreted by SCOTUS.
3. *The idea until 1976 was of absolute immunity.* This principle was thought to flow from the principle of the equal sovereignty of states, and that no state can sit and judge the activity of another state.

Moving towards Restrictive Immunity

1. In the early 20th century, states began adopting the restrictive approach of sovereign immunity (CB pg. 538) *The restrictive approach to sovereign immunity* is that states would be granted immunity with respect to their official/public acts, but not when acting as a private actor (ex. when signing a commercial contract), since they are not acting in a sovereign capacity here.
 - a. Note that sometimes the lines are blurred between public and private, such as when US sells treasury bonds).
 - b. Note too that it's a judicially developed doctrine
2. *Why was there a move from the absolute approach to the restrictive approach?*
 - a. *Increases in world trade and government commercial activity.* One reason seems to be that nations began to engage in commercial activities more, in large part because of an increase in world trade. That led to the creation of more government owned companies.
 - i. How would restrictive theory promote trade? It gives citizens of other countries incentives to trade with foreign governments, because it

- lessens the fear that other country will be given sovereign immunity if it reneges/violates the terms of an agreement.)
- b. *The US increasingly found itself subject to the restrictive theory of immunity in foreign courts, even though US courts would grant absolute immunity to these same foreign nations. (CB pg. 538)*
3. As sovereign immunity questions were gaining increasing valence, *courts in 1930s began giving absolute deference over when to grant immunity to executive branch. (CB pg. 538)*
 - a. The executive branch took a position about whether a particular entity was entitled to immunity, the Courts would follow that even if it contradicted customary practices. This was a change from prior practice, where Courts would simply apply customary international law, and didn't feel bound by executive preferences.
 4. 1952 Tate Letter (CB pgs. 538-540)
 - a. Written by US State Department legal adviser Jack B. Tate, announcing that *that the State Dept. would now follow the restrictive theory, giving immunity to public, sovereign acts, and not to private, commercial acts.*
 - i. The letter acknowledged that this was part of a move in general, and it would be best for US to do so as well
 - b. *Omissions in letter:* It did not specify what acts would be subject for immunity, nor did it provide criteria to distinguish between public and private acts.
 5. A Confusing regime: Following the Tate letter, the regime became confusing: The State Department made some immunity determinations and the courts made others (CB pgs. 543-544)
 - a. This did not produce consistent decisions
 - b. Uniformity was lacking, and a state wouldn't know when they would receive immunity in US Courts for sure.
 - c. The State Department had to create a mini-tribunal to address foreign claims to immunity and decide whether it should be granted. But this tribunal lacked procedural protections, and it's not equipped to receive evidence, no opportunity for appeals...it can't act as a Court.
 - d. It was still unclear when determining if act is private or public, does one look at the nature of the act or its purpose?

The 1976 Foreign Sovereign Immunities Act (FSIA)

1. 1976- Congress passes FSIA, which *codifies restrictive approach to sovereign immunity*, and transfers determination over when immunity would be granted from the State Department to Courts. *FSIA grants immunity to acts of foreign state unless the act falls under stated exceptions:* (CB pg. 543)
2. The FSIA covers suits against three types of entities: *foreign states proper, their political subdivisions, and their agencies and instrumentalities.* (CB pg. 552)
 - a. Sometimes, foreign states proper and their political subdivisions receive more protection under FSIA than do agencies and instrumentalities
 - b. To distinguish between political subdivisions and agencies/instrumentalities, Courts usually apply a "core functions test"

- (whether the functions of the entity are governmental or commercial) and a “legal characteristics test” (whether the entity can sue/be sued under its own name, contract in its own name, and hold property in its name)
- c. If the court finds that the defendant is immune because the act does not fall under one of the FSIA’s exceptions, the court automatically lacks personal and subject-matter jurisdiction. If the Court finds that the act falls under one of the FSIA’s exceptions, then the court automatically has personal and subject matter jurisdiction (assuming there is no violation of due process requirements)
3. *FSIA exceptions*:
 - a. *Expropriation* of property in violation of int’l law.
 - b. *Waiver* (the state can waive immunity so it can come before court),
 - c. *Commercial activity*: If the suit is based on act in commercial activity, and commercial activity has ties to the US.
 4. So the statute begins with presumption that states are immune, but lists a number of exceptions of immunity. A federal court has subject matter jurisdiction if indeed the particular claim is not entitled to immunity (falls under one of the exceptions under FSIA).
 5. SCOTUS stated that FSIA is the sole statutory basis for suits against foreign states.
 6. *The FSIA does not address substantive law over whether a state is liable- it is a jurisdictional statute* (if it’s a contract case, it doesn’t say what contract law would be).

FOREIGN SOVEREIGN IMMUNITY CASES

Verlinden B.V. v. Central Bank of Nigeria (1983)

(Case provides a description of the scope of the FSIA)

1. SCOTUS, Chief Justice Burger delivers unanimous opinion, 1983
2. *Facts*: The petitioner, Verlinden B.V., a Dutch company, contracted to sell Nigeria some cement. Nigerian Central Bank sets up unofficial letter through a bank in New York. After a few months, the Central Bank of Nigeria unilaterally directed the NY bank to amend all letters of credit, including the one pertaining to Verlinden, and directly notifying suppliers that payment would only be made to cement shipments approved by Nigeria two months in advance. The District Court concluded that none of the FSIA exceptions applied and dismissed the suit.
3. *Claim*: Verlinden sued the Central Bank in US District Court alleging that its actions constituted an anticipatory breach of the letter of credit.
4. *Question*: Does the act qualify as an anticipatory breach of the letter of credit, and the act fall under one of the FSIA’s exceptions, thus waiving immunity to the Central Bank of Nigeria?
 - a. *If one of the FSIA’s exceptions apply, “the foreigner shall be liable in the same manner and to the same extent as a private individual under like circumstances.”* (CB pg. 545)
 - b. SCOTUS: Usually, a statute grants courts jurisdiction, and then there is substantive law. But FSIA does both. The issue for SCOTUS is that this statute isn’t just jurisdictional, it also has a substantive component. FSIA doesn’t

refer to another substantive statute, it includes both: *“If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction.”* (CB pgs. 546)

- c. SCOTUS: Makes clear that foreign plaintiffs can bring suit against foreign states in US courts. *“The legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens.”* (CB pgs. 546).
5. *Decision:* Court of Appeals must consider whether jurisdiction exists under the Act itself. The Court had originally not found it necessary to address whether the act falls under one of the FSIA’s exceptions.

Republic of Austria v. Altmann (2004)

(The case focuses on retroactive application of activities that occur before the FSIA act was passed in 1976: the decision is that FSIA can apply retroactively for conduct that occurred before 1976 so long as claim was brought after 1976. The Court bases this judgment on the fact that the retroactivity applies to procedural, instead of substantive component, of the FSIA). (CB pg. 562-566)

1. SCOTUS, Justice Stevens delivered the opinion, 2004
2. Facts: Maria Altmann filed this action against Austria and its instrumentality, the Austrian gallery. She sought to recover paintings that were expropriated after Nazi Germany’s annexation of Austria. The Austria gallery eventually obtained possession of the paintings. After the war, Austria voided all Nazi confiscations. A lawyer representing Altmann and other heirs of the paintings allegedly agreed, without Altmann’s consent, to acknowledge the validity of the Austrian gallery’s possession of the paintings. A journalist later found paperwork where the gallery acknowledged that the paintings were not consensually donated. After suing in Austrian courts proved too costly, Altmann then forum-shopped and sued in US federal district court.
3. *Claim:* Altmann sought to establish jurisdiction over her claims by the expropriation of property exception in the FSIA.
4. *Question:* Whether to apply FSIA act retroactively before 1976, or even before the 1952 Tate letter (back to a time when US adhered to absolute theory of immunity, subject to some deference to the executive). If the suit had taken place pre 1952, the absolute immunity regime would prevail, and Altmann wouldn’t have a claim in the US.
 - a. On retroactivity- normally courts presume that statutes do not operate retroactively, since they may upset settled expectations.
 - b. The executive argued that the expropriation of property exception should not apply retroactively.
5. *Decision:* The FSIA suit applies to foreign sovereign even to suits based on conduct pre-dating the Tate letter. In the Verlinden case, the SCOTUS says law is procedural and substantive. *Here, the SCOTUS says act’s retroactivity applies to procedure and not substance*, so it can apply retroactively (trumps the presumption against retroactivity).
 - a. SCOTUS finds evidence of intent for the FSIA to apply retroactively: *“this language is unambiguous: Immunity “claims”- no actions protected by*

immunity, but assertions of immunity to suits arising from those actions- are the relevant conduct regulated by the Act; those claims are “henceforth” to be decided by the courts...” (CB pg. 564)

- b. is not definitive about when to apply retroactivity... plus, did Nazis have a settled expectation of getting immunity in US courts, and that’s why it expropriated? Probably not. SCOTUS sees FSIA retroactivity is procedural, that it applies to all “claims brought henceforth...”
- c. SCOTUS rejects executive preference for no retroactivity- it reaffirms that executive can file statement of interest telling court whether it would prefer court to/abstain from exercising jurisdiction in some case.
 - i. Dissent (Kennedy/Rehnquist/Thomas): majority opinion weakens the force of the rule against the retroactivity of statutes. (CB pg. 566)

Mohamed Ali Samatar v. Bashe Abdi Yousuf et al. (2010)

(Case concerning whether the FSIA is applicable for foreign officials: the decision is that the FSIA does not govern immunity for foreign officials. The case establishes that immunity of officials is governed by common law, which is heavily deferential to executive (State Department preference). Immunity for states, on the other hand, is statutory and governed by FSIA.) (CB pgs. 554-559)

1. SCOTUS, Justice Stevens delivers court opinion.
2. *Facts:* From 1980 to 1990, the petitioner, Samantar served as Minister of Defense or PM of Somalia. Respondents, including Yousuf, were subject to torture and extrajudicial killing during this time, and say that he knew or aided and abetted these acts. Brought suit under Alien Torts Statute, among other groups. The district court dismissed under FSIA- says act fell to individual acting in his official capacity under the foreign state. Court of Appeals reversed- said FSIA doesn’t apply to individual foreign government agents like Samantar. Petitioner appealed to SCOTUS.
3. *Question:* Does the FSIA provide the petitioner with immunity from suit based on actions undertaken in his official capacity?
4. *Decision:* FSIA refers to “agency or instrumentality,” “entity” or an “organ” of a foreign state- doesn’t seem to apply to a person. *The FSIA doesn’t cover officials, because the types of defendants listed are all entities.* (CB pg. 556)
 - a. SCOTUS cites the Restatement, which says that immunity could extend to officials, but “if the effect of existing jurisdiction would be to enforce a rule of law against the state.” Since the FSIA doesn’t clearly suggest petitioner should have immunity, then the petitioner does not.
5. *“We do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity. But it does not follow from this premise that Congress intended to codify this immunity in the FSIA.”* (CB pg. 558)
6. *“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”* (CB pg. 558)
 - a. In other words, there is a 2-part common law test: First, you look to statute- does it grant immunity to the individual? In this case, no. Then, you look to State Department- does it specify that the individual should be given immunity? In this case, no again.

7. Conclusion: no immunity for Samatar.
8. *Outcome*: immunity of officials is governed by common law, which is heavily deferential to executive. Immunity for states, on the other hand, is statutory and governed by FSIA act.

DIPLOMATIC AND CONSULAR IMMUNITY (Casebook 604-25; 634-36)

Inviolability of Embassies and Consulates

1. Embassies and consulates are generally immune under international and US law- in fact, they receive special status in the US and abroad.
2. Diplomatic mission and consular properties are not extensions of the sending state's territory- in fact and in law, they are within the territory of the receiving state.
3. Restatement Section 466: "*The premises... of an accredited diplomatic mission or consular post [...] are inviolable, and are immune from any exercise of jurisdiction by the receiving state that would interfere with their official use.*" (CB pg. 605)
4. US is also a party of the Vienna Convention on Diplomatic Relations (1964) and the Vienna Convention on Consular Relations (1963), which reiterate the inviolability of embassies and consulate. *Inviolability* includes:
 - a. *Refraining from acting within the diplomatic premise* (immunity from searches, seizure, attachment, execution, or any other enforcement jurisdiction that might interfere with the premise's official use) (CB pg. 605)
 - b. *Protecting diplomatic premises from private interference* such as protests (CB pg. 605)
5. Reason cited for inviolability of these premises: functional necessity- diplomats would otherwise encounter additional obstacles to fulfilling their responsibilities. (CB pg. 605)

Personal Immunity for Diplomats

1. Diplomatic personal inviolability in some form is universally recognized. (CB pg. 607)
2. Vienna Convention on Diplomatic Relations (1964) covers immunity for diplomats. Article 31 states:
 - a. *Diplomatic agents receives immunity from the receiving state's criminal, civil, and administrative jurisdiction except in cases of an action relating to "any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."* (CB pg. 607)
 - b. In other words, immunity is not granted to trade or business engaged in for personal profit
3. Note that *a state can waive immunity for its diplomat*, and states can pressure one another to do so.
 - a. If the state refuses, the receiving state can take away diplomat's accreditation, so they become a *persona non grata*, so they have to leave. In theory, the diplomat could then be prosecuted at home. *Persona non grata* status is usually related to conduct not consistent with diplomatic status (such as espionage).

Personal Immunity for Consuls

1. Substantially different from diplomatic immunity
2. Covered under Vienna Convention on Consular Relations (1963):
 - a. Like diplomats, career consuls are generally inviolable. Honorary consuls are accorded immunity for their official acts but remain liable for their acts not related to consular business (CB pg. 608)
3. Note, again, that a state can waive immunity for a consul
4. *But overall, consular officers have less immunity than do diplomats*- They are generally subject to more commercial suits than diplomats. Their immunity of arrest does not apply pursuant to a grave crime and subject to a decision by a competent judicial body (this is stated in the Vienna Convention).

HEAD OF STATE IMMUNITY CASE

United States v. Noriega (1997)

(In this case, the US Court of Appeals does not grant Noriega head of state immunity from his conviction for drug trafficking- he was never the constitutional head of state of Panama, and the executive showed clear intent not to grant him foreign official immunity). (CB pgs. 609-611)

1. US Court of Appeals 11th Circuit, 1997
2. *Facts*: Manuel Noriega was head of Panamanian Defense Forces. He is indicted in US court in 1988 while he is still in Panama for drug trafficking. Noriega was never acknowledged by the US to be the Head of State- it was first Arturo Dellavalle, and, later, after a disputed president election which Noriega nullifies, Guillermo Endara. On December 1989, Noriega declares a state of war against the US. President Bush sent troops to Panama. This war did not last long. He's not captured immediately, for seeks refuge in Vatican City. He was then released by Vatican to US military officials in 1990 and brought to Miami to face federal charges. A district court convicted Noriega of drug-related charges. Noriega appeals. (CB pg. 609-610)
3. *Question*: Does head of state immunity apply to Noriega and his actions?
4. *Decision*: *Noriega's conviction for drug trafficking is upheld and he is denied head of state immunity.*
 - a. The US had never recognized his government or him as the head of state. Moreover, international law doesn't require recognizing him.
 - b. He also wasn't the constitutional head of state based on Panamanian constitution.
 - c. Out of principles of international comity, courts generally defer to the executive regarding immunity of foreign officials. In this case, "*by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head of state immunity.*" (CB pg. 611)
5. Important notes:
 - a. *Where does jurisdiction stem in this case?* Protective principle- preventing drugs from being trafficked into the US- a danger to US national security.

- b. *Was it legal to abduct him?* The Court's jurisdiction is not affected by how person is brought to the Court, even if it's outside the provisions of a treaty.
- c. *Was US invasion of Panama legal?* Noriega declared war on US, and US could claim that it was acting to protect the security of the US.
- d. *Panama also waived immunity for Noriega.*

The Act of State Doctrine

1. *The doctrine provides that certain acts of a foreign state will be presumed to be valid, and the court will not sit in judgment on them.* (CB pg. 613)
2. Unlike foreign sovereign immunity, which is codified by Congress by the FSIA, *the act of state doctrine is still a judicial doctrine* (CB pg. 613)
3. The doctrine was first invoked in the SCOTUS case *Underhill v. Hernandez* (1897), where the SCOTUS held:
 - a. *"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one will not sit in judgment on the acts of the government of another, done within its own territory."* (CB pg. 614)
4. *Basis for the doctrine:* the doctrine is not compelled by US law. There is nothing in US law states we have an act of state doctrine. Rather, it's based on strong territorial principle in int'l law, respect of sovereignty, and comity concerns- namely the fear of impacting diplomatic relations.
 - a. Act of state doctrine is not acquired from international law. Other nations don't follow act of state doctrine rigidly, no international tribunals require enforcement, and domestic courts don't always enforce it. It's driven more so from comity than international law.

Banco Nacional de Cuba v. Sabbatino, Receiver (1964)

(This important decision helped settle whether the act of state doctrine could cover expropriation of property via nationalization: In this case, the SCOTUS determined that the Cuban expropriation of US property was covered by act of state doctrine, arguing that the doctrine applies to expropriation claims in the absence of some treaty or when customary int'l law is unclear or contested, as it was vis-à-vis nationalization.) (CB pgs. 616-625)

1. SCOTUS, Justice Harlan delivered the majority opinion
2. *Facts:* the plaintiff is a Cuban government bank (the Banco Nacional de Cuba), and it seeks proceeds from sale of sugar. The defendant is a court-appointed receiver, Sabbatino, who represents a Cuban corporation whose stock was principally owned by US residents, and which was nationalized by Cuba. (CB pg. 616)
3. *Claim:* The defendant maintained that the Cuban bank was not entitled to proceeds, because the expropriation of property violated customary international law. The plaintiff, or the Cuban bank, argued that the act of state doctrine requires courts to presume validity of foreign sovereign acts in its own territory.
4. *Lower Court decisions:* The District Court found the Cuban expropriation decree to violate int'l law in 3 respects: it was motivated by a retaliatory and not a public purpose; it discriminated against American nationals; it failed to provide adequate compensation. The Court of Appeals affirmed the decision. The petitioner, the Cuban bank, then appealed to the SCOTUS

5. *SCOTUS discussion of Act of State Doctrine*: It is not mandated by a federal statute or by international law. Where does it stem from? A separation of powers concern- executive has prerogatives in foreign affairs, which Courts don't have. Then perhaps the Courts are not well placed to pass judgments on activities of foreign states, when it doesn't have the competency to figure out diplomatic/foreign affairs consequences. (CB pg. 622)
 - a. So the Court shifts away from comity considerations to separation of powers as justification- invoking a domestic common law rule stemming from separation of powers considerations.
5. The court then discusses the Bernstein exception- the idea that if the executive says to go decide a case, then the Court would do this. The Court rejects the reverse Bernstein exception- that is, the implication that the act of state doctrine would only apply when the executive would ask it to. Court- there might be reasons why executive would stay silent even if they think act of state doctrine would be appropriate. So it doesn't want to force executive to take position. (CB pg. 623)
 - a. *In this case, the State Department urged application of act of state doctrine, saying although it had condemn the act by Cuba, it did not want judicial resolution of the case.*
6. *SCOTUS holds that act of state doctrine could apply even if acts allegedly violate international law, provided that customary international law rule is contested and uncertain*
 - a. This was certainly the case with expropriation "*there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate property of aliens.*" (CB pg. 621)
7. *Decision: The Court of Appeals Decision (that the Cuban expropriation violated international law and wasn't covered by act of state doctrine) is reversed and the case is sent back to District court.*
8. *Consequence*: Congress was unhappy with the decision, and reversed it by passing legislation stating that the act of state doctrine could not be applied to expropriation of property, and even provided the legislation with retroactive effect.
 - a. This Congressional amendment was interpreted narrowly- only applies to property or proceeds located in the US. In Cuba, the proceeds were in the US, after all. But in most cases of nationalization of foreign property by a foreign state, we would expect proceeds to mostly stay in that country, so the amendment would lose much effect.
9. *Additional notes*:
 - a. If US had signed treaty with Cuba against expropriation, and then Cuba expropriated, then US Courts would not have been able to apply the act of state doctrine. What's the logic? If it's a treaty, nations have agreed to the principle. But customary international law is contested and unclear.
 - b. *General rule of thumb: The more consensus there is about a customary int'l law rule, the closer it becomes to something binding, the less reason to apply the state doctrine.* Basically, this argument suggests that less controversial customary int'l rules are not applicable to act of state doctrine. Some courts have suggested doctrine should not apply to egregious violations of human

rights (especially *jus cogens*), given that there is sufficient consensus that they violate int'l law.

FSIA vs. Act of State Doctrine: Similarities and Differences

1. *Similarities:*

- a. Both apply to foreign sovereigns.
- b. Both express some sort of deference to acts of foreign sovereigns.
- c. Both seek to reduce international friction.
- d. Both constitute federal law binding on states (even though one is a statute, and one is common law springing out of separation of powers concerns.)

2. *Differences:*

- a. FSIA does not preclude application of act of state doctrine. Doctrine - since it is common law, it can still be applied.
- b. The FSIA is a comprehensive jurisdictional and substantive act, and concerns subject-matter jurisdiction. For the act of state doctrine, the court needs to have jurisdiction independently.
- c. The FSIA applies to acts committed anywhere, whereas the act of state doctrine to foreign domestic acts.
- d. For the FSIA, the acts of immunity can be waived. The act of state doctrine cannot be waived, indeed, courts are reluctant to permit waiver -how could another state waive a doctrine that's born out of domestic constitutional order? How can another state come in and say: don't worry about infringing on executive powers?

STATE RESPONSIBILITY (Casebook 721-44)

1. Background: Before WWII, int'l law was mostly applied to monitoring relations between states, along with the state and foreign nationals within their territory. After WWII with the rise of int'l human rights law, int'l law standards are increasingly brought to bear on the conduct of a state within its territory vis-à-vis its own nationals. (CB pg. 721)

Law of Diplomatic Protection

2. An important antecedent to int'l human rights law is the law of diplomatic protection:
 - a. *It is the view that when a state injured an alien, that injury was viewed as an injury to the state whose national was injured. This creates a claim for the harmed state.* (CB pg. 721)
3. Equal treatment with nationals? The standard is not necessarily equal treatment to nationals, for the state may mistreat its nationals. Rather the test is, broadly speaking, whether aliens are treated in accordance with standards of civilization. This is not a precise standard, it is the standard of the "reasonable state"- 'reasonable' according to the notions accepted by modern civilization. (CB pg. 722)
 - a. On the other hand, if a state treats its nationals well and provides them with broad civil and political rights, an alien cannot demand equality with them

4. Severity of the abuse: According to the US-Mexican Claims Commission, “*the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize the insufficiency.*” (CB pg. 723). Foreign nationals must also be protected by the state (CB pg. 726).
 - a. *Criticism*: The wrong must amount to something serious. But what is an outrageous wrong?
1. Exhaustion of local remedies: The alien must usually exhaust remedies available under local law- this principle is based on the belief that a state is entitled to have an opportunity of doing justice in its own way before international justice is demanded by another state. We also need finality, and since we don’t have an appeal body for international tribunal, we want to go to domestic system first.(CB pg. 723)
 - b. However, it is not necessary to exhaust local remedies which, though theoretically available, would be ineffective or insufficient to redress the injury (ex. Corrupt tribunals). (CB pg. 723)
5. Bond of Nationality: The bond of nationality between the claimant state and the person injured must exist at the date of the original injury and continue until the date of judgment or award. (CB pg. 724)
6. Denial of Justice: Erroneous or even unjust judgments do not necessarily amount to denial of justice that entitles a state to evoke diplomatic protection: the abuse must be particularly severe: corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, execution without trial, long imprisonment before trial, grossly inadequate punishment, etc. Note that a denial of justice can originate in private conduct. (CB pg. 724)
 - a. ICCPR/UDHR provide a list of possible examples of denial of justice (see CB pg. 725)
 - b. *Criticism*: Some look at denial of justice as an attempt by more developed countries to civilize foreign legal systems. It’s the bigger states who are most able to invoke denial of justice for their nationals, and will use domestic standards to decide what a denial of justice would be. So the bar for what a “flagrant abuse” is the bar set up by more powerful, Western states.
7. Why are states responsible for diplomatic protection, and not governments?
 - a. Because of the complications that would arise from regime change- if there is a regime change, then the government can retract diplomatic protection. Since we want to solve the problem of inconsistency of application of rules, we look to states, independent of changes in government.
8. When responsibility for diplomatic protection arises: Restatement (Section 711) outlines the responsibility of a state to provide for diplomatic protection in the following cases:
 - a. An act of another state that violates a human right
 - b. An act by another state that violates a personal right that under int’l law a state is obligated to respect
 - c. An act of a foreign state that violates the right to property or economic interest protected under international law

Attributing Conduct to a State

1. There are several key principals used to decide when conduct can be attributed to a state: (CB pg. 728)
 - a. *A state acts through people exercising the state's machinery of power and authority. Therefore, acts or omissions of official organs, agents, political subdivisions are attributable to the state.*
 - b. *Int'l law does not attribute conduct of a non-state character, such as acts or omissions of private persons, mobs, associations, insurgents, and unions, to a state as such.*
 - c. *A state may act through its own independent failure of duty or inaction when an international obligation requires state action in relation to non-state conduct.*
 - i. Ex. Iran, 1980- Rebels storm the US embassy- Iranian government did not protect the premises. So it not only violates physical premises, but inviolability of diplomats.
 - d. More details provided in CB pgs. 729-30, referencing a draft resolution of the UN's International Law Commission (ILC), which provides a non-binding list of when acts are attributable to state
2. Comparing the ICJ's Nicaragua Case with the ICTY's Tadic case: Effective control or overall control?
 - a. *Nicaragua case: US was providing financial assistance to the contra rebel forces- the question was whether activities of the contras would be attributed to US. US was training and arming the contras- and the contras were engaging in activities violation of international humanitarian law. Is arming in violation of international law? The ICJ says yes, it is a violation of a duty not to use force, or interfering in the sovereign affairs of another country. But, was the conduct of the contras, including their human rights violations, attributable to the US? No, because there was no evidence that US had effective control of the contras. Arming and financing is not necessarily effective control. (CB pg. 731)*
 - i. *Takeaway: while supplying arms and training to a rebel group violates international law, for their actions to be attributable to the foreign state that is supporting them, the state has to assert "effective control" of the rebels*
 - b. *Tadic case: In this case before the International Criminal Tribunal for the Former Yugoslavia, the question was whether actions of Bosnian Serb forces could be attributable to the Federal Republic of Yugoslavia. Decision: the Court determined that it is sufficient for attribution "that the Group as a whole be under the overall control of the State." (CB pg. 732)*
 - i. *Takeaway: there seems to be some tension with the Nicaragua case- the ICTY's "overall control" test is broader than the ICJ's "effective control" test*
 - ii. In a subsequent case before the ICJ, the ICJ then came back and said that effective control test would remain in effect, not overall control, because the effective control test "has the major drawback of

broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility.” (Bosnia and Herzegovina v. Serbia and Montenegro, 2007). (Cb pg. 732)

- c. *Why the difference between the two tests in between the two cases?*
 - i. It could be a power story- since the US more powerful, attributable actions were interpreted more narrowly in the *Nicaragua* case.
 - ii. Also, there was tension between US and ICJ at the time, and the ICJ concerned with its legitimacy, and it may have been concerned with US and its willingness to comply.
 - iii. There has also been a large shift between the *Nicaragua* case and the *Tadic* case- we’ve gone from Cold War to USSR collapse, and in *Tadic* case there is a more positive view of international law, thus there might have been a greater willingness to promote more expansive rules.

Expropriation and Property Rights

1. It’s accurate to say that now, vis-à-vis expropriation, the Washington Consensus has prevailed. The Restatement, Section 712, outlines when a state is responsible, under int’l law, for expropriation that: (CB pg. 734)
 - a. *Is not for a public purpose,*
 - b. *Is discriminatory, or*
 - c. *Is not accompanied by provision for just compensation* (an amount equivalent to the value of the property taken and paid at the time of the expropriation, or with interest added if paid after the taking of the property)
2. Note that new states, as well as communist states during the Cold war, see expropriation as part of a state’s legitimate right to self-determination.
3. *Bilateral Investment Agreements:* Fearing expropriation, and particularly of the potential impact that it would have on American companies abroad, the US has entered bilateral agreements with each country of concern (Bilateral Investment Agreement (BIT) that contain provisions protecting property rights (CB pg. 736; see also for example of a BIT between the US and the Ukraine)
4. *Questions remain over what constitutes expropriation:* If you re-zone, is that tantamount to expropriation? What about imposing stringent building codes? What about occupational safety and health standards or environmental standards?

Nationality of Individuals

1. Restatement, Section 211: *“For purposes of international law, an individual has the nationality of a state that confers it, but other states need not accept that nationality when it is not based on a genuine link between the state and the individual.”* (CB pg. 740)
 - a. Restatement comment: international practice accepts informal intercessions by states on behalf of individuals who are not its nationals
 - b. Restatement comment: *“Genuine link”:* Jus solis or jus sanguinis citizenship are universally accepted as based on genuine links. Voluntary naturalization

is generally recognized but may be questioned where there are no other ties to the state, such as a period of residence in the state.

2. Nottebohm case (Liechtenstein v. Guatemala, 1955, ICJ): (CB pg. 740-741)
 - a. *Facts*: We have a German, Nottebohm, who is a longtime resident of Guatemala, who took a brief trip to Lichtenstein, and took nationality there. Once WWII broke out, Guatemala treated Nottebohm as enemy of state, since it did not recognize his Liechtenstein nationality. Lichtenstein tried to provide Nottebohm with diplomatic protection and brought the case before the ICJ.
 - b. *Decision*: The ICJ rules there was no genuine link:
 - i. *The Court referred to international arbitral decisions holding that the state to which a dual national has stronger ties is the one entitled to extend protection against third states.*
 - c. Note that to become Lichtenstein citizen, you must renounce your other citizenship (and German citizenship would have been invalidated anyway). So Nottebohm is in a quasi-state of statelessness; Nobody can exercise diplomatic protection.

