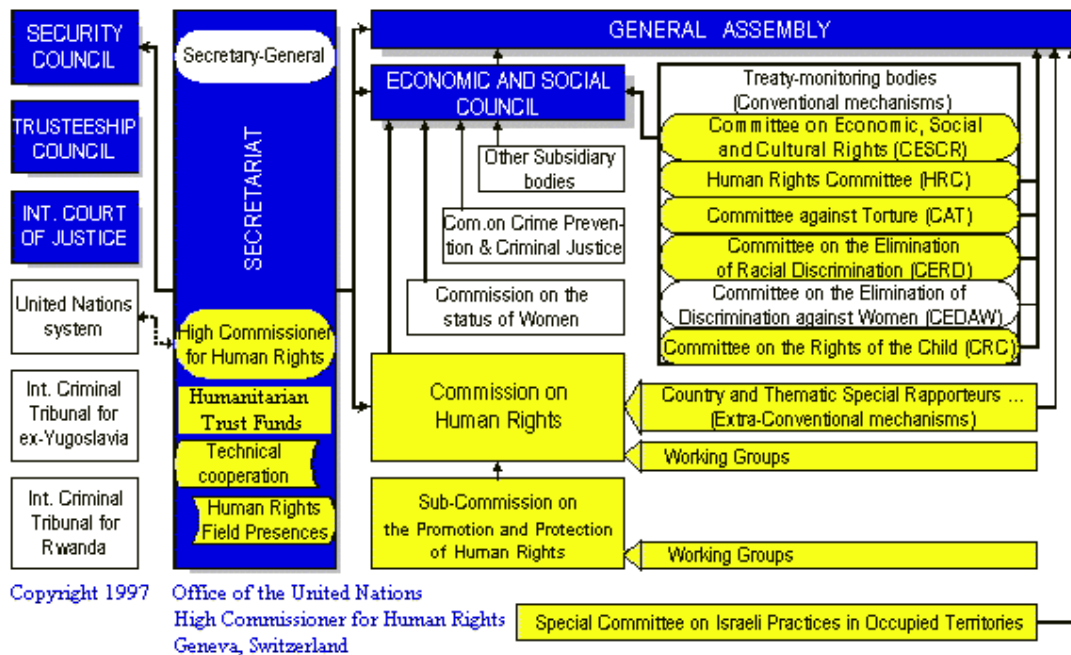


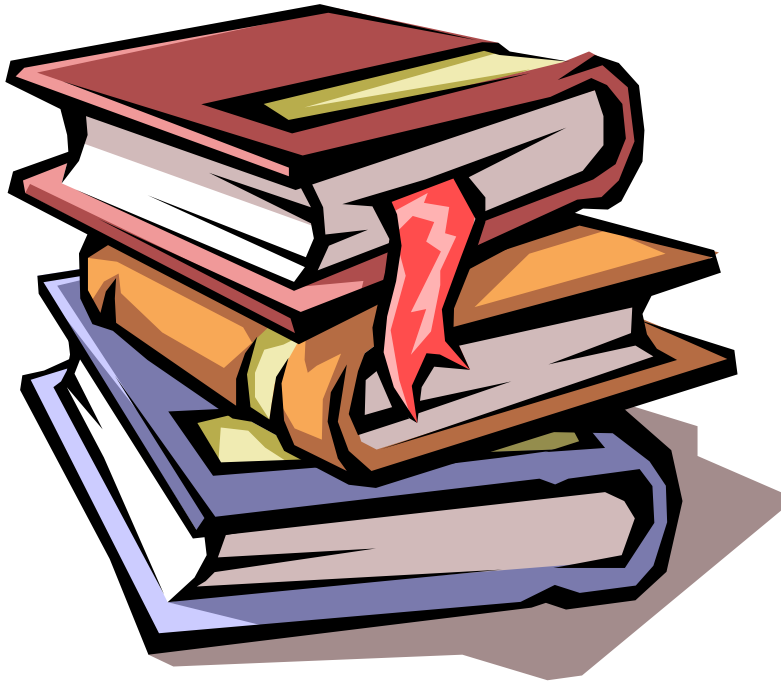
Exam review – Fall 2002  
**FINAL EXAM – 16 December 2002 (Monday)**  
**INTERNATIONAL LAW**  
**Professor Maureen B. Fitzmahan, JD**  
**Concordia International University Estonia**

The United Nations  
The Courts  
Unilateral State Action

# THE UNITED NATIONS

(191 members; 1 non-member observer - Holy See)





## UNITED NATIONS CHARTER (1945 – San Francisco)

### 1. PURPOSES AND PRINCIPLES

#### CHAPTER I

**Article 1 - Purpose of UN:** 1. maintain international peace and security – take collective action to prevent and remove threats to peace; 2. develop friendly relations among nations; 3. promote respect for human rights.

*The purpose of the United Nations are: ...To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion(Article 1(3))*

**Article 2 - Principles of UN:** The UN is based on the principles of: 1. sovereign equality of all Members - Members shall: a. Fulfill obligations, b. settle international disputes by peaceful means, c. REFRAIN from THREAT or USE OF FORCE (in international relations) against the territorial integrity or political independence of other state, c. develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples .

*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. (Article 2(7))*

## CHAPTER III - Organs

**Article 7 - Principle organs of UN: General Assembly, Security Council, Economic and Social Council, ICJ, Secretariat (Secretary General)**



### THE GENERAL ASSEMBLY

#### Composition

## CHAPTER IV

**Article 9 - General Assembly = ALL Members of UN; one vote per member**

#### Powers

**Functions and Powers - Powers of GA: 1. discuss any question re UN, 2. Make recommendation to Security Council, 3. Initiate studies, 4. Set the budget for the UN; 5. Appoint the Secretary General;**

**Limitation: “General Assembly shall not make any recommendation with regard to [any] dispute or situation [being considered by the Security Council] unless the Security Council so requests.” (Article 12)**



### THE SECURITY COUNCIL

#### Composition

## CHAPTER V

**Article 23 - 15 members – 5 permanent members (US, UK, France, Russia and China) with veto power over substantive issues; 10 non-permanent members (2 year term, elected by GA). Require 9 out of 15 votes (include all permanent members).]**

#### Powers: Security Council (Obligations of Members)

**Article 24 -Power of Security Council to require UN Members to act**

***1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.***

***2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. ..***

**Article 25 - Obligation of Members - accept and carry out binding decisions of the Security Council (under Chapter VII) – supplying of troops for peace keeping/peace enforcement operations subject to agreements made in accordance with Article 43**

**Power - SETTLE DISPUTES**

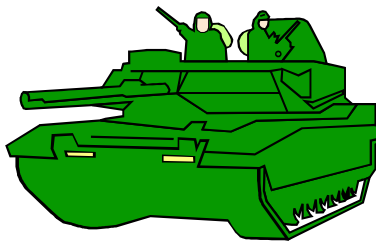


**PEACEFULLY**

**CHAPTER VI - peaceful settlement of disputes**

**Article 33 - 1. Parties to dispute shall seek peaceful solution (negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies).**  
**2. Security Council may call upon MS to settle dispute by peaceful means.**

**Article 36 -legal disputes should be referred to International Court of Justice (ICJ) – see statute, ICJ has no compulsory jurisdiction ☹**



**ENFORCEMENT MEASURES –**

**COLLECTIVE SECURITY**

**CHAPTER VII - SC determines “Threat to Peace” & decide measures**



**Article 39**

**Security Council (wide discretion) determine existence of threat to the peace; make recommendations, decide what measures to take re Article 41 (non armed) or Article 42 (armed).**

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

**b. UN not limited by Article 2(4)**

### c. UN Practice



1. **Classical use of force – “Peace Enforcement”**
  - a. (1950) North v. South Korea
  - b. 1990 – UN Members “take necessary measures” in cooperation with Kuwait - to resist Iraq invasion of Kuwait
  - c. Yugoslavia, Somalia, Haiti, Sierra Leone



2. **“Peace – Keeping”**
  - 1) Cold War – inability to take enforcement action under Chap VII
  - 2) with consent of State
  - 3) border control, create calm after independence - keep peace between factions
  - 4) Peace- keeping  $\equiv$  peace enforcement (Yugoslavia, Somalia)



3. **Gross human rights violations** (shift from protection of sovereigns to protection of people)
  - Southern Rhodesia, South Africa, Northern Iraq, Somalia, Rwanda



4. **Terrorism = threat**
  - a. 1992 - Lockerbie case, require Libya to extradite Libyan nationals accused of Lockerbie bombing
  - b. 1998 – Afghanistan: demand Taliban stop providing sanctuary and training to international terrorist;
  - c. 2001 – (UNSC res 1368) - any act of international terrorism = threat to international peace and security (1<sup>st</sup> referral to powers under Article 39)



5. **ad hoc International Criminal Tribunals**
  - d. (1993) ICTY
  - e. (1994) ICTR



d. **LIMITATIONS on Security Council Powers**  
**Tadic case (ICTY 1995) -Prosecutor v. Tadic, Decision On The Defense Motion For Interlocutory Appeal On Jurisdiction (2 October 1995)**

1. Are the powers of the Security Council subject to limitations?
  - a. Though the Security Council  $\equiv$  very wide discretion under Article 39, powers are not unlimited. UN Charter = a constitutional framework.
  - b. Article 24 - Security Council shall act - accordance with the Purposes and Principles of the United Nations and powers stated in Chapters VI, VII, VIII, and XII.
2. What institution can rule on the limitations of the power of the Security Council?
  - a. Judicial courts created by UN Security Council - authority to determine its own jurisdiction and, thus, the legality of its establishment by the Security Council.
  - b. Court – NO power to review acts of the organs of the United Nations.
3. In establishing the ICTY, did the Security Council have power to make a determination under Chapter VII?
  - a. “Article 39 - choice of means and their evaluation to the Security Council.
  - b. ICTY appeals chamber RULE - conflict in Yugoslavia = “threat to peace”  $\equiv$  whether the conflict was international or national  $\equiv$  gave the Security Council power under Chapter VII to make a determination
4. Did the Security Council have the power under Chapter VII to establish a judicial body, in particular, the ICTY?

**Once the SC determines a “threat to peace” under Article 39, it has wide discretion to determine the necessary action to take and an establishment of the ICTY comes under the powers given it under Article 41 of the UN Charter.**

## Article 41



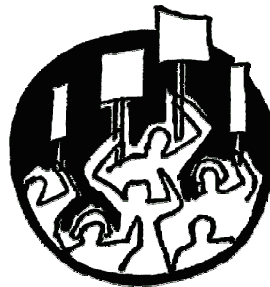
Measures not involving armed force; call on Members to apply measures (incl. Complete or partial interruptions of economic relations, communications, diplomatic relations)

*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*



## . SANCTIONS (Article 41)

- a. Resolution 661 (1990) – response of Security Council to Iraq’s invasion of Kuwait: full trade embargo – stop imports and exports – except medical supplies and some food, no flights
- b. Resolution 986 (1995) – Oil for Food program accepted by Iraq in 1997 – monies were placed in UN account. Sanctions addressed humanitarian needs
- c. Reasons for ineffectiveness of sanctions
  - (1) Hussein unwilling to use money received for food, medicine
  - (2) continued to use Black trade
  - (3) erosion of compliance by other States



## 1. Demands/Warnings (Article 41)



a.

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**(1990) Resolution 660** ≡IRAQ ≡ KUWAIT≡ - Security Council demanded that Iraq immediately withdraw its troops to the positions held prior to the invasion of Kuwait on 1 August 1990.



b.



**(1991) Resolution 687**– Ceasefire agreement to end Gulf War, require disarmament

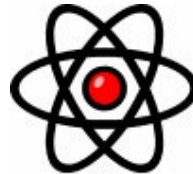


**Demand destruction, removal:**

- ⚡ All chemical and biological weapons, and all stocks of agents and components
- ⚡ All research, development, support and manufacturing facilities for ballistic missiles with a range greater than 150km and related repair and production facilities.



**Create UNSCOM** ≡ inspect Iraq' s chemical, biological and nuclear facilities.



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**Demand Iraq**

**hand over all biological and chemical weapons to Unscm for destruction, and respect 1968 Treaty on Non-Proliferation of Nuclear Weapons.**



c. **(8 Nov 2002) Resolution 1441** nvtech.com ≡**FINAL SOLUTION**≡

- ✓ Iraq = ‘in material breach’ of obligations to UN Security Council resolutions



- ✓ Demands Iraq give UNMOVIC unrestricted access to site, records, equipment, means of transport
- ✓ Demands Iraq provide access to all officials, private individuals – inside or outside Iraq
- ✓ Provides deadlines:
  - (Iraq: “no weapons”) 🕒 confirm within seven days of notification of the UNSC resolution its intention to comply fully with resolution 1441(2002)
  - (8 Dec 2002) 🕒 30 days – provide UNMOVIC with: complete declaration of all aspects of chemical, biological, and nuclear weapons programs  
locations of such weapons
  - (inspections begun) 🕒 45 days - instructs UNMOVIC and requests the IAEA to resume inspections no later than 45 days following adoption of this resolution and to
  - 🕒 update the Council 60 days thereafter (105 days after passage of resolution)
- ▶ Decides that:
  - false statements, omissions, failure to comply shall:
    - constitute a further material breach of Iraq’s obligations and
    - will be reported by UNMOVIC to the Council
- ▶ Decides to convene immediately upon receipt of a report of interference by Iraq and failure to comply “in order to secure international peace and security”
- ▶ Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations

#### 4. Call for action from Member States

- a. (1991) Resolution 688– Humanitarian
  1. Condemns the repression of the civilian Iraqi population, in particular the Kurds.
  2. Appeals to all UN Members to contribute to UN humanitarian efforts.

## b. CREATION OF INTERNATIONAL CRIMINAL



TRIBUNALS

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### 1. Pre-UN ≡ **NUREMBERG & TOKYO** ≡

- a. IMT (International Military Tribunal) – Nuremberg trials
- b. Tokyo Tribunal

### 2. ICTY ≡ **YUGOSLAVIA** ≡

- a. (1993) UN Security Council resolution 827
  - 1) Chapter VII
  - 2) Seat – The Hague, Netherlands
  - 3) Unique: UN SC resolution instead of treaty
    - a. Faster, simpler
    - b. Bind all states
    - c. See Tadic case for ICTY's view of SC authority to create court
  - 4) Jurisdiction
    - a. *Ratione loci* – territory of former Yugoslavia
    - b. *Ratione temporis* – from 1 January 1991
    - c. *Ratione materiae* - crimes against humanity, genocide, war crimes
    - d. *Ratione personae* and denial of immunities
    - e. Concurrent jurisdiction with domestic courts, BUT primacy
  - 5) Focus: those primarily responsible for atrocities
    - a. 1<sup>st</sup> case = Dusko Tadic

**b. Slobodan Milosevic, President - Yugoslavia**



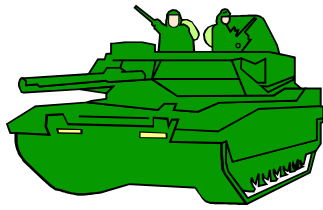
- i. **HISTORICAL- 1<sup>st</sup> standing leader to ever be prosecuted**
- ii. **Trial - February 2002 ≡ ongoing**
- iii. **Indictments**
  - 1. **Croatia and Bosnia (1991, 1992 –1995)**
    - a. **Crimes**
      - [1] **Crimes against humanity**
      - [2] **Genocide**
  - 2. **Kosovo (1998 –1999)**
    - a. **Crimes**
      - [1] **Crimes against humanity**
      - [2] **War crimes**
    - b. **Liability**

“The accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes. By using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally.”
    - c. **Mens rea** – “The purpose of this joint criminal enterprise was..., the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province. To fulfil this criminal purpose... the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him.”

### 3. ICTR ≅ RWANDA ≅

#### a. (199) UN Security Council resolution 955

- 1) modeled after ICTY
- 2) separate prosecutorial administration, trial chambers and administrative organs
- 3) shares appeal chamber and Prosecutor with ICTY
  - a. seek consistency (law and practice) with ICTY
- 4) seat – Arusha, Tanzania
- 5) jurisdiction
  - a. *ratione loci* – Rwanda, neighbors (if committed by Rwanda nationals)
  - b. *ratione temporis* – 1 January 1994 and 31 December 1994 (1 year)
  - c. *ratione materiae* - genocide, crimes against humanity, war crimes
- 6) Focus – those most responsible (Rwanda courts address 1000s of lower abuse cases)
  - a. 1<sup>st</sup> case – Jean Paul Akayesu
    - i. recognized rape = act of genocide
    - ii. HISTORIC – convicted of genocide
    - iii. 1<sup>st</sup> genocide verdict of international court
    - iv. sentence: life in prison



## Article 42

### Security Council may take action by armed force

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

## IRAQ



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## Action under Article 42

### a. Resolution 678 (29 November 1990) ≡ **GULFWAR** ≡



authorizing instrument for Gulf War



Acting under Chapter VII”



authorized UN Members to cooperate with Kuwait “to use all necessary means to uphold and implement Resolution 660”, i.e. to withdraw from Kuwait (gave Iraq a 45 day deadline to leave Kuwait, which Iraq failed to comply with)



collective security led by the United States

b. **‘Implied authorization’**      **≡NO FLY ZONES≡**



- 1) (1991, 1992) **‘No -fly zones’** designated - ONGOING
  - 1) **Claim authorization under Resolution 678 (1990) and Resolution 688**
  - 2) **Created by US, UK, France**
  - 3) **Response to**
    - i. **attacks on Kurds and Shiites**
    - ii. **need to protect borders of Kuwait and Saudi Arabia**
  - 4) **Police northern and southern parts of Iraq**
  - 5) **No condemnation from UN**

- 2) (1998) **Desert Fox**      ≡  ≡
  - 5) **failure of Iraq to comply with UN resolutions.**
  - 6) **Claim authorization of UN Security Resolution 678 (1990)**

- 3) (2002) **United States proposed attack on Iraq**
  - 1) **US & UK claim ≡ adequate authority from Security Council to use force against IRAQ.**
  - 2) **Security Council Resolution 678 (1990)**
    - **member states should use "all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions AND to restore international peace and security in the area."**
    - **Resolution 660, adopted the day after Iraq invaded Kuwait, demanded that Iraq withdraw unconditionally from Kuwait.**

## c. HUMANITARIAN INTERVENTION

1. A humanitarian intervention is an armed intervention in another state, without the agreement of that state, to address (the threat of) a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights. (NATO – 1999)

Threat to peace

- f. refugee crisis across borders
- g. cause trans-border political and military instability
- h. treatment of nationals is international concern

### 2. General rule

- a. prohibition of use of force: Two exceptions (UN Collective Security [Article 2(4), Individual/Collective self defense [Article 51])

- 1) UN Charter, Article 2(4) – “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

- 2) (1974) Definition of Aggression 5(1) - “No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”

- b. (1999) – ICJ: *Legality of Use of Force: Yugoslavia v. Belgium* (10 of 19 NATO member states)

- 1)  $\pi$  – no right to humanitarian intervention in international law AND if such a right, air strikes  $\neq$  humanitarian intervention.

- a) Yugoslavia claim

1. NATO has no right to humanitarian intervention in international law AND
2. if such a right, air strikes  $\neq$  humanitarian an intervention

- b)  $\Delta$  - Belgium claim

1. Implied authorization – based on Security Council resolutions

- A. Humanitarian intervention

- (a) obligation to intervene
- (b) prevent humanitarian catastrophe
- (c) which had been established by UN Security Council resolution
- (d) necessary to protect essential rights of status of *ius cogens*
- (e) attack not intended to intervene with territorial integrity or political independence

- B. 1<sup>st</sup> official expression of acceptance of humanitarian intervention

2. Court
  - (a) no provisional measures against Defendants (jurisdictional problems)
  - (b) express concern?

c. UN

1. (1999) Secretary General supports view that human rights protection is not solely an internal matter, however, “enforcement action without Security Council authorization threatens the very core of the international security system founded on the Charter of the UN. Only the Charter provides a universally accepted legal basis for the use of force.”

2. (1990s) UN Security Council

- A. UN Charter

- a. Article 2(7) – “nothing shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state”  
: BUT
- b. Article 24(1) – Security Council primarily responsible for maintaining peace and security – “Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

- B. UN Practice

- a. (1992) Somalia case

The Security Council considered the civil war and anarchy in the state as a threat to international peace and security and "authorized a military intervention for humanitarian purposes".

- b. (1993) Yugoslavia

Security Council considered the humanitarian disaster – could not get votes to intervene (NATO will). Sets up Tribunal to deal with extreme crimes committed in the humanitarian catastrophe.

- c. (1994) Rwanda case

The Security Council considered the humanitarian disaster, which resulted from genocide, civil war and grave breaches of international humanitarian law as a threat to international peace and security. It authorized a humanitarian intervention and established *ad hoc* International Criminal Tribunal for Rwanda to try war criminals.



**d. Scholars RE: Kosovo action by NATO**

**1. Bruno Simma – (new ICJ judge)**

**a. threat of armed force employed by NATO against the FRY in the Kosovo crisis since the fall of 1998**

**b. must not set a precedent and should remain exceptional.**

**c. illegal**

**i. due to the lack of a Security Council authorization,**

**ii. but NATO made every effort to get as close to legality as possible BY**

**1. linking its efforts to the Council resolutions which did exist, and,**

**2. characterizing its action as an urgent measure to avert even greater humanitarian catastrophes in Kosovo,**

**3. taken in a state of humanitarian necessity.”**

**2. Antