Public International Law Index

C. OBSERVANCE & APPLICATION
   1. Pacta sunt servanda
   2. Relation with internal law
   3. Non reto-activity
   4. Territorial application
   5. Inconsistent treaties

D. TREATY INTERPRETATION
   1. Effectiveness principle?
   2. VCLT general rules of interpretation
   3. Other rules/maxims of interpretation
   4. VCLT supplementary means of interpretation

E. THIRD STATES

F. INVALIDITY
   1. Non-compliance with municipal law requirements
   2. Error
   3. Fraud & corruption
   4. Coercion
   5. Jus cogens

G. TERMINATION
   1. In accordance with the terms of the treaty, or by consent
   2. Material breach
   3. Supervening impossibility
   4. FCIC
   5. Severance of diplomatic & consular relations
   6. Jus cogens

H. PROCEDURE FOR TERMINATION, etc.
   1. Consequences of termination, etc.
   2. Severability of treaty provisions
   3. Loss of right to invoke a ground for invalidity of the treaty
   4. Settlement of disputes

Topic 4: Municipal Law & PIL → Page 56

A. MUNICIPAL LAW IN INTERNATIONAL LAW

B. CUSTOMARY INTERNATIONAL LAW IN MUNICIPAL LAW
- Incorporation or transformation approach?

C. TREATIES AND RESOLUTIONS OF INTERNATIONAL ORGS IN MUNICIPAL LAW

Topic 5: State Jurisdiction → Page 65

A. State jurisdiction (Intro)

B. Civil Jurisdiction
   1. 5 bases of jurisdiction
      1.1 Territorial principle
      1.2 Nationality principle
      1.3 Protective/security principle
      1.4 Passive personality principle

2. Nationality of claims
3. Exercise of DP a matter for the national state's discretion
4. Exhaustion of local remedies

Topic 8: Use of Force → Page 121

1. General Prohibition on UOF
   - Historical development
   - UN Art 2(4)
2. Exceptions to the General Prohibition
   - 2.1 Self Defence
     - Individual self defence
       - UN Art 51
       - "Armed Attack"
       - Necessity & Proportionality
     - Collective self defence
     - Other applications of SD?
       - Protection of nationals?
       - Settling territorial disputes?
       - Anticipatory and pre-emptive?
   - 2.2 Collective security measures through the UN
     a) Peace keeping operations
     b) SC authorization (UN Ch VII)
     c) "Humanitarian Intervention" and "R2P"
     d) Regional arrangements (UN Ch VIII)
3. Case study: US Invasion of Iraq

Topic 9: International Dispute Settlement → Page 133

1. General Principles
2. Methods of Dispute Settlement
   - 2.1 Negotiation
   - 2.2 Inquiry
   - 2.3 Good offices
   - 2.4 Mediation and Conciliation
3. The role of the ICJ
   - 3.1 Contentious Jurisdiction
   - 3.2 Provisional Measures
   - 3.3 Advisory Jurisdiction
   - 3.4 Review of SC decisions?

- (d) Strictly construed, high burden of proof lies on the injured person
- (e) Waiver needs to be express (***ELSI case***)

Topic 8: USE OF FORCE

1. General Prohibition on UOF
- Historical development
- UN Art 2(4)

2. Exceptions to the General Prohibition

2.1 Self Defence
- Individual self defence
  - UN Art 51
  - "Armed Attack"
  - Necessity & Proportionality
- Collective self defence
- Other applications of SD?
  - Protection of nationals?
  - Settling territorial disputes?
  - Anticipatory and pre-emptive?

2.2 Collective security measures through the UN
e) Peace keeping operations
f) SC authorization (UN Ch VII)
g) "Humanitarian Intervention" and "R2P"
h) Regional arrangements (UN Ch VIII)

3. Case study: US Invasion of Iraq

1. General Prohibition on UOF

Historical Development:
- Two branches of theory based on the "just war" tradition
  - Jus ad bellum (limitations on the use of force, developed throughout the 20th C)
  - Jus in bello (international humanitarian law, limitations on conduct of military operations during a war)
- Beginning of the 20th C: UOF widely recognised as legal, regardless of its purpose (e.g. for just or unjust ends, states trying to take over new territory, pursue their own interests, or just for the lolz)
- Developments after WWI:
  - *1919 Covenant of the League of Nations*
  - *1928 General Treaty for the Renunciation of War*
  - BUT – these only applied to "war" (not lower levels of UOF, so the prohibition could be avoided)

UN Charter (1945)
- UN system of collective security agreed at the end of WWII
- Preamble: states its purpose, "to save succeeding generations form the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"

UN Charter, Art 2(4):	"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other

	manner inconsistent with the purpose of the United Nations."

Interpretation:

- Does not just relate to war, but to UOF generally (much broader range of measures, including threats of UOF)
- The phrase "against the territorial integrity or political independence" is NOT intended to limit the unlawfulness of the UOF.
    - ***Corfu Channel Case*****:** the argument that force was defensive and not intended to threaten territorial or political rights was rejected.

Corfu Channel

Facts:

- Recall from SR (Topic 7): UK Royal Navy ships were damaged by mines in the Corfu Channel. ICJ held that the Albanian govt was responsible for the damage (that they knew/ought to have known, and warned of the danger)
- FOLLOWING this: the UK Royal Navy conducted a mine sweep of the area, including of Albanian territorial waters, w/o permission from the Albanian govt.
- Albania complained about this to the UN – UOF & violation of territorial sovereignty

Held:

- (Court gave judgment to Albania w/ respect to the minesweeping operation as an unlawful UOF)
- Even though the previous failure of due diligence by the Albanian govt was wrongful, the court said "that the action of the British navy constituted a violation of Albanian sovereignty" and a disproportional UOF.
-

- The meaning of "force" does not include economic or political coercion under the Charter (though it does in the Declaration on FR)
- *The "threat" of force* is unlawful where the envisaged use of force is itself unlawful: ***Nuclear Weapons*** case.
- The prohibition on the UOF (as in the Charter) is also a rule of CIL and a norm of *jus cogens* status (IT MAY BE A JUS COGENS, some parts of it are, the core of it is, not the whole thing, be careful)
    - *UOF = a peremptory norm from which no derogation is permitted:* ***Nicaragua (Merits)*** **case** [1986]
    - Therefore: binding on all states, including non-members of the UN.
    - As per ***Art 53 of the VCLT***: peremptory norms prevail over inconsistent treaty provisions, so states can't make treaties agreeing to unlawful UOF

Declaration on Principles of Friendly Relations and Cooperation Among States

UNGA Resolution 2625 (XXV)

- "The strict observance by states of the obligation not to intervene in the affairs of any other state is an essential condition to ensure that nations live together in peace… the practice of any form of intervention… violates the spirit and letter of the Charter"