Nationality of Corporations

1. Restatement (Section 213): *“For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.”* (CB pg. 741)
 - a. This is the traditional rule- the corporation has the nationality of the state where it was created.
2. Restatement Comment: *“a state may refuse to treat a corporation as a national of the state that created it, and reject diplomatic protection by that state, where there is no “genuine link” between them.”* (CB pg. 741)
3. Restatement Comment: *“In some circumstances, other states may treat as analogous to nationality the fact (i) that the shares of a corporation are substantially owned by nationals of that state; (ii) that the corporation is managed by an office within that state, or (iii) that the corporation has a principal place of business in that state.”* (CB pg. 741)
4. Multinational corporations have yet to achieve special status in law, and many issues relating to discerning their nationality remains.
5. Barcelona Traction case (Belgium v. Spain, 1970, ICJ): (CB pg. 742):
 - a. *Overview*: A corporation founded in Canada that had sought Canadian diplomatic protection before could not seek protection from Belgium for expropriation from Spain even though most shareholders were Belgian, since the corporation was incorporated and based its headquarters in Canada.
 - i. This would have been a more interesting case if Canada had not previously exercised diplomatic protection. If it hadn't happened, you'd have an interesting split- Canada with the incorporation, Belgium with the shareholder majority

- ii. In other words, *even though it may seem that the ICJ privileged the state of incorporation rather than the state of link, it's possible that the corporation's previous exercise of diplomatic protection may have tipped the scales.*
- b. Note: a set of non-binding, draft articles by the International Law Commission state that when corporation is controlled by nationals of another state or the seat of management and financial control of corporation are located in another state, that state shall be regarded as the state of nationality (CB pg. 744)
 - i. Recall that this convention is not yet binding, but it looks like this is what we're moving towards.

HUMAN RIGHTS I- BACKGROUND, MAJOR INSTRUMENTS, UN SYSTEM (Casebook 744-71)

1. History: The internationalization of human rights (CB pgs. 744-747)
 - a. *The treatment of states' own citizen used to not be issue of int'l law.*
 - b. With respect to foreign nationals, *a standard against the denial of justice emerged*, which was not universally ascribed to, but still produced some level of fair treatment. Sometimes it even resulted, paradoxically, in better treatment for foreign national than own citizens.
 - c. *Treatment of foreign nationals was important for the evolution of customary rules on the minimal standard of foreign national treatment.*
 - i. But all considerations regarding how to protect foreign nationals were political: they were negotiated through inter-state agreements usually dealing with egregious violations.
 - ii. Concerns only mounted when there was a special domestic constituency in one country with relationship to foreign national that possessed lobbying power.
 - iii. Some states also imposed agreements on smaller states to get treatment of foreign nationals up to standard (US did this in Central/Latin America).
 - d. *Some incidents began to start connecting to this idea of foreign national protection with providing some codified international standard of human rights protection:*
 - i. Concern during Russian pogrom riots in Russia and Ukraine against Jews, which were sparked by conspiracy theories over the murder of Czar Alexander.
 - ii. The Armenian genocide
 - iii. German justification for invading the Sudetenland in western Czechoslovakia- Hitler alleged attempt to protect foreign nationals.
 - iv. Movement for abolition of slavery.
 - v. Formation of the International Labor Organization (ILO).
 - e. *Are these good examples of the development of human rights norms or is there something else at work?*

- i. The abolition of slavery, for example, grants some states comparative advantage.
 - ii. The ILO could be seen as a Cold War tool to counter spillover of socialism.

- 2. More on the abolition of slavery, and the first human rights courts?
 - a. Fight started in the early 19th century- ban on slave trade passed in the British Parliament in 1807.
 - b. In the US, slavery arguably continued in the form of prison labor and sharecropping. Yet the anti-slavery movement in US is considered most successful human rights movement ever.
 - c. Between 1817 and 1871, bilateral treaties between UK and other countries (including US) led to international courts trying to suppress slave trade (arguably the first human rights courts).
 - i. Made up of judges from other countries, these courts could seize and condemn any ship that carried slaves. More than 600 cases were brought forth, and 80,000 slaves were released. As many as 1 of 4 slave-carrying ships were eventually brought to court.
 - ii. So we see a sense of altruism, concern for the human person, and even the creation of international enforcement bodies, developing.
 - 1. Some of the push was religious, sure, but still, the human rights discourse might predate WWII.

- 3. Chronology of the human rights movement:
 - a. First, we see the rise of the anti-slavery movement.
 - b. Second, we see responses to various genocides, the creation of the Minority Treaties at the Post-WWI Paris Peace Conference
 - c. Many people think that origins of the Post-WWII human rights movement came out of Roosevelt's 4 freedoms speech: Freedom of speech, of religion, from fear (of invasion), and freedom from want (food, health, etc.).
 - i. Note that freedom from want is a positive right- something the state has to provide.
 - d. Then the Nuremburg trials held Nazi government officials accountable for human rights abuses during WWII
 - i. This leads to the development of criminal liability for crimes against humanity and state liability for crimes against a state's own citizens.

- 4. The UN Charter: it sets out a variety of "purposes" of the United Nations. *It lists human rights protection in Articles 1, 55, and discusses enforcement in article 56:* (CB pg. 747)
 - a. Article 1: "...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."
 - b. Article 55: "respect for the principle of equal rights and self-determination of peoples" and, further, the UN shall promote "higher standards of living, full employment, and conditions of economic and social progress," "solutions of

international economic, social, health, and related problems,” and “universal respect for, and observance of, human rights and fundamental freedoms.”

- c. Article 56: all members of the UN “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

The Universal Declaration of Human Rights (UDHR)

5. Approved unanimously in 1948, with eight abstentions. (CB pg. 749)
6. Does the UDHR have legal binding force?:
 - a. Louis Sohn argues that the UDHR ‘expressed more forcefully rules that were already recognized by customary international law. Under the latter view, the Declaration would possess a binding character.’ Further, “the Declaration thus is now considered to be an authoritative interpretation of the UN Charter.” (CB pg. 749)
 - b. *Sohn’s position is not the dominant view, given that the UN Charter provides power to interpret its position to the ICJ.* However, clearly the UDHR has been a discursive focal-point for the human rights movement
7. Are the rights included in the UDHR reflective of ‘Western’ values?
 - a. Argument that they are western-centered: Prof. Matua says that “*The fact that half a century later human rights have become a central norm of global civilization does not vindicate their universality. It is rather a telling testament to the conceptual, cultural, economic, military, and philosophical domination of the European West over non-European peoples and traditions [...] Its emphasis on the individual egoist as the center of the moral universe underlines its European orientation.*” (CB pgs. 749-750)
 - b. Argument that they are not western-centered: Prof. Geldon says that “*The Declaration... was far more influenced by the modern dignitarian rights traditions of continental Europe and Latin America than by the more individualistic documents of the Anglo-American heritage [...] Though its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in a “spirit of brotherhood” and ends with community, order, and society.*” (CB pg. 750).
 - c. Third view: It doesn’t matter, because countries accept these values: Prof. Donnelly: “*the moral equality of all human beings is strongly endorsed by most leading comprehensive doctrines in all religions of the world [...] People, when given a chance, usually (in the contemporary world) choose human rights, irrespective of region, religion, or culture.*” (CB pg. 751)
8. How are the values of the UDHR enforced?
 - a. *The 1975 Helsinki Accord:* the West would recognize the borders of the Eastern bloc as legitimate, suggesting that they would not take steps to interfere within the USSR, in exchange for human rights commitment by the USSR and eastern bloc.
 - i. Some say the West lost out, others say that this was crucial of the fall of communism, given that the Act became a discursive tool “you signed up for this, why aren’t you protecting these rights?”

- b. Through a series of conventions and associated enforcement mechanisms, laid out below

The International Covenant on Civil and Political Rights (ICCPR)

1. Composed of 53 articles, entered into force in 1976, 167 parties, and ratified by US (CB pg. 752)
 - a. It has a negative liberty basis: freedom from interference from the state, rather than obligations to the individual.
 - b. Some of the rights include the right to self-determination, protection against discrimination, a right to life, prohibition on torture and slavery, procedural rights concerning arrest, trial, and detention, a right of privacy, and rights of association and assembly. (CB pg, 752)
 - c. Negative isn't always right: to choose your leader, the state has to have elections (so some positive rights are included in the document order to ensure the negative right).
 - d. US has ratified this Covenant, but with the reservation that the ICCPR cannot do anything that would violate the constitution (like limiting some types of speech)- so constitution is the ceiling vis-à-vis the rights
2. Enforcement of the ICCPR: The Human Rights Committee
 - a. Established to monitor state compliance with the treaty, the Committee has 18 members, elected and nominated by the parties to ICCPR. (CB pg. 752)
 - i. Members are obligated to submit periodic reports to the Committee describing the measures they have taken to give effect to the rights enumerated in the ICCPR
 - ii. Committee then issues "concluding observations" about the country reports as well as suggestions in ways the country can improve its human rights practices
 - b. The 1976 First Optional Protocol to the ICCPR- empowers the Human Rights Committee to consider communications from individuals concerning alleged violations to the ICCPR. (CB pg. 753)
 - i. US has not ratified this protocol
 - c. The Human Rights Committee on Reservations to the ICCPR:
 - i. *In General Comment 24, issued in 1994, the Human Rights Committee controversially declared that The Vienna Convention on the Law of Treaties' provisions regarding reservations "are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically [...] concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place."* (CB pg. 755)
 - ii. *The Committee argued that the compatibility of a reservation with the object and purpose of the ICCPR must be established objectively, and this "necessarily falls to the Committee" rather than the parties.* (CB pg. 756)
 1. The US vigorously objected to General Comment 24, as did Britain and France, and even the UN International Law

Commission was critical of it. For the US criticism, see CB pg. 756.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR)

1. Took effect in 1976, and has been ratified by 160 parties. It includes 31 articles. The US signed the covenant in 1977 but has yet to ratify it. (CB pg. 752)
2. The Covenant movement away from 'core' rights to what may be considered secondary rights. These tend to be more positive rights, including provisions for paid leave, leisure
3. Importantly, the ICESCR include language for the parties to employ all appropriate means and available resources for the "*progressive realization*" of the enumerated rights, so their realization is much more gradual than those of the ICESCR (it could take time to garner the resources and create the infrastructure to ensure positive rights). (CB pg. 754)
4. The Committee on Economic, Social, and Cultural Rights: the monitoring committee for the ICESCR established in the late 1980s (CB pg. 753)
 - a. It issues general comments, reports (known as "concluding observations"), about the practices of specific countries.
 - b. In 2008, the GA approved the Optional Protocol to the ICESCR which, upon entering into force, will allow the Committee to consider complains from individuals or groups alleging violations of the convention
5. Is there a tension between the ICCPR and the ICESCR?
 - a. Both focus on the role of the state, but ICESCR requires the state to be strong (given its need to provide positive rights), but for the ICCPR, you want the state to be weak or non-interfering.
 - b. The tension is that if you fear that it's the state that's the threat to human rights, empowering the state, as the ICESCR requires, might backfire.
 - c. There is also a tension between individual rights and communitarian rights, even though it might not be as strong as it first appears.

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)

1. Background: the term "genocide" was coined by Lemkin, who was a polish Jew who lost 49 relatives in the holocaust.
2. The Convention entered into force in 1951, and has been ratified by 141 parties, including the United States (that ratified the treaty in 1988). (CB pg. 757)
3. The convention makes genocide as jus cogens and international crime: "*whether committed in a time of peace or in time of war, is a crime under international law which they [the parties] undertake to punish.*" (CB pg. 757)
4. Definition of Genocide: Any of the following acts "committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such": (CB pg. 757)
 - a. Killing members of the group
 - b. Causing serious bodily or mental harm to members of the group

- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
 - d. Imposing measures intended to prevent births within the group
 - e. Forcibly transferring children of the group to another group
5. Punishable offenses under the convention include: (CB pg. 1105)
- a. Genocide
 - b. Conspiracy to commit genocide
 - c. Direct and public incitement to commit genocide
 - d. Attempt to commit genocide
 - e. Complicity in genocide

Other Important Human Rights Instruments

1. The Convention on the Elimination of All Forms of Racial Discrimination: Took effect in 1963, has been ratified by 174 parties, including the US in 1994 (CB pg. 757-758)
 - a. It obligates parties to “*prohibit and eliminate racial discrimination in all its forms*”
 - b. Racial discrimination is defined as “*any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin*” with the purpose to prevent the equal exercise of human rights and fundamental freedoms (CB pg. 758)
2. The Convention on the Elimination of All Forms of Racial Discrimination Against Women (CEDAW): In force in 1981, ratified by 186 parties, excluding the US, which has signed, but not ratified, the treaty.
 - a. Defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose or impairing or nullifying” the equal exercise of human rights and fundamental freedoms (CB pg. 758)
3. Convention on the Rights of the Child: In force in 1990, ratified by 193 parties. The US has signed but not ratified it. (CB pg. 758)
 - a. Defines a child as anyone under the age of 18. Convention on rights of the child.
 - b. *Two Optional Protocols to the Convention*: Prohibiting child soldiers, child prostitution, and child pornography. Both have been ratified by the US.
4. Convention Relating to the Status of Refugees: In force in 1951, and its 1967 protocol gave universal scope to the rules of the convention. 144 parties have ratified both the convention and the protocol, and the US is a party to the protocol. (CB pg. 759)
 - a. It pledges not to expel refugees to places where they might fear bodily harm (refoulement)
 - b. It defines a refugee as a person which “*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and*

is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” (CB pg. 759)

Implementing/Enforcing Human Rights Treaties

1. For some, these documents constitute binding human rights documents for all states. *But enforcement has been less successful, as it would limit state sovereignty-human rights protections require interference. Two problems to their enforcement:*
 - a. *One problem is the lack of reciprocity to bind states.* With diplomatic immunity, the logic is of reciprocal protection. But with human rights, there is no reciprocal incentive. Trade also has a reciprocal component. Human rights treatments lack this.
 - b. *Another problem is the overuse or reservations, declarations, and understandings (RUDs) to the treaties:* Interestingly: countries with least abuse often have most reservations/resistance in these mechanisms.
2. What are the tools for enforcement?
 - a. *National courts-* an example is the Alien Tort statutes in the US, where aliens can bring suit for violations of customary international law relating to human rights or to human rights treaties to which the US is a party.
 - b. *Universal jurisdiction conceptions-* but this hasn't been used much.
 - c. *The ICC-* has jurisdiction for crimes against humanity, for genocide, for war crimes, but so far, it has not been very successful.
 - d. *Political enforcement:* This includes economic sanctions or humanitarian intervention based on the concept of the 'responsibility to protect.'
 - i. But such acts are costly, and they are often used to justify for aggression (ex. Iraq).
 - e. *UN pressure-* The UN as a forum to apply pressure and shame and blame.
 - i. There are some questions, however, about the UN's legitimacy. For example, half of GA resolutions regarding human rights violations focus on Israel. There are 0 on China, and 0 on Chechnya and Russia. So UN is not necessarily a fair player.

UN Promotion of Human Rights: From ECOSOC's Human Rights Commission to the Human Right Council

1. The UN Charter established the UN's Economic and Social Council (ECOSOC) to "set up commissions... for the promotion of human rights." (CB pg. 761)
2. ECOSOC thus established the Human Rights Commission empowered to examine, monitor, and publicly report on human rights situations.
3. In 1996, the Commission was disbanded, largely due to criticism that member states did not join the commission to strengthen human rights, but to protect themselves against criticism and to criticize others.
4. The Human Rights Council replaced the Commission in 2006: with 47 member states, 3 year terms, and states are elected by the GA, the council has the responsibility to promote universal respect for human rights. (CB pg. 761)

- a. In electing members, states are to “take into account the contribution of candidates to the promotion and protection of human rights.”
- b. But states in the Council still vote on regional lines, and so you still have a council whose membership isn’t quite committed to human rights.

Human Rights and Customary Int’l Law: What should the focus be, and what the role of NGOs?

1. Argument in favor of focusing on opinio juris: Prof. Tomuschat (Cb pg. 763)
 - a. We can’t observe practice for human rights like other aspects of customary international law. Some human rights violations are not easily observed (even if over time we can gain that capacity to better monitor violations).
 - b. We must look to something else, namely on official acts and statements- if they reference human rights language or deny that they violate its intent, states are recognizing that it is an appropriate practice (the human rights protection, that is). So the focus is on opinio juris.
 - c. The focus is on deductive reasoning: if human life and physical integrity were not protected, the entire idea of a legal order would collapse.
2. Argument in favor of focusing on practice: Profs. Simma and Alston (CB pg. 764-765)
 - a. Customary int’l law is more attractive than treaty law vis-à-vis human rights. Problem with treaties: Treaties are subject to interpretation in domestic courts, and you can have reservations vis-à-vis treaties, plus you can create a patchwork that keeps some states untouched.
 - b. Plus, if you believe that human rights standards should be high, treaties could lead to the lowest common denominator or a minimum standard being applied.
 - c. *But custom, inferred deductively and focused on opinion juris, “has lost the element of retrospection: if its protagonists look back at the past it is a look back in anger, full of impatience with processes of treaty-making [...] Thus the flight into a new, “progressive,” instant custom.”*
 - d. Thus the problem becomes that customary int’l law could be molded to fit anyone’s opinion. Whom do you look at to determine custom? Professors? NGO statements? It creates an instant custom, which seems like an oxymoron
3. Argument in favor of NGO involvement I: Kenneth Roth (executive director of Human Rights Watch) (CB pg. 768-769)
 - a. “The emergence of human rights organizations in all parts of the world undercuts these arguments. It shows that rights are not a “foreign imposition” but that people everywhere aspire to the same basic dignity and respect that the rights of the Universal Declaration protect.” (CB pg, 769)
 - b. Even though violations continue, *NGOs help increase the cost of abuse* and thus to alter the political calculations that might lead to human rights violations
4. Argument in favor of NGO involvement II: Thomas Risse and Kathryn Sikkink: (CB pg. 771)
 - a. *NGOs become part of transnational advocacy networks that:*

- i. Put norm-violating states on the international agenda in terms of moral consciousness raising
- ii. Empower and legitimate domestic opposition against human rights abusing governments
- iii. Challenge norm-violating governments by creating a transnational structure pressuring such regimes simultaneously “from above” and “from below”

HUMAN RIGHTS II: REGIONAL ENFORCEMENT MECHANISMS (Casebook 793-812)

The European Court of Human Rights

1. *Overview*: Based in Strasbourg, France, is the judicial organ of the Council of Europe. It was established pursuant to the European Convention of Human Rights, which entered into force in 1953. (CB pg. 793)
2. *Parties*: All 47 members of the Council of Europe have ratified the convention, under which parties “undertake to abide by the final judgment of the Court in any case to which they are parties.” (CB pg. 793)
3. *Admissibility of cases*: A panel of judges considers the standing, exhaustion of domestic remedies, if the alleged human rights violations are insufficiently established (i.e. “manifestly ill-founded”), or if the complaints are incompatible with the ECHR (CB pg. 795).
4. *Composition*: 47 judges, one per state, 7 judge chambers to hear cases, and grand chamber of 17 in rare cases of appeal or if a big issue comes up. Each judge is elected by the Parliamentary Assembly of the Council of Europe from a list of 3 candidates supplied by the member state. Terms last 6 years (CB pg. 795)
5. *Statistics/case load*: The main focus has been individual complaints- 13,500 judgments rendered (successful or not). There is a large backlog, and almost 500,000 complains for decision or considerations.
6. *Weaknesses*: The biggest weakness is enforcement: It has limited abilities to force a state to pay damages or procedural costs.
 - a. To be fair, sometimes the states are responsive- there are reputation costs, don’t want publicity- through inter-state pressure, ECtHR rulings could still be enforced.
7. History
 - a. *Originally, the jurisdiction of the ECtHR was optional and states had to endorse a claim in order for it to be brought before the ECtHR* (CB pg. 794)
 - i. Complaints were submitted to the European Commission on Human Rights which would issue non-binding determinations about whether the state could refer the case to the ECtHR
 - ii. Thus, applicants had to rely on the goodwill of their own government (the party against which the complaint is directed) or that of the Commission
 - b. *With the 11th Additional Protocol (1998), which subsumed the Commission into the Court, and allowed individual Europeans to bring cases to the Court*

- i. *Further, the optional clauses were deleted, meaning that the jurisdiction of the Court was now compulsory for all member states*
- 8. **Margin of Appreciation:** The court has a doctrine whereby, in assessing whether a state has violated the ECHR, it will provide some deference to state determination on sensitive issues where a consensus doesn't exist.

Schalk and Kopf v. Austria (2010)

(Case involving the legality of a civil-unions act in Austria that didn't grant full marriage equality. The Court found that the act did not violate the ECHR. The case is also a good example of the Court's use of the "margin of appreciation" doctrine). CB pgs. 796-800).

1. ECtHR, 2010
2. *Facts:* In 2002, the applicants, a same-sex couple living in Vienna, sought to marry. There were denied the request because only heterosexual marriage was allowed. In 2010 Austria passed the Registered Partnership Act, which provided same-sex couples with legal recognition of their relationship. A big difference with traditional marriage was that same-sex couples were not allowed to adopt a child. Artificial insemination was also excluded.
3. *Claim:* the applicants argue that the act violates Article 12 of the ECHR, or articles 8 and 14 taken together.
 - a. Article 12 states: "Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right." (CB pg. 796)
 - b. Article 8 reads: "Everyone has the right to respect for his private and family life [...] There shall be no interference by a public authority with the exercise of this right" except in cases of national security, public safety, or the economic well-being of the country. (CB pg. 797)
 - c. Article 14 reads: "The enjoyment of the rights and freedoms set for in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status" (CB pg. 798).
4. *Decision:*
 - a. *Regarding the alleged violation of Article 12:* If we look at the context of the Convention, most rights are granted to "everyone"- thus, the language of "men and women" suggests heterosexual marriage. (CB pg. 796-797) There is also no European consensus regarding same-sex marriage, so even if the ECHR is interpreted as a living instrument, it can only reflect the consensus position of European states. (CB pg. 797) Therefore, same-sex marriage is not required under the Convention, and *there is no violation of Article 12. (unanimously)*
 - b. *Regarding the alleged violation of articles 8 and 14 taken together:* For there to be a violation of article 14, there as to be a case of different persons being treated differently. (CB pg. 798). The member states, however, "enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment." (CB pg. 798). In this case, the Registered Partnership act allows for "a legal status equal or

similar to marriage in many respects,” and the Court does not see that Austria “exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership.” (CB pg. 798). Therefore, *there is no violation of articles 8 and 14 taken together. (by a majority of 4 to 3).*

5. *Dissenting opinion (with regards to articles 8 and 14):* The margin of appreciation is only applicable if a member state justifies why it is treating similar cases somewhat differently. In this case, “the respondent Government did not advance any argument to justify the difference of treatment.” (CB pg. 800). Further, “Any absence of a legal framework offering them, at least to a certain extent, the same rights or benefits attached to marriage would need robust justification.” Because it wasn’t provided, there is a violation of articles 14 and 8, taken together.
6. *Could things have turned out differently?* If the plaintiffs had brought up a claim about parental rights- to have a family- which was denied by their not being able to adopt a child under the Austrian act- maybe the case would have turned out differently.

Soering v. United Kingdom (1989)

(A case that established the fact that a European citizen cannot be extradited to the US given the length of time that prisoners convicted of capital punishment have to spend awaiting execution in sub-standard conditions, violating the ECHR. The case rendered it much more difficult to extradite a European national to countries that allow capital punishment). (CB pgs. 800-801).

1. ECtHR, 1989
2. *Facts:* Soering is a German national residing in the United States, a student at UVA. He and his girlfriend kill her parents, and subsequently flee to the UK. The US then seeks extradition, based on the Extradition Act of 1870 between between the US and the UK. It seems likely that the death penalty will be applicable in Soering’s case. Unable to prevent the extradition in the British court system, Soering appeals to the ECtHR, citing that the extradition would subject him to inhuman and degrading treatment in conflict with Article 3 of the Convention.
3. *Decision:* The ECtHR concluded that due to the long period of time prisoners convicted of capital crimes spend on death row in “extreme conditions, with the ever-present and mounting anguish of awaiting execution and the death penalty,” the extradition could not take place as it would violate Article 3 of the ECHR. (CB pg. 801).
4. *Takeaway:* extradition from countries from ECHR is much harder with death penalty countries, such as the US.

The Organization of American States (OAS)

1. In 1948, the Charter for the Organization of American States was established. Today, all countries in the Americas have ratified the Charter. (CB pg. 803)
2. Also in 1948, American states adopted the non-binding American Declaration of the Rights and Duties of Man
3. The Inter-American Commission on Human Rights:

- a. Established in 1959 and provided for in the OAS Charter, its function is to: “*to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.*” (CB pg. 803)
 - b. Since 1965, it has been authorized to examine complaints/petitions concerning human rights violations, and has processed thousands of such cases (CB p. 803).
 - c. The Commission carries out numerous visits to the member states to observe the human rights situations and investigate their practices (CB pg. 803).
 - d. The Commission has had difficulties preventing human rights abuses: “*In situations of major tensions, the pronouncements of the [Commission] do not easily prevail over short-sighted considerations of political expediency.*” (CB pg. 804).
 - e. Nevertheless, as the investigative arm of the OAS, *the Commission has been successful to bring wrongdoing to light, creating non-legal pressure for states to correct human rights practices.* In that sense, the Commission is bringing things to attention, even though it doesn’t issue judgments.
4. Inter-American Convention on Human Rights:
- a. Took effect in 1978, and currently has 24 parties (excluding Canada and the US). (CB pg. 803).
 - b. The Convention established the Inter-American Court of Human Rights
5. Inter-American Court of Human Rights:
- a. Established by the Inter-American Convention on Human Rights, it is , based in San Jose, Costa Rica (CB pg. 804)
 - b. *It is weaker than the ECtHR- here are some weaknesses:*
 - i. Only state parties or the Inter-American Commission on Human Rights can bring a case before the Court
 - ii. In contrast with the ECHR and the ECtHR, the jurisdiction of the Inter-American Court is not compulsory and must be specifically accepted (the US has not consented to the Court’s jurisdiction) (CB pg. 805)
 - iii. So far, the Court has only yielded 94 cases with 167 judgments (CB pg. 804)
 - iv. It suffers from poorer logistics and resources than both the ECtHR and even the Inter-American Commission (CB pg. 804)
 - v. One theory on why court has not been so effective is the historic presence of lots of dictatorships in South America and Central America, thus many countries in the Americas continue to have weak judiciaries, undermining the creation of a legal norm to enforce the Court’s judgments domestically (CB pg. 805)
 - c. The Court tends to have more influence issuing advisory opinions because the number of cases and judgments have been so small

The African Union

1. The African Charter on Human and People's Rights was adopted in 1981 came into force in 1986 under the auspices of the Organization for African Unity, now known as the African Union, or AU. (CB pg. 807)
 - a. The Charter includes basic civil and political rights, but also a number of *collective rights*, such as the right to existence and to self-determination (CB pg. 808)
 - b. The Charter, unlike any other such document, includes *duties of the individual*- for example, duties of the individual to family and society, to the state, to other legally recognized communities, etc. (CB pg. 808).

2. The African Commission on Human and People's Rights: established under the Charter, it is charged with promoting and protecting human rights on the African continent. (CB pg. 807). It provides for 3 procedures:
 - a. *A state reporting procedure*: the Commission obtains reports from state parties to ascertain whether or not each state has implemented the Charter (CB pg. 808)
 - b. *An inter-state procedure*: a state can submit a complaint if it believes another state is violating its obligations under the Charter. (CB PG. 809)
 - i. So far, however, this procedure has almost never been used (only twice).
 - c. *Other communications*: The Commission accepts other communications from other entities. To date, there have been some 300 communications. (CB pg. 809).
 - i. Weakness of this complaints procedure: there are no remedies, no clear procedures for individuals, nor can NGOs be parties to these cases, and state has to accept jurisdiction for a case to be hold (jurisdiction is optional).

3. The African Court of Human and People's Rights: established by the 1998 protocol to the Charter, which came into force in 2004. (CB pg. 809)
 - a. The Commission can decide which complaints to refer to the Court (CB pg. 809).
 - b. It gives binding judgments for parties that have ratified the protocol

INTERNATIONAL CRIMINAL LAW I: INDIVIDUAL RESPONSIBILITY (Casebook 1088-1104)

1. The question before international criminal law- should individuals be held criminally responsible for violations of international law?
2. The definition of an international crime is composed of two components: (CB pg. 1088)
 - a. The crime must be a grave act
 - b. The crime must implicate the interests or values of the international community as a whole

3. There are three key types of international criminal responsibility:
 - a. Responsibility of subordinates
 - b. Command responsibility
 - c. Vicarious responsibility (aiding and abetting).

Nuremberg and Individual Criminal Responsibility

1. In 1945, the Allies established the Charter of the International Military Tribunal, which would be based in Nuremberg.
2. The Charter: (CB pg. 1089)
 - a. Defined crimes against peace, war crimes, and crimes against humanity, and specified that individuals could be held responsible for these
 - b. Specified that organizers, leaders, accomplices, and instigators participating in the formulation or execution of a plan or conspiracy to commit the above crimes can also be held responsible

Judgment of the International Military Tribunal (1946)

(The conclusion to the Nuremberg trials, the judgment convicted 24 top Nazi leaders who survived the war. The IMT decided that a war of aggression is an international crime, it was an international crime at the time it was committed by Germany, and individuals can be held criminally responsible for it.) (CB pgs. 1089-1092)

1. *Defendant arguments:* (CB pg. 1089)
 - a. The defendants challenged the notion that they could be held criminally responsible as individuals for violations of international law (international law concerns state, not individual, actions).
 - b. They also argued that being prosecuted for planning or waging a war of aggression violated the “no crime without law, no punishment without law” (*nullum crimen sine lege, nulla poena sine lege*) principle, since a war of aggression was not a crime under int’l law at the time CB pg. 1090)
 - c. Challenging the jurisdiction of the tribunal: The 1928 Kellogg-Briand Pact, to which Germany was a signatory, did not make war to solve international problems a crime, and didn’t set up a Court to deal with these issues. The resolution of political conflict- war was a legitimate method under act. And, even if it were legal, the pact did not authorize the creation of a tribunal to prosecute wrongdoers.
2. *Decision:*
 - a. In the circumstances, “the attacker must know that he did wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.” Further, “*they must have known that they were acting in defiance of all international law* when in complete deliberation they carried out their designs of invasion and aggression.” (CB pg. 1090). A war of aggression was specified as an international crime in:
 - i. The nations who signed the Kellogg-Briand Pact (including Germany) “unconditionally condemned recourse to war for the future as an instrument of policy and expressly renounced it.” (CB pg. 1090)
 - b. The *individuals can be held liable for international crimes by the IMT*, and there is a precedent for this:

- i. The 1907 Hague Convention prohibited resort to certain methods of waging war, including inhuman treatment of prisoners, and is seen as codifying custom. Many individuals have been tried for violations of the laws of war, even though there is no specific provision in the Hague convention for their prosecution (CB pgs. 1090-1091).
- ii. A declaration by the League of Nations in 1927, including the German, Italian, and Japanese delegations, defined a war of aggression as an international crime (CB pg. 1091)
- iii. Article 227 of the Treaty of Versailles provided for the constitution of a special Tribunal to try the former German Emperor. In Article 228 of the Treaty, the German government consented to “bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.” (CB pg. 1091)
- c. Decision summary: war of aggression is an international crime, it was an international crime at the time it was committed by Germany, and individuals can be held criminally responsible for it. Custom and practice do matter- There is evidence in national courts that individuals are being tried for violations of international law. The law is changing. Also: general argument of justice- you should know better. Can’t claim immunity as an individual then commit acts that violate international law.
- d. Unresolved problems:
 - i. The IMT’s reasoning is somewhat vague. Could these Nazi officials have known about the Hague convention, the evolution of law... how could they, or the Court, for that matter, know this? Where’s the notice for the defendants?
 - ii. Is the fact that Germany had invaded Sudetenland, and that the allies negotiated with Germany and appeased it, cut against argument that aggression was clearly illegal?

Criminal Responsibility for Subordinates

1. This involves criminal responsibility for subordinates who commit crimes ordered by their superiors. (CB pg. 1094)
2. *Generally, although one cannot be absolved for committing an international crime because the superior ordered it, the punishment can be reduced:*
 - a. During the Nuremberg Trials, the issue was addressed. The IMT’s Charter provides in Article 8:
 - i. “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.” (CB pg. 1094)
 - b. During the International Criminal Tribunal for the Former Yugoslavia, in the Prosecutor v. Erdemovic case dealing with the Srebrenica massacre, the Tribunal ruled:
 - i. While duress (being forced to carry out an order) did not provide a defense to criminal responsibility, it could in appropriate cases be taken into account in mitigation of sentence.” (CB pg. 1094-1095.

Immunity for Government Officials

Arrest Warrant Case: Democratic Republic of the Congo v. Belgium (2002)

(This ICJ decision dealt with the tension between foreign sovereign immunity and international criminal liability. The ICJ concluded that, under customary int'l law, foreign ministers, while in office, generally enjoy full immunity from criminal jurisdiction, rejecting Belgium's argument that this immunity does not apply to war crimes or crimes against humanity.) (CB pg. 1095-1097)

1. ICJ, 2002
2. *Facts:* In April 2000, a Belgian investigating magistrate issued an arrest warrant against then-Minister of Foreign Affairs of the Democratic Republic of the Congo (DRC), Abdulaye Yerodia Ndombasi, seeking his extradition to Belgium for prosecution for violations of international criminal law. The DRC initiated a case before the ICJ claiming that the arrest warrant violated the "absolute inviolability and immunity from criminal process of incumbent foreign ministers." (CB pg. 1095) Belgium argued that immunity doesn't apply for war crimes and crimes against humanity.
3. *Decision:* No tribunal has exceptions to immunity for a sitting government official for war crimes or crimes against humanity. There is no evidence of this. Therefore, the Belgian arrest warrant cannot be honored. The court argued that immunity from jurisdiction in Belgian court does not mean impunity for Ndombasi: (CB pg. 1096)
 - a. DRC could waive immunity
 - b. Ndombasi could be tried in domestic court
 - c. After Ndombasi is no longer Foreign Minister, he "will no longer enjoy all of the immunities accorded by international law in other States." (CB pg. 1096)
 - d. Ndombasi could be subject to criminal proceedings before the International Criminal Court (ICC) (Cb pg. 1096-1097)

Command Responsibility

In re Yamashita (1946)

(This case involved a Japanese commander who was tried in a US military tribunal in the Philippines after troops under his command committed war crimes. The case addressed the doctrine of "command responsibility," which the SCOTUS decided that Yamashita had failed to uphold, and is well known for Justice Murphy's dissent). (CB pgs. 1099-1100).

1. SCOTUS, Justice Stone delivered the opinion of Court, 1946
2. *Facts:* The charge is that Yamashita, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he ... thereby violated the laws of war." Yamashita did not commit or order such acts. (CB pg. 1099)
3. *Decision:* Yamashita failed at his duty to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." Underlying law: laws of war (customary int'l law), Fourth

Hague Convention of 1907- does require that troops be commanded by a person responsible for his subordinates, to incentivize commander to make sure subordinates comply with law.

- a. Yamashita's conviction was thus upheld, and he was hanged in 1946.
4. *Dissent*: By Justice Murphy (CB pg. 1100): The US was trying to disrupt the Japanese's ability to effectively command their troops. It is just a case of blatant victor's justice- one cannot be convicted of inefficiently controlling troops in the context of war. This amounts to saying "In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them." (CB pg. 1100)
5. Comparison case: Prosecutor v. Kordic (ICTY, 2001).
 - a. This case involved Dario Kordic, a local Bosnian Croatian political leader involved in planning war crimes.
 - b. *The court ruled that there must be an ability to prevent conduct in order for one to be held accountable under command responsibility.*
 - i. "Substantial influence (such as Kordic had), by itself, is not indicative of a sufficient degree of control for liability [on command responsibility grounds]." (CB pg. 1101)
 - ii. The Court concluded that Kordic lacked "effective control" defined as a "material ability to prevent or punish criminal conduct, however that control is exercised." (CB pg. 1101).
 - iii. The Court also argued that command responsibility can attach to both civilians and military personnel.

Vicarious Responsibility

Prosecutor v. Furundzija (1998)

(This case before the International Criminal Tribunal for the Former Yugoslavia involved a soldier who was charged with aiding and abetting in the perpetration of outrages upon personal dignity, including rape, and addresses the issue of vicarious responsibility, that is, aiding and abetting in the commission of international crimes.) (CB pgs. 1102-1103)

1. ICTY, 1998
2. *Facts*: Furundzija was a soldier interrogating a woman as a fellow soldier was raping her. He did not personally rape the victim, but he was present in the room when the other soldier did, and he interrogated the victim while she was raped (CB pg. 1102).
3. *Question*: Does Furundzija's behavior amount to aiding and abetting, defined as "personal assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." (CB pg. 1102)
4. *Decision*: *Furundzija's interrogation was considered to be practical assistance or moral support.* To establish vicarious responsibility, Furundzija need not share objective with rapist, and there need not be a causal relationship between his support and the crime (whereby the interrogation leads to the raping.) In this case, the key thing is just a moral support, which was established by Furundzija's interrogation.

5. *Key takeaway*: What we see is a trend that the activities people are charged with are so horrible that international law should try to capture them. Why? First, on moral grounds. Second, it could just be victor's justice. Third, it could just be politics and power players. In either case, we see a more expansive approach, and we see that this is easier when done by courts, who tend to be more expansive when interpreting meaning of treaty terms or even custom.

INTERNATIONAL CRIMINAL LAW II- INTERNATIONAL CRIMES (Casebook 1104-26)

1. International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the state of which the individuals may act as organs) (CB pg. 1104).
 - a. These breaches may violate customary rules as well as treaty provisions that exist and codify or spell out customary law.
 - b. There exists a universal interest in repressing these crimes, and, *in principle, the perpetrators may be prosecuted and punished by any state*, regardless of any territorial/nationality link with the perpetrator or victim
 - c. International crimes thus include war crimes, crimes against humanity, genocide, torture, aggression, and some extreme forms of international terrorism

Genocide

1. Recall that under the 1951 Genocide Convention, genocide is made jus cogens as well as an international crime (CB pg. 757; 1105)
2. Refer to outline, Pg. 50, for more on Genocide Convention

Prosecutor v. Krstic (2004)

(The case deals with whether Radislav Krstic, a general of the Bosnian Serb Army (VRS), can be held responsible for the Srebrenica Genocide. The ICTY found that the massacre constituted genocide, but that Krstic acted as an aider and abettor, but not a direct perpetrator, of genocide.) (CB pg. 1106-1108).

1. ICTY Appeals Chamber, 2004
2. *Facts*: In 1995, Bosnian Serb forces killed between 7,000 and 10,000 Bosnian Muslim men in the town of Srebrenica. Radislav Krstic was a general in the Bosnian Serb Army (VRS) which carried out the massacre. (CB pgs. 1105-1106)
3. *Questions*:
 - a. First, does the Srebrenica massacre constitute genocide, defined as acts "intended to destroy a part of the Bosnian Muslim people as a national, ethnic, or religious group"?
 - i. To do this, the ICTY specified that one considers the numeric size of the targeted part of the group, evaluated also in relation to the overall size of the group, and the targeted group's prominence within the group. (CB pg. 1106)
 - b. Second, did Krstic display the requisite intent to be held responsible for the genocide?

4. *Decision regarding whether Srebrenica Massacre was genocide:*
 - a. *The ICTY concluded that the killing of Bosnian Muslim men at Srebrenica was committed with genocidal intent.* The massacre was evidence of the intent to destroy all Bosnian Muslims of Srebrenica. The massacred men amounted to one fifth of the Srebrenica community, and given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would “inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.” (CB pg. 1107)
5. *Decision regarding whether Krstic could be held responsible:*
 - a. *The ICTY found that Krstic was an aider and abettor of genocide, but not a perpetrator of genocide.*
 - i. “All the evidence can establish is that Krstic was aware of the intent to commit genocide on the part of some members of the BRS Main Staff, and with that knowledge, he did nothing to prevent the use of the Drina Corps personnel and resources to facilitate those killings.” (CB pg. 1108).
 - ii. “Although the evidence suggests that Radislav Krstic was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and employ those resources. The criminal liability of Krstic is therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator.”
 - b. Note: Krstic was sentenced to 46 years, which was then reduced to 35 years on appeal.

Bosnia and Herzegovina v. Serbia and Montenegro (2007)

(The case dealt with whether Serbia, the successor to the Federal Republic of Yugoslavia, could be held responsible for genocide committed by Bosnian Serb forces. The ICJ concluded that Serbia could not be held accountable for committing genocide, because it was not established that this was the intent of the FRY, or that the FRY exercised effective control over the Bosnian Serb forces. The ICJ did, however, find Serbia responsible for failing to prevent genocide, a violation of Article 1 of the Genocide convention). (CB pgs. 1109-1110).

- c. ICJ, 2007
- d. *Facts:* In 1993 (14 years before the final judgment), Bosnia brought a claim to the ICJ alleging that the country then known as the Federal Republic of Yugoslavia (FRY) was committing genocide in Bosnia.
- e. *Decision:* *The ICJ concluded that although the widespread killing of Bosnian Muslims were perpetrated during the conflict, it was not “conclusively established” that most of those killings “were committed with the specific intent on the part of the perpetrators to destroy, in whole or in part, the group.” (CB pg. 1109)*
 - i. Reasoning: In a conflict, it is very difficult to prove that an act constitutes genocide- Serbians happened to be fighting Bosnians, and the problem is that the war was defined upon the very lines of the genocide convention, so it’s hard to discern regular fighting from genocide.

- f. *The court did agree that the massacres at Srebrenica were committed with genocidal intent but the ICJ did not find Serbia responsible. Applying the standard of “effective control” articulated in its Nicaragua judgment for attributing the conduct of non-state actors to a state, the Court ruled:*
 - i. “It has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which ... constituted the crime of genocide, were perpetrated.” (CB pg. 1109)
 - g. *The Court did find that since the FRY “did nothing to prevent the Srebrenica massacres,” it violated the duty to prevent genocide under Article 1 of the convention. The duty to prevent genocide, the ICJ held, obligates states “to employ all means reasonably available to them, so as to prevent genocide so far as possible.” (CB pg. 1110)*
6. Related case: Prosecutor v. Akayesu (1998)
- a. *Facts:* This case, before the International Criminal Tribunal for Rwanda (ICTR), involved the genocide prosecution of Jean Paul Akayesu
 - b. *Question:* Did widespread acts of rape and sexual violence against Tutsi women constitute genocide?
 - c. *Decision: Yes, rape and widespread sexual acts did constitute genocide:*
 - i. With regard to those acts, “the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act so long as they were committed with the specific intent to destroy, in whole in part, a particular group” and that “these rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities” thus “contributing to their destruction and to the destruction of the Tutsi group as a whole.”
7. Other related cases:
- a. Khmer Rouge- the question of whether the extermination of Cambodian intellectuals can be captured by convention. The question is if we broaden the definition of genocide, does it weaken the Convention? The evidence appears weak (CB pg. 1111)
 - b. In Darfur, the UN sent a commission of inquiry, and it said that Sudan’s violation of human rights are occurring, but there is no clear evidence of genocide.
 - i. Situation in Sudan: Sudanese government was propped up by China, there was a civil war going on in the South, which resulted in the referendum for its eventually successful independence, and also Darfur was in Western Sudan- the conflict cut across a lot of different ethnic lines, so it was hard to figure out that people would be targeted under the Convention.
 - ii. Moreover, there is a political question: if genocide is occurring, int’l community has to get involved. How could it act in such a massive country?

- iii. Further, the commission of inquiry created by UNSC, and there might have been a power politics story why US or China might not want the atrocities to be called genocide.

Crimes Against Humanity

1. Unlike genocide, which is defined in a treaty, crimes against humanity are a category of int'l crimes that arose initially under customary int'l law. (CB pg. 1111-1112)
2. The IMT at Nuremberg had jurisdiction over crimes against humanity, and the IMT's charter defined them as:
 - a. *"Namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."* (CB pg. 1112)

Prosecutor v. Kunarac et al. (2002)

(This case before the IMTY, which found Kunarac, among other things, guilty of crimes against humanity, is important because it discusses some of the key features of the concept of crimes against humanity.) (CB pg. 1112-1114)

1. ICTY, 2002
2. *Facts:* From April 1992 to February 1993, during the armed conflict in Bosnia, non-Serb civilians in the area of Foca were killed, raped, or otherwise mistreated by Bosnian Serb forces. Kunarac participated in this campaign, which sought to "cleanse" the area of its non-Serb inhabitants.
3. *Decision:* Kunarac is guilty of crimes against humanity on the counts of enslavement, rape, and torture.
4. *Important takeaways: What are the requirements for crimes against humanity?* (CB pg. 1112)
 - a. *There must be an attack*
 - b. *The acts of the perpetrator must be part of the attack*
 - c. *The attack must be directed against any civilian population*
 - d. *The attack must be widespread or systematic*
 - e. *The perpetrator must know that his acts constitute that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern*

War Crimes

1. The Four Geneva Conventions: After WWII, the adoption of the four 1949 Geneva Conventions not only expanded the protections of victims of war, but, unlike earlier treaties on the laws of war, specifically provided for individual criminal responsibility for certain treaty violations. (CB pg. 1116)
 - a. The first and second Geneva conventions provide for the protection of wounded and sick soldiers and sailors.
 - b. The third Geneva convention governs the status and treatment of prisoners of war (POWs)

- c. The fourth Geneva convention applies to civilians who have fallen in the hands of the enemy
2. Each Convention also provides that “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches.” (CB pg. 1117)
3. The 1977 Protocol I to the Geneva Conventions: expands the protections applicable in times of armed conflict, incorporates a number of rules governing the means and methods of waging war, including: (CB pg. 1117-1118)
 - a. *The principle of distinction*: requires parties to an armed conflict to distinguish between civilians and military objects)
 - b. *The principle of proportionality*: forbids attacks against even military targets that will cause harm to civilians that is excessive in comparison to the military advantage gained
4. The United States and the Conventions: US is a party to all 4 conventions, but is not a party to Protocol I, although the US views many of the substantive provisions of the Protocol as binding customary law (CB pg. 1117).
 - a. Within the US, the discussion pertains to protection of prisoners of war not of an armed conflict not of an international character occurring within territory of one of the parties (could be a civil war).
 - b. Article 3, common to all four Geneva Conventions, refers to conflict of not an international character occurring in one of the parties. The Bush Administration took the position that this entailed internal war. Bush admin said that this did not accord protection to terrorists captured for war on terror. SCOTUS disagreed- convention applies to non-state actors such as terrorists.
 - c. The US did adopt the War Crimes Act- covering US soldiers and nationals, which does criminalize their behavior abroad if they commit war crimes, but it does define war crimes somewhat more narrowly than int’l law.

Aggression

1. Defining it has been difficult. US position: it should be a political body, not a court, that defines/determines a crime of aggression. Why?
 - a. Besides the fact that the US is a veto power in the Council, the issue is that defining aggression is difficult, so there can be no bright line standard, so there could be differences in opinion from court to court.
 - b. Further, when a crime of aggression is decided to have occurred by a Court, the UNSC would be expected to intervene, so why not give UNSC the discretionary power in the first place?
2. The Charter of the IMT at Nuremberg defined crimes of aggression namely as “crimes against peace,” including:
 - a. *“Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”* (CB pg. 1120)
3. A proposed amendment to the statute of the International Criminal Court defines a “crime of aggression” as:

- a. *“Planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”* (CB pg. 1121)

Torture

1. 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: makes torture a crime under international law. It defines torture as:
 - a. *“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person had committed or is suspecting of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”* (CB pg. 1122)
2. Further, under the Torture Convention, every party is required to ensure that torture is an offense under its domestic law (Article 4) and to take measures to establish jurisdiction over acts of torture committed in its territory. (CB pg. 1122)
3. “Try or extradite”: Article 7 obligates each party to try or extradite any person alleged to have committed torture who is found in its territory (Cb pg. 1122)
4. Discussion:
 - a. The main disagreement has not been over whether torture is illegal, but what are the acts that constitute torture.
 - b. In the US we have implementing legislation criminalizing torture.

Terrorism-Related Offenses

1. The world has struggled to decide whether state action can be included under the definition of a terrorist act. The laws of war do capture activities of states that support terror, so there is an int’l legal framework to capture this activity.
2. A common feature of the major multilateral counterterrorism conventions is that states must either *try or extradite* persons found in their territory who are alleged to have committed offenses defined in the treaties
3. UNSC Resolution 1373 imposes obligations on all UN member states to:
 - a. *“Ensure that any person who participates in the financing, planning, preparation, or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”* (CB pg. 1123)
4. International Convention for the Suppression of Terrorist Bombings: This 1998 Convention defines perpetrators of the convention as any person who:
 - a. *“intentionally delivers, places, discharges, or detonates an explosive or other lethal device in, or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility”* either with the intent to cause death or injury or to cause extensive destruction. (CB pg. 1123)

5. United States v. Yunis (1991)
 - a. Federal Court of Appeals, 2nd District
 - b. *Facts*: Yunis, a Lebanese national, hijacked a plane where there are several Americans on board. The hostages are eventually released in Beirut, and then Yunis blew up the plane and escaped. The plane never flew over US airspace. Yunis challenged US jurisdiction.
 - c. *Decision*: The Court of Appeals upheld the District Court conviction of Yunis for violating Congressional statutes incorporating the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the “Hague Convention”) and the 1979 International Convention against the taking of Hostages.
 - i. Note that the only US connection to the offense was the presence of several American nationals on the plane.

INTERNATIONAL CRIMINAL LAW III- ARRANGEMENTS FOR PROSECUTIONS (Casebook 1127-54)

1. Prosecution for international crimes may take place either before national courts, international tribunals, or hybrid courts. This section begins with domestic courts, then moves to international tribunals, and then considers hybrid courts.

Prosecution for Int’l Crimes before Domestic Courts

1. *The US has a longstanding tradition of prosecuting international crimes- the provisions are found in the Constitution, and much of the customary laws of war have been implemented domestically as statutes.*
 - a. Article 1, section 8, of the US Constitution grants Congress the “power to define and punish... Offenses against the law of Nations” (CB pg. 1127)
 - b. The IMT at Nuremberg cited the longstanding practice of prosecuting violations of the laws or customs of war before military commissions. Indeed, Congress can provide for military tribunals “to try offenses against the law of war.” (CB pg. 1127)
 - c. The US also is party to some treaties, like the Genocide Convention, that are implemented through domestic legislation and provide domestic courts with the ability to prosecute perpetrators of genocide
2. Further, the gravest international crimes, like genocide, crimes against humanity, torture, and terrorism-related offenses are generally seen as “offenses recognized by the community of nations as of universal concern” and subject to universal jurisdiction (CB pg. 1128)
3. Trying individuals for international crimes in domestic courts is also a longstanding practice abroad:
 - a. *German case of attempted prosecution of Rumsfeld and Tenet*: The Center for Constitutional Rights tried to pursue charges to Rumsfeld and Tenet in German Courts, alleging their responsibility for the Abu Ghraib abuse, even though German Court rejected this attempt. But the risk of even US leaders facing prosecution in foreign domestic courts is real, even though, because of the associated political consequences, they are unlikely to occur.

- i. In the Abu Ghraib case, lower-level officials, but not Rumsfeld or Tenet, were prosecuted in US courts.
- 4. Is trying individuals under universal jurisdiction a good or bad idea?
 - a. *Good idea argument:* William Burke-White: Universal jurisdiction “is the provision of an alternate means of bringing to justice serious criminals when the State where the crimes occurred is unable or unwilling to prosecute [...] prosecution under the universality principle may be the preferred way to avoid impunity for serious international criminals.” (CB pg. 1128)
 - b. *Bad idea argument:* Jack Goldsmith and Stephen Krasner: Universal jurisdiction courts “are completely unaccountable to the citizens of the nation whose fate they are ruling upon [...] the courts themselves will invariably be less disciplined and prudent than would otherwise be the case.” Further, prosecutions aren’t always the best way towards reconciliation, and universal jurisdiction could cause remove options such as amnesty which “can prolong ... conflict, resulting in more deaths, destruction, and human suffering.” (CB pg. 1129)

The International Criminal Tribunal for the Former Yugoslavia (ICTY)

1. *History of ICTY's establishment:*
 - a. The vicious civil war in the former Federal Republic of Yugoslavia that erupted in 1991 was filled with egregious human rights abuses and international crimes.
 - b. In response, the UNSC, via *Resolution 808 (Feb. 1993) to establish “an international tribunal...for the prosecution of serious violations of international humanitarian law.”* (CB pg. 1131)
 - c. Three months later, the *UNSC in Resolution 827 adopted the Statute of the ICTY.* It relied upon Chapter VII of the UN Charter as a legal basis to establish the tribunal.
2. *The ICTY Statute provided subject-matter jurisdiction over:*
 - a. Genocide
 - b. Grave breaches of the Geneva Conventions
 - c. War crimes
 - d. Crimes against humanity
3. *Reasons for establishing tribunal:*
 - a. First, it would take too long to resolve the conflict by treaty.
 - b. Second, there is some urgency to the situation, as it was well known that atrocities were being committed, so the UN wanted to stop and prosecute them.
 - c. Third, it was argued that these tribunals wouldn’t create law (although that’s debatable), they’re just here to prosecute- they will focus on jus cogens norms violations.
 - d. Finally, the ICTY would also apply existing international humanitarian law. So, if anything, the UN was creating a court to enforce all of the rules that the int’l community has already agreed upon.
4. *Historical Context and the Clinton Administration:*

- a. Part of Clinton's foreign policy in 1st term is that Cold War is over, and we can really move towards human rights and move away from self-interest. Building int'l tribunals was part of this effort.
5. *Composition:*
- a. At first, 11 judges, but eventually the ICTY expanded, to 27 judges, composed of 16 permanent, 11 ad hoc judges. (CB pg. 1131)
6. *From initial failure to greater success:* (CB pg. 1131-1132)
- a. Initially, the Tribunal wasn't successful- the parties involved in the war activities were ignoring its warrants (non-compliance problem).
 - b. Plus, the UNSC was not doing much to get them, so in the end, the Tribunal didn't have the ability to coerce individuals.
 - c. Things started to change in '97-'98 (by 1998, the strategic interests of US and Europeans started to align towards the moral concerns to prevent these international crimes). Another event occurred outside of Europe that might have shamed US and Europe to act: the genocide in Rwanda.
 - d. Economic and diplomatic pressure from US and NATO countries allowed for Court to start making arrests, and people began getting turned over.
 - i. Milosevic turned over in 2001 (he eventually dies during his trial in 2006.)
 - ii. Then there is a period of a search of two people: Karadzic and Mladic- these were the two individuals supervising the VRS. Finally, by 2008, Karadzic is captured (he was working as a faith healer!). In 2011, Mladic was finally turned over (found him in his hometown). All were turned over to Tribunal.
7. *Statistics:*
- a. As of may 2011, 161 indictments, 64 final sentences, 35 still at trial, and 13 cases were transferred to domestic courts. 65% of people prosecuted were Serbian (some suggest that this was evidence of bias, others say it's evidence of greater Serbian involvement in atrocities).
8. *Recent developments:*
- a. To complete its task, the ICTY has adopted "completion strategies" under which it will only pursue high level officials/perpetrators, and will refer some of the cases of indicted persons to domestic courts. (CB pg. 1131)
 - b. In Dec. 2010, the UNSC adopted Resolution 1966, calling upon the ICTY to complete all of its remaining work by December 2014. (CB pg. 1133)
 - i. The Resolution also established a new body, the "International Residual Mechanism for Criminal Tribunals," to finish the remaining tasks of both the ICTY and the International Criminal Tribunal for Rwanda (CB pg. 1133)
9. *Assessment:*
- a. *Argument of its success:* The tribunal led to an expansion of the body of international criminal law and elaborated its principles. It also led to the recognition that certain crimes, such as the Srebrenica massacre, were indeed genocide. Further, "some judgments have provided a sense of justice not readily captures or commonly reflected in assessment of the Tribunal." (CB pg. 1134)

- b. *Argument for its failure:* When asked whether the ICTY has contributed to reconciliation in [Bosnia-Herzegovina] and whether it can do so, 90% of interviewees answered no." Some of the reasons for dissatisfaction were: that "it is only judging Serbs!" and because "the Serbs do not accept its judgments." Others say that it has short-circuited communication and was imposed by the international community (CB pg. 1134)

The International Criminal Tribunal for Rwanda (ICTR)

1. *History:* In November 1994, the UNSC created the ICTR in response to the widespread killing of Tutsis in Rwanda that had occurred during the Rwandan genocide. (CB pg. 1132)
2. *Jurisdiction:* Genocide, crimes against humanity, and war crimes (CB pg. 1132)
3. *Composition:* 17 judges- 6 permanent, and 11 "ad litem" judges, in addition to the judges that serve on the joint ICTY-ICTR Appeals Chamber (CB pg. 1132)
4. *Statistics:* 55 final judgments, including those involving senior figures such as prime minister and other government ministers. 20 cases are still underway, and 10 indictees remain at large. (CB pg. 1132-1133).
 - a. Defendants were convicted of genocide, incitement to genocide, conspiracy, and crimes against humanity
 - b. 2 cases were transferred to France as part of the ICTR's "completion strategy"

1. Criticisms of both the ICTR and ICTY:

- a. Costs- estimates are 3.5+billion for both Tribunals.
- b. The Courts are also focusing on high level prosecutions, and thus there is the concern that the individuals who directly committed the horrible acts will not be prosecuted or, in the case of Rwanda, they don't get an adequate trial and are quickly executed.
- c. In the case of Yugoslavia, murders actually increased after the ICTY was created, so there are questions about these tribunals' deterrent effects
- d. Concern that the Courts were set up by the west, and therefore, there could be more than just a tinge of imperialism

Hybrid ("Mixed") Tribunals

1. *Hybrid Courts:* *The institutional apparatus and the applicable law consists of a blend of the international and the domestic.* Foreign judges sit alongside their domestic counterparts, to try cases prosecuted and defended by teams of local lawyers working with foreign lawyers. Judges apply domestic law that has been reformed to accord with international standards. (CB pg. 1137)
 - a. *Justification:* These may be especially useful in countries emerging from authoritarian systems who don't have well developed judicial systems, all while retaining local involvement and communication
2. *Examples:*
 - a. Sierra Leone: Special Court for Sierra Leone is a hybrid court established in an agreement between Sierra Leone and the UN, mean to prosecute atrocities that

- occurred in Sierra Leone starting in 1996 during its civil war. It is composed of eight judges, 5 appointed by the UN, and 3 by Sierra Leone. (CB pg. 1137-1138)
- b. Cambodia: Extraordinary Chambers of the Courts of Cambodia (ECCC) were set up by a UN-Cambodia agreement to try the leaders of Democratic Kampuchea, for those responsible of gravest violations, committed between '75 and '79. The Court is composed of 4 Cambodian and 3 international judges, and under a supermajority rule provided in its statute, no judicial decision of consequence can be made without the approval of at least one international judge. (CB pg. 1138)

The International Criminal Court

1. *History*: The ICC was established by the Rome Treaty, which was finalized at a UN Conference in Rome in 1998. The 1998 Rome Statute of the ICC came into force in July of 2002, after the required 60 ratifications were deposited. (CB pg. 1140)
 - a. *Came to being as an attempt to minimize the role of politics or of victor's justice by establishing a permanent Court.*
2. *Parties to ICC*: 120 states are parties to the ICC by approving the Rome Treaty. The United States is not a party to the treaty. 115 members are parties to the Statute of the ICC, thus recognizing its jurisdiction. Russia, Israel, and China are not parties to the ICC statute. (CB pg. 1140)
3. *Composition*: The Court is composed of 18 judges, who are elected by the member states to the Rome Statute, and have the power to approve prosecutions, to adjudicate and hear appeals. They also have an administrative staff.
4. *Jurisdiction*: The Court has jurisdiction over only "the most serious crimes of concern to the international community as a whole," including genocide, crimes against humanity, war crimes, and aggression. (CB pg. 1141). According to Article 12 of the ICC statute, the ICC can exercise its jurisdiction when:
 - a. Either one or both a) the state on the territory of which the conduct in question occurred and b) the state of which the person accused of the crime is a national, have accepted the jurisdiction of the Court by signing the ICC statute. (CB pg. 1141)
 1. Important note: Article 12 of ICC statute provides ICC jurisdiction over nationals of non-signatories accused of crimes committed *on the territory* of an ICC member state (CB pg. 1145-1146)
5. *Ways cases can be initiated before the ICC*: (CB pg. 1141)
 - a. A state party brings forth allegations of a crime to the ICC Prosecutor
 - b. The UNSC brings forth allegations of a crime to the ICC Prosecutor
 - c. The Prosecutor initiates an independent investigation (*In proprio motu*)
 - i. "only if both he or she and the Pre-trial Chamber (composed of three judges) have determined that a 'reasonable basis' exists to initiate the investigation." (CB pg. 1142)
6. *Principle of Complementarity*: the ICC is a complement only when a state has had the opportunity to prosecute the action but was *unwilling or unable* to carry out the investigation and prosecution (CB pg. 1143)
7. *Statistics*: To date, the ICC's Chief Prosecutor has commenced investigations in 6 situations (CB pgs. 1147-1148)

- a. In three of these, involving Uganda, the DRC, and the Central African Republic, ICC state parties referred events occurring in their own territories to the ICC (“auto-referrals)
 - b. Two cases, involving Sudan and Libya, were referred by the UNSC
 - c. One case was initiated by the Chief Prosecutor and approved by the Pre-Trial Chamber in March 2010 involving crimes committed in Kenya during the post-election violence in that country in 2007-2008
 - d. As of May 2011, the prosecutor is awaiting authorization to open an investigation regarding violence in Cote D’Ivoire after President Laurent Gbagbo’s refusal to step down from power after he lost the November 2010 election.
8. US Views and criticism towards the ICC:
- a. President Clinton signed the Rome Treaty in December 2000 despite “our concerns about significant flaws in the treaty.” The Bush Administration, in May 2002 sent a letter to the UN Secretary General indicating that the US “does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.” (CB pg. 1142)
 - b. *US Concerns: “the ICC is an institution of unchecked power,” for “the treaty created a self-initiating prosecutor, answerable to no state or institution, other than the Court itself.” Thus, “the treaty threatens the sovereignty of the United States,” because “by putting US officials, and our men and women in uniform at risk of politicized prosecutions, the UCC will complicate US military cooperation with many friends and allies who will now have a treaty obligations to hand over US nationals to the Court- even over US objections.”* (CB pgs. 1142-1143).
 - c. US Action to prevent US nationals from being turned over to ICC: Thus, the US has passed domestic legislation preventing any American from being turned over to ICC. US then passes bilateral agreements with states abroad- that you can’t turn over any American citizen in your territory to the ICC. The leverage- a threat of loss of US foreign aid. US has conducted over 100 such agreements.
 - d. Recent developments: The Obama administration has moved cautiously towards a closer relationship with the ICC. Harold Koh, State Department Legal Adviser, stated that “After 12 years, I think we have reset the default on the US relation ship with the court from hostility to positive engagement.” (CB pg. 1145).
9. Further ICC Criticism:
- a. Jack Goldsmith: The ICC is self-defeating and diminish human rights protection because:
 - i. Many countries will be deterred from being involved in foreign conflict and humanitarian intervention out of fear of prosecutions.
 - ii. We are also exposing the biggest supporter of human rights, the US, to politically motivated prosecutions.

1. Consider the cases of US involvement that might have been deterred: US wouldn't have gone into Somalia in 1991, the US wouldn't have gotten involved in Kosovo, the US wouldn't have gotten involved in Haiti. What about Bosnia? All cases of US involvement that would have been deterred.
 - iii. Complementarity safeguards in the ICC are also poor. The "unwilling or unable" language is vague- what does that mean, and who makes the judgment? Can the ICC do so itself? How do we appeal such a determination?
 - iv. Human rights support is dependent on US for funding, political support, and military support, because the US has massive projection power. Given all this, why would the ICC be designed in such a way as to deter US involvement?
 - v. Goldsmith believes its because of the equal commitment to justice divorced from power realities. You have to consider power realities- the ICC has serious design errors. *The ICC is more about constraining the US over prosecuting human rights violations.*
 - vi. So Goldsmith concludes that the future for the ICC is not promising, because it's unlikely that the US will acquiesce to the Rome Statute and ratify it.
- b. Madeline Morris (CB pgs. 1146-1147)
- i. *The Rome Statute violates the law of treaties-* the law of treaties is consent based, and this provision is violated when a non-party national can be prosecuted before the ICC.
 - ii. A state may object to compulsory third-party adjudication before the ICC to *retain the discretion to address interstate-dispute type cases through bilateral means or diplomatic methods and through compromise*
 - iii. *States have more reason to be concerned about the political impact of adjudications before an international court than before an individual state's courts, since the international court will have significant prestige and authority. This political impact will itself create high risks for states*
 - iv. *States may object to the ICC in effect legislating international law in areas where the law is relatively underdeveloped*
10. Support for ICC: Gary D. Solis (CB pg. 1143-1144)
- a. What is the US afraid of? *"Thanks to complementarity [...] the ICC may only exercise jurisdiction if a good-faith prosecution is not carried out by the accused's state."*
 - b. *There are many examples of conventions extending jurisdiction over nationals of states that are not parties to the conventions, including the four 1949 Geneva Conventions.*
 - c. *The ICC's Chief Prosecutor cannot do whatever he/she pleases:*

- i. May only initiate an investigation with the authorization of a three-judge Pre-Trial chamber. The decision may even be appealed to another Trial Chamber panel.
 - ii. Even with both panels' authorization, the UNSC may request that the trial be delayed for a year, and can renew this request.
 - iii. The Prosecutor can be removed by a simple majority vote
- d. *The ICC has an interest in not politicizing the prosecutions*, since it is a fledgling international body seeking to build up its legitimacy. "Is the ICC likely to facilitate its own marginalization through biased indictments and politically-motivated prosecutions?"
- e. *The ICC includes much of the criminal law provisions of US law*, including presumption of innocence, the guarantee against double jeopardy, the right to remain silent, etc.

Alternatives to Criminal Prosecutions

1. Amnesty- it is an act of oblivion, which essentially "connotes that the offender's crime has been overlooked because that course of action benefits the public welfare more than the punishment would. In essence, justice is traded for peace. (CB pg. 1151).
 - a. This is distinct from a pardon, which implies forgiveness and are generally individualized (amnesties typically apply to groups of offenders)
 - b. *Justifications*: (CB pg. 1152)
 - i. Dictators have often demanded impunity as a condition of relinquishing power. Societies eager to end a conflict may shy away from criminal trials
 - ii. There may be serious difficulties in prosecuting wrongdoers, so in the face of resource shortages and lack of basic facilities, it might not be viable to pursue prosecutions
 - c. *Legality*: (CB pg. 1152)
 - i. Legal when it comes to non-international armed conflict- amnesties in this case are not only permitted, but are encouraged.
 - ii. Violates customary int'l law when it comes to international armed conflict and prosecuting war crimes
 - iii. With regards to crimes against humanity or genocide, the provisions of the Geneva conventions might be against amnesties

THE LAW OF TREATIES (Casebook 85-112)

1. Since 1946, the UN treaty database has registered over 158,000 treaties.
2. What are treaties? The main source of int'l law- it used to be that custom mattered more, but there has been a shift particularly to multilateral treaties. They're somewhat similar to contracts- they involve the free consent of autonomous states (replacing individuals for contracts) to sign a treaty. Or they may sometimes be thought of as constitutions (UN Charter or the Treaty of Rome for the EU). You can also view them as legislation (like the Geneva Conventions- we legislate vis-à-vis

treatment of prisoners of war). You can see them as corporate charter of international organizations. Treaty doctrine is similar to contract doctrine- it involves a process of treaty formation, termination, withdrawal, just like in contract doctrine.

3. Treaties go by many names, including convention (usually used for multilateral agreements), agreement, covenant, charter, statute, and protocol. (CB pg. 85)
4. Bilateral treaties might deal with extradition, visas, aircraft landing rights, taxation, and investment (CB pg. 85)
5. Multilateral treaties range from the UN Charter, the agreement establishing the WTO, the International Covenant on Civil and Political Rights (ICCPR), and the Law of the Sea Convention (LOS Convention). (CB pgs. 85-86)
6. Difference in terminology with US Domestic Law: (CB pg. 86)
 - a. *In the US*, an agreement is referred to as a treaty if it has gone through the Article II process of executive signature and Senate approval by a 2/3 majority.
 - b. *Internationally*, all written international agreements are referred to as treaties, so all international agreements that the US signs are treaties for international law purposes

Vienna Convention on the Law of Treaties

1. *Overview:* Entering into force in 1980, the Vienna Convention on the Law of Treaties *set forth a comprehensive set of rules governing the formation, interpretation, and termination of treaties.* (CB pg. 86)
 - a. Why? Since helps overcome the costs of bargaining and negotiating treaty rules by codifying them once and for all. Further, *the Vienna Convention codifies customary international law*, so it becomes more clear, it creates a basis for the progressive development of treaty law.
2. *Membership:* 111 states are parties to the Convention. (CB pg. 87)
3. *The US view of the convention:* The US is not a party to the Vienna convention, but it does suggest that most of the provisions of the convention represent customary int'l law- so even if US is not party to treaty, it still considers the underlying custom binding. (CB pg. 87)
4. *Definition of a Treaty:* (Article 2) (CB pg. 87)
 - a. "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"
 - i. note that the *agreement must be in written form and governed by int'l law*
 - ii. note that oral declarations/agreements can still be binding, but they aren't considered treaties (CB pg. 88)
5. *Definition of a party to a treaty:* (Article 2) (CB pg. 87)
 - a. "a State which has consented to be bound by the treaty"
 - i. *so non-state actors cannot be parties to a treaty*
6. *Agreements that are essentially commercial in character are not governed by the convention*

7. *When does a treaty come into force?* Determined by the treaty itself- it could be on a date, it could be after a number of countries have ratified the treaty.
8. *What happens after a treaty has been concluded?* The written instrument is then placed in the custody of a depository. The deposit of the instruments of ratification then establishes consent.
 - a. For treaties with a small number of parties, the depository will usually be the gov't of the state whose territory upon which the treaty was signed. Other times, it's often an international location- like Geneva. Large, multilateral treaties usually rely on int'l orgs, like the UN Secretary General, as depository.

Unilateral Statements

1. Restatement (Section 301 comment): *"A unilateral statement is not an agreement but may have legal consequences and may become a source of rights and obligations on principles analogous to estoppel. It may also contribute to customary law."* (CB pg. 89)
2. Related case: Nuclear Tests Cases (Australia v. France; New Zealand v. France, 1974) (CB pg. 89)
 - a. ICJ, 1974
 - b. *Facts:* Australia and New Zealand initiated litigation in the ICJ challenging the legality of atmospheric nuclear weapons tests conducted by France in the Pacific Ocean. After the cases were filed, the French president announced that France had completed the course of its tests. The ICJ considered the legal effects of these statements.
 - c. *Decision:* The ICJ concluded that although "not all unilateral acts imply obligation," the French president had made a public statement addressed "to the international community as a whole." Thus, *the ICJ concluded that the statement constituted "an undertaking possessing legal effect."* (CB pg. 89)

Political Commitments

3. *Main difference between treaties and political commitments:* Treaty has a binding language that acknowledges that it's legally binding. Political commitments build expectations of compliance, but they don't include binding legal language like "shall comply..."
 - a. Ex. The Final Act of the Conference on Security and Cooperation in Europe signed at Helsinki in 1975, which avoids words of legal undertaking and is ineligible for registration under Article 102 of the UN Charter (Restatement Section 301 Reporter's Notes) (CB pg. 90).
4. *Why non-binding political commitments?*
 - a. Parties sometimes prefer non-binding agreement in order to avoid legal remedies. (Restatement Section 301 Reporter's Notes) (CB pg. 90).
 - b. They may be attainable when treaties cannot (CB pg. 93)
5. *Consequences of breaking a political commitment:*
 - a. Expectations of compliance may still surround a political commitment, so sometimes even sanctions can be imposed for their violation (CB pg. 90)
6. *"Soft Law":* Political commitments can sometimes contribute to the development of soft law

7. “*Good faith*”: Political commitments are governed by the general principle of “good faith” (CB pg. 93)
8. *Examples of Political Commitment*:
 - a. *Brazil-Turkey-Iran Joint Declaration*: It’s drafted similarly to a treaty, and its mean to be as binding as possible, but the conditionality of it (that another set of states, namely the Vienna Group composed of the US, Russia, France, and the IAEA, agree to it in order for it be implemented sets it apart from a treaty) (CB pg. 92)
 - b. *2010 G-8 Declaration*: there is no signal that the declaration is binding, so the declaration is just a political commitment (CB pg. 92)

Obligation Not to Defeat the Object and Purpose of a Treaty

1. Article 18 of the Vienna Convention: A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (CB pg. 94)
 - a. It has signed the treaty and it is subject to domestic ratification, until it shall have made its intention clear not to become a party to the treaty
 - b. It has expressed its consent to be bound by the treaty, pending entry into force of the treaty
2. Ex: Clinton and Bush and the ICC Statute: Clinton signs Rome statute in 2000 even though he expressed problems. At that point, US is bound not to undermine object and purpose of treaty. But Bush wants to conduct bilateral treaties with many states such that US citizens cannot be subjected to the jurisdiction of the ICC (which obviously undermines the object and purpose of the ICC statute). So Bush sends a letter to the UN Secretary General letting him know that the US no longer wishes to become a party to the treaty, and then it is no longer required that he doesn’t undermine the object and purpose of a treaty. (CB pg. 94)

Observance of Treaties

1. Article 26 of the Vienna Convention expresses the fundamental/widely accepted rule of *pacta sunt servada*:
 - a. “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” (CB pg. 95)
2. Article 27 of the Vienna Convention invokes a corollary to the rule:
 - a. A state “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” (CB pg. 95)
 - i. In other words, a state cannot use its domestic law as a means to escape international responsibilities

Interpretation of Treaties

1. Article 31 of the Vienna Convention includes the general rule of interpretation: (CB pg. 96)
 - a. A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in light of their context as well as object and purpose
 - b. The context for the purpose of interpretation shall comprise:

- i. The treaty text, including its preamble and annexes (textual/structural interpretation)
 - ii. Any agreement relating to the treaty that was made between the parties in connection with the conclusion of the treaty (contextual interpretation)
 - iii. Any instrument which was made by the parties in connection with the conclusion of the treaty and accepted by other parties as an instrument of the treaty (Protocols) (contextual interpretation)
- 2. Article 32 of the Vienna Convention includes additional means of interpretation if the above leave the treaty's meaning "ambiguous" or lead to a result which is "manifestly absurd or unreasonable": (CB pg. 96)
 - a. Preparatory work (travaux préparatoires) (historical interpretation)
 - b. The circumstances of the treaty's conclusion (contextual interpretation)

Reservations

1. *Definition of reservation*: According to Article 2(1)(d) of the Vienna Convention, a reservation is: (CB pg. 100)
 - a. "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State."
2. *Why Reservations?* (CB pg. 100)
 - a. *Reduction of decision costs*- it's easier for all parties to agree. So it could lead to more treaties. They may, however, weaken the overall instrument, even if it doesn't directly undermine the object and purpose of treaty.
 - b. *Federalism concerns*: a state may want to prevent a treaty's application from subordinating political entities in a federal system
 - c. *Compatibility with local law*: A state may wish to ensure that a treaty is compatible with peculiarities of its local law
 - d. *Disagreement with specific points*: A state may wish to be a party to a treaty even though it disagrees with some specific substantive points
 - e. *Declining from dispute-settlement mechanisms*: A state may agree to a treaty but reserve away it being bound to the treaty's dispute settlement mechanism (such as the ICJ)
3. *Reservations only apply to multilateral treaties*: The issue of reservations does not come up with bilateral treaties. Why? It's a counter-offer, they either accept it as part of the treaty or reject it and it will never take effect.
4. *When reservations are not allowed*: (Vienna Convention, Article 19) (Cb pg. 101):
 - a. When the reservation is prohibited by the treaty
 - b. When the reservation is incompatible with the object and purpose of the treaty
5. *Acceptance of reservations*: Under Article 20 of the Vienna Convention: (CB pg. 101):
 - a. A reservation specifically allowed by the treaty requires no acceptance
 - b. When the object and purpose of the treaty may be subverted by the reservation, it requires acceptance by all state parties

- c. An act by a State expressing its will to be bound by the treaty and expressing a reservation is effective as soon as at least one other contracting state has accepted the reservation (which is assumed if a state raises no objection to a reservation after a certain period)
- 6. *Effect of reservations on other parties to the treaty* (CB pg. 102)
 - a. What a reservation does is it modifies the reserving states' relation to other states on that particular provisions without modifying the treaties for other parties. So the US, its relationship to other states is changed. So, for example, US reservations on human rights treaties do not effect another state's duty to comply with a treaty's terms.
 - b. Reciprocity: when a state enacts the reservation, another state party is not bound to that provision of the treaty vis-à-vis the reserving state. For example, if the US reserves away from Article 5, then Canada is not bound to Article 5 of the treaty vis-à-vis the US (but it still is vis-à-vis all states that have not reserved away from Article 5)
- 7. *Method of communicating reservations: Article 23 of Vienna Convention: (CB pg. 102):*
 - a. The reservation and the express acceptance of a reservation must be in writing and communicated to the contracting States and other states entitled to become a party to the treaty

Invalidation of Treaties

- 1. Articles 46-52 of the Vienna Convention provide for the conditions that justify the invalidation of treaties: (CB pgs. 98-99):
 - a. *Coercion*: "the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law today."
 - b. Other possible justifications: *Duress, error, fraud, corruption*

Termination and Suspension of the Operation of Treaties

- 1. Termination vs. Invalidation:
 - a. Prior obligations are erased through invalidation, whereas termination would only invalidate future obligations or obligations after termination, but the past commitments still stand. It's a temporal distinction.
- 2. When treaties can be terminated: According to Article 60 of the Vienna Convention: (CB pg. 105)
 - a. *For bilateral treaties*: They may be terminated after a material breach of the treaty by one of the parties
 - b. *For multilateral treaties*:
 - i. They may be terminated if after a *material breach* by one of the parties the other parties unanimously agree to terminate the treaty. This termination may either be between themselves and the defaulting state, or between all parties
 - ii. *Impossibility of performance*: The treaty may be terminated if it is no longer possible to perform the treaty (Article 61) (CB pg. 107)
 - iii. *Fundamental changes in circumstances* (Article 62) (CB pg. 107)

3. Definition of a material breach: According to Article 60 of the Vienna Convention, a material breach consists of: (CB pg. 106)
 - a. A repudiation of the treaty not sanctioned by the convention
 - b. The violation of a provision essential to the accomplishment to the object or purpose of the treaty
4. What constitute “fundamental changes in circumstances” worthy of treaty termination? The changes in circumstances have to be essential to the treaty and have to radically change the parties’ ability to perform the treaty.

Withdrawal from or Denunciation of a Treaty (when there hasn’t been a material breach)

1. *Most treaties include terms providing the bases for withdrawal from, or denunciation of, the treaty, and indeed, these acts are usually done according to the treaty terms. These terms usually specify the duration or date of termination of the treaty, or the conditions/events that allow for termination, withdrawal, or the right to denounce the treaty. (CB pg. 109).*
2. Withdrawal causes in treaties are now common practice, and are recognized by the Vienna Convention.
 - a. Article 54 of the Vienna Convention provides that the termination of a treaty/a party’s withdrawal may take place “in conformity with the provisions of the treaty” or “at any time by consent of all the parties.” (CB pg. 110).
3. If the treaty does not contain any withdrawal/termination/denunciation provisions, then Article 56 of the Vienna Convention provides that such acts are not possible unless: (CB pg. 110)
 - a. It is established that the parties intended to admit the possibility of denunciation or withdrawal, or
 - b. The right to denunciation/withdrawal may be implied by the nature of the treaty

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) (1997)

(In this case, Slovakia asked the ICJ to rule on the validity of Hungary’s termination of a 1977 treaty with Slovakia’s predecessor state (Czechoslovakia). Hungary argued that because of the environmental damage that would occur, it was impossible for it to fulfill its treaty obligations, and that there had been a fundamental change in circumstances that legitimated its termination. The ICJ ruled against Hungary, arguing that there had not been fundamental changes in circumstances and that, if the viability of the project was impossible, it was due to Hungary’s own actions, invalidating its “impossibility of performance” argument. Further, termination was not provided for in the treaty terms, and Hungary hadn’t provided enough prior notice, violating the Vienna Convention.) (CB pgs. 108-109; 110).

1. ICJ, 1997
2. *Facts:*
 - a. Hungary and Czechoslovakia, when under the communist rule of the USSR, had made a treaty regarding a project of locks on the banks of the Danube river. Hungary terminated the treaty in 1989 arguing it would have a terrible environmental impact: “it could not be “obliged to fulfill a practically

- impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage.” (CB pg. 108)
- b. Hungary further argued that due to “changes of a political nature, the Project’s diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law,” there had been a fundamental change in circumstances that justified its termination of the treaty
3. *Decision with regards to whether the treaty allowed for termination:*
 - a. The ICJ found that the 1977 Treaty does not contain any provision regarding its termination, nor was there any indication that the parties intended to include this, and in fact, the parties seemed to want a long-standing commitment to the project. Thus, the treaty can only be terminated in accordance with the limited grounds enumerated in the Vienna Convention, which requires states to “act in good faith.” Since Hungary terminated the treaty in 1992 only six days after notifying Slovakia without having suffered any injury during this time, the ICJ ruled that “Hungary’s termination of the treaty was premature.” (CB pg. 110).
 4. *Decision with regards to Hungary’s “impossibility” argument:*
 - a. *The ICJ did not accept Hungary’s “impossibility argument.”* The ICJ found that since Hungary was responsible for not investing in the project in the first place, if the project was no longer viable, it was for Hungary’s own fault. Further, Article 61 of the Vienna Convention “expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party’s own breach of an obligation.” (CB pg. 108)
 5. *Decision with regards to Hungary’s “fundamental changes in circumstances” argument:*
 - a. The ICJ did not accept Hungary’s “fundamental changes in circumstances argument.” First, changes in the political environment were not related to the purpose of the treaty, and are thus irrelevant. Second, the economic viability of the project “does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.” Finally, the developments in environmental law and knowledge cannot be said “to have been completely unforeseen.” And, a fundamental change in circumstances in line with Article 62 of the Vienna Convention must have been unforeseen.

DISPUTE RESOLUTION: THE INTERNATIONAL COURT OF JUSTICE (ICJ) (Casebook 295-325)

1. *History/overview*
 - a. Created by the 1945 UN Charter, the ICJ is the principal judicial organ of the UN. (CB pg. 295)
 - b. It is the successor to the Permanent Court of International Justice (PCIJ) created by the League of Nations in 1920, which was most active between 1922 and 1939. (CB pg. 295).

- c. The ICJ statute is largely the same as the PCIJ statute, and the ICJ has often referred to the PCIJ's precedents (CB pg. 296)
- 2. *Composition/election of judges:* (CB pg. 296)
 - a. The ICJ is composed of 15 judges who serve 9-year terms
 - b. The judges are elected in staggered cohorts- 1/3 every 3 years for election/re-election
 - c. They must be "independent" and "persons of high moral character" who possess the qualifications to be appointed to the highest judicial offices in their home countries
 - d. They are nominated by national groups appointed by individual governments
 - e. They are elected by the UN GA and the UNSC by a majority of the votes in both chambers.
 - f. No two judges can be nationals of the same state
 - g. Composition should "bear in mind" that it should be representative of "the main forms of civilization and of the principal legal systems of the world."
- 3. *Are ICJ judges independent?*
 - a. *Yes:* Prof. Edith Brown Weiss: "The record does not reveal significant alignments, either on a regional, political, or economic basis. There is a high degree of consensus among the judges on most decisions." (CB pg. 297)
 - b. *No:* Profs. Eric Posner and Miguel de Figueiredo: using more sophisticated empirical methods, they conclude that judges are more likely to vote for their own country or for countries that share certain characteristics, such as level of wealth and political systems, with their home country." (CB pg. 297)
- 4. *Binding decisions/consequence of non-compliance:* Under article 59 of the ICJ statute, the Court's judgments are only binding on the parties to that case. If a country doesn't comply with the judgment, then the other party may refer the matter the UNSC, which may take measures to enforce the judgment. (CB pg. 297)
- 5. *Statistics:* Over 150 cases have been presented to the Court- 123 contentious cases and 27 advisory opinions. As of Feb. 2011, there were 16 contentious cases pending.
 - a. What do they focus on: 1/3 on boundary disputes, 1/3 on use of force (less likely to produce an outcome that has an independent effect), 1/10 deal with diplomatic issues like immunities, and 1/5 deals with other types of cases.

Types of ICJ Jurisdiction

ICJ Jurisdiction over Contentious Cases

- 6. Jurisdiction of the ICJ for Contentious Cases:
 - a. Article 34(1) of the ICJ statute provides that only states may be parties before the Court (CB pg. 298)
 - i. This is the main question to determine if the Court has jurisdiction in contentious cases: are both parties states?
 - ii. If a party is not a UN member, it can still opt into the ICJ mechanism by providing its consent

- b. Article 36: the ICJ jurisdiction “*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.*” (CB pg. 298)
 - c. Jurisdiction could also be consented to in advance under the ICJ’s “Optional Clause,” discussed further below.
7. Examples: 2 cases, 2 different judgments: Is the FRY a state, and does the ICJ have jurisdiction over it?:
- a. Serbia and Montenegro v. Belgium (2004): Involved FRY versus the NATO countries involved in the bombing of Kosovo- FRY brought charges against legality of the bombing in 1999, before FRY’s application for membership in the UN was approved. The ICJ held that its not clear that what’s left of FRY (Serbia and Montenegro) is actually the proper successor to FRY’s seat- there are other countries that want that seat (such as Slovenia, Croatia)-it’s contested. *The ICJ doesn’t have jurisdiction over this contentious case because FRY “was not a Member of the United Nations, and in that capacity a State party to” the ICJ Statute, at the time of filing its application before the ICJ.* (CB pg. 299)
 - b. Croatia v. Serbia (2008): The ICJ employed a different approach in this judgment brought against the FRY by Croatia. The ICJ held that although FRY was not a member of the UN when Croatia initiated the case, the Court would have had jurisdiction at any time after the FRY became a member of the UN in November 2000. *Under the circumstances, the Court elected to show “realism and flexibility...[where] the conditions governing... jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction.” The ICJ thus rejected the argument that it didn’t have jurisdiction over the FRY (by then called Serbia).* (CB pg. 299)
 - c. Why the difference between the two?
 - i. The ICJ didn’t want to let a country that’s not a party to the ICJ bring suit, but in the second case, Croatia was a party, and so it had standing to bring suit.
 - ii. One doesn’t want a country to receive immunity just because it wasn’t a party to the ICJ statute at the time of application, even though it now is a party.

ICJ Jurisdiction by Special Agreement

8. Jurisdiction by Special Agreement:
- a. When a dispute between two countries has arisen, they may conclude by special agreement, known as a compromis, to submit the matter before the ICJ. (CB pg. 299)
 - i. The compromis will define the question or dispute the parties wish the court to resolve.
 - b. Jurisdiction by special agreement usually isn’t contentious (usually both countries want to bring up a case to ICJ).

- c. *Sometimes, though, it's unclear whether the countries actually agreed to ICJ jurisdiction:*
 - i. Qatar v. Bahrain (1994): (CB pgs. 299-300)
 1. ICJ, 1994
 2. *Facts*: Bahrain and Qatar have a dispute over sovereignty over some islands and a maritime boundary. They seek to resolve the dispute via negotiations, with Saudi Arabia acting as a mediator. In December 2000 meeting, they met and recorded the minutes in Arabic. Qatar and Bahrain released slightly different English translations. The minutes appear to suggest that Bahrain consented to ICJ's jurisdiction, along with Qatar, if it did not resolve the dispute by May 1991. In May 1991, given no resolution of the dispute, Qatar filed an application in the ICJ. Bahrain argued that the minutes did not constitute a legally binding agreement manifesting its consent to ICJ jurisdiction.
 3. *Decision*: *The ICJ concluded that the minutes were not "a simple record of a meeting," but rather constituted a legally binding international agreement.* It also rejected Bahrain's argument that the 1990 minutes required that both states act jointly in order to submit a case before the ICJ. (For the text of the agreement, see CB pg. 300).

ICJ Jurisdiction under a Dispute Settlement Clause in a Treaty

1. *When states negotiate a treaty, they may agree in advance that any party may submit a dispute concerning the interpretation or application of that treaty to the ICJ. These are known as "compromissory clauses."* (CB pg. 301)
 - a. Over 300 treaties, both bilateral and multilateral, contain such ICJ dispute resolution clauses.
2. Example: Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (August 15, 1955): (CB pg. 301)
 - a. "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

Oil Platforms Case (Islamic Republic of Iran v. United States of America) (1996) (CB pgs. 301-304)

(This ICJ case was brought forth by Iran which challenged the lawfulness of the destruction by US military forces of a number of Iranian oil production platforms in the Persian Gulf during the 1980-1988 Iran-Iraq War. Iran claimed the ICJ had jurisdiction given a provision for dispute settlement in the ICJ included in the 1955 US-Iran Treaty of Amity. The US claimed that the ICJ did not have jurisdiction over the case given that the relevant rule was that concerning the use of force and self defense, falling outside the scope of the Treaty. The Court ruled that it had jurisdiction over the case, given that the destruction of the platforms could have a harmful effect on commerce, which was protected in Article X of the Treaty.) (CB pgs. 301-304).

1. ICJ, 1996
2. *Facts*: During the Iran-Iraq war, Iran claims that US destroyed several of its oil platforms.
 - a. *The US*, which sought to ensure that commercial shipping in the Gulf was not impeded, concluded that Iran was using oil platforms as command and control centers for attacks against neutral commercial vessels. *The US argued that the destruction of the platforms was governed by the law regulating the use of force and self-defense*, and did not fall within the ambit of the Treaty of Amity between the US and Iran excerpted above. (CB pg. 302)
 - b. *Iran* grounded jurisdiction on the ICJ dispute resolution clause in Article XXI of the US-Iran Treaty of Amity excerpted above. *It argued that the destruction of the platforms violated several terms of the treaty, including*: (CB pg. 302)
 - i. Article I which provided that there shall be firm and enduring peace between the two countries
 - ii. Article IV, which provided that the parties shall provide fair and equitable treatment to nationals and companies of the other party, and to their property and enterprises
 - iii. Article X, which provided that there “shall be freedom of commerce and navigation” between the territories of the two parties
3. *Question*: “whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction... to entertain, pursuant to [the compromissory clause] in Article XXI.” (CB pg. 302).
4. *Decision*: *The ICJ held that it had jurisdiction not over Articles I or IV, but over Article X, since the destruction of the oil platforms “was capable of having such an effect [on export trade in Iranian oil], and , consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X” of the 1955 Treaty.* (CB pg. 304)
 - a. *Note*: eventually (7 years later) the ICJ ruled on the merits of the case: it held that the US did not violate the 1955 Treaty: because none of the oil produced in the platforms could have been shipped from Iran to the US because the platforms were already damaged/out of production/due to trade restrictions, the attacks did not interrupt ongoing commerce of oil between the two parties. (CB pg. 304-305).

1. Other Dispute Settlement Clause Cases

- a. Democratic Republic of the Congo v. Rwanda, 2006: (CB pg. 306)
 - i. In this case, the ICJ upheld the legality of the Rwanda reservation to the ICJ dispute resolution clause in Article IX of the Genocide Convention.
 1. The DRC argued that Rwanda’s reservation aims to “exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity for this serious a violation of international law.”
 2. The ICJ argued that, in accordance with the ICJ statute that jurisdiction to the ICJ is always based on the consent of the

parties, Rwanda's reservation did not undermine the object and purpose of the Genocide Convention.

Jurisdiction under the Optional Clause:

1. The "Optional Clause": Under Article 36(2) of the ICJ Statute, referred to as the "Optional Clause," States may recognize the Court's jurisdiction as compulsory in advance in all legal disputes concerning: (CB pg. 298; 306)
 - d. The interpretation of a treaty
 - e. Any question of int'l law
 - f. The existence of a fact which, if established, would constitute a breach of an int'l obligation
 - g. The nature or extent of the reparation to be made for the breach of an int'l obligation
2. Reciprocity: a declaration recognizing compulsory ICJ jurisdiction "*is, however, subject to reciprocity, and a defendant state against which a proceeding is brought may invoke an exclusion or other reservation not stipulated in its own declaration but included in the declaration of the plaintiff state.*" (Restatement Section 903 comment) (CB pg. 307).
3. As of 2010, 66 states have declarations in force under Article 36(2) accepting the compulsory jurisdiction of the ICJ. (CB pg. 307)
 - a. Some are without limit of time, others are for a specified period of usually 5 to 10 years, in many instances with an automatic renewal clause. Seventeen declarations are without reservation, the remaining declarations include a variety of reservations, the most common reservation excluding disputes committed by parties to other tribunals or which the parties have agreed to settle by other means than the ICJ.

Certain Norwegian Loans Case (France v. Norway) (1957)

(In this case, the ICJ addressed the validity and legal effect of reservations in a state's Optional Clause declaration in the following case. France included a reservation to its Optional Clause declaration saying any matter subject to its domestic jurisdiction could not be brought to the ICJ, and Norway argued that since this matter fell within its domestic jurisdiction, it was covered by the French reservation. The ICJ agreed with Norway, and found that because reservations to Optional Clause declarations are subject to reciprocity, it lacked jurisdiction to address France's claims.) (CB pgs. 308-309).

1. ICJ, 1957
2. *Facts*: French nationals owned bonds issued before WWI by Norway and two Norwegian banks. These bonds included clauses which France claimed guaranteed payment in gold. Norway later passed legislation allowing payment of the bonds with Bank of Norway notes, which were not convertible to gold. The French gov't then brought the case to the ICJ. Both parties had declared their acceptance of the compulsory jurisdiction of the ICJ under the "optional clause." However, the French declaration included the following reservation: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic." (CB pg.

3. *Claims:* Norway argued that based on the reciprocity of reservations to declarations under the optional clause, it “has the right to reply upon the restriction placed by France upon her own undertakings.” Claiming that the bondholder’s claims were within the domestic jurisdiction of Norwegian courts, Norway thus argued that the French reservation also covers this case, thus the ICJ “lacks jurisdiction.” (CB pg. 309).
4. *Decision:* The ICJ sided with Norway, writing: “the common will of the Parties, which is the basis of the Court’s jurisdiction, exists within these narrower limits indicated by the French reservation [...] Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction.” Thus the ICJ held, by 12 votes to 3, that “it is without jurisdiction to adjudicate upon the dispute” brought by France. (CB pg. 309).

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (1984)

(This case deals with a dispute between the US and Nicaragua with respect to US involvement in supporting the contras that were fighting the Nicaraguan government. The US argued that the ICJ did not have jurisdiction over the case, based on its reservations to its 1946 optional clause declarations, and given that it had amended the declaration to not include conflicts with central/south American countries. The ICJ ruled against the US and found it had jurisdiction over the case. It would eventually hold that the US violated customary int’l law, and in 1985 the US terminated its 1946 declaration consenting to the ICJ’s compulsory jurisdiction). (CB pgs. 310-312 for background, pgs. 312-316 for case).

1. ICJ, 1984
2. *Facts:* In 1984, Nicaragua sued the US over US support for the contras, an insurgent group seeking to overthrow the Soviet-supported Sandinista Nicaraguan government. Nicaragua claimed that the US was, with respect to the contras, training them, paying them, supplying them with arms and ammunitions and other supplies. (CB pgs. 310-311)
 - a. At the time the case was brought, the US had consented to compulsory ICJ jurisdiction via a declaration by President Truman from 1946, subject to a few reservations. See CB pg. 311.
 - b. Nicaragua had consented to the compulsory ICJ jurisdiction in a 1929 declaration, without reservation (see CB pg. 312). However, its declaration had been lost at sea, despite contacting the League of Nations by telegram that it planned to be bound by the jurisdiction of the ICJ’s predecessor, the PCIJ. (CB pg. 313)
 - c. In 1984 the US submits a “notification” to the UN Secretary General, signed by the US Secretary of State, stating that the US’s declaration did not apply to disputes within any Central American state, effective immediately. (CB pg. 312)
 - d. Further, the US argued that because one of the reservations in its original declaration included that disputes arising under a multilateral treaty should not be subject to the Court’s compulsory jurisdiction, and that Nicaragua believes that the US has violated several treaties, including the UN Charter

and the Montevideo Convention, that the ICJ does not have jurisdiction. (CB pg. 315)

3. *Decision on whether Nicaragua had consented to ICJ jurisdiction:* Yes, Nicaragua has consented to ICJ jurisdiction. Since in 1945 Nicaragua became a party to the UN Charter in 1945 and to the ICJ Statute, and “in sum, Nicaragua’s 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the new Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so.” (CB pg. 313). Further, “constant acquiescence of Nicaragua in affirmations, to be found in United Nations and other publications, of its position as bound by the optional clause constitutes a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court.” (CB pg. 313)
4. *Decision on whether the US’ 1984 “notification” is valid:* The ICJ ruled that it wasn’t valid, because it hadn’t provided Nicaragua with enough prior notice: “the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar a Application filed on 9 April 1984 [...] according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties [...] it need only be observed that from 6 to 9 April would not amount to “reasonable time”” (CB pg. 315)
5. *Decision on the US claim that this dispute concerns a multilateral treaty dispute outside the ICJ’s jurisdiction:* The ICJ held that the treaties mentioned by Nicaragua simply codify customary int’l law, thus the ICJ could still have jurisdiction over the case, since the dispute isn’t just about treaties, but customary int’l law, which is not mentioned in the reservations to the US’s optional clause declaration. (CB pg. 315)
6. *Final decision:* The ICJ has jurisdiction to entertain Nicaragua’s application (CB pg. 316).
7. *Subsequent outcomes:*
 - a. The US withdrew from the proceedings, and in 1986 the ICJ ruled against the US, stating that the US involvement with the contras had violated customary int’l law and the FCN Treaty between the two countries.
 - b. In December 1985, the US gave formal notice that it was terminating its 1946 declaration consenting to the ICJ’s compulsory jurisdiction.

Forum Prorogatum Jurisdiction

1. Under Article 38, the doctrine of forum prorogatum enables a party to a dispute to invite its adversary to resolve the case before the ICJ by submitting an application with the Court (CB pg. 319)
 - a. Many states won’t accept such invitations. In some cases, the goal is to continue to develop a body of law, so sometimes states accept it for that reason. Or a state may feel it has a better chance of getting a favorable judgment before the ICJ or by some other means and will consent.

PROCEDURE BEFORE THE ICJ

1. ICJ procedure is highly formal and deliberate. Regular proceedings involve the following steps: (CB pg. 319)
 - a. A country files an application with the Court

- b. The parties submit lengthy written pleadings (including documentary evidence)
 - c. Phase 1: Preliminary objections phase- does the ICJ have jurisdiction and is the case admissible?
 - d. Phase 2: merits of the case phase-the arguments and claims of both parties are addressed
 - e. Phase 3- the reparation/damages phase
2. Because of the ICJ's deliberate and formal procedure, it usually completes no more than 2-3 cases per year (CB pg. 320)

Provisional Measures

1. *The ICJ may, at the request of either party or on its own initiative, issue a preliminary order that grants some interim relief to one of the parties or, in some circumstances, that directs the parties to refrain from acts that would aggravate the dispute while it is pending before the Court.* (CB pg. 320)
 - a. This is codified in Article 41 of the ICJ Statute
 - b. Provisional measures (sort of like an injunction- to stop a particular behavior until damages or merits of the legality of the behavior can be made)
2. Are provisional measures legally binding?
 - a. Yes. In the ICJ's 2001 La Grand Case (Germany v. United States of America), the ICJ argued that to violate a provisional measure would undermine the object and purpose of the ICJ Charter: "The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article." (CB pg. 321)

Admissibility

1. Along with challenges to jurisdiction, respondent states may try to dispose of cases on preliminary grounds by objecting to the "admissibility" of a claim. In raising this argument: (CB pg. 322)
 - a. The objecting State argues that the claim cannot be admitted, is "inadmissible," often on the ground that some other applicable rule of general int'l law has not been complied with (like exhausting local remedies before the institution of proceedings), or the failure to attempt to reach agreement through diplomatic negotiations when they are called for in a treaty or general international law.
 - b. Admissibility can also isolate matters such as whether a dispute is primarily "legal" in nature, and thus best settled by judicial means, or whether it involves political questions best settled by the UNSC.
2. Relevant case: Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) (1984) (CB pgs. 322-323).
 - a. *Note: this case is discussed in more detail on pg. 89 of this outline.*
 - b. *Here, the part of the case of interest is the US contention that the case was inadmissible because it dealt with politically sensitive use of force issues committed to the political, and not judicial, organ (UNSC) of the UN* (CB pg. 322)

- c. US argument: “The United States regards the Application as inadmissible because each of Nicaragua’s allegations constitute no more than a reformation [...] that the United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council.” (CB pg. 323)
- d. *Decision*: The ICJ held that the case is admissible because the UNSC does not have exclusive, but merely primary, responsibility for the maintenance of int’l peace and security under Article 24 of the UN Charter (CB pg. 323).
 - i. “the Court has never shied away from a case brought before it merely because it had political implications” (CB pg. 323)

Request for an Interpretation of a Judgment

1. Even though ICJ judgments are not subject to appeal, the parties may, if they disagree about the meaning of a judgment, request an interpretation from the Court. This provision is found in Article 60 of the ICJ Statute. (CB pg. 324)

Advisory Opinions

1. The ICJ is empowered under the UN Charter and the ICJ Statute to render advisory opinions on legal questions presented by various int’l organizations: (CB pg. 325)
 - a. UN organs and specialized agencies may request advisory opinions on legal questions arising within the scope of their activities. (UN Charter Article 96)
 - b. ICJ Statute Article 65 repeats this general competence

If every part could consider a case a political concern to go to UNSC, it avoids being able to bring a case before ICJ.

INTERNATIONAL LAW IN THE US I: TREATY POWER (Casebook 164-80)

Status of Treaties under the Constitution

1. Article VI Supremacy Clause: “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (CB pg. 164)
 - a. *Impact*: the Supremacy Clause places treaties higher than state constitutions and laws in the hierarchy of domestic law, and confers equal status to federal laws and treaties
2. Article 3 provisions- Federal judges can hear cases regarding treaties. States cannot enter into treaties with international states, but can enter agreements amongst themselves.

Self-Executing vs. Non-Self-Executing Treaties

1. The supreme court has long recognized a distinction between the two, first in *Foster v. Neilson*, 1829, where the SCOTUS held that some treaties are not enforceable in Court unless Congress passes legislation implementing the treaty: (CB pg. 164)

- a. *Self-executing treaties*: become domestically enforceable federal law upon ratification
 - b. *Non-self-executing treaties*: only become domestically enforceable through implementing legislation passed by Congress
 - i. Restatement Section 111: an Int'l agreement is not self-executing if: (CB pg. 164)
 - 1. the agreement manifests the intent not to be domestically enforceable without implementing legislation
 - 2. the Senate, in giving consent to a treaty, or Congress by resolution, requires implementing legislation
 - 3. If implementing legislation is constitutionally required
 - ii. The US violates these non-self-executing treaties and can be subject to an international claim against it if it doesn't comply, but non-compliance could still act in accordance with domestic law.
2. General rules: (Restatement Section 111, Comment) (CB pgs. 164-165):
- a. *If the int'l agreement is silent as to its self-executing character and the intention of the US is unclear, account must be taken of any Presidential statement in concluding the agreement or in submitting it to the Senate or Congress for approval, and of any expression by the Senate or Congress*
 - i. After the agreement is concluded, often the President must decide on the self-executing nature of the agreement
 - b. *An int'l agreement cannot take effect as domestic law without implementation by Congress if the agreement would achieve what lies within the exclusive law-making power of the Congress under the Constitution*
 - i. It has been commonly assumed that an int'l agreement cannot itself bring the US into a state of war
 - ii. It has also been suggested that a treaty cannot raise revenue/impose a new tax or tariff without Congressional action
3. Further general rules: when are courts likely to interpret a treaty as being self-executing?
- a. When we see language that is mandatory and in the present tense- more likely be more self-executing
 - b. The more specific the obligation, the more likely that a Court will view the treaty as self-executing
 - c. Treaty provisions that ask the state to refrain from doing something are more likely to be deemed self-executing as opposed to treaties that require positive action
 - d. Might also turn on whether treaty is bilateral or multilateral (bilateral more likely to be self-executing than multilateral)
 - i. Examples: UN Charter (not considered self-executing), whole range of HR treaties (not considered), on the other hand, bilateral extradition treaties (are considered self-executing).
 - e. Even a treaty is self-executing, it doesn't mean it provides for certain remedies (you might have a right w/o a remedy- so there could be no provision for any damages).

CASES DEALING WITH SELF-EXECUTING NATURE OF TREATIES

Note: the Medellin case is now the leading case on the subject

Asakura v. City of Seattle (1924)

(In this case, a Seattle ordinance was passed rendering it impossible for the plaintiff, a Japanese national, from continuing to work as a pawnbroker. The SCOTUS ruled against the ordinance because it violated a 1911 treaty between the US and Japan granting each others' citizens equal rights to trade as native citizens, and since the treaty was self-executing, the Seattle ordinance cannot violate the treaty, for it is the law of the land.)(CB pgs. 165-166)

1. SCOTUS, Justice Butler delivered the opinion of the Court
2. *Facts:* Plaintiff (Asakura) is a Japanese citizen working in Seattle, Washington, as a pawnbroker. In July 1921 the city passed an ordinance making it unlawful to engage in pawnbrokering unless the individual has a license, which cannot be granted "unless the applicant be a citizen of the United States." Akasura had \$5000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. Palintiff brought suit in the Superior Court of King County, Washington. He claimed that the oridnance violates the 1911 treaty between the US and Japan, which includes the following provision: (CB pgs. 165-166)
 - a. "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail [...] and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects [...] The citizens or subjects of each... shall receive, in the territories of the other, the most constant protection, and security for their persons and property."
 - b. The Superior Court ruled in favor of Asakura, on appeal the Supreme Court of Washington State reversed the decree
3. *Decision:* The SCOTUS decides that "the treaty is binding in the State of Washington" and "it operates of itself without the aid of any legislation, state or national." Thus, the SCOTUS decides the 1911 treaty between the US and Japan is self-executing. The Seattle ordinance, in this case, "makes impossible for allies to carry on the business," and the plaintiff is thus "denied equal opportunity." The SCOTUS thus reversed the decree of the Washington supreme court.
 - a. *Why is the treaty self-executing?* SCOTUS doesn't say why, but it was likely influenced by language of treaty, "shall have," "shall receive" (as opposed to, "undertakes to comply")- there is no contemplation of future action- plus, the treaty just required equal treatment, it was a prohibition of discrimination- you don't really need to pass legislation to do this. Just treat anyone equally. Moreover, the treaty was to the benefit of private parties- Japanese citizens.

Medellin v. Texas (2008)

(This case dealt with whether the ICJ's Avena judgment, namely that the defendant and 51 Mexican nationals have their cases and sentences reconsidered in domestic Courts, and whether the ICJ judgment was directly enforceable in US state courts, especially after a Presidential memorandum asking that the decision be enforced in domestic courts. The SCOTUS majority found that "neither Avena nor the President's Memorandum constitute

directly enforceable federal law that re-empts state limitations on the filing of successive habeas petitions. Thus, the ICJ decision could not be enforced in domestic court without congressional action.) (CB pgs. 167-178)

1. SCOTUS, Chief Justice Roberts delivered the Court Opinion, in which Scalia, Kennedy, Thomas, and Alito joined, 2008
2. *Facts:*
 - a. Medellin is a Mexican national living in the US convicted of capital murder and sentenced to death in Texas. (CB pg. 168)
 - b. Meanwhile, Mexico brought suit in the ICJ (Case Concerning Avena and Other Mexican Nationals (Mexico v. United States, 2004) on behalf of Avena and 51 similarly situated nationals, including Medellin, alleging US had violated the Vienna Convention by failing to inform the Mexican nationals of their right to request assistance from the consul of their home state, violating Article 36(1) of the Vienna Convention. (CB pg. 167)
 - c. The ICJ held that the US had indeed violated the Vienna Convention, and thus the 51 named Mexican nationals, including Mendellin, were entitled to review and reconsideration of their state-court convictions and sentences in the US. (CB pg. 167)
 - d. To implement the decision, President Bush issued a memorandum for the Attorney General in 2005 declaring that the US would “discharge its international obligations” under Avena “by having State courts give effect to the decision.” (CB pg. 167)
 - e. Medellin, relying on the ICJ decision and the Presidential memo, petitioned for a writ of habeas corpus in state court.
 - i. A writ of habeas corpus is a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.
 - f. The Texas Court of Criminal appeals dismissed Medellin’s application as an abuse of the writ under state law, given Medellin’s failure to raise his Vienna Convention claim in a timely manner under state law (CB pg. 167)
3. *Questions before court:* (CB pg. 167)
 - a. Is the ICJ’s judgment in Avena directly enforceable as domestic law in a US state court?
 - b. Does the President’s memo independently require the states to review and reconsider the claims of the 51 Mexican nationals, including Medellin, regardless to state procedural rules governing the writ of habeas corpus?
4. *Decision:* *The SCOTUS decided that “neither Avena nor the President’s Memorandum constitute directly enforceable federal law that re-empts state limitations on the filing of successive habeas petitions. Thus, the Texas Criminal Court of appeals decision was affirmed.* (CB pg. 167)
 - a. *Details with regards to whether ICJ’s Avena’s decision is binding on state courts:*
 - i. Majority treats treaty interpretation like statutory interpretation: let’s look at the text (CB pg. 169) of the UN Charter: “each Member of the United Nations undertakes to comply with the decision of the [ICJ] in

any case to which it is a party.” (CB pg. 168). First, the text is not a directive, because “undertakes to comply” denotes future (implementing, possibly) action (CB pg. 170).

- ii. What else supports this contention: why would there be an express diplomatic remedy to violations or failures to implement ICJ decisions before the UNSC if they are self-executing? The express diplomatic remedy in UNSC supports this conclusion in US courts. If there had been no explicit diplomatic remedy, then it would have been evidence of direct effect. (CB pg. 170). ICJ judgments were never meant to be self-executing in domestic courts. (CB pg. 170)
- iii. The issue for the SCOTUS is what did the US intend in 1969? Did it intend, when it signed, that ICJ decisions regarding the Vienna convention would have immediate legal effect? It’s unlikely. Looking at the US legislative history- US was very skeptical at time of int’l courts. Further, no other countries treat ICJ decisions as self-executing.

b. *Details on whether Presidential memo is binding on state courts:*

- i. It’s an attempt to exercise a unilateral authority to create domestic law by turning a non-self-executing treaty into a self-executing one, and there is no evidence of intended Congressional acquiescence to this effect. It’s a breach of separation of powers- this is Congressional power, not a presidential power.
- ii. “The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not one of them. The responsibility [...] falls to Congress.” (CB pg. 172)

5. *Justice Breyer’s dissent, with Souter and Ginsburg joining:*

- a. “I would find that the United States’ treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action.” (CB pg. 178)
- b. “The majority places too much weight upon treaty language.” (CB pg. 173).
- c. He focuses on the search for self-execution language- first, the absence proves nothing. We cannot have in multilateral treaties an explicit declaration of self-execution, because national practices differ from state to state and they change, so rarely is there an explicit declaration of self-execution (CB pg. 176).. Plus, what benchmark do we look to?
- d. Breyer points to treaty subject matter, the history, whether it’s addressed to political branches or courts, whether it deals with courts, or individual rights and causes of action. We cannot just look to a textual analysis- if there is a need for an explicit declaration of self-execution, then we will never have self-executing treaties, and this threatens to throw away 70 treaties with ICJ dispute-resolution provisions similar to those contained in the Optional Protocol, and the US has treated these as self-executing in the past. (CB pg. 176).
- e. Further, the president believes the treaty is self-executing, and the Congress has express no concern to that effect.

- f. The majority litmus test is too conservative, and there can never be a clear cut test of self-execution: we have to many factors taken together.
- 6. *Majority response to dissent*: Breyer would grant courts too much discretion, and thus power not just to interpret treaties, but also to create law.
- 7. *Outcome*: After the SCOTUS decision, the state of Texas executed Mendellin by lethal injection on August 5, 2008. (CB pg. 180)

INTERNATIONAL LAW IN THE US II: EXECUTIVE AGREEMENTS & US TREATY PRACTICE (Casebook 202-09; 771-79)

Agreement vs. Treaty

1. All international agreements are treaties in the international plane.
2. In the US, some agreements are not considered to be treaties:
 - a. These would agreements that do not go through the Article II process, where they are signed by the President, then submitted by President to the Senate for approval by a 2/3 vote
 - b. These are considered executive agreements (CB pg. 202)
 - c. For int'l law, these remain valid and binding
3. Which agreements usually require Senate approval via the Article II treaty process?
 - a. Most agreements dealing with human rights, extradition, diplomatic and consular privileges, military alliances, war and peace, arms control, boundaries, immigration, intellectual property, taxation, and the environment have been submitted to the Senate as Article II treaties. (CB pg. 204).
4. Which agreements are often concluded as congressional-executive agreements (see below)?
 - a. Most agreements dealing with trade, finance, energy, fisheries, postal matters, and bilateral aviation relations (CB pg. 204).
5. General rule: The more invasive the language of an agreement is, the more likely it should be done by treaty instead of executive agreement.

Executive Agreements

1. *Background*: Since the late 1930s, the vast majority of agreements entered under by the United States are executive agreements- there is a shift away from treaties to executive agreements that don't have to go through the Article II process.
 - a. Ex. NAFTA
2. *Status*: Restatement Section 111 Comment d notes that executive agreements "while not mentioned specifically in the Supremacy Clause, are also federal law and as such as supreme over State law." (CB pg. 203).
3. *Self-executing or not?* Just like treaties, some executive agreements might be self-executing, and some might not, and it's unclear often if they are one or other.
4. *Superseding executive agreements*: All executive agreements can be superseded by subsequent legislation or subsequent congressional-executive agreements

5. 3 types of executive agreements:

- a. Agreement pursuant to treaty: *Agreements pursuant (stemming from) to a treaty brought into force through the Article II process of presidential signature and 2/3 Senate consent (CB pg. 202).*
 - i. Ex. A treaty a US signs, for example, with Qatar, to establish a US military base. It's done by treaty, with a presidential signature and 2/3 majority by US senate. But the treaty allows US to sign additional agreements dealing with who works of the base, etc. In this case, the subsequent agreements no longer requires the initial treaty's procedure.
 - ii. These are relatively uncontroversial, because the Senate is expressly allowing subsequent agreements not to go through the Article II process.
- b. Congressional-executive agreements: *These are agreements pursuant to legislation: The president may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by Congress. (CB pg. 203).*
 - i. These agreements are thus approved before or after the fact by Congress, and *they constitute the vast majority of non-treaty agreements, about 90%.* (CB pg. 205).
 - ii. If before the fact (*ex-ante congressional-executive agreements*), the Congress authorizes the President to go negotiate something, and it's the whole congress, a majority of both houses, that approves the authorization.
 - iii. An after-the fact agreement (*ex-post congressional-executive agreement*) involves the President negotiating an agreement, bringing it back to Congress, and then seeking majority approval in both houses.
 - iv. Has Congress been upset by this process? No they haven't, partly because this executive agreement process is often more democratic (cong-exec) agreement is more democratic (it requires both houses). In fact, it seems to have recognized that this is how int'l agreements will be made.
 - v. *The SCOTUS has appeared to assume the constitutionality of congressional-executive agreements* in several decisions. For example, in *Weinberger v. Rossi* (1982), the Court interpreted the word "treaty" to include congressional-executive agreements as well as Article II treaties (CB pg. 206).
- c. Presidential executive agreements: *these are agreements pursuant to the constitutional authority of the president:* These are agreements made by president without the involvement of Congress. (CB pg. 203).
 - i. Many examples, especially concerning the settlement of claims by US citizens against foreign governments.
 - ii. *The SCOTUS has upheld the validity of presidential executive agreements* against the claim that Article II required the participation of the Senate for the conclusion of such agreements, including in

United States v. Belmont and United States v. Pink, discussed below.
(CB pg. 206-207)

1. The 1972 Case Act:

- a. *Background:* Passed during the Vietnam war, the act was part of a congressional effort to control presidential power in foreign affairs. (CB pg. 204).
- b. *Substance:* Under Section 112b, the Secretary of State is required to transmit to Congress a copy of all international agreements concluded by the US (except, of course, treaties approved by the Senate). (CB pg. 204).

United States v. Pink (1942)

(In this case, the SCOTUS held that the executive agreement in question, the Litinov Assignment, superseded the otherwise applicable state law. The SCOTUS held that “the powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the nationalization decrees.”) (CB pgs. 207-209).

1. SCOTUS, Justice Douglas delivered the opinion of the Court, 1942
2. *Facts:* After the 1917 revolution, the USSR nationalized a lot of the property and companies, including the First Russian Insurance Co., and all of its worldwide assets, including the one existing in the US in its New York branch. Nationalization is not recognized under NY state law, so it would not get enforced by NY state courts. In 1933, Roosevelt enters into agreement with USSR, called the Litinov assignment, where the US agrees to grant diplomatic recognition to the Soviet government, and the Soviets assigned to the US its claims to certain nationalized assets in the US, including First Russian Insurance Co. Thus, the US government, as the successor to the Soviet government, sued the insurance commissioner of New York to claim the assets of Russian Insurance Co. (CB pg. 208).
3. *Decision:* The SCOTUS upheld the Litinov Assignment, arguing that “the powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the nationalization decrees.” If president deems it necessary to settle claims to recognize gov’ts, then it’s under his authority to do it. In other words, the decision to recognize the Soviet government in exchange for acquisition of nationalized assets in the US falls within the Presidential powers as “the sole organ of the federal government in the field of the international relations. Thus, “we would usurp the executive function if we held that that decision was not final and conclusive in the courts.”(CB pg. 208).
 - a. The Court cited the Belmont case, which “recognized that the Litinov Assignment was an international compact which did not require the participation of the Senate.” (CB pg. 208).

The US and Concerns about Ratification of Human Rights Treaties

1. *Background:* The US has had an uneasy relationship with human rights treaties and institutions, and it is frequently accused of having a double standard, whereby it

seeks to enforce international human rights norms against other countries but is unwilling to have its own practices subjected to int'l regulation. (CB pg. 771).

2. History of US Concerns vis-à-vis human rights treaties:
 - a. In the 1950s, some were concerned that the UN Charter's human rights provisions would give Congress the power to enact civil rights legislation otherwise beyond its constitutional powers. (CB pg. 772).
 - i. This was a plausible belief in light of the SCOTUS' Missouri v. Holland decision, a case that held that when implementing a treaty the Congress is not subject to the federalism limitations applicable to the exercise of its Article I powers.
 1. *In essence, the SCOTUS concluded that US can do things by treaty that congress couldn't do by statute, so that treaty power is something beyond what congress can do domestically.* This created concern at the time, concern that President could negotiate a treaty to impose civil rights regulation domestically, usurping congress.
 - b. Post WWII- If treaties can then regulate beyond scope of Congress legislative powers, the slew of human rights agreements passed post WWII also created concern. Particular concern was given over broad definition of genocide in the 1948 Genocide Convention that President Truman submitted for Senate approval (which he would not receive), and concern that US policies over Native Americans could have amounted to its definition of genocide. (CB pg. 772).
3. The Bricker Amendment: A number of attempts were made to limit treaty power. These proposed amendments were collectively known as the "Bricker Amendment." (CB pgs. 772-773).
 - a. *In general, the proposed amendments were intended to preclude treaties from being self-executing and to make clear that treaties would not override the reserved power of states.*
 - i. *One proposed amendment in the 1950s fell just one vote short of the necessary 2/3 vote in the Senate*
4. Alleviating Concerns:
 - a. One reason why the "Bricker Amendment" failed is that President Eisenhower said that his administration would not submit HR treaties for ratification, or use treaties to regulate domestic matters.
 - b. Another development- the SCOTUS began to expand its definition of what Congressional legislative powers could do, to include civil rights. Thus the concern that it could only be done by treaty were alleviated.

Reservations, Understandings, and Declarations (RUDS) to Human Rights Treaties

1. Objective: RUDs are designed to harmonize the human rights treaties the US ratifies with existing requirements of US law and to leave domestic implementation of the treaties to Congress. (CB pg. 774).
2. Substantive reservations- *these are reservations pursuant to which the US declines to consent altogether to certain substantive provisions on the treaties.* (CB pg. 774)

- a. Some are based on potential conflicts between treaty provisions and US constitutional rights
 - b. Some are based on a political or policy disagreement with certain provisions of the treaties
- 3. Interpretive Conditions: *Some RUDs set forth the US's interpretation of vague treaty terms, thereby clarifying the scope of the US consent.* (CB pg. 775)
- 4. Non-self-executing declarations: *These declarations state that the substantive provisions of the treaties are not self-executing, and are designed to preclude the treaties from being enforceable in US courts in the absence of implementing legislation.* (CB pg. 775) Some possible reasons for these include:
 - a. Sometimes, there is a belief that US domestic law and remedies are sufficient to meet obligations under human rights treaties
 - b. Sometimes, there is concern that the treaty terms are not identical to US law and thus might have a destabilizing effect on domestic rights protections if self-executing
 - c. Sometimes there is disagreement about which treaty terms would be self-executing thus such a declaration would provide certainty about the issue in advance of litigation
 - d. Treatymakers may believe that if there is to be a change in domestic rights protections, it should be done via legislation with the participation of the House of Representatives
- 5. Federalism understandings: *statements that US will not federalize matters within the state's competencies (which are large- including the Death penalty)* (CB pg. 775).
- 6. ICJ Reservations: *These are reservations to ICJ clauses in human rights treaties pursuant to which claims under the treaties could be brought against the US in the ICJ.* (CB [pg. 776).
 - a. The justification is often to "retain the ability of the United States to decline a case which may be brought for frivolous or political reasons." (CB pg. 776).
- 7. Criticism of RUDs: (Prof. Louis Henkin): (CB pg. 776-778)
 - a. The US is "pretending to assume international obligations but in fact is undertaking nothing."
 - b. "To many, the attitude reflected in such reservations is offense: the conventions are only for other states, not for the United States."
 - c. RUDs "set up obstacles to [the implementation of HR treaties] and refusing to treat human rights conventions as treaties dealing with a subject of national interest and international concern."
 - d. "The Framers intended that a treaty should become law ipso facto, when the treaty is made; it should not require legislative implementation."
 - e. "Senator Bricker lost his battle, but his ghost is now enjoying victory in war. For the package of reservations, understandings and declarations achieves virtually what the Bricker Amendment sought and more [...] leaving [HR treaties] without any life in United States law."

1. Support for RUDs:
 - a. The US does comply, substantively, with most of the HR treaty provisions even if it does attach RUDs.
 - b. RUDs increase the chances of greater participation in HR treaties by allowing states to object to a few select provisions but embrace most of the document
 - i. Thus if we believe that having more HR treaties is a good thing, because it helps to diffuse human rights norms, then RUDs could be beneficial

INTERNATIONAL LAW IN THE US III: CUSTOMARY INTERNATIONAL LAW (Casebook 240-49; 253-65)

1. *Constitutional basis:* The only mention of customary int'l law in the Constitution is Article I, Sec. 8, cl. 10, which states that Congress has the power to "define and punish... Offenses against the Law of Nations." (CB pg. 240).
 - a. Indeed, customary int'l law used to be referred to as Law of the Nations- has long been important as a source of int'l law.
2. *History:* Before the 20th century, customary int'l law was the dominant form of int'l law- there were few treaties.
 - a. Further, there was a much smaller pool of countries that defined custom- the 'civilized' imperial powers. It was easier to evaluate compliance when the number of countries is smaller.
3. *Status:* In several decisions, the SCOTUS has referred to customary int'l law as "part of our law" or part of the "law of the land." (CB pg. 241)
 - a. It thus has the same binding authority as treaties
 - b. The most famous decision is the Paquete Habana decision, discussed below.

The Paquete Habana (1900)

(This decision, in which the SCOTUS declared that customary int'l law is "part of our law," concerns the seizure and condemnation of two Spanish fishing vessels off the coast of Cuba during the Spanish-American war. Based on the history of state practice, along with a Presidential declaration to conduct the blockade consistent with customary int'l law, the SCOTUS held that fishing vessels should be exempt from being captured as prize of war, and that the capture was unlawful, and without probable cause). (CB pgs. 241-244)

1. SCOTUS, Justice Gray delivered the opinion of the court.
2. *Facts:* Two fishing vessels, the Paquete Habana and the Lola, were captured and condemned, along with their cargoes, as prize of war. Each vessel regularly engaged in fishing off the Cuban coast, sailed under the Spanish flag, and was commanded by a subject of Spain residing in Havana, Cuba. Until stopped by the US blockading squadron, she had no knowledge of the existence of the war or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor resistance at the time of capture. (CB pg. 241). The vessels were brought by their captors to Key West, and in 1898 a final decree of condemnation and sale was entered by the District Court of the US for the Southern District of Florida. (CB pg. 241-242).

3. *Question:* Whether the fishing vessels were subject to capture by the armed vessels of the US during the war with Spain
4. *Decision:* The SCOTUS held that fishing vessels should be exempt from being captured as prize of war, and that the capture was unlawful, and without probable cause and the District Court decree is reversed. This is especially the case because “the President issued a proclamation, declaring that the United States had instituted and would maintain that blockade, “in pursuance of the laws of the United States, and the law of nations applicable to such cases.” (CB pg. 243).
 - a. “by an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.” (CB pg. 242)
 - b. Further, the SCOTUS held, “*International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction [...] where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.*” (CB pg. 242).
5. *Discussion:*
 - a. *The most important passage is that Int’l law is part of our law...what does this mean, exactly?*
 - i. CIL was generally treated as general common law, so state courts would interpret it differently from state to state.
 - ii. Now, if there were any conflict between custom and domestic law, the domestic law would prevail. So in that sense, custom doesn’t have the same level as treaties.
 - iii. The SCOTUS says if there is no other body of law to look to or domestic legislation, you look to custom. *So if Congress/President had said the seizure is legal, then the SCOTUS would have decided differently, in all likelihood. Where there is controlling evidence, including an executive act, it supersedes customary int’l law.*
 1. There are circuit Court decisions that hold that president and higher executive officials and congress can violate int’l law.
 - a. The Navy admiral did approve of the seizure- question of whether this constitutes a higher executive act? SCOTUS says no- it’s the presidential declaration that matters.
 2. But in this case, POTUS declared the intention to be in compliance with custom.
 - iv. Takeaway- perhaps, is that CIL is enforceable against low-level officials but perhaps not high-level officials like POTUS or Attorney General.
 - b. *How is custom interpreted?* As state practice. The SCOTUS looked at the history of state practice with respect to fishing vessels during war. It is thus a

more conservative interpretation of custom (different from *Filartiga* case below).

- c. *What happened then to the status of CIL after Paquete Habana (but before the next case below, Filartiga)?*
 - i. There was a case (*Eire v. Hankins*) that said there was no federal common law, meaning that something that isn't found in legislation, constitution, or treaty cannot be applied in federal courts. State courts can, however, reference it, but the interpretation will vary from state to state. The likelihood is that the SCOTUS wasn't focusing much on custom in that decision. In the *Sabbatino* case, the Appeals Court created the act of state doctrine, a rule of federal common law, in order to achieve uniformity between states.
1. Background for the *Filartiga* case below: The Alien Tort Statute
 - a. The Alien Tort Statute (ATS) was passed as part of the 1789 Judiciary Act, establishing district court jurisdiction over: (CB pg 244)
 - i. "all causes where an alien sues for a tort only [committed] in violation of the law of nations."
 - b. *In essence, the ATS allows aliens to bring suit in US district courts for violations of customary international law or for violation of treaties to which the US is a party.* Note that the phrase "law of nations" would have encompassed customary int'l law.
 - c. *Between 1789 and 1979, the first 190 years of the statute's existence, the statute was relied upon in just two cases. Why was nobody using it?*
 - i. Originally, the law of nations was never thought to refer the relationships between a state and its citizens. Moreover, plaintiffs could not rely on human rights treaties, because US did not ratify them until later, and mostly with RUDs.
 - ii. But with customary int'l law beginning to encompass human rights provisions, especially over jus cogens violations, individuals began being able to bring suit based on the ATS provision
 - d. Note that Americans cannot rely on ATS- it only addresses claims made by aliens (CB pg. 253)
 - e. The Torture Victim Protection Act (TVPA): Passed by congress in the early 1990s, can also be invoked by aliens. It can only be invoked by US citizens if they were "under actual or apparent authority, or color of law, of any foreign nation."
 - i. In other words, Us citizens who sue domestic defendants for violations of customary int'l law cannot invoke either the ATS or the TVPA,

Filartiga v. Pena-Irala (1980)

(This US Court of Appeals case deals with customary international law as it pertains to human rights and whether an alien could bring suit in US district court under the ATS for violation of customary int'l law. The Court of Appeals held that torture (and, therefore, other grave human rights violations) can be a basis for an alien to bring suit in US district courts, because

torture violates customary int'l law as it pertains to human rights. Moving beyond the SCOTUS' Paquete Habana case, this decision interprets custom as less of a general and consistent state practice, but rather of broad agreement of opinion regarding custom, thus moving towards a focus on opinion juris.) (CB pgs. 244-249).

1. US Court of Appeals 2nd Circuit, Circuit Judge Kaufman delivered the opinion, 1980
2. *Facts:* The appellants are citizens of Paraguay. Dr. Joel Filartiga, a physician, was a longstanding opponent of the government of Paraguay. The Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala, also a citizen of Paraguay, for wrongfully causing the death of Filartiga's 17-year old son in 1976. The Filartigas contend that their son was tortured and killed in retaliation for his father's political activities and beliefs. Dr. Filartiga commenced criminal action in Paraguayan courts against Pena, but his attorney was arrested, brought to police headquarters, and threatened by Pena. In 1978, Pena entered the US under a visitor's visa, which he overstayed. In an April 1979 hearing, he was ordered to be deported. The Filartigas heard about this and filed a summons and civil complaint at the Brooklyn Navy yard where Pena was being held, alleging that Pena had tortured and wrongfully caused their son's death and seeking compensatory and punitive damages of \$10 million. (CB pgs. 244-245).
3. *Decision:* *The Court of Appeals held that torture violates "universally accepted norms of the international law of human rights, regardless of the nationality of the parties." Thus, when an alien brings suit under the ATS over alleged torture, the ATS provides jurisdiction. The Court of Appeals thus reversed the judgment of the district court that had dismissed the complaint for want of subject-matter jurisdiction. Reasoning:*
 - a. Because the district court had dismissed the action for want of subject-matter jurisdiction, the Court of Appeals begins by accepting the allegations against Pena as true. (CB pg. 244)
 - b. "We find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." (CB pg. 245).
 - c. The Court of Appeals moved beyond the SCOTUS's Paquete Habana decision by holding that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." (CB pg. 246). Further, for something to become customary, it must command the "general assent of civilized nations." *In other words, we move from established state practice (in SCOTUS' Paquete Habana) to general opinion juris (widespread belief in a moral and legal obligation to uphold a rule).*
 - i. Indeed, the Court of Appeals refers to the UDHR and GA Assembly resolutions condemning torture, in short, non-binding documents more indicative of opinio juris, to decipher that torture violates customary int'l law (CB pgs. 246-247).
 - ii. This would induce a quicker evolution of custom vis-à-vis human rights.
 - d. Indeed, "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." (CB pg. 246).

- e. Finally, the Court reasserts its jurisdiction by arguing that “the constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.” (CB pg. 248).

4. *Discussion/Effects of Decision:*

- a. Harold Koh referred to this case as the *Brown v. Board of human rights*. After the decision, there were numerous human rights suits under the ATS: 280, as opposed to 2 before the case.
 - i. The early suits were similar to *Filartiga*- against foreign officials for abuses committed in a foreign country, including against Guatemala’s Minister of Defense. Over time, the strand expanded to include high level foreign officials, including heads of state. These suits tended to be dismissed, mostly on the basis of doctrine of state immunity. Then there were efforts to sue foreign nations themselves.
 - ii. In recent years, where has it turned to? Non-state actors, including corporations. Many corporations are involved in countries with poor human rights standards. The question becomes: to what extent is there corporate liability (many times, they simply aid and abet gov’t’s poor treatment of workers). Then, there were suits against US department of defense in war on terror- haven’t gotten anywhere.

Sosa v. Alvarez-Machain (2004)

(This case deals with whether the ATS provided a statutory basis for a cause of action: did Alvarez-Machain’s claim that he had been arbitrarily arrested by Sosa amount to a violation of the law of nations that was specific and definite enough? If not, did district courts have the ability to recognize new claims of action, and how cautious should they be? The SCOTUS held that Alvarez-Machain was not entitled to a remedy under the ATS, largely because Alvarez’ claim of arbitrary detention “violates no norm of customary international law so well defined as to support the creation of a federal remedy.” It also emphasized that only a narrow, specifically definite, set of violations could provide basis for a cause of action under the ATS.)(CB pgs. 253-265)

1. SCOTUS, Justice Souter delivered the opinion of the Court, 2004

2. *Facts:*

- a. In 1985, an agent of the US Drug Enforcement Administration (DEA) was captured on assignment in Mexico, tortured, and then murdered. Respondent Alvarez-Machain, a Mexican physician, acted to prolong the agent’s life in order to extend the interrogation and torture. (CB pg. 254)
- b. In 1990, a federal grand jury indicted Alvarez and a US District Court issued a warrant for his arrest. After failing to gain cooperation from the Mexican government in extraditing Alvarez, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to trial, and this plan was implemented successfully. Sosa was one of the abductors. The case ended with a District Court granting Alvarez’ motion for a judgment of acquittal. (CB pg. 254).
- c. Upon returning to Mexico, Alvarez sued Sosa under the Alien Tort Statute (ATS) for a violation of the law of nations. The district Court awarded

\$25,000 in damages to Alvarez on his ATS claim. Upon appeal, the Court of Appeals for the 9th circuit affirmed the ATS judgment (CB pg. 254).

3. *US/Sosa Claim*: Both claim that there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action. (CB pg. 255).
4. *Alvarez-Machain Claim*: The ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new case of action for torts in violation of international law. Alvarez' claim is that his abduction by Sosa was an "arbitrary arrest" condemned by the UDHR and the ICCPR, and, further, that the prohibition of arbitrary arrest has "attained the status of binding customary international law." (CB pg. 255; 262).
5. *Decision*: The SCOTUS held that Alvarez-Machain was not entitled to a remedy under the ATS, largely because Alvarez' claim of arbitrary detention "violates no norm of customary international law so well defined as to support the creation of a federal remedy." (CB pg. 264).
 - a. The ATS granted district courts jurisdiction, "not power to mold substantive law." Plus, the fact that the Judiciary Act encompassing the ATS was "exclusively concerned with federal-court jurisdiction, is itself support for [the ATS'] strictly jurisdictional nature." It thus does not provide a statutory basis for a cause of action. The justices unanimously agree on this. (CB pg. 255)
 - b. What was the intent of the ATS when enacted? To grant jurisdiction to district courts based on the understanding that "common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." These included, at the time of the ATS' enactment, mostly, offenses against ambassadors, individual claims arising out of prize captures and piracy. The justices unanimously agree on this. (CB pg. 258)
 - c. Therefore, "we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and define with a specificity comparable to the features of the 18th-century paradigms we have recognized." In other words, the number of violations under the law of nations that can be punishable in the US under the ATS must be narrow. (CB pg. 258).
 - d. *Why should the interpretation of private causes of action under the ATS be narrow/ why exercise judicial caution?*
 - i. First, if violations aren't narrowly defined, then it would grant judges too much discretion (CB pg. 258)
 - ii. Second, the "general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role." (CB pg. 259)
 - iii. Third, the SCOTUS has repeatedly said that a decision to create a private right of action is better left to Congress in the great majority of cases.

- iv. Fourth, the potential implications for the foreign relations of the US of recognizing more private causes of action under the ATS could lead to Courts “impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” (CB pg. 259).
- v. Finally, the Congress has not provided the Courts with a congressional mandate to define new violations of the law of nations- in fact, “several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law.” (CB pg. 260).
- e. *Therefore, “we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations.”* This is a 6-3 majority decision, namely to subject the number of claims under the ATS to vigilant doorkeeping. (CB pg. 261).
 - i. Further, the determination of whether a norm is sufficiently definite to support a cause of action should involve “an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.” (CB pg. 261). Alvarez’ claim is that his abduction by Sosa was an “arbitrary arrest” condemned by the UDHR and the ICCPR. But neither is self-executing
 - f. Therefore, Alvarez-Machain’s claim that arbitrary arrest is a clear violation of customary int’l law doesn’t stand, largely because it has less definite content and acceptance among civilized nations. “It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” (CB pg. 263-264).
 - g. Thus, the Court of appeals judgment is reversed.
- 6. *Justice Breyer*, concurring in the judgment, suggests the ATS could just be applicable to violations of jus cogens norms of customary int’l law. (CB pgs. 264-265).
- 7. *The Dissent*, made up of Scalia, Rehnquist, and Thomas, argue that the reasons the majority describes for judicial caution are wrong- the real reason is that we shouldn’t have any suit under ATS absent congressional legislation. Let congress specify the causes of action under the ATS- the courts shouldn’t create it. They make the general critique that this is judicial lawmaking. The Courts have decided that they want to hear HR cases, and so they will create customary int’l law norms, and this is intruding onto the political branches. (CB pg. 264).
- 8. What questions are left open post-Sosa?
 - a. Should claims be allowed against non-state actors? If they do find that corporations/non state actors can be subject to suit, how do you understand aiding and abetting by them?
 - b. We don’t know to what extent courts will give deference to executive statements of interest.
 - c. Finally, what does this judgment mean for CIL outside of the ATS? Outside of the ATS, is CIL federal common law? Conceivably, if CIL is federal common

law, then you can have federal question jurisdiction. Someone can file suit for violation of federal law, even if that federal common law is CIL. This would obviously increase the number of cases.

THE LAW OF THE SEA I: THE UN CONVENTION ON THE LAW OF THE SEA (Casebook 813-40).

1. The law of the sea (LOS) is an area fraught with politics.
2. LOS is an essential area of law that has undergone a tremendous evolution in underlying legal rules, especially until the convocation of Customary int'l law in the UN Convention on the Law of the Sea (LOS Convention) in 1982

The UN Convention on the Law of the Sea (LOS Convention)

1. Completed in 1982, came into force in 1994 (CB pg. 813)
2. 161 parties to the LOS Convention
3. A subsequent *1994 agreement* was conducted modifying the controversial deep seabed mining provisions of the LOS Convention, making the convention more acceptable to industrialized countries (CB pg. 813)
 - a. 140 parties to the 1994 agreement
4. *US non-ratification*: The US is now the only major industrialized country not to have ratified the LOS Convention or the 1994 agreement (CB pgs. 813-814)
 - a. Although the US had actively participated over negotiations leading up to the LOS Convention, President Reagan opposed the final document because of the deep seabed mining provisions
 - b. The changes made in the 1994 agreement prompted the Clinton Administration to submit both the agreement and the LOS Convention to the senate for its advice and consent
 - c. Mostly because of the opposition of a few republican senators, both the agreement and convention have yet to be brought to a vote
5. *Why care?*
 - a. The law of the sea has consequences for travel, for food, for mineral mining/oil prices, it has military importance, it impacts the sea/oceans' recreation value, it concerns our energy sources. Lots of uses of sea.
6. But int'l law is mostly about land territory. Almost all territory is claimed with exception of Antarctica.
 - a. Given this dichotomy, it leads to some questions. Why private rights on land, and not on sea? Particularly when it's 70% of world surface? When do you have private rights of control of the sea? What is private, public, common? It's not too far from property- commons, right to exclude.
7. The Law of the sea reflects balance of states trying to exclude and managing congestion. Where are the areas of highest congestion? Closer to territory than in high seas. *It's a problem of the commons, in which congestion rises closer to shore, and the question is where can the state exclude.*

8. History of the evolution of the Law of the Sea

- a. In the early 20th century, we see the rise of lots of seafaring nations, and a need arises to codify rules. This was promoted both by the progressive depletion of fishing stocks and by the possibility of greater technological exploitation of the oceans. (CB pg. 815)
 - i. The League of nations attempted to move towards codification at a 1930 conference in the Hague, but the parties were unable to come to an agreement
- b. After WWII, the pressure to codify the LOS increases. Exploitation of offshore mineral wealth, particularly oil, was becoming a reality, and the depletion of fishing stocks was rapidly increasing.
- c. *So a UN conference on the Law of the Sea was called in Geneva (UNCLOS I), which produced four treaties in 1958:* (CB pg. 816)
 - i. Convention on the Territorial Sea and the Contiguous Zone
 - ii. Convention on the Continental Shelf
 - iii. Convention on the High Seas
 - iv. Convention on Fishing and Conservation of Living Resources on the High Seas
- d. But UNCLOS I left many issues open, most importantly the width of territorial sea. This led to UNCLOS II, which was a failure, because it failed, by only one vote, to adopt a compromise formula that provided for a 6-mile wide territorial sea, plus a six-mile fishery zone. (CB pg. 816)
- e. Dr. Arvid Pardo, Malta's Representative to the UN, was at the forefront of calling for a third conference. Particularly concerned about the technological progression that now made deep seabed mining possible, he argued that instead of being exploited by whoever got there first, the seabed should be developed for the benefit of all mankind.
 - i. The US and other industrialized countries, including the UK, disagreed. They had a technological advantage to exploit the deep seabed, and indeed, the US has many companies interested in this, whereas Malta didn't have the technology or any company wishing to do this.
- f. UNCLOS III was held first in Caracas in 1974 then Geneva in 1975. In an attempt to foster a sense of common concern, the conference used a system of consensus- this lengthened the proceedings, but made sure that no single group of nations could force their will on a minority. (CB pg. 816)
- g. *UNCLOS III led to the first comprehensive document, the UN Convention on the Law of the Sea (LOS Convention).*

Nationality of Vessels

Case: The Law of the Flag and Customary Int'l Law

Lauritzen v. Larsen (1953)

(In this case, a Danish seaman was injured on a Danish ship docked in Havana, Cuba, and he sued the owner of the ship's company in US courts because the company had many contacts in

New York state. The Danish seaman sought recovery for pain and suffering under the US Jones Act. The SCOTUS decided that US law does not apply, because, under almost all circumstances, the law of the flag (namely, that the ship's flag determines the ships' nationality, and thus the laws of that nation should apply aboard the ship) superseded the territorial principle, and thus Danish law, and not US law, applied.(CB pgs. 817-818)

1. SCOTUS, Justice Jackson delivered the opinion of the Court
2. *Facts:* Larsen, a Danish seaman, brought suit under the US Jones Act to recover for injuries sustained while on the Danish ship he was working in, which was docked in Havana, Cuba, at the time of the accident. The Jones Act read, in part “Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway-employees shall apply.” Larsen based his claim that US federal courts had jurisdiction on a broad reading of the Jones act, arguing that Lauritzen’s company, which operated the ship, held significant New York business contacts. The trial court entered a verdict for Larsen, and Lauritzen appealed, contending that Danish, not US, law should apply. Note that under Danish law, unlike US law, negligence was not considered and recovery for pain and suffering was not provided.
3. *Decision:* By a vote of 7 to 1, the SCOTUS held that US law should not apply, arguing that the law of flag should supersede the territorial principle- the ship is part of the territory of the country associated with the flag.
 - a. *Law of the flag:* “Perhaps the most venerable and universal rule of maritime law [...] Nationality is evidenced to the world by the ship’s papers and its flag.” (CB pgs. 817-818)
 - b. “*This Court has said that the law of the flag supersedes the territorial principle even for purposes of criminal jurisdiction of personnel of a merchant ship, because it “is deemed to be part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial waters of another sovereignty.”*” (CB pg. 818).
 - c. Thus, “the weight given to the [flag] overbears most other connecting events in determining applicable law.” Thus, “these considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears.” (CB pg. 818)
4. Discussion of the Law of the Flag:
 - a. *Why is it practical?* Does a different law apply at every different place? No, you can’t change the law at every single stop- so you apply the law of the flag state. The idea is we don’t want to be subject to regulation of every location it might find itself in.
 - a. *What’s the logic for one flag, and not multiple?* You want one set of rules, vis-à-vis safety, health... we don’t want multiple rules applying simultaneously- that could create confusion or conflict. (See the provisions in the LOS convention (Articles 92/93) regarding the 1 flag only rule in CB pg. 820).

Flags of Convenience (FOC)

1. *The term describes ships that bear the flags of countries other than those of the beneficial owners. In theory, they allow a seaman to register his boat under whichever country he wants.* (CB pgs. 818-819)
 - a. This practice began in the 1920s and has greatly expanded since WWII. By 1994, half of all ships bore FOCs.
 - b. The countries who have the most ships that bear FOCs instead of their own country's flag include the US, Norway, Greece, and Japan
 - i. Why? Some of these countries have particularly stringent regulations regarding safety, health, etc.
2. Why would a state allow a ship to bear its flag? Money- registration fees and regulatory fees. This is especially lucrative for small states, such as Panama, for one, Liberia.
3. Race to the bottom: FOCs cause a collapse of standards-individuals choose the country with lowest safety and health standards (CB pg. 819)
4. How did the LOS Convention deal with FOCs? (CB pg. 819)
 - a. Article 91: "There must be a *genuine link* between the State and the ship."
 - i. Problem: ambiguous language- what constitutes a "genuine link"?
5. Any other efforts to overcome the FOC problem?
 - a. In 1986, the Convention on Conditions for Registration of Ships was adopted in a conference in Geneva, which sought to better define a "genuine link" between the ship and the state. However, so far only 14 states have ratified it, well short of the 40 contracting parties required for entry into force. (CB pg. 820).

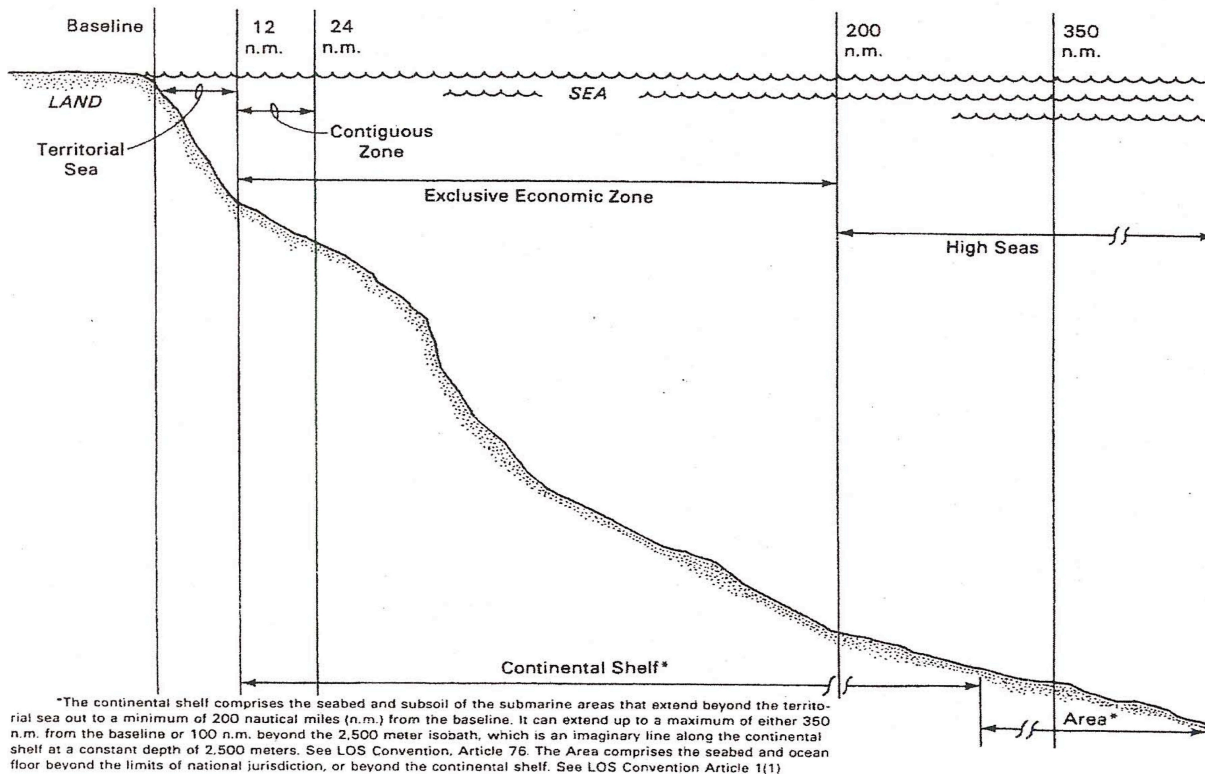
The Problem of Cruise Ships

1. The cruise ship industry presents challenging problems. And it is likely that many citizens who travel on cruises do not realize "*that when they step onto a cruise ship, even if it embarks from a United States port, they are probably stepping into a floating piece of Panama, or the Bahamas, or whichever foreign country whose flag that ship bears [...] as such, the same laws and rights that protect United States citizens on US soil do not apply on cruise ships.*" (CB pg. 821)
2. Some recent problems include cruise ships dumping their wastes in Alaskan territorial waters, allegations of sexual assaults committed by foreign crew members against passengers, outbreaks of communicable diseases, unresolved thefts. (CB pg. 821)
3. *US is trying to regulate cruise line industry more and more, including for foreign vessels:*
 - a. Under US law, some individuals can be charged and convicted under US law for certain crimes committed in international and foreign waters, so long as the acts occurred "during a voyage having a scheduled departure from arrival in the United States with an offense committed by or against a national of the United States." (CB pg. 822)
 - i. So there is an incentive to submit to US regulatory standards, given the large # of Americans that go on cruises.

Internal and Territorial Waters (under LOS Convention)

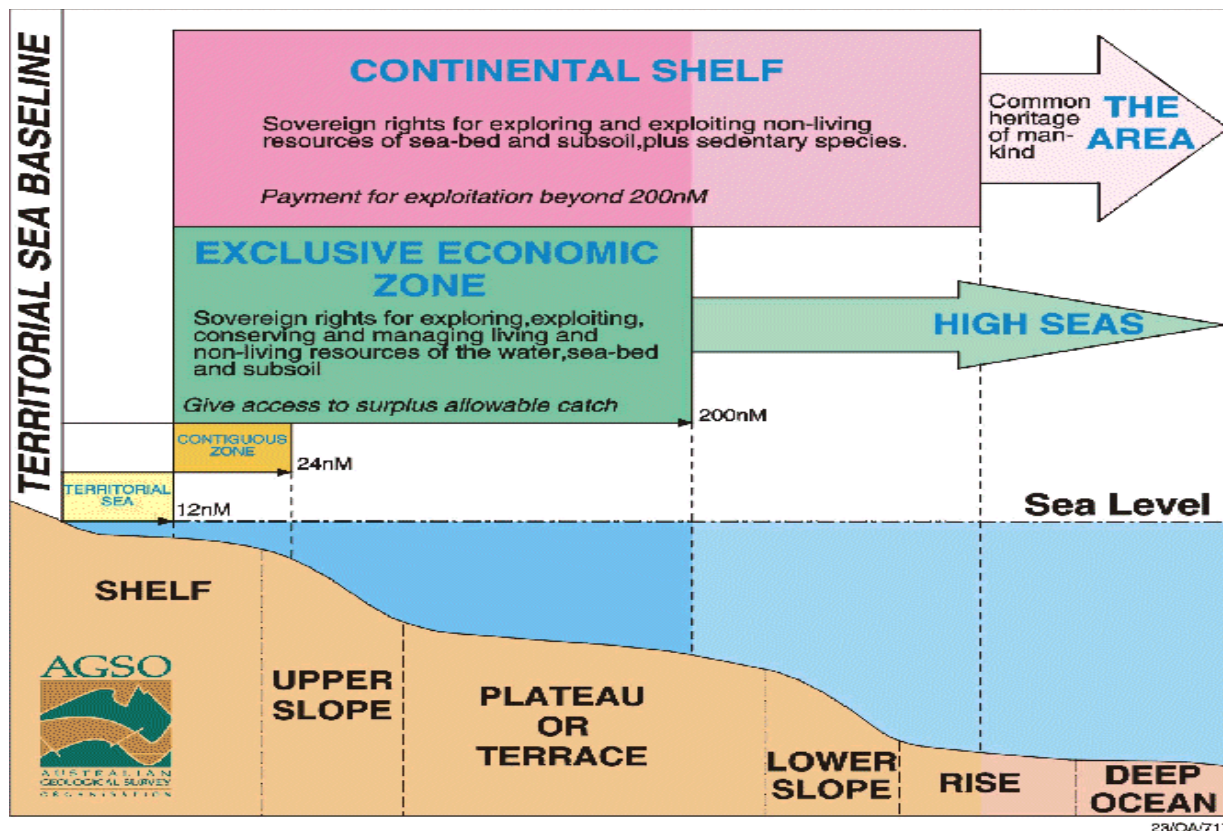
1. Internal waters: include not only fresh water lakes and rivers, but also parts of the sea, including bays and the belt of the sea adjacent to the coast that is within the "baselines." (CB pg. 822)
 - a. These are considered part of the territory of the state, and it is generally recognized that the state exercises full sovereignty over these waters
2. Territorial Sea: From the baselines outward 12 nautical miles. (CB pg. 822)
 - a. The coastal state also has sovereign rights over this territory. However, foreign ships have right of innocent passage through these waters.

CHART 9-1.
LOS Convention: Sea Claims Structure



Beyond the Territorial Sea: The Contiguous Zone and Exclusive Economic Zone

1. Contiguous Zone: Beyond the 12-mile mark of the territorial sea and an additional 12 miles (12 to 24 miles from baseline, 12 miles wide), you have the contiguous zones.
 - a. Outside of the contiguous zone, there is free transit for foreign vessels
2. Exclusive economic zone: including the contiguous zone and outward 200 nautical miles from the baseline (12 to 200 miles from the baseline- 188 miles wide)
 - a. Within this zone, the coastal state exercises sovereign rights for fishing/exploitation of living and non-living resources (see next figure)



Baselines

1. The regulations for delimiting baselines are contained in article 5 through 14 of the LOS Convention. (CB pg. 826)
 - a. **Normal baselines:** Referred to in Article 5, these are baselines that follow the low-water line along a coast except for irregularities, such as bays or river mouths, where straight closing lines may be used
 - b. **Special regime for straight baselines:** Referred to in Article 7, these are used "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity."
 - c. **Archipelagic state baselines:** Provided for in Article 47, this is a special case for drawing baselines for states mostly composed of islands (discussed later in this outline).
2. The ICJ grappled with the difficulties of drawing baselines for irregular coasts in the 1951 Fisheries case below.

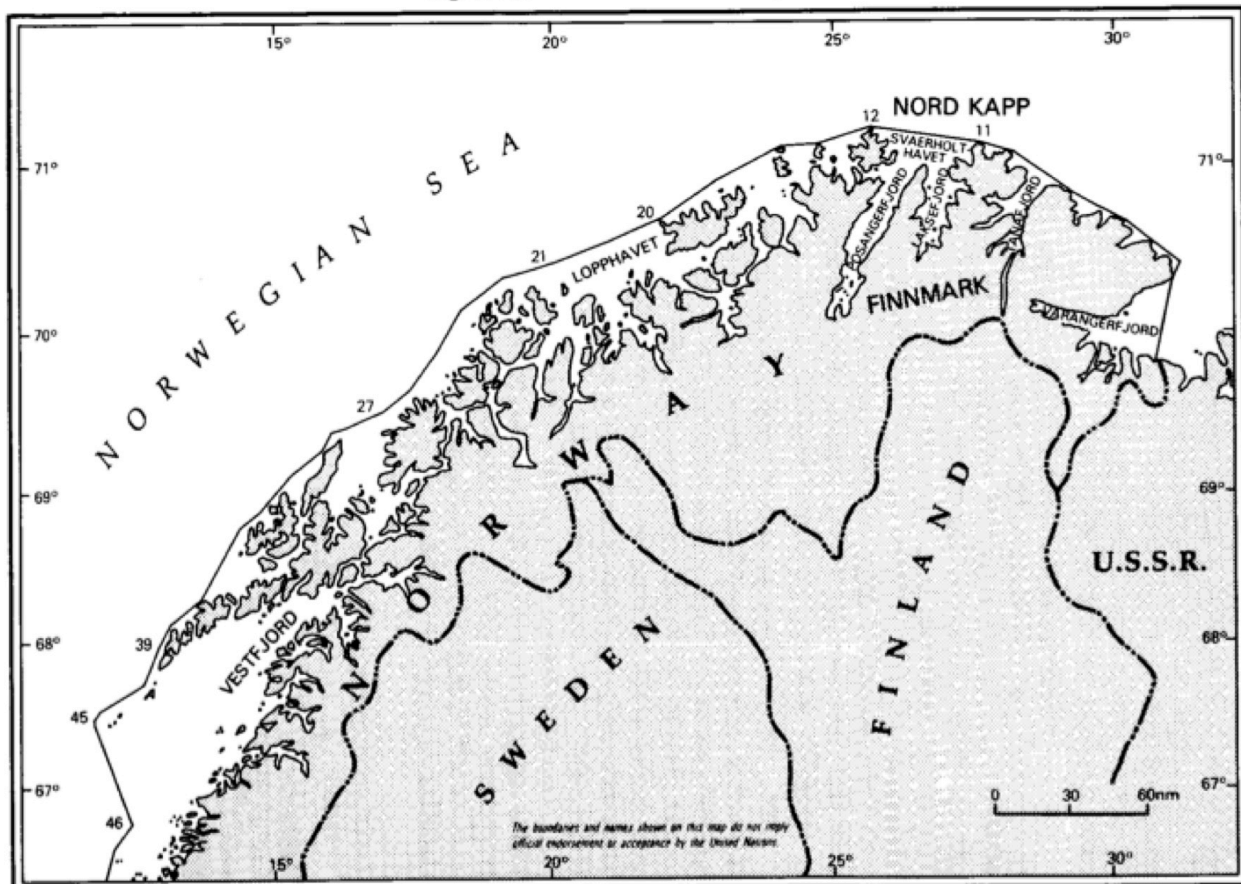
Fisheries Case (United Kingdom v. Norway) (1951)

(This ICJ case involved a dispute between the UK and Norway over a 1935 Norwegian Royal decree that drew baselines along the irregular Norwegian coast. The UK argued that the baselines were not drawn in accordance with customary int'l law. The ICJ ruled that the baselines did not violate customary int'l law. It also concluded that, when it comes to drawing baselines, the coastal state is best placed to make this determination, so long as in compliance with customary int'l law. The four general ICJ rules outlined include 1) baselines must stick close to coast, 2) they must closely link to mainland, 3) they must consider the economic

interest in area., and 4) straight baselines are acceptable given the peculiarities of Norwegian coasts.) (CB pgs. 826-831)

1. ICJ, 1951
2. *Facts:* In 1906, British fishermen began off the coasts of Norway and began fishing there with greater frequency and in greater numbers. In 1911, a British trawler was seized and condemned by the Norwegian government for violating measures it had taken to prevent British ships from fishing close to the Norwegian coast. With time, the number of warnings and arrests increased. In 1933, the UK government sent a memorandum to the Norwegian government complaining that Norway had delimited its territorial sea using unjustified baselines. In 1935, a Royal Norwegian decree was enacted delimiting the Norwegian fishing zone and establishing baselines (see image below for the baselines). Note that the baseline runs along the outer edges of the “skjaergaard,” or the system of islands and inlets that is attached to, and surrounds, the Norwegian mainland. Britain, on the other hand, believed the baselines needed to be drawn along the Norwegian mainland. By 1948, given a lack of agreement with the UK government, Norway began more rigidly enforcing the 1925 decree. The UK then initiated the case before the ICJ. (CB pg. 827)
3. *Question:* “the subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935.” (CB pg. 827)

Figure 14. Coast of north Norway



4. *Decision: The ICJ ruled that the baselines did not violate customary int'l law. It also concluded that, when it comes to drawing baselines, the coastal state is best placed to make this determination, so long as in compliance with customary int'l law. The four general ICJ rules outlined include 1) baselines must stick close to coast, 2) they must closely link to mainland, 3) they must consider the economic interest in area., and 4) straight baselines are acceptable given the peculiarities of Norwegian coasts. Details of its logic:*
- a. "Since the mainland is bordered in its western sector by the "skjaergaard," which constitutes a whole with the mainland, it is the outer line of the "skjaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities." (CB pg. 829)
 - b. "It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view [...] there is no valid reason to draw them only across bays [...] and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay." (CB pg. 829)
 - c. "Basing itself on the analogy with alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles. In this connection, the practice of States does not justify the formulation of any general rule of law" (CB pg. 830).
 - d. "The Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system." Therefore, the 1935 Decree "has not violated international law." (CB pg. 830)
 - e. But although the 1935 Decree is being upheld, the ICJ says that a state, like Norway, must still be in compliance with international law. The principles it lays out are the 4 outlined above in the decision summary. (CB pg. 830-831)
 - f. "The Court is thus led to conclude that the method of straight lines, established by the Norwegian system, was imposed by the peculiar geography of the Norwegian coast [...] this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law." (CB pg. 831)

Dealing with Islands under the LOS Convention

1. Definition of an island: For a land-mass to be considered an island, it has to be able to "sustain human habitation or economic life" of its own. Absent this, the rock does not have an exclusive economic zone or continental shelf under Article 121 of the LOS Convention (CB pg. 832)
2. Archipelagic baselines: an archipelagic state (such as the Philippines) may draw baselines provided that "within such baselines are included the main islands and an

area in which the ratio of the area of the water to the area of the land [...] is between 1 to 1 and 9 to 1. (CB pg. 832)

- a. The length of such baselines cannot exceed 100 nautical miles, except for up to 3% of the total number of baselines enclosing an archipelago, which can be of up to a length of 125 miles. (CB pg. 833)

Foreign Vessels in Internal Waters

1. Foreign vessels may only enter a state's inland waters (including ports) with the state's consent. Usually, this consent is freely given and is presumed from the lack of an express prohibition. (CB pg. 833)
2. A state can require specific notification, however, for military ships. If no objection, upon notification, is received, the foreign warship is usually seen as having been granted consent to enter a state's inland waters. (CB pg. 833)
3. In the US, the President is given broad discretion to define who can access US internal waters. (CB pg. 833)
4. Once in a state's inland waters, foreign vessels is subject to the sovereignty of the host state. All of that country's laws apply with equal force to the vessel.
5. However, although the host state is entitled to exercise jurisdiction over foreign vessels, they rarely do. Most states abide by the "*French modification*," namely that based on comity and reciprocity, host states decline to exercise their jurisdiction over foreign vessels unless activities of those vessels threaten the "peace of the port" or the "public peace." (CB pg. 834)
 - a. Medvid Affair (1985)- Russian sailor jumped off a Russian freighter, while being docked outside New Orleans. US Immigration and Naturalization Service (INS) officers determined he was not seeking political asylum and returned him to the freighter. But there was huge domestic uproar over his return. The US thus requested the right to interview Medvid again to make sure he wouldn't face persecution if returned to the USSR. Legal Advisor to the Department of State even argued that the US was within its rights to remove Medvid, by force if necessary, from the Soviet freighter. (CB pg. 834)

Breadth of the Territorial Sea

1. Today: territorial sea and its breadth- the 12 mile rule is recent under the LOS Convention. (CB pg. 835)
2. In the past: Tests used before- sight method (ambiguous- however far it is possible to still see the coast), canon method (also inconsistent- however far a canon-ball can shoot- but different cannons shot to different distances), and, finally, the marine league, which was more consistent, namely that territorial waters would be 3 nautical miles wide. (CB pg. 835)
 - a. The 3-mile marine league stuck, but in 20th century it became clear that it needed to be broadened, given that as technology develops, and with the events of WWI and WWII, the desire and capacity to exploit marine resources, and security concerns incentivize to broaden the distance to 4, 6, and, finally, 12 miles. The same technological pressure might push this limit further. (CB pg. 835-836).

Rules for Innocent Passage

1. As rules for the territorial sea began to crystallize, rules for innocent passage also began to emerge, but they were not well-defined. (CB pg. 837)
2. The Corfu Channel case (United Kingdom v. Albania) (1949) (Cb pgs. 837-838)
 - a. *(The Corfu Channel case below required the ICJ to better define what is meant by “innocent” passage. It determined that the “manner” of a ship’s passage was decisive for determining whether or not the passage is “innocent”).*
 - b. ICJ, 1949
 - c. *Facts:* In 1946, British warships were moving through the Corfu Channel, an international strait that was partly within the territorial waters of Albania and Greece, when Albania fired on two British cruisers because, Albania claimed, the British had not requested permission. The British decided to reassert their right of innocent passage by sending a squadron of warships through the Channel in October. The warships ran into a minefield and sustained damage. In November 1946, the British Navy returned, sweeping the channel for mines, including within Albanian territorial waters. The British then instituted suit before the ICJ to recover compensation for its damaged ships.
 - d. *Decision:* The ICJ determined that the October British passage was “carried out in a manner consistent with the requirements of international law” and did not present a threat to the coastal state. *The ICJ thus defined the right of innocent passage by considering the “manner” of the passage as a decisive test.* The ICJ held that the UK was entitled for compensation for the damaged ships.
3. Innocent passage in the LOS Convention: Building on the Corfu channel case, Article 19 of the LOS Convention defines “innocent passage” as passage that “is not prejudicial to the peace, good order, or security of the coastal state.” Article 17 provides for the ships of all state to “enjoy the right of innocent passage through the territorial sea.” Article 19 also lists examples of activities not considered innocent, including: (CB pg. 838)
 - a. An exercise or practice of weapons of any kind
 - b. Any fishing activities

Passage through International Straights and Archipelagic Sea Lanes

1. Under the LOS convention, *in general passage through international straits and archipelagic sea lanes allow less control for the coastal states over passing vessels than does innocent passage, but they do not give ships the same rights as they do on the high seas.* (CB pg. 838)
2. Passage through international straits: freedom of navigation and overflight is provided but solely for the continuous and expeditious transit of the straight. Ships are also bound to refrain from the threat or use of force against States bordering the straits. (CB pg. 839)
3. Passage through archipelagic sea lanes: is essentially the same as the passage through international straits (CB pg. 839)

The Contiguous Zone and the Right of Hot Pursuit

1. Contiguous zone: Its existence is generally accepted in international law. This is the zone adjacent to the territorial sea where the coastal state is allowed to enforce certain laws, such as customs and immigration. These extend, under Article 33 of the LOS Convention, 12 to 24 miles from the baseline. (CB pg. 840)
 - a. *State has the right to exercise these controls in the contiguous zone under Article 33 of the LOS Convention*: (CB pg. 840)
 - i. Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory/territorial sea
 - ii. Punish infringement of the above laws within its territory/territorial sea
2. Right of hot pursuit: This right has general acceptance in int'l law. It allows a coastal state to pursue into the high seas a foreign ship that the coastal state has reason to believe has violated its laws either in the contiguous zone, its internal waters, or the territorial sea. (CB pg. 841).

THE LAW OF THE SEA II: THE EXCLUSIVE ECONOMIC ZONE AND THE CONTINENTAL SHELF (Casebook 841-61)

1. The Exclusive Economic Zone: This extends 200 nautical miles from the baseline, or 188 miles from the territorial sea. In this area, the coastal state exercises sovereign rights over all living and non-living resources. It is effectively a merger of the fisheries regime and continental shelf regime- so the EEZ includes both fisheries regulation and continental shelf reservation. If continental shelf extends beyond 200 miles, coastal state can extend EEZ just for continental shelf exploitation up to 350 miles. (CB pg. 841)
 - a. Note that foreign states still have the right to navigate through the EEZ, to fish the surplus catch, and to conduct research projects, within limits. (CB pg. 841).
2. History pre-WWII: Prior to WWII, there was not affirmative international law permitting states to claim jurisdiction over the resources of the seas or seabed outside their territorial sea. The customary int'l law was that a state's sovereignty and jurisdiction almost always stopped at the outer edge of its territorial sea. (CB pg. 841).
3. The Truman Proclamations (1945): referred to by the ICJ as the "first positive law on this subject" of exploitation of resources beyond the territorial sea, the Truman Proclamations unilaterally claimed major new rights for the US with regards to the continental shelf and fisheries.
 - a. *Impact*: The immediate impact was great, with a number of countries following the US example. By 1958, 20 countries had made similar unilateral claims. (perhaps even "instant" customary law?) CB pg. 842)
 - b. *Substance*: The proclamations a) asserted the jurisdiction of the US over natural resources of the continental shelf under the high seas contiguous to the coasts of the US, and b) provided for the establishment of conservation

zones for the protection of fisheries in certain areas of the high seas contiguous to the US. (CB pg. 842-843)

- i. The US would also enter into agreements with other states over mutual recognition of these conservation zones: indeed, the right of any other state to establish its own conservation zones off its shores is conceded by the US “provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas.” (CB pg. 843).

c. *Motives:*

- i. “world-wide need for new sources of petroleum and other minerals” and “such resources underlie many parts of the continental shelf off the coasts of the United States.” (CB pg. 842)
- ii. Therefore, “efforts to discover and make available new supplies of these resources should be encouraged” (CB pg. 842)
- iii. Plus, there was an increasing practice of distance fishing beyond coastal waters- technological innovation, so US wanted to make sure that US fishermen had capacity to exploit. Plus, technology is being developed to exploit oil and mineral resources beyond the territorial seas.

- d. *Subsequent codification:* The Congress codified the provisions of the Truman proclamation in Section 43, subsections 1-3, of the United States Code.

4. Did the Truman Proclamations, and subsequent ones like it, violate int'l law?

- a. No, it's simply stating what states already wanted to do. Almost all states wanted greater jurisdiction than just the territorial sea. It became customary really quickly. It's possible that collective action problems can be solved when one powerful state acts- so the role of leadership, in this case, really does matter.

5. Problems post-Truman Proclamations:

- a. The proclamations aren't specific. So debates began to rise regarding use of deep sea fishing and coastal fishing in the high seas.
- b. An attempt at resolving such ambiguities was made by the *1958 Convention on Fishing and Conservation of Living Resources of the High Seas*, but this convention is considered to be the least effective of the four 1958 Conventions and has only been ratified by 38 countries.

Fisheries Jurisdiction Case (United Kingdom v. Iceland and Germany v. Iceland) (1974).

(In this case, the UK and Germany asked the ICJ to rule against Iceland excluding British vessels from fishing beyond Iceland's 12-mile limit. The ICJ declared that Iceland had infringed on the principle in the Convention on the High Seas which requires coastal states to exercise their freedom of fishing while paying reasonable regard to the interests of other states, particularly, as with UK fishermen in this case, if a state has built an economic dependency on fishing in the area. It also asked the parties to resolve the dispute via negotiation and attempting to achieve an equitable outcome. The decision has been criticized for its imprecision in articulating the concept of preferential rights.) (CB pgs. 845-847).

1. ICJ, 1974

2. *Facts:* The UK and Germany had asked the ICJ to declare that there was no foundation in int'l law for the claim by Iceland to be able to extend its fisheries jurisdiction to fifty miles from the baseline of the territorial sea, and thus exclude British fishing vessels beyond its 12-mile limit. (CB pgs. 845-846)
3. *Decision:* *The ICJ declared that Iceland had infringed on the principle in the Convention on the High Seas which requires coastal states to exercise their freedom of fishing while paying reasonable regard to the interests of other states, particularly, as with UK fishermen in this case, if a state has built an economic dependency on fishing in the area.* The Court said that Iceland and the UK should seek to resolve the dispute "by negotiation on the basis of the facts that Iceland had preferential rights in the fishing, but the United Kingdom had a historic interest." The negotiations should yield "an equitable apportionment of fishing resources beyond the twelve-mile limit." (CB pg. 847).
 - a. Two concepts ad crystallized into customary int'l law, according to the ICJ: a) the concept of a fishery zone up to 12 miles from the baseline, and b) the concept of preferential rights of fishing in adjacent waters of the coastal state beyond the 12-mile limit (CB pg. 846)
 - b. Therefore, while a state's absolute right of fishing is restricted to 12 miles, the ICJ did not deny that a costal state has preferential access to fisheries beyond 12 miles.
 - c. The concept of preferential rights, according to the ICJ, had become customary because of the Geneva Conferences of 1958 and a widespread acceptance of the preferential rights concept by a large majority of states at both conferences (CB pg. 846).
 - d. Preferential rights are "not compatible with the exclusion of all fishing activities of other states" but rather they "imply a certain priority, but cannot imply extinction of current rights of other states [...] particularly when they have established an economic dependence on the same fishing grounds." (CB pg. 846)
4. *Criticism of the decision:* The decision was criticized for the imprecision of the concept of preferential rights. Were they different from absolute rights? If so, how? (CB pgs. 846-847).

The LOS Convention and the Current Status of the EEZ and the Continental Shelf

1. *The EEZ in the LOS Convention:* Provisions are found in Articles 55-58, 61-62. (CB pg. 847)
2. *The Continental Shelf in the LOS Convention:* Provisions are made in Articles 76-78, 82. (Cb pg. 847)
3. Despite not signing the LOS Convention, in 1983 President Reagan proclaimed a US IIZ and announced that the US will recognize provisions in the Convention delimiting coastal states' rights, including over the EEZ as customary int'l law (CB pg. 847; see pgs. 851-852 for full declaration).
4. *Disputes involving the EEZ:*
 - a. Senkaku Islands: These are islands are a group of 5 islands, uninhabited, located between Okinawa and Taiwan. These are part of a territorial dispute between China, Taiwan, and Japan. The islands are located in rich fishing

grounds and possibly sit atop significant oil and gas deposits. Territorial control of the islands would add to the EEZ of the claiming country. (CB pg. 848)

- b. Okinotorisima Island: This small and rapidly eroding island is Japan's southernmost point. Erosion by hurricanes means that high tide the island is now no bigger than two king beds. Japan spent over \$240 million to keep the island above water, because if it sunk below sea-level, Japan would lose fishing rights and mineral rights to 163,000 square miles of ocean- a greater area than Japan itself. (CB pg. 848-850).

Opposite and Adjacent States

1. The problem arises when zones overlap because states are opposite or adjacent to each other. So it's back to a border game-How to figure out the outer boundaries of the EEZ and the continental shelf when it overlaps with the coastal rights of other states. How do these problems get solved? (CB pg. 853)
 - a. Usually, the states come together and negotiate- there are over 50 treaties in force delimiting continental shelves between opposite or adjacent states. When states are unsuccessful, the ICJ plays a role, as in the case below.

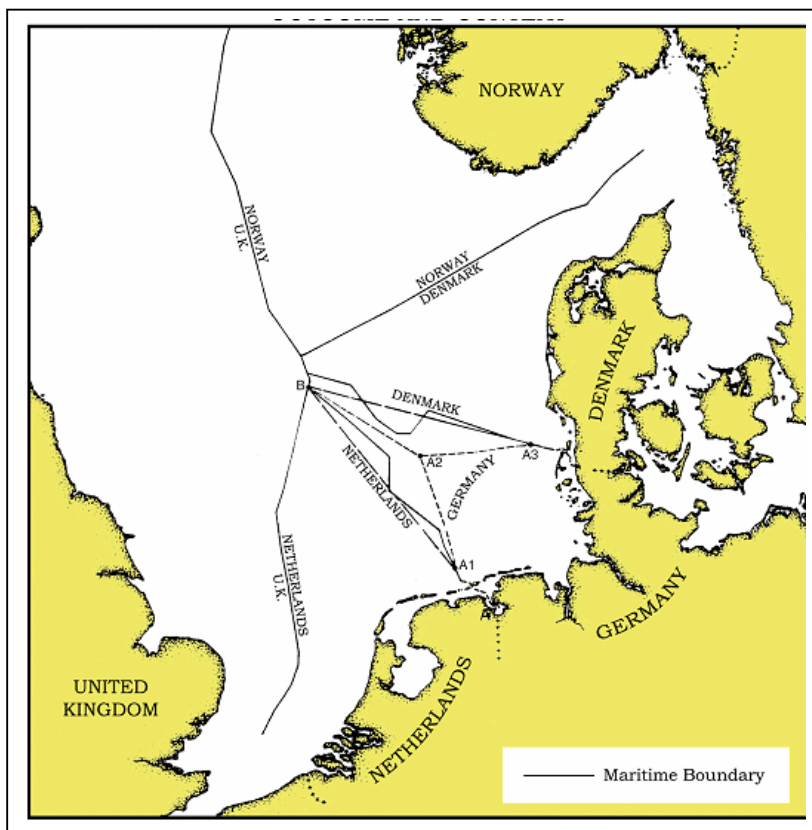
North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands) (1969)

(In this case, the ICJ was asked to settle a dispute over the proper method of delimiting the continental shelf between Denmark and the Netherlands, which argued that the equidistance principle was mandated by int'l law, and Germany, which argued that the equidistance principle was not mandated and more equitable principles should apply. The ICJ found that the equidistance principle is not obligatory between the parties or mandated by either the 1958 Convention or as a rule of customary int'l law, and that its application could "unquestionably lead to inequality.")

(CB pgs. 854-855).

1. ICJ, 1969
2. *Facts:* The ICJ was asked to state what international law mandated as the proper method for delimiting the continental shelf between Germany, Denmark, and the Netherlands. Denmark and the Netherlands contended that int'l law mandated the "equidistance principle" in delimiting the boundary, essentially meaning that every point along the boundary is the same distance from two points chosen on either side of the boundary. The application of the equidistance principle, however, would have substantially reduced the German continental shelf. Germany argued that the equidistance principle was not mandated by int'l law and more equitable principles should apply. (CB pgs. 853-854) (see map below).
3. *Decision:* *The ICJ found that the equidistance principle is not obligatory between the parties or mandated by either the 1958 Convention or as a rule of customary int'l law, and that its application could "unquestionably lead to inequality."* The Court then outlined some general factors to be taken into account as the parties sought to negotiate an equitable settlement: (CB pgs. 854-855)
 - a. The general configuration of the coasts of the parties, including the presence of unusual features

- b. The physical and geological structure and the natural resources on the continental shelf involved
 - c. A reasonable degree of proportionality in delimiting the boundaries, via a process subject equitable principles
4. *Notes:*
- a. One possible resolution, often undertaken by parties, is to render the area in dispute subject to joint-jurisdiction. Obviously, there needs to be relative equality in the power of the parties for this to be an equitable settlement
 - b. Clearly, in cases over conflicting claims to the continental shelf, the ICJ helps solve a zero-sum coordination game
 - c. For more on the equidistance principle, see Jonathan Charney, CB pgs. 855-856).
- 1969 North Sea case



The Regime of the High Seas

1. Freedom of the high seas: According to Restatement Section 521, freedom of the high seas consists of the high seas being open and free to all states, whether coastal or land-locked. It specifically consists in: (CB pg. 857)
 - a. Freedom of navigation
 - b. Freedom of overflight
 - c. Freedom of fishing
 - d. Freedom to lay submarine cables/pipelines
 - e. Freedom to construct artificial islands, installations, and structures

- f. Freedom of scientific research
- 2. Enforcement jurisdiction over foreign ships on the high seas:
 - a. *Absolute immunity for warships:* According to Restatement Section 522, a warship, or a government-operated ship for non-commercial purposes, enjoys absolute immunity. (CB pg. 858)
 - b. *Limited immunity for all other ships:* All other types of ships also enjoy general immunity, but may be boarded by a clearly-marked law-enforcement ship of any state if there is reason to suspect that the ship: (CB pg. 858)
 - i. Is engaged in piracy, slave trade, or unauthorized broadcasting
 - ii. Is without a nationality
 - iii. Through flying a foreign flag or refusing to show its flag, is in fact of the same nationality of the warship/law enforcement ship
 - c. *Example: Spanish naval vessels boarding of North Korean ship:*
 - i. In December 2002, two Spanish naval vessels stopped and boarded a North Korean cargo vessel, which was unmarked, and found weapons on board- scud missiles, that were unlisted on the ship's manifest. The boarding did not violate int'l law because the ship was unmarked. The scuds were destined for the Yemen government, which isn't considered to be a belligerent, so the ship was allowed to keep the weapons, and the cargo vessel and was released. The stopping was done in the context of US and its allies trying to intercept Al Qaeda fighters. Why were they released? Concern of reciprocity leading to lots of ships being stopped because they're carrying weapons, and some of these weapons sales might harm US economic interests. Further, not releasing the ship would have violated int'l law.

THE LAW OF THE SEA III: DISPUTE SETTLEMENT AND THE LAW OF THE SEA

(Casebook 862-77)

- 1. General Characteristics: the focus is on flexibility, so as opposed to other international instruments, the LOS Convention does not provide for unitary system of dispute settlement. (CB pg. 863)
- 2. Options for dispute settlement:
 - a. *Arbitration* (note: if two states have chosen two different methods, then dispute may only be submitted to arbitration)
 - i. Note that arbitration is the US's preference (CB pg. 864)
 - b. The ICJ
 - c. *The LOS Convention's International Tribunal for the Law of the Sea* (see CB pg. 864)
 - i. 21 independent members elected by state parties, with no two members being nationals of the same member state and fewer than three members from each geographical group
 - ii. Based in Hamburg
 - iii. 18 cases have been filed with the tribunal since its inception in 1996, with most dealing with disputes over seized vessels

- d. *Technical commissions*
- e. *Special chamber of the International Tribunal for the Law of the Sea dealing with seabed mining disputes*
- 3. Parties can opt-out of these dispute resolution mechanisms at any point.
- 4. Specific categories of disputes subject to different procedures:
 - a. Article 297 of the LOS Convention governs disputes relating to the exercise by a coastal state of its sovereign rights or jurisdiction in the EEZ (including fisheries, often the continental shelf) (CB pg. 863)
 - b. Article 298 governs disputes relating to sea boundary delimitations, to military or law enforcement activities, or to disputes submitted to the UNSC (CB pg. 863)
 - c. Articles 186-191 govern disputes relating to seabed mining, which are, as specified, usually settled by the LOS Convention International Tribunal's seabed mining chamber (CB pg. 863)
- 5. Advantages of a variety of dispute-settlement options:
 - a. Increases participation in the LOS Convention
 - b. Different institutional forums have better abilities to collect information and to address different issues
 - c. Increases likelihood that states come to agreement over disputes (encourages the resolution of disputes)
- 6. Disadvantages of variety of dispute-settlement options:
 - a. Might lead to more inconsistent body of law (if we assume that a single structure better develops a unified body of law with precedent)
 - b. Might lead to strategic behavior and forum shopping- some dispute mechanisms may be better suited for some states than others
 - c. If we assume ICJ is best suited for resolving these disputes, then having other forums might be bad

The Deep Seabed Mining Regime Pre-1994 Agreement

- 1. History
 - a. In 1958, the International Law Commission of the UN considered the prospect of deep seabed mining to be so remote that it was not material to the 1958 Convention on the High Seas (CB pg. 865)
 - b. The rapid advance of technology and the depletion of land-based mineral deposits, however, made deep seabed mining increasingly attractive. (CB pg. 865)
 - c. *Clear divisions emerged:* (CB pg. 865)
 - i. Developing nations maintained that the natural resources of the deep oceans were the common heritage of mankind, and should therefore take place under a communal regime
 - ii. Developed nations, including the US argued that the high economic value of seabed minerals and their strategic value to the first-world states required free access by the technologically and financially richer countries as a matter of economic interest

- d. *As the LOS Convention was being drafted, there was significant diplomatic and political maneuvering to try to get the eventual agreement to accord with each state's individual preferences* (CB pg. 865)
 - i. In 1980 the US Congress passed the Deep Seabed Hard Minerals Resources Act, whose purpose was to establish an interim deep seabed regime pending successful completion and entry into force of the Convention.
 - 1. The Act was supported by the US Ambassador to the LOS Convention as a way to pressure the developing countries into agreeing to certain US positions in the negotiations
 - 2. This Act was quickly condemned by a number of convention participants, especially by the group of 77 (which now totals some 120 countries), namely composing the developing countries seeking to protect their interests.
- 2. US Opposition to the LOS Convention's Seabed Mining Provisions:
 - a. *"The Reciprocating States Regime"*: The US rejected the LOS Convention in 1982. When it did so, it began negotiating bilateral and multilateral agreements with other developed countries. The nickname for the emerging regime was the "reciprocating states regime" or the "mini-treaty" and included the UK, the Netherlands, Belgium, France, West Germany, and Italy. (CB pg. 866)
 - i. The Provisional Understanding attempted to ensure respect for mining rights granted by reciprocating states and to avoid overlapping mining sites
 - b. *US Objections*: Ambassador David A. Colson, Deputy Assistant Secretary of State for Oceans, articulated the US stance vis-à-vis the LOS Convention's seabed mining regime: (CB pg. 867)
 - i. The regime was based on a highly interventionist central economic planning model that was overly bureaucratic and would have pre-empted private investment, thus preventing their development when conditions warranted it
 - ii. The US and other states with the greatest economic interests in seabed mining, were not provided with a commensurate voice in decision-making
 - 1. The US was not guaranteed a seat on the executive council of the international seabed authority (the organization that would administer the deep seabed regime)
 - 2. The majoritarian rule of decision-making would mean that developing countries would dominate the regime
 - 3. The convention's provisions could be amended in the future and bind the US without its consent
 - iii. Revenues from the deep seabed mining might be distributed to national liberation movements over US objections
 - iv. Commercial enterprises, as a condition for being provided with mining rights, would have to share/transfer their mining technology to the Enterprise (the central mining arm of the seabed mining

- regime) or even to developing countries, losing their competitive advantage
 - v. The onerous payments were over the top, requiring a \$1 million annual fee payable beginning at the exploratory stage
3. Moving Closer to the US Position: Changes leading up to the 1994 Agreement
- a. Massive structural change with USSR collapse. Many countries also begin to adopt free market principles, and many developing countries move from socialism to capitalism, and become more open to private rights. (CB pg. 866)
 - b. The price of minerals dropped, so the cost of investing in technology now outweighs the returns of getting the minerals (so there is an expectation that few will engage in it, so it won't be a problem).

The Deep Seabed Mining Regime Post-1994 Agreement

1. The 1994 agreement that modified the LOS Convention's deep seabed mining provisions was meant to assuage the concerns of the US and other developing countries articulated above (CB pg. 867)
2. Current regime: The regime governs all activities connected with exploration and exploitation of mineral resources in the "Area" (CB pg. 868)
3. The "Area" is defined as "the sea bed and ocean floor and subsoil thereof beyond national jurisdictions." (CB pg. 868)
 - a. The "Area" comprises some 60% of the sea bed, and is the "common heritage of mankind" and is thus is not susceptible to unilateral national appropriation
 - b. Rights in the Area and its resources can only be obtained with authorization of the Int'l Sea Bed Authority established by the LOS Convention
 - i. The mining activities have to be carried out for the benefit of mankind as a whole
 - c. The Int'l Sea Bed Authority's mining arm, the Enterprise, can also mine in the "Area"
4. National jurisdiction extends broadly speaking to a distance of 200 miles from the baseline where the margin does not extend up to that distance (CB pg. 868)
5. The Int'l Sea Bed Authority: Is the body through which States Parties are to organize and control all activities concerned with seabed minerals in the Area (CB pg. 868-869)
6. The Assembly: is said to be the supreme organ of the Authority to which all other principal organs shall be accountable. Each state has one vote. It elects members to the Council- the Governing Body of the Enterprise, and is the forum within which Authority decisions are formally adopted on budgetary matters (CB pg. 869)
7. The Council: responsible for the implementation regime within the limit set by the Convention and the general policies established by the Authority. It has 36 members, and is designed to be representative of the main interest groups concerning with seabed mining. Russia and the USA are guaranteed a seat (CB pg. 869)
8. The Enterprise: The original plan was that mining of the riches of the deep seabed would be the primary privilege and responsibility of the Enterprise, the international mining corporation governed by the Council. With time, the feasibility

of mining in the Area has come to be seen as unlikely in the near future, so the Enterprise has yet to be established

9. Decision-making in the Council: In general, it has to be by consensus (absence of formal objections), and over some key substantive decisions in the Council, decisions must be taken by consensus as opposed to majority vote (CB pg. 870)
10. What changes were made by the 1994 Agreement: (all these changes make it more difficult to act against US interests):
 - a. The Assembly's powers were weakened vis-à-vis the 36-state executive council
 - b. Russia and the US are guaranteed a seat on the executive council
 - c. Adequate representation of different interests involved is required in decision-making in the Council, along with some geographic representation
 - d. Deep-seabed mining has not turned out to be that cost-beneficial, so the Enterprise is no longer necessary, and it wouldn't function as an independent entity- it would function through joint ventures, with a voice for the private entity involved.
 - e. Adopted a consensus decision-making structure, and it's required for budgetary/financial/big matters.
 - f. Benefits should be shared equitably distributed (though unclear what equitable means) (CB pg. 871)

Antarctica

1. Governed by 1959 Antarctic Treaty System. (CB pg. 875)
 - a. 12 parties to the Treaty: (CB pg. 876)
 - i. Seven countries claim territorial sovereignty in Antarctica, including Argentina, France, Norway, Britain, Australia, New Zealand, and Chile.
 - ii. Five parties (the US, Belgium, Japan, South Africa, and Russia) neither recognize nor assert claims, though the US and Russia maintain a basis for a claim if they choose to make one.
 - b. In 1991, the Antarctic Treaty States approved the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol): scientific research permitted by all parties, but until 2041, no commercial exploitation is permitted due to environmental concerns.

INTERNATIONAL ENVIRONMENTAL LAW I: CUSTOMS AND TREATIES (Casebook 879-903)

1. Concerns with the environment is rooted in externalities.
 - a. Benefits/costs that are produced by an activity that impact and individual/people not involved in the initial activity. So for negative externalities like pollution, the cost is often not internalized in the production.
2. The 1941 Trail Smelter case (below) is often considered to be a key early source of customary int'l law in the environmental area.

Trail Smelter Case (1941)

(Since 1925, large amounts of sulphur dioxide had been emitted by a smelter plant at Trail, British Columbia. The US and Canada, at a 1935 Convention, established a tribunal empowered to decide whether the Smelter plant had caused damages, the indemnity that should be paid for the damages, and whether the smelter should be required to refrain from causing damage to the state of Washington in the future. The Tribunal concluded that the the smelter plant had caused damage in Washington, and the indemnity to be paid was \$78,000. Further, it held that the Trial Smelter shall be required to refrain from causing any damage through fumes in the state of Washington.) (CB pgs. 880-882)

1. Arbitral Tribunal, 1941
2. *Facts:* The case resulted from injuries caused in the State of Washington by large amounts of sulphur dioxide emitted since 1925 by a smelter plant at Trail, British Columbia. Claims of injury could not be brought in the courts of British Columbia under a doctrine of nuisance since under the law of that province such claims were “local” could only be brought in the jurisdiction where they were located. The State of Washington on the other hand, had no jurisdiction over the polluter, a Canadian Company. Negotiations between the US and Canada led to a 1935 Convention which established a tribunal empowered to decide the following two questions (CB pg. 880)
3. *Questions:* a) whether the Trail smelter plant had caused damage in Washington and what indemnity should be paid for such damages, and b) whether, if the plant had caused the damage, “the Trial Smelter should be required to refrain from causing damage in the State of Washington in the future, and if so, to what extent.” (CB pg. 880).
4. *Decision:* The Tribunal concluded that the emission of substantial amounts of sulphur dioxide by the smelter plant had caused damage in Washington, and the indemnity to be paid was \$78,000. Further, the Tribunal held that Canada should “see to it that this conduct should be in conformity with [its obligations] under international law,” and thus that the “Trail Smelter shall be required to refrain from causing any damage through fumes in the state of Washington.” (CB pgs. 881-882)
 - a. General rule of int’l law used in the judgment is that “A state owes at all times a duty to protect other States against injurious acts by individuals from within jurisdiction.” (CB pg. 881)
 - b. Relying on several SCOTUS decisions, the Tribunal held that “under principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another”.

Stockholm Conference (1972)

1. Convened by the UN GA, adopted several non-binding instruments, including a Declaration of Twenty-six Guiding Principles (The Stockholm Declaration). This represented the first effort at constructing a coherent strategy for the development of international policy and institutions to protect the environment. (CB pg. 883)
2. The Stockholm Declaration is generally regarded as the foundation of int’l environmental law. Some key principles of the declaration include (CB pg. 883)

- a. *Principle 21*: States have right to exploit their own resources and pursue their own environmental policies, but also the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment to areas beyond the limits of their jurisdiction (CB pg. 884)
 - b. *Principle 22*: States shall cooperate to develop further the int'l law regarding the liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction (CB pg. 884)
3. The Conference also established the *UN Environment Programme* (UNEP), which has been instrumental in the establishment and implementation of important global and regional treaties addressing ozone depletion, trade in hazardous waste, biodiversity, and marine protection (CB pg. 883)

The Rio Conference (“Earth Summit”) (1992)

1. In 1992 the UN sponsored the 1992 Rio Conference, formally called the UN Conference on Environment and Development (UNCED), nicknamed the “Earth Summit.” (CB pg. 884).
 2. The conference reasserted the Rio principles, but added the word “development” to the language of Principle 21 of the Stockholm Declaration. (CB pg. 885)
 - a. Why? Developing countries argue there is a tradeoff between environmental and development concerns.
1. Stockholm and Rio: As a matter of form, *these declarations are non-binding soft law*. What’s the role?
 - a. Trying to resolve coordination problems, to act as new baselines for discussion. It attempts to serve as a framework (though the common criticism is that one moves from framework to framework and doesn’t get anywhere)
 - b. They set a floor for discussion and attempt to prevent regression
 - c. They are aspirational- they are meant to delineate the ideals we should strive for
 - d. Despite being soft law, these commitments can eventually harden via treaty or custom
 2. Stockholm Declaration vs. Restatement Section 601: The Restatement also addresses state obligations with respect to the environment, but uses “significant injury/damages” language, “to the extent practicable.” In other words, it hedges away from the Stockholm principle (CB pg. 885)

General Principles of Int’l Environmental Law

1. Sovereignty and the Responsibility for the Environment: Sovereignty is seen as including a right, namely over a state’s own natural resources, and also as a responsibility, namely that states have the responsibility to prevent damage to the environment of other states/areas beyond their territorial jurisdiction. (CB pg. 887)
2. Sustainable Development: The focus is also on reconciling economic development with environmental protection- consider future generations (generational equity) and setting appropriate standards for conservation vs. use. The state should think of

using resources with equity in light of the situations of other states, integrating environmental concerns into economic plans. (CB pgs. 888-889)

3. Common but Differentiated Responsibility- This principle includes two elements: first, states have a common responsibility to protect certain environmental resources. Second, it is important to take account of differing circumstances, particularly in relation to each state's contribution to causing a particular environmental problem and its ability to respond to the threat. This leads to the adoption and implementation of environmental standards that impose different commitments for states, and provides the basis for providing financial and technical assistance to developing countries to assist them in implementing commitments (CB pg. 889).
 - a. *Debate over obligation between developing and developed countries:*
 - i. Developing countries want less onerous obligations, and longer time-periods for implementation. They argue that developed countries polluted in the past as they industrialized- you can't prevent us for doing the same. It's hypocritical.
 - ii. Developed countries instead highlight that some of the biggest emitters are getting off free! It's a free rider problem, especially vis-à-vis India and China. Further, when developed countries industrialized, they didn't know about the environmental issues. Finally, it's in the developing countries' own self-interest to act.
 - b. This common but differentiated responsibility principle might be the driving issue to all negotiations.
 - c. Some argue that this is part of customary int'l law in the broadest sense, but the devil's in the details.
4. Precautionary principle: Some believe it reflects customary int'l law, and is reflected in Principle 15 of the Rio Declaration, which states "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The idea is that we don't postpone cost-effective measures to prevent environmental degradation simply because of uncertainty. So one regulates first. Opponents, however, suggest this promotes overregulation unnecessarily. It's pretty clear this isn't customary int'l law, even though some tried to argue this. (CB pg. 889).
5. Polluter pays: costs of pollution should be paid by polluters. The precise meaning, int'l legal status, and effect of the principle remains open to question because int'l practice based on the principle is limited, but it is doubtful that it has achieved the status of generally applicable rule of int'l law. (CB pg. 890).
6. Cost-benefit analysis: Often the practice is to try to weigh environmental costs with economic gains, for sustainable development, for example.

Could pollution be a legitimate claim under the Alien Tort Statute (ATS)?

1. It's hard to bring up suit under the ATS for a violation of customary int'l law regarding pollution, largely because few of the above principles are accepted as custom.

2. Further, few of them are codified in a legally binding Treaty, and certainly not one that the US would have ratified

Challenges in Developing Int'l Environmental Law

1. *International environmental problems are caused primarily by private conduct, and int'l law remains best suited to address questions of government conduct* (CB pg. 894)
2. *International environmental problems involve significant scientific uncertainties. We often don't know how serious the problem is, what its causes are, how expensive it will be to address, or whether it's even a problem at all, and if it is, whether it is still possible to address it* (CB pg. 894).
3. *Perspectives on addressing int'l environmental problems are widely divergent, and interests are generally misaligned. Even states with similar scientific and normative views can see their interests very differently based on national circumstances- states with significant coal/oil resources have different interests with respect to climate change than do island nations* (CB pg. 895).
4. *States have an incentive to free-ride, because their collective interest doesn't match their individual interest. Collectively, states have an incentive to stop pollution so long as the benefits outweigh the costs, but each individual state has an incentive to continue to pollute if most of the damages from pollution are externalized, and they can free-ride in the sense that the rest of the world agrees to reduce pollution and they reap the benefits anyway.* (CB pgs. 895-896).
5. *States have different perceptions of fair and equitable outcomes when it comes to addressing environmental problems. Developing countries consistently argue that since they were not responsible for creating the climate change problem and have less capacity to respond, it would be unfair for them to be bound to any emissions reduction target, whereas developed countries would feel that setting no target for developing countries would be unfair and inequitable* (CB pg. 896).

Multilateral Environmental Agreements: Some Common Features

1. Environmental agreements have some common characteristics. The main features they share are: (CB pg. 897-898)
 - a. *An absence of reciprocity of obligations*
 - b. *Interrelated or cross-referenced provisions from one instrument to another*
 - c. *Framework agreements* (agreements to agree)
 - i. *These generate principles to generate subsequent principles, and hopefully (though infrequently) a spillover effect*
 - ii. *Problem: the continuation of agreements to agree that don't lead anywhere*
 - iii. *Benefits: A consensus on basic principle and the need for action which will follow generally is easier to reach than the details of the action itself. Plus, since environmental knowledge is evolving, the flexibility of framework agreements is well suited to environmental problems* (CB pg. 899)
 - d. *Frequent interim application*

- e. *The creation of new institutions or the utilization of already existing ones to promote continuous cooperation*
- f. *Innovative compliance and non-compliance procedures*
- g. *Simplified means of modification and amendment*
- h. *They tend to be non-self-executing agreements and often tend to be non-binding (soft, as opposed to hard, law)*
- i. *Attempts to address non-parties to prevent free riding (such as restriction of trade imports from them unless they comply with the agreement)*

Compliance/Noncompliance Mechanisms

1. A managerial approach: The focus is not on punishing wrongdoing, but on incentivizing information reporting by countries- once the information is gathered, then negotiations begin to see how the state can best be aided to achieve compliance (CB pg. 902)
 - a. *Compliance information systems*: These systems contain elaborate procedures for the provision of information by parties, the possible review of this information by independent experts, and the availability of information to the general public (CB pg. 901).
 - b. *Noncompliance procedures*: Such procedures, rather than punishing noncompliance, are aimed at finding ways to facilitate compliance by the state in breach of its obligations. They provide for a political framework for amicable responses to noncompliance that cannot be considered “wrongful.” (CB pg. 902).

INTERNATIONAL ENVIRONMENTAL LAW II: THE OZONE LAYER AND CLIMATE CHANGE (Casebook 903-29)

THE OZONE LAYER

1. Background:
 - a. *Ozone* in the earth’s stratosphere filters harmful ultra-violet radiation from sunlight that can cause skin cancer. Thus, *the ozone layer is a public good*(CB pg. 903)
 - b. There was growing evidence in the 1980s that *ozone depletion was being caused by anthropogenic gases* (human-emitted gases), most notably chlorofluorocarbons (CFCs) contained in aerosol sprays and in solvents and refrigerators. (CB pg. 903)
 - c. *Most states demonstrated a commendable ability and willingness to act.*
 - i. They negotiated relatively quickly the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, followed by successive amendments and adjustments tightening the Protocol’s provisions. (CB pg. 903).

2. The 1985 Vienna Convention for the Protection of the Ozone Layer
 - a. *Overview:*
 - i. The Convention is a framework convention providing the basis for systematic cooperation among the states parties respecting protection of stratospheric ozone. (CB pg. 904)
 - b. *History:*
 - i. In the 1980s UN Environment Programme (UNEP) made protection of stratospheric ozone a priority item in its legal action plan and after several years of effort, it succeeded in negotiating the Vienna Convention (CB pg. 904)
 - c. *Obligations:*
 - i. The general obligation of states is to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities that modify or are likely to modify the ozone layer (CB pg. 904)
 - d. *Protocols:* According to Article 8 of the Convention, parties may adopt protocols to the convention (CB pg. 904)
3. The 1987 Montreal Protocol:
 - a. *Overview:* (CB pg. 904)
 - i. The protocol foresees the control of various forms of CFCs and halons and their progressive elimination.
 - ii. Came into force in 1989
 - b. *Obligations:* (CB pg. 904)
 - i. Industrial countries agreed to cut production and use of CFCs by half by 1998, and by 1992 to freeze production of halons.
 - ii. Developing countries were given a 10-year period to comply
 - c. *Provisions for adjusting the lists of controlled substances/permissible levels of production of controlled substances:* (CB pg. 906)
 1. Article 2(9) states that in making such adjustments, parties must make every effort to achieve consensus, but if it is impossible, then a decision can be adopted by a 2/3 majority vote (this prevents just developed or developing countries from achieving majority rule- both blocs must agree)
 - d. *Addressing free-riding*(CB pg. 904)
 - i. The protocol also restricted trade between state parties and non-parties
4. Annual meetings:
 - a. The core of the int'l structure of the ozone regime is the annual Meeting of the Parties to the Montreal Protocol which allows the participating states to decide collectively when there is a conflict concerning the interpretation of or the compliance with the treaty obligations accepted (CB pg. 905)
5. Success
 - a. Int'l efforts to protect the ozone layer have had significant impact (CB pg. 905)

- i. By 1995, global production of CFCs was down 76% from the peak year of 1988
 - ii. Several countries and regions advanced beyond the agreements- the EU announced that it will phase out HCFCs by 2015, 15 years before it was legally required to do so
 - iii. The US Clean Air Act mandates phase-out of methyl bromide nine years ahead of Protocol requirements
- 6. The Successful Structure of the Ozone Agreements
 - a. Managerial approach- state parties were encouraged to reveal info rather than being discouraged of doing so for fear of sanctions. Not a big use of the sanction- more use of public shaming. Since encouraging the provision of info was a factor, that also generates more opportunities for discussion and generate new norms.
 - b. Regular meetings provide for flexibility to address changing conditions, implementing the commitments, and possibly improving or adopting new commitments (CB pg. 908)
 - i. This leads to a continuous updating of the Vienna Convention's goals and standards
 - ii. This also allows for the rule system to develop over time, responding to evolving science and the capacity to deal with environmental problems
 - c. Financial incapacity to comply was addressed- under the Montreal Protocol, a multilateral fund was set up (Article 10) to provide financial assistance, as well as the transfer of technology under Article 10A. (CB pg. 909)

What are the US Legal Effects of the Decisions by the Annual Meeting of the Parties?

Natural Resources Defense Council v. Environmental Protection Agency (NRDC v. EPA) (2006)

(This case dealt with whether the annual meeting of the parties to the Montreal Protocol and their decisions amounted to binding law in US federal courts. The Court of Appeals found that "The "decisions" of the parties are not "law" within the meaning of the Clean Air Act and are not enforceable in federal court.")(CB pgs. 906-907)

1. US Court of Appeals (DC Circuit), 2006
2. *Facts:* The NRDC challenged a rule issued by the EPA regarding the production and consumption of methyl bromide, a substance controlled under the Montreal Protocol. The NRDC argued that the EPA rules violated a "decision" of the Meeting of the Parties to the Montreal Convention regarding the production and consumption limits of methyl bromide. The NRDC argued that "decisions" under the Montreal Protocol are "law." (CB pgs. 906-907)
3. *Decision:* "The "decisions" of the parties are not "law" within the meaning of the Clean Air Act and are not enforceable in federal court." Why?
 - a. If the decisions are law, and enforceable in federal court like statutes or legislative rules. "then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without

presidential signature or Senate ratification, in violation of Article II of the Constitution..." and creating serious problems in light of the non-delegation doctrine(CB pg. 907)

- b. Further, the decisions are usually considered to be agreements to agree that are "usually not enforceable in contract...There is no doubt that the "decisions" are not treaties." (CB pg. 907)
- c. "Without congressional action...side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts, but through international negotiations." (CB pg. 907).

GLOBAL CLIMATE CHANGE

1. *Background:* A major problem of the global commons is the phenomenon of global climate change. It involves the increase of greenhouse gases in the atmosphere, which trap solar radiation, causing the general warming of the planet. Some of the potential effects include changing weather patterns and sea level rises, threatening over 1/3 of the world's cropland, along with over 1 billion people living on coastlines. (CB pg. 914)
2. *Challenges:* The nature, severity, and time scale of these particular effects is subject to contentious debate. It is unclear exactly how much specific factors, such as human emitted GHGs, are contributing to climate change.
3. The US could be quite influential if it had a strong view in favor of addressing climate change, but there has been some reduction in US support over climate change being a problem. But so far, it has not taken such a stance.
4. The economic implications of addressing CC are also much greater than addressing the ozone later, as GHG production goes to the heart of energy, transport, agricultural, and industrial policy (CB pg. 915)
5. 1992 Framework Convention on Climate Change (FCCC):
 - a. Adopted at the Rio Conference, the convention went into effect in 1994. It has 193 parties, including the United States. (CB pg. 912)
 - b. The FCCC represents broad acknowledgement by states of the need to address climate change. (CB pg. 917)

Differing views at the conference: (CB pg. 917)

 - i. Small island states, which might disappear due to sea rises, were in favor of a strong convention.
 - ii. OPEC oil producers whose income could suffer due to decreased consumption of fossil fuels by developed states.
 - iii. Larger developing states like China and Brazil and India were mainly concerned with not limiting their own economic growth, but had no objection to developed states taking the lead
 - iv. Developed OECD countries had mixed views. The US in particular did not want to commit itself to emissions reductions or timetables and disagreed with lumping China and India with developing states, thus producing less stringent requirements for those states
 - c. *Substance:* (CB pg. 918)

- i. The Convention establishes the objective of achieving “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” (Article 2).
- ii. It calls on all states to implement national programs “to mitigate climate change by addressing anthropogenic emissions”
- iii. For developed countries, the Convention further stipulates that national policies should limit GHG emissions with the aim of returning emissions to 1990 levels.
- iv. The convention created a structure for regular meetings of the parties, which met in Kyoto in 1997 to negotiate a treaty with more rigorous commitments.

6. The 1997 Kyoto Protocol

- a. *Overview:* At the third Conference of the Parties to the FCCC held in Kyoto in 1997, the parties adopted a controversial protocol that established some legally binding obligations to reduce GHG emissions. The Protocol came into force in 2005 after 55 states, representing at least 55% of carbon dioxide emissions produced in 1990, ratified the treaty. 192 countries, plus the EU, are parties to the protocol. The US has signed, but not ratified, the Protocol.(CB pg. 912)
- b. *Substance:*
 - i. *“Big bubble approach” for Developed Countries:* Developed countries are allowed to join together and attain their emission reduction commitments jointly by aggregating their GHG emissions. Emissions for developing countries should be reduced by 5% below 1990 levels by the first commitment period of 2008-2012. (CB pg. 918)
 - ii. *Former communist countries* in economic and political transition benefit from a certain degree of flexibility in the implementation of their commitments, and they may use, for example, a different base year to determine the reduction in their emissions. (CB pg. 918)
 - iii. *Emissions trading system:* According to Article 6(1), any developed country, for the purpose of meeting its commitments, may transfer to, or acquire from, any other party emission reduction units resulting from projects aimed at reducing emissions. (CB pg. 919)
 - iv. *“Clean Development Mechanism” for developing countries:* Article 12 outlines this mechanism, the task of which is to assist developing countries in achieving sustainable development and in contributing to the ultimate objective of the convention. It also may assist developed countries in achieving compliance with their quantified emission limitation and reduction commitments. The mechanism assists in arranging funding of certified project activities for developing countries. (CB pg. 919)
 - v. *Monitoring of GHG emissions:* Developed countries must establish national systems to estimate anthropogenic emissions (Article 5) and must demonstrate compliance with the commitments accepted under

the Protocol (Article 7). Such info is reviewed by teams of experts nominated by the parties. (Article 8). Developing countries' emissions are not limited, but they should formulate cost-effective national/regional programs to improve the quality of emissions factors. (Articles 10-11) (CB pg. 919).

- vi. *Developed-Developing country cooperation*: This includes the transfer of, or access to, environmentally sound technology, know-how, practices, and processes pertinent to climate change, capacity building, as well as financial resources. (CB pg. 919)
- c. *US Opposition*: Although Clinton signed the Protocol as one of his last presidential acts, President Bush opposed it and did not submit it for senate ratification on the following basis: "I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India for compliance, and would cause serious harm to the US economy" and charged that it was an "unfair and ineffective means of addressing global climate change concerns." (CB pg. 920)

7. 2009 Copenhagen accord:

- a. *Overview*: Drafted by big countries when it was clear that nothing would come of the conference. It made a non-binding declaration, and is thus a political rather than legal document, negotiated by 25 heads of state, of government, ministers, and other heads of delegations. (CB pg. 921)
- b. *Non-adoption of the accord*: Mostly due to opposition by Sudan, Venezuela, Bolivia, and Nicaragua, the 25 parties were unable to adopt the accord, and instead decided to "take note of" the below substantive measures, and allow countries to formally "associate" themselves with the accord, and more than 120 countries have done so, representing over 80% of global GHG emissions. (CB pg. 923)
- c. *Substance*:
 - i. The accord recognizes *the need to limit temperature increases to no more than 2 degrees Celsius* (CB pg. 921)
 - ii. *Developed countries* "commit to implement" their targets, individually or jointly, subject to international monitoring, reporting, and verification (CB pg. 922)
 - iii. *Developing countries* will submit GHG inventories every 2 years, and country mitigation actions will be subject to domestic monitoring, verification, and review, and the results of this receive will be reported in biennial communications (CB pg. 922)
 - iv. *Financial assistance*: the accord creates a "collective commitment" for developed countries to provide \$30 billion in resources for 2010-2012, and \$100 billion per year by 2020 linking this money to "meaningful mitigation actions and transparency of implementation." It calls for the establishment of a Copenhagen Green Climate Fund as an operating entity to manage the financial contributions and help meet the \$100 billion yearly goal (CB pg. 922)

- v. *Monitoring, Reporting, and Verification* (MRV): The accord calls for rigorous, robust, and transparent MRV of developed country emission reductions and financing (CB pg. 922)
- d. 2010 UN Climate Change Conference in Cancun:
 - i. An overall failure: the parties failed to reach agreement on a new multilateral agreement that would establish binding emissions reduction obligations at the end of the Kyoto Protocol's first commitment period in 2012 (CB pg. 924)
 - ii. Silver lining: The conference did include a political commitment by developed states to mobilize \$100 billion per year by 2020 to assist developing countries to adapt to CC and mitigate emissions (CB pg. 924)

Why success tackling Ozone Depletion by not Climate Change?

Key Explanatory Criteria	Ozone Layer	Climate Change
# of sources of the problem	Few: Mostly CFCs in aerosol cans and refrigerators	Many: GHGs are used in a plethora of human activity
Identifiability of causal factors	Easy: CFCs were clearly linked to ozone depletion	Not easy: everyone uses energy, so it's hard to know what GHG-producing processes to let go of
Distribution of the costs	Costs are for everyone	Costs impact some more than others, like island nations
Distribution of the benefits	Benefits go to the few substitute industries to aerosol sprays and refrigerators (there is a lobby)	Harder to say what the substitute industry is for oil, coal, ect. So the benefit distribution is unclear
Timing of the benefits	Short-term: measureable improvements relatively quickly	Unclear- it's hard to tell when CC will have a more serious impact and how soon we can expect to see results
Scientific verifiability	very high	moderate/some disagreement remains
Interest alignment of key states/polluters:	Aligned	Misaligned

Further difficulties dealing with Climate Change

1. *Who is responsible?* The US and other countries contributed heavily to the existing stock of GHGs, however the current flow is increasingly coming from the developing world. The question is if China is morally required to mitigate its output because the rest of the developed world contributed to most of the stock. Where does the moral obligation lie? With the stock, or with the current emissions?
2. *Tension with WTO free trade rules:* states trying to use environmental standards as a backhand way of creating non-tariff barriers to trade. (CB pg. 928)
 - a. *Example:* (CB pgs. 928-929) Separate cases were brought before the GATT/WTO dispute settlement mechanism challenging US laws prohibiting the importation of tuna obtained with nets that also catch and kill dolphins, as well as laws banning the importation of shrimp from countries whose commercial shrimp trawlers did not use technology to prevent the killing of endangered sea turtles.
 - b. In both cases, the dispute settlement body found that the US was in violation of its obligations under the WTO/GATT, because GATT-consistent alternatives were available and the US measures were applied in a discriminatory fashion.
 - c. Following the decisions, the US amended its regulations to permit shrimp imports from any country that had adopted shrimp-harvesting practices deemed “comparably effective” in protecting turtles as those practiced from countries from which the US permitted imports, and these regulations were deemed to comply with free trade rules

Other ways of dealing with Climate Change?

1. Some say we should wait, and technology will be able to take care of it in the future.
2. Others say we focus on sea defenses to prevent sea erosion, particularly for islands/coastal states.
3. Others focus on individual action, changing our diets, reduce our consumption patterns, and instituting change the way our cities are structured and reduce sprawl.
4. Another is geo-engineering- putting up massive sun shades, emission of certain particles that are effective.