- States must refrain from coercion, threat or use of force against the territorial integrity or political independence of other states
    - States may not resort to force to settle disputes, claim territory or as an act of reprisal.
    - This involves a duty to refrain from war propaganda and from organising or encouraging the organisation of irregular forces.
    - States have a duty to refrain from encouraging or participating in acts of civil strife or terrorist acts
    - States must pursue in good faith negotiations for a universal treaty on general and complete disarmament
- States shall settle their international disputes by peaceful means
    - States shall seek early settlement by negotiation, enquiry, mediation, arbitration, judicial settlement or as appropriate
- No state has the right to intervene in the internal or external affairs of another state
    - No state may use economic or political measures to coerce
    - No state may assist terrorist or armed activities directed towards the overthrow of the state
- States have the duty to cooperate with one another in accordance with the Charter
- All peoples have the right freely to determine their political status and to pursue their economic, cultural and social development
    - All states have a duty to promote the realisation of the principle of self-determination.
    - States have a duty to respect and promote human rights and the end of colonialism

- All states enjoy sovereign equality
- States shall fulfil in good faith the obligations of the Charter, CIL and treaties. Where a treaty and the Charter come into conflict, the latter shall prevail.

Armed Activities in the Territory of the Congo
(DRC v Uganda) [2005]

Facts:

- President Mobutu's DRC government was overthrown by a Congolese rebel force (AFDL) supported by Uganda and Rwanda. On taking office, the former ADFL leader consented to Ugandan forces remaining in the territory, however, as relations disintegrated, this *consent was revoked.*
- Despite this, Ugandan forces remained and progressed into the territory on the grounds of self-defence, namely that the DRC government was exacerbating the problem of cross-border raids (conducted against Uganda by rebel groups based in DRC territory)

Result: *The Ugandan presence was an unlawful use of force*

Reasoning:

- The Charter justifies the use of force within STRICT CONFINES, the use of force for protection of perceived security interests beyond these parameters is unlawful.
- Furthermore, Uganda's previous actions equally constituted an interference in the internal affairs of the DRC by supporting a DRC rebel group (prohibited under the *Declaration on Friendly Relations - also stated in the judgment to = CIL)*

Modern developments

- Many modern conflicts do not occur between states but rather between states and non-state actors (terrorism) or within states (civil conflict).
- Recent state practice includes:
  - *Delegation of UNSC peacekeeping* to regional organisations and coalitions of states
  - *Widening of the principles of individual and collective self-defence*, including pre-emptive strikes
  - *Right to intervene for humanitarian purposes*
  - *Use of force in territories believed to have supported terrorism*

- States will *invariably attempt to justify* their use of force by reference to principles of international law including express or implied authorisation of the Security Council or forms of self-defence
  - e.g. belated justification of the UK's invasion of Iraq.
- Difficulties with identifying the sources of law.
  - Debates within the UN are often couched in legal terms but are mixed with political and security evaluations.
  - State practice is also often at variance with *opinio juris* and it is difficult to distinguish evolving practice with maverick or opportunistic practice.

2. Exceptions to the general prohibition

There are *only two exceptions* to the Article 2(4) prohibition:

2.1 The inherent right to ***individual or collective self defence*** (SD)(Article 51)

2.2 ***Collective security action*** undertaken by the SC (pursuant to Ch VII) – including UNSC-authorised intervention in civil conflicts, such as in Libya

2.1 Self-Defence

Individual Self-Defence

Conditions for Exercise: Armed Attack, Necessity, Proportionality

UN Charter, Art 51:	"Nothing in the present Charter shall impair the *inherent right of individual or collective self-defence if an* ***armed attack*** *occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and

	security. Measures taken by Members in the exercise of this right of self-defence ***shall be immediately reported to the Security Council*** and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

- Article 51 is the *ONLY express exception* in the UN Charter for unilateral use of force, without UN authorisation.
- The reference to "inherent right" is to the right of SD at CIL (i.e. *incorporates previously established rules about SD in CIL*)
- Right of SD is to be exercised *only on a TEMPORARY basis*, until the SC is able to act

A. Meaning of "Armed Attack"

- *NOT ALL UOF = AN "ARMED ATTACK"*
- Whether a use of force will amount to an armed attack depends on scale and effects.
- Armed attacks are reserved for the most grave uses of force (***Nicaragua***).

Nicaragua Case

- US tried to justify its UOF against Nicaragua on the grounds of collective SD – said it was acting in response to attacks by rebel groups on El Salvador (groups were supplied w/ arms by the Nicaraguan govt)

Held:

- Sending an armed irregular force across borders COULD constitute an armed attack, depending on its scale and effects
- However, *the provision of weapons* & other assistance to rebels did not constitute an armed attack, and therefore did not constitute grounds for SD
- Provision of weapons *does* however constitute the UOF

Oil Platforms Case (Merits)
(Iran v United States)

Facts:

- During the Iran-Iraq war, a number of attacks on merchant shipping occurred in the Persian Gulf, causing the US to provide naval escorts for ships flying their flag.
- A civilian vessel, flying the US flag, was hit by a missile in Kuwaiti waters and a US warship on escort duty was damaged by a mine in international waters.
- The US attacked Iranian oil platforms in the name of self-defence.

Held: The actions of the US did NOT qualify as self-defence

Reasoning:

- The US had to show that:
- ***1. t****he attacks were attributable to Iran*
- *2. the attacks constituted* ***"armed attacks****" against the US*
- ***3. t****he US's actions were necessary and proportional*
- ***4. t****he platforms were a legitimate military target*
- These were NOT satisfied.
- Not conclusive evidence that the acts were attributable to Iran, or that they were directed at the US (one of the ships not flying a US flag)
- While the US presented evidence that the platforms acted as military communication links that served as bases for attacks, the evidence was not sufficiently persuasive to show necessity.
- Court said it was possible that a series of small instances of UOF could add up to an "armed attack" attracting the right to SD – but this wasn't the case here
- "Even taken cumulatively… these incidents do not seem to the Court to constitute an "armed attack" on the US, of the kind that the Court, in the [Nicaragua case] qualified as a 'most grave' form of the UOF"

B. Necessity and Proportionality

The Caroline Case

Facts:

- Arose out of the Canadian Rebellion, 1837
- The Caroline used to transport men and supplies from the US to Canada to fight against UK colonial rule.

- British protests failed to stop supplies and attacks and so a UK force entered US territory at night, seized and set fire to the Caroline and sent it over Niagara Falls

Reasoning:

- Britain was requi
- Britain must show they "*did nothing unreasonable or excessive*, since the act justified by the necessity of self defence, must be *limited by that necessity*, and kept clearly within it"

- **Necessity** = are there alternative means of repelling the attack?
- **Proportionality** = are the means used proportional to the *purpose of repelling the attack*. The mode of response need not be proportionate to the mode of attack.

- ***Nuclear Weapons Advisory Opinion***:
  - "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is *a rule of CIL*."
  - Court was concerned w/ whether the use of nuclear weapons could EVER meet the proportionality requirement (maybe lawful in "extreme circumstances of SD, in which the very survival of a state would be at risk")
- ***Nicaragua:***
  - Referred the rule of CIL "whereby SD would warrant ONLY measures which are proportional to the armed attack and necessary to respond to it"
- (both of these quoted & affirmed in the ***Oil Platforms*** case)

(***Armed Activities*** case*: dicta on UOF generally, and both SD requirements* of "armed attack" by another state, and necessity & proportionality)

Armed Activities
(DRC v Uganda)

Facts: see above
Result: Claim of Self-defence failed
Reasoning:

- ***Armed attacks must be made by a STATE***
- The "armed attacks" against Uganda were made by the ADF (Ugandan forces which were opposed to the Ugandan govt, operating out of DRC territory), and were *not attributable to the DRC* (see Topic 7: State Responsibility, re. attribution)
- All other arguments relied on security needs that were essentially political/preventative e.g. to ensure that a political vacuum in DRC did not affect Uganda and to deny Sudan the opportunity to use the DRC to destabilise Uganda.
- The *legal and factual circumstances for self-defence were not present*.
- Accordingly the court did not NEED to consider parameters (i.e. necessity/proportionality) - however, it was noted that *the taking of airports hundred of kilometres away from the Ugandan* ***border appeared disproportionate and unnecessary.***
- The fact that ***Uganda had not reported to the Security Council*** *was important in diminishing the necessity* of the act.

Separate opinion:

- Judge Simma argues that it shouldn't matter whether the armed attacks were attributable to the DRC or not, attacks by non-state actors should STILL create a right to self-defence.
- However, once Ugandan presence spread beyond the border, the reaction became disproportionate and was therefore unlawful at that point.

CONSIDER: How this case relates to justification of US troops in Afghanistan (justified on one basis as "self-defence" against non-state terrorist organisations based in/potentially being harboured by Afghanistan)

Collective Self Defence

- Criteria for individual SD:
  - 1. "Armed attack" on the state exercising SD
  - 2. Necessity & proportionality of measures taken in SD
- Criteria for collective SD (per ***Nicaragua***):
  - 1. "Armed attack"
  - 2. ***Statement by the victim state that an armed attack has occurred***
  - 3. ***Request by victim state for assistance*** from assisting state/s

- 4. Necessity & proportionality of measures taken in CSD (by assisting state/s)

Other applications of SD?

Self Defence in protection of nationals?

- States have attempted to argue SD where an *attack on its nationals* (in the territory of another state) is equated to an attack on the national state itself.
  - There is little judicial precedent on this point.
  - Ultimately, state practice supports a LIMITED right to UOF in this circumstance, where the force is necessary to save the lives of nationals and is proportionate to this objective.

The Entebbe Incident (1976) *[debated in the UN, but no resolution was adopted]*
Facts: - A French airline was hijacked en route from Greece to Israel, then flown to Uganda, where Jewish passengers were held hostage - Israel intervened without the Ugandan govt's permission – flew a team of armed forces into Ugandan territory & rescued the hostages by force (resulted in deaths of some hostage-takers and Uganda security personnel) Arguments: - Israel: Argued for a right to the UOF by a state to defend its nationals in the territory of another state (since Uganda violated its obligation under IL to protect FNs on its territory) - Uganda: said that act was an unlawful display of aggression, and demanded compensation

Invoking SD in settling territorial disputes?

Partial Award: Ius Ad Bellum: Ethiopia's Claims 1-8 (Eritrea Ethiopia Claims Commission 2005)
Facts: - Ethiopia – claimed that Eritrea had carried out a series of armed attacks on Ethiopian territory (took over the town of Badme & adjacent areas) - However – Eritrea claimed that these incidents actually occurred within Eritrean territory (disputed Ethiopia's title to that region) - Eritrea claimed that its actions were "lawful measures of SD" (under Article 51) – done in response to the recent fighting that had gone on in that region (which it claimed to own) Held: Eritrea's UOF was illegal, could not rely on SD, had to pay compensation to Ethiopia Reasoning: - Commission rejected the argument that Eritrea's recourse to force was lawful because it had a valid claim to some of the territory concerned - State practice shows that "self defence cannot be used to settle territorial disputes" - Furthermore – the events that occurred around Badme in the lead up to Eritrea's take-over were "relatively minor incidents.. not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51"

HOWEVER:

- UOF by State A to recover territory which it claims has been forcibly taken by State B can be justified by SD if it is exerted IMMEDIATELY after the territory is taken (e.g. UK response to Argentinian invasion of the ***Falkland Islands***)

Anticipatory and Pre-Emptive Self-Defence?

- By requiring an armed attack before a right to self-defence arises, article 51 appears to preclude possibility of anticipatory action.

- *Where the attack is imminent*, there are a number of ways to interpret self-defence flexibly to encompass **anticipatory self defence**
  - Where there is an overwhelming and imminent threat of force against the state, the ***Caroline*** principles may permit the state to use necessary and proportional force to repel the attack and deter others.
  - ***Nicaragua*** & ***Armed Activities*** cases – the *ICJ declined to consider* the lawfulness of a response to an imminent threat of an armed attack.

- A flexible interpretation of "armed attack" could question when an "armed attack" actually begins. The law cannot require a state to wait until forces have crossed the border.
- There is some tenuous support for the theory of *'accumulation of events'* in the ***Oil Platforms*** case, whereby a right to use SD arises in response to a series of events which taken separately might not justify the use of force.

- **Pre-emptive self defence**
  - Concrete threat that hasn't materialised
    - E.g. even though the *September 11 attacks* were over, the US claimed a continuing right to use force against a terrorist state to deter terrorist actions in the future.
    - (2002 US National Security Strategy, under George Bush – claimed a right to pre-emptive SD)
  - There is *limited international support* for this claim.
  - For: Changing nature of weaponry and slow response of the UN demands pre-emptive self-defence.
  - Against: How do you measure the threat? Too subjective, cant use the limitations of necessity and proportional because there is nothing to measure them against. Broad scope for abuse.

2.2 Collective Security Measures through the UN

Fundamental purpose of the UN Charter = to restrain the right of states to use force UNILATERALLY, and INSTEAD establish a system of COLLECTIVE security.

a) Peacekeeping Operations

- UN Peacekeeping forces are employed wherever law and order has broken down and human rights are at risk.
- The traditional mandate for peacekeeping forces is that they are *non-combative and are required to remain neutral*
- It has been axiomatic that peacekeeping forces may only be stationed within the territory of a state with its *consent*, however, this is gradually lessening in significance.

- **UN Peacekeeping in East Timor**
  - After Indonesia's invasion of East Timor various peacekeeping forces were deployed to oversee a peaceful independence process. Some of these forces involved unprecedented roles.
  - UNAMET was the first peacekeeping force with the mandate of carrying out consultation and overseeing the transition period until a vote had been taken on autonomy or independence.
  - INTERFET had the role of responding to escalating violence and had the power to use force under a unified command structure headed by Australia.
  - UNTAET was established as a peacekeeping force until independence and resembled a future government with various portfolios. It issue regulations and negotiated treaties – unprecedented powers.
  - UNIMSET was established to ensure stability in the post-independence period.

b) Security Council Authorisation

UN Charter, Ch VII: Action with respect to threats to the peace, breaches of the peace, or acts of aggression

Art 39	The SC shall *determine the existence of any threat* to the peace, breach of the peace, or act of aggression and shall *make recommendations* or *decide what measures* shall be taken.
Art 40	The SC may *call upon the parties to comply* with provisional measures deemed necessary. Such provisional measures shall be without prejudice to either party and failure to comply will be taken account.
Art 41	The SC shall decide what *measures are to be employed, excluding the use of armed force.* It may call upon the Members to apply such measures e.g. interruption of economic, communication or severance of diplomatic relations.
Art 42	Should the SC consider the above *measures inadequate, it may take action by air, sea or land forces* as may be necessary, e.g. demonstrations or blockades.
Art 43	1. All members undertake to *make available to the SC armed forces, assistance and facilities* by agreement…. necessary for the purposes of maintaining international

	peace and security. **2.** Such agreements shall govern the number, type, location and readiness of forces. **3.** Agreements shall be negotiated as soon as possible on the initiative of the SC, and subject to ratification by member states in accordance w/ their constitutional processes.
Art 48	Decisions of the SC shall be carried out by all its Members or some of them as the SC determines. This may be directly or through the appropriate international agencies.
Art 49	Members shall join in affording *mutual assistance in carrying out measures* decided upon by the SC.

Resolution on the Definition of Aggression, UNGA Resolution 3314 (XXIX):

Art 1	Aggression is the ***use of armed force by a state against the sovereignty, territorial integrity or political independence of another state.***
Art 2	The first use of force will constitute prima facie evidence of an act of aggression. However, the SC may refrain from making this declaration where the circumstances are not sufficiently grave.
Art 3	The following acts qualify as an act of aggression; • invasion or attack, bombardment or use of weapons, • blockade of ports or coasts, • an attack on land, sea or air forces, • use of armed forces in contravention of an agreement with the state for use of its territory, • permission to use territory so another state can perpetrate an act of aggression against a third state and • the sending of armed bands, groups, irregulars or mercenaries.
Art 4	These acts are not exhaustive.
Art 5	*No consideration may serve as a justification* for aggression. A war of aggression *attracts international responsibility*. No territorial acquisition achieved through such means shall be lawful.
Art 7	Nothing in this definition prejudices the right of self-determination.

- Most situations declared a threat to or breach of the peace have arisen in contexts of civil war/internal conflict
- The SC has readily linked breaches of human rights and humanitarian law with a threat to international peace and security.
    - E.g. Rwandan genocide, heavy loss of life in Yugoslavia, human tragedy in Somalia.
    - Threats to international peace also arise where a state has failed to comply with earlier SC resolutions calling for a response to terrorism
        - e.g. Libya's failure to extradite bombers in the ***Lockerbie case***.

- As a result of the impotence of the SC and the use of the veto, states have argued an **implied authorisation** by the SC. However, *a determination that a situation constitutes a breach of the peace does not necessarily imply authority to act.*

c) "Humanitarian Intervention" and the "Responsibility to Protect"

Humanitarian Intervention

- Humanitarian Intervention is:
    - The use of armed force by a state or states
    - In the territory of another state
    - With the *object of protecting human rights*
    - *Without the permission of the state* against whom force is applied
    - and *without the approval of the SC*
- So prima facie:
    - *Contrary to **art. 2(4)***
    - *Contrary to the principle of non-intervention*,

- e.g. in ***Declaration on Friendly Relations 1970*** (GA Res 2625): "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."

- *Majority of legal opinion **DENIES** existence of a right of humanitarian intervention*.

Arguments FOR	Arguments AGAINST
• Not directed against the territorial integrity or political independence of the state, in fact HRs is in line with the purposes of the UN • Support for a modern doctrine of humanitarian intervention advanced by the ***UK regarding Iraq and no-fly zones***: "international intervention without the invitation of the country concerned can be justified in cases of *extreme humanitarian need*" when: o compelling and urgent situation of extreme humanitarian distress o demanding immediate relief o other state unable or unwilling to deal with distress o no practical alternative o action limited in time and scope	• Lack of state practice – o Instances that COULD be characterised as humanitarian intervention have invariably been justified as self-defence o e.g. Vietnamese invasion of Cambodia, Israeli intervention in Entebbe • Neither the UN Charter nor CIL specifically includes such a right with SC authorisation. • Developing states do not accept the principle of humanitarian intervention o e.g. G77 (132 developing states) in reaction to Kosovo expressly rejected the "so-called right of humanitarian intervention" • It is too dangerous an exception that leaves itself open to abuse by the powerful

The NATO bombing of Kosovo:
o One of the first cases that openly justified intervention on the grounds of averting a humanitarian catastrophe. o While the UNSC recognised the compelling interests of gross violations of HRS by voting down a resolution condemning NATO's use of force, no convincing precedent could be found by jurists to support the use of force. o Furthermore, even if a right could be found, the principles of necessity and proportionality of response would not have been fulfilled.

- Overall, the doctrine of humanitarian intervention *has not attracted more than cautious support from a few developed states. The suggested approach is **to judge each case by reference to article 2(4) and the available facts.***

Responsibility to Protect

- Various International bodies have supported the concept of the responsibility to protect, however, it does not yet have the status of CIL

- In 2001, report published by the ***International Commission on Intervention and State Sovereignty***:
  - The primary responsibility for a state is protection of its people, *where a population is suffering serious harm and the state in question is unwilling or unable to halt or avert it,* the principle of non-intervention yields to the international responsibility to protect.
  - The legal basis for this principle is:
    - Obligation inherent in sovereignty
    - Responsibility of the SC under UN Charter Article 24
    - International humanitarian law and human rights obligations, treaties etc.
    - Developing state practice
  - 3 specific responsibilities:
    - **To protect** (address root and direct causes of conflict),
    - **To react** (sanctions, prosecution and in the extreme, military intervention),
    - **To rebuild** (recovery, reconstruction and reconciliation).
  - *Preventative options must be fully exhausted before intervention.*
  - *Intervention should always involve the least intrusive and coercive measures possible.*
  - Military intervention should only be justified where there is large scale loss of life or large scale ethnic cleansing or *serious, irreparable harm* of this kind.
  - The primary purpose of the intervention must be to avert human suffering, it must be *the last resort, be proportional and have reasonable chances of success.*

- SC authorisation should be sought and in turn the SC should respond promptly and seek adequate verification of the facts. The members of the SC should agree not to use their veto power unless their vital state interests are involved. If the SC fails to adequately respond alternative options are:
  - An Emergency Special Session of the UNGA or
  - Action within area of jurisdiction by regional organisations
- The operation should have clear, unambiguous objectives and a coordinated military command.

- **UN World Summit Outcome document (2005), clause 139:**
  - "the international community, through the UN, has the responsibility to…take collective action in a timely and decisive manner, *through the Security Council, in accordance with the UN Charter*, including Chapter VII… should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

d) Regional Arrangements

UN Charter, Ch VIII: Regional Arrangements

Art 52	1. *Nothing in the Charter excludes the existence of regional arrangements or agencies* for dealing with such matters relating to the maintenance of international peace and security, provided that activities are *consistent with the Purposes and Principles of the UN*. 2. Pacific settlement of local disputes should be pursued through these regional agencies before referring them to the SC. 3. The SC should encourage such pacific resolution through regional arrangements/agencies, either on the states' own initiative, or by reference of the SC
Art 53	**1. W**here appropriate, the SC shall use such regional arrangements for enforcement action, however, *no enforcement action shall be taken without the authorisation of the SC.*
Art 54	The SC shall be *kept informed at all times* of the activities undertaken by regional bodies for the maintenance of peace and security.

- A question that arises is ***the meaning of 'enforcement action'***.
  - Accepted that economic sanctions imposed by a regional organisation do NOT require SC authorisation
    - E.g. SCR 841 imposing an oil and arms embargo referred to earlier OAS sanctions that did not require authorisation
  - There has generally been no clear pattern of practice as to what activities fall within the scope of Chapter VIII.

3. Case Study: The Invasion of Iraq

August 1990:
- Talks between Iraq & Kuwait broke down
- July/August:
  - Iraq pushed forces into Kuwait & quickly took control of the territory (claimed to have been invited into by Kuwaiti revolutionaries)
- Met with widespread international condemnation & provoked SC response
- Many countries immediately froze Kuwaiti assets
- August 2: Resolution 660
- August 6: Resolution 661
- August 7: US launched Operation Desert Storm (US troops in Saudi Arabia)
- August 8: Hussein announced annexation of Kuwait
- August 12: Naval blockade of Iraq
- (1990-1991 armed conflict shenanigans in the region)
- Feb 22 1991: 24 hour ultimatum for Iraqi withdrawal, or US troops would start a ground-war
- Feb 24: ground war started
- Feb 26: Sadaam Hussein ordered withdrawal from Kuwait
- Feb 28: US President Bush announced ceasefire & liberation of Kuwait
- March 3: Iraq accepted terms of ceasefire

Summary of SC Resolutions

1990-1991 (GULF WAR)

- ***Resolution 660 (1990)***
  - Condemned Iraq's invasion of Kuwait, and demanded that Iraq withdraw immediately & unconditionally. Called upon Kuwait & Iraq to immediately begin intensive negotiations.
- ***Resolution 661 (1990)***
  - Expressed "deep concern" that the resolution had not yet been complied with (although Kuwaiti govt had said it was willing to comply)
  - Decided that all member States should take certain measures to secure compliance of Iraq (including a trade embargo)
- ***Resolution 678 (1990)***
  - Noted that Iraq was still refusing to comply w/ 660
  - Allowing Iraq "one final opportunity, as a pause of good will, to do so"
  - Gave members the right to "use all necessary means to uphold and implement resolution 660 and all subsequent resolutions and to restore international peace and security in the area"
- ***Resolution 687 (1991)***
  - Notes that as soon as the Secretary-General notifies the council of the deployment of the UN observer unit, member states cooperating with Kuwait will bring their military presence in Iraq to an end as soon as possible.
  - It also declares that upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the above provisions, a formal ceasefire is effective.

(*2002: IRAQ WAR)*

- ***Resolution 1441(2002)***
  - Recognised that Iraq's non-compliance with Council resolutions (including 660 and 1382) and proliferation of nuclear weapons represented a threat to international peace and security.
  - Gave Iraq "a final opportunity to comply with its disarmament obligations" that had been set out in several previous resolutions
  - Stated that Iraq was in material breach of the ceasefire terms presented under the terms of R687- relating not only to WMD, but also
    - the known construction of prohibited types of missiles,
    - the purchase and import of prohibited armaments, and
    - the continuing refusal of Iraq to compensate Kuwait for the widespread looting conducted by its troops during the 1990–1991 invasion and occupation
  - Notes that if Iraq fails to comply with this "final opportunity" resolution, the UNSC will convene immediately "in order to consider the situation and the need for full compliance with all the relevant Council resolutions.
  - It concludes by warning that Iraq will face 'serious consequences' as a result of continued violations.

Legality of the Iraq War

1. Was the authorised use of force confined to the Kuwait invasion?

Legal:	*Illegal:*
The wording of Resolution 678 does not confine the use of force to the limited purpose of ensuring Iraq's withdrawal of Kuwait, but also includes 'all subsequent resolutions' and the purpose of restoring international peace and security.	- Authorisation of the use of force cannot be used as a blank cheque. The context of the resolution clearly ties the use of the force to the liberation of Kuwait. The current dispute has little or nothing to do with Iraq's illegal invasion and annexation of Kuwait. - At the time many complained that the member states should have continued on to Baghdad and disposed of the Hussein government. - The US and Australia both gave as reasons for not doing this, the fact that such action was not authorised by the security council - Furthermore, the history of the passage of resolution 1441 indicates that there was no intention by the members of the Security Council to authorise the use of force. France, Russia and China initially refused to agree to the resolution in fear that force would by used by the US.

2. Was the ceasefire conditional upon Iraq fulfilling the conditions of SCR 687?	
Legal: By its conduct subsequent to SCR 687 has demonstrated that it did not and does not 'accept' the terms of SCR 687, consequently the ceasefire is not effective.	*Illegal:* The Resolution makes the ceasefire conditional upon *acceptance* by Iraq of SCR 687, not perpetual fulfilment of the conditions set out. The requirements for the ceasefire to take effect are announcement by the Security council that an observer unit had been deployed and official notification by Iraq of acceptance.
3. What is the relevance of the 'final opportunity'?	
Legal: SCR 1441 sets out that failure to comply with this resolution would constitute a further material breach, therefore, since Iraq did not immediately cooperate they have expended their final opportunity.	*Illegal*: The procedure clearly described in the Resolution is that, in the event a material breach is reported, the Security Council will 'convene immediately' to discuss further action – the 'serious consequences' faced could infer other measures in chapter VII that do not involve the use of force.
4. Does reference to further action taken by the Security Council preclude UN members from taking their own further action?	
Legal: The authority to use force would only be negated by an express resolution requiring member states to refrain from using force against Iraq	*Illegal*: The correct approach is to read the instrument in good faith. The plain meaning of the text is that it is left for the Security Council to decide how to respond to material breaches. The decision to 'remain seized of the matter' expressly informs states not to take matters into their own hands

Topic 9: INTERNATIONAL DISPUTE SETTLEMENT

1. General Principles

UN Charter

Art 2(3)	All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Chapter VI: Pacific Settlement of Disputes

Art 33	1. The parties to any dispute that is likely to endanger international security must first seek solution through *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies and other peaceful means* of their choice. **2.** The SC where necessary will call upon the parties to settle their dispute by such means.
Art 34	The *SC may investigate* any dispute in order to determine whether its continuance is likely to endanger international security.
Art 35	1. Any member of the UN may bring any dispute *to the attention of the SC*. **2.** A state which is not a member may bring any dispute to the SC if it accepts in advance the obligations of pacific settlement.
Art 36	1. The SC may, in a dispute under Art 33, *recommend appropriate methods* of adjustment, **2.** taking into consideration any procedures that have already been undertaken by the parties **3.** Legal disputes should as a general rule be referred by the parties to the ICJ.
Art 37	Should the parties fail to settle their dispute according to Art 33 they shall refer it to the SC. The SC may then either take action under Art 36 or recommend appropriate terms of settlement.
Art 38	If all parties to the dispute so request, the SC may make recommendations to the parties regarding settlement.

- The obligation under Article 2(3) sits in tension with the principle of state sovereignty, as described in *Status of Eastern Carelia (Advisory Opinion)*, the consequence of the sovereignty equality of states is that no state can, without consent, be compelled to submit its disputes to any form of pacific settlement.
- Proliferation of international dispute bodies and tribunals: consequences
    - The 'Democracy Deficit':
        - Questions surround how judges are appointed and the accountability of new judicial bodies.
        - There are further concerns about the 'judicialising' of international relations.
        - By taking a strictly legal approach, cultural, environmental and human rights considerations are less important
        - e.g. WTO Appellate Body is required to adopt objective scientific standards.
    - Fragmentation of Jurisprudence:
        - Jurisprudence may become fragmented by different approaches across different tribunals
        - E.g. ICTY in the *Tadic* case differed from the ICJ in the *Nicaragua* case.
    - Evolving jurisprudence:

        - It is likely that new tribunals will develop IL in a way that better reflects the culture and history of Africa, the Middle East and Asia.
        - The unwillingness for states to accept the jurisdiction of the ICJ and the rapid growth of dispute settlement by individual and non-state actors is likely to see greater development of substantive laws regarding these actors.
    - Forum Shopping:
        - Overlapping jurisdictions arise which inevitably leads to litigants choosing a tribunal most favourable to them.

2. Methods of Dispute Settlement

- Overwhelmingly, disputes are settled by political means such as negotiation, inquiry, mediation and conciliation.
- Advantage: these flexible and informal approaches are better able to consider cultural values.
- 2.1 Negotiation:
    - Negotiations may take place between the parties or with a third party facilitating discussions.
    - Often they will continue where other processes are underway
        - e.g. ***Tehran Hostages*** case failed at UN level but succeeded in negotiations.
    - Asian states have particularly preferred negotiation over adversarial judicial procedures.
- 2.2 Inquiry:
    - Under inquiry, parties agree to set up an impartial and independent body to determine the facts [empowered by ***Art 50, ICJ statute]***
    - Commissions of inquiry have typically been used in maritime incidents
        - e.g. ***Dogger Bank*** and ***Red Crusader*** cases.
    - *However, inquiry is RARE* since states are often reluctant to pursue means that may prove contrary to their interests e.g. ***IAEA*** in Iraq.
- 2.3 Good Offices:
    - Involves the parties referring to a third party for assistance and expertise
        - e.g. the EU in the ***Gabcikovo-Nagymaros*** case.
    - The SC often provides good offices through distinguished statesmen who facilitate peace processes.
    - Regional organisations also provide good offices e.g. ASEAN Regional Forum
- 2.4 Mediation and Conciliation:
    - No distinct line between the two practices.
        - Mediation: may involve facilitation and proposing ways of settlement
        - Conciliation: slightly more formal, with the 3rd party taking a semi-judicial role.
    - Important factors for mediation:
        - Political will on both sides
        - Senior and well-respected mediator
        - Observance of confidentiality
        - Respect to both parties
        - Recognition of social, racial, religious and legal contexts.
    - A successful e.g. is the Camp David Agreement between Egypt and Israel mediated by President Carter.

3. The Role of the International Court of Justice

- The ICJ is the successor court to the PCIJ
- Has been used infrequently since 1946 – however, in recent times the docket has become crowded suggesting growing confidence.
- 15 judges
- Members have agreed to the convention that seats are reserved for different global regions (even though this somewhat undermines the notion that judges should be elected on calibre and merit rather than nationality)
- **Art 26, ICJ Statute:**
    - The ICJ may form small chambers, the advantage being that states can select the judges making up the five member chamber.
- Decisions of the court are based on a majority and the President has a casting vote where the vote is otherwise equal –
    - This has arisen in notorious cases such as the *South West Africa* cases and the *Nuclear Weapons* case – both disappointing judgments.

3.1 Contentious Jurisdiction

- Statute of the ICJ:

Art 34	*Only states may be parties* before the court. The court may request information from public international organisations.
Art 35	The court is *open to all states party to the present Statute*. Where a state is not party to the statute, conditions will be laid down by the SC but in no case shall they place the parties in a position of inequality before the court
Art 36(1)	The JURISDICTION of the Court comprises *all cases which the parties refer* to it, and all *matters specially provided for* in the Charter of the United Nations or in treaties and conventions in force.
Art 36(2)	States party to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, the jurisdiction of the Court in all legal disputes concerning: *a.* the interpretation of a *treaty;* b. any *question of IL*; c. the *existence of any fact* which, if established, would constitute a *breach* of an international obligation; d. the nature or extent of the *reparation* to be made for the breach of an international obligation.
Art 36(3)	The above declarations may be made unconditionally, or on the condition of reciprocity of certain states or for a certain time.
Art 36(5)	Declarations made under Article 36 of the Statute of the PCIJ and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the ICJ for the period which they still have to run and in accordance with their terms.
Art 36(6)	In the event of a dispute as to *whether the Court has jurisdiction*, the matter shall be settled by the *decision of the Court*. Providing there is a legal issue, the court *will not decline jurisdiction simply because the case raises political aspects*, nor will it matter that the SC already has cognisance of the case.

Requirement of Consent

- Access to the ICJ (***Art 35***) does NOT imply that a state is amenable to the jurisdiction of the court without consent.
- This may occur where:
  - States enter a special agreement to consent to ICJ jurisdiction
  - A state expressly or impliedly agrees that the ICJ has jurisdiction over it, and another state has applied unilaterally
  - A state has formerly agreed in a bilateral or multilateral treaty
  - A state has made a declaration under the 'optional clause' (***Art 36(2)).***
- Special Agreement:
  - Advantage: states have more control over the outcome, by asking the court to set out the relevant principles of IL that can form a basis for future settlement
    - e.g. ***North Sea Continental Shelf*** cases where fully adversarial conflict was avoided and the court was able to develop CIL.
- Unilateral Application:
  - Consent may be express or inferred in conduct, so long as it is genuine. This is known as prorogated jurisdiction
  - ***Corfu Channel***:
    - On the UK's application to the ICJ, Albania sent a letter agreeing to appear despite the irregularity, this constituted a waiver of the right to object to jurisdiction and any subsequent attempt to withdraw was too late.
  - ***Rights of Minorities in Polish Upper Silesia***:
    - Implied consent was found because Poland chose to argue the merits of the case before the court.
- Treaties Providing Jurisdiction:
  - Jurisdiction of the court is frequently founded on an agreement by parties to submit their disputes to the ICJ.
  - ***Article 36(5):*** means that declarations accepting jurisdiction of the PCIJ will also apply to the ICJ
  - ***Nicaragua***:

        - Jurisdiction also was founded in this case on the basis of the *1956 Treaty of Friendship, Commerce and Navigation* between Nicaragua and the US.
    - Agreement evidencing an intent to agree to submit disputes to the ICJ will also suffice
    - ***Bahrain v Qatar*:**
        - An exchange of letters from the King of Saudi Arabia to the Amir of Qatar and Minutes signed by the Ministers of Foreign Affairs constituted consent.
- Compulsory Jurisdiction under the Optional Clause
    - Jurisdiction was founded on the basis of ***Art 36(2)*** in the ***Armed Activities on the Territory of the Congo*** case.
    - Jurisdiction on this basis *only arises in respect of 'legal disputes'*
        - e.g. ***Territorial and Maritime Dispute*:** a treaty had settled the question of sovereignty and thus there was no extant legal dispute to consider.
    - Where two parties have made declarations under the optional clause and those declarations are limited, each party can take advantage of the limitations imposed under the other party's declaration.
    - ***Nicaragua*:** distinction made between limitations of scope and substance and those of formal creation, duration or extinction – another party can only rely on the former.

Interhandel Case *(Switzerland v US)*
Facts: • During WWII the US took over the assets of the Swiss company Interhandel, claiming they were German and thus enemy controlled. • Switzerland argued the company was genuinely Swiss and demanded restitution. • The dispute was determined to have arisen in 1948. • The US in 1946 had limited the jurisdiction of the court to disputes 'hereafter arising' while Switzerland in July 1948 made a declaration with no such qualifying clause. The US argued that they could avoid jurisdiction because the Swiss could rely on the US exclusion and thus any dispute arising between 1946 and 1948 did not have jurisdiction. **Result:** The argument of the US was rejected and jurisdiction was found **Reasoning:** • *Reciprocity enables the state which has made the wider acceptance of jurisdiction to rely upon the reservations laid down by the other party.* • However, it cannot justify a state in relying upon a restriction which the other party has not included in its own declaration. • In other words, a state cannot use the principle of reciprocity to avoid the terms of its own declaration.

Reservations to Consent

- 'Self-judging' reservations (such as those that exclude all disputes within the domestic jurisdiction as determined by the declaring state) are *incompatible* with the right of the ICJ to determine its own competency (**Art 36(6))** and inconsistent with acceptance of the court's jurisdiction.
- While the ICJ avoided comment in the ***Norwegian Loans*** and ***Interhandel*** cases, the *principle of good faith and doctrine of abuse of right* would likely declare such a clause invalid.
- Reservations can be severely limiting where they exclude disputes arising under multilateral treaties
    - e.g. ***Nicaragua*** case where the court had to rely on CIL (in order for US to submit to ICJ jurisdiction).
- Problem: when may a declaration be validly withdrawn?
    - ***Rights of Passage*** case: a declaration could be withdrawn 'by simple notification without any obligatory period of notice'
    - ***Fisheries Jurisdiction*** case: the ICJ upheld Canada's reservation which was made 10 months earlier.
    - ***Nicaragua*** case: a declaration withdrawn three days before was not recognised for two reasons
        - 1. Where a declaration is of indefinite duration, the right of immediate termination is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties which requires *reasonable notice*
        - 2. The US was *bound by a six-month notice clause* it had voluntarily appended
    - E.g. Australia modified its earlier unqualified acceptance of the optional clause just eight weeks before East Timor's independence, excluding from jurisdiction disputes relating to the delimitation of maritime zones with immediate effect.

Issues of Jurisdiction and Admissibility

East Timor Case *(Portugal v Australia)*
Facts: • Portugal brought an application against Australia on the basis of its declaration under the optional clause. It could not bring a claim against Indonesia since they had made no such declaration. Portugal claimed that by entering the Timor Gap Treaty with Indonesia, Australia had failed to respect the rights of Portugal and the rights of the people of East Timor to self-determination, that Indonesia could not lawfully enter into the treaty due to illegal invasion and that Portugal was the only power who could concluded a treaty on behalf of the people of East Timor **Result:** The ICJ could not make a determination without Indonesia • **Reasoning:** • Australia's behaviour could not be assessed without entering into the question of Indonesia's lawfulness in entering the treaty. • The court could not make such a determination in the absence of the consent of Indonesia. • The point of distinction is whether the legal interests of the absent state are merely affected by the decision or whether they form the 'very subject matter' of the decision (*Monetary Gold* case).

- Contrast with the ***Certain Phosphate Lands in Nauru*** case. The interests of NZ and the UK do not constitute the very subject matter of the judgment; judgment might well have implications for the legal situation of the two states but no finding in respect of their legal situation is needed as a basis for the ICJ's decision on Nauru's claims against Australia.

3.2 Provisional Measures

- ***Article 41, ICJ Statute***:
  - The ICJ has the power to indicate any provisional measures which ought to be taken to preserve the respective rights of either party.
  - This enables the court to act quickly to prevent irreparable injury to the state, however, the ICJ has set a high standard of proof.
  - Risks to human rights appear more likely to prompt provisional measures (***Genocide Convention Cases*****)**
- A question that arises is whether the court should indicate provisional measures where it is uncertain whether it has jurisdiction over the state.
- Practice has been that *provisional measures will be indicated so long as there is a prima facie foundation for jurisdiction.*
- A consequence of indicating a provisional measure >> it can provide a tactical advantage even where it is eventually found that the ICJ does not have jurisdiction e.g**. *Anglo-Iranian Oil Co*.**
- Another question that has arisen is whether an indication of interim measures is binding on states in the same way a final judgement is, since states usually fail to abide by measures ordered against them.

LaGrand Case *(Germany v US)*
Facts: • Germany applied to the ICJ for provisional measures against the US to stay the execution of two German nationals. • Germany argued that the US had failed to promptly advise the accused of their rights to contact the German authorities when they were arrested. • The Court indicated preliminary measures 27 hours before the planned execution. • Despite the court order, the execution took place anyways. • Germany returned to the court asking it to declare that the US had violated its obligations. • **Result:** *The US had breached its obligations to Germany* **Reasoning:** • It follows from the terms of Article 41: *the BINDING nature of preliminary measures is implicit* because they will be ordered only if necessary – the contention that they are not binding would be contrary to the object and purpose of Article 41.

3.3 Advisory Jurisdiction

- Article 65(1):
    - The Court may give an *advisory opinion* on any legal question *at the request of whatever body may be authorized* by or in accordance with the Charter of the United Nations to make such a request.
- The advisory procedure is available to 5 UN Organs and 16 agencies of the UN.
- An advisory opinion is NOT binding on the organ that requests it.
- They are available in the following contexts:
    - *Interpretation of the UN Charter* and constitutive documents of its specialised agencies (***Certain Expenses of the UN***)
    - *Guidance to UN organs in carrying out their functions* (***Israeli Wall***)
    - Advice on substantive legal issues e.g. international law applicable to armed conflict in the ***Legality of Nuclear Weapons*** case
    - Treaties may provide for recourse on a compulsory and binding basis?
- Benefit: AOS are general in nature, which gives the ICJ *greater scope to respond than in a contentious case* where the parties can refine the legal questions to be addressed.
- The UNGA is prohibited (under ***Art 12 of the UN Charter***) from making recommendations with respect to disputes that are currently before the UN.
- Requesting an Advisory Opinion does not constitute a recommendation in violation of this article (***Israeli Wall***).

Reasons for DECLINING to Give an Advisory Opinion

- Sovereign Consent:
    - An advisory opinion *should NOT be used as a means of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent* (***Eastern Carelia***)
    - Where a UN organ is seeking enlightenment as to the course of action, an advisory opinion should not be denied.
        - This can be distinguished from the issue of state consent since the request is solely concerned with the settlement actions of the UN body rather than the merits of the dispute itself. (***Interpretation of Peace Treaties (First Phase); Western Sahara* case**).
- Must have an Object and Purpose:
    - ***Western Sahara, Genocide*** and ***Namibia*** cases: the Ct determined that an AO would be useful for the UNGA and SC in carrying out their functions.
- Political Nature of the Dispute:
    - Such an objection will fail so long as the request concerns 'any *legal question'* under ***Art 65*** (***Israeli Wall***).
    - *Motives for the request are NOT relevant* nor is the possibility that an opinion might lead to adverse consequences (***Kosovo* case**).
- Judicial Propriety:
    - It is suggested that the court should exercise its discretion to give an opinion where it has the power to do so, because leadership in setting out the principles of IL is a crucial function that can be performed by no other global judicial body.
- Lack of Information:
    - Lack of access to adequate facts could provide a reason to deny a request for an AO.
    - The ICJ is required to assess whether it has sufficient information and evidence.
    - ***Israeli Wall* case:** the report of the Security General was important information that allowed the court to provide an opinion.

Legality of Nuclear Weapons

Did the UNGA have the power to request an opinion?

- Court drew its competence from article 65 – necessary for the body requesting the opinion to be 'authorised' –this was satisfied under UN Charter Art 96 where the GA or SC may request an advisory opinion
- Responding to the argument that the UN was not allowed to ask for opinions on matters unrelated to their work
    - The GA has competence relating to "any questions or any matters" (Art 10), but also specifically relating to international security and disarmament (Art 11) and the development of international law (Art 13).

- Nuclear disarmament is relevant to many aspects of the activities of the UNGA and it doesn't matter that important activities relating to nuclear disarmament are also being pursued in other for a
- Article 96 cannot limit the ability of the UNGA to request opinions only on matters in which it can take binding decisions

Does the request concern a 'legal question'?

- The question is legal since it demands an identification of the existing rules and principles of international law and apply them to the threat or use of nuclear weapons
- The fact that the question also has political aspects does not deprive its character as a legal question. In fact " in situations in which political considerations are prominent it may be *particularly* necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable" **(*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*)**
- Any political motives that may have inspired the request or any political implications of an opinion are irrelevant

Once the court has determined its competence it must then activate the discretionary decision on whether to give an opinion.

- The court was mindful in principle that it should not refuse to give an advisory opinion unless there are "compelling reasons"
- The court drew attention to the very limited number of cases that had refused to supply an opinion.
- Reasons supplied for refusing were:
  - The question is vague and abstract
    - Here states intended that there exists no specific dispute. The court distinguished between contentious procedure and advisory opinions where the function is not to settle dispute but offer legal advice
    - Moreover it is a clear position of the court that they may deal with "any legal question abstract or otherwise"
  - Other bodies in the UN have an express mandate to address this matter
    - The court states the existing law, it does not legislate and therefore the court would not be going beyond its judicial role and taking upon itself a law-making capacity
  - An opinion would provide no practical assistance
    - The fact that the GA has not provided the precise purposes for which it seeks an opinion is not relevant to the court.
    - The GA has the right to decide usefulness for itself.
    - The court "will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution"
  - Such an opinion as the potential of undermining progress
    - The court did not doubt that an advisory opinion would have an effect on continuing debate but it had received contrary accounts as to what that effect might be.
    - Since there was no criteria to prefer one assessment over another this could not be a relevant factor

3.4 Review of Security Council Decisions?

- Neither the ICJ nor any other legal person has the implicit power of judicial review or appeal against Security Council actions.
- In ***Lockerbie*** it was found that:
  - In the UN system, the ICJ is not vested with the review or appellate jurisdiction often given to the highest courts in a domestic framework.
  - Municipal law principles of the separation of powers are also not applicable in this context.
  - As a judicial organ, it will be the ICJ's duty from time to time to examine from a strictly legal point of view matters which may at the same time be the subject of determination from an executive or political point of view

The ICJ is not deprived of jurisdiction just because the SC is considering a matter it also by no means follows that the court should co-operate with the SC to the extent of desisting from exercising its independent judgment on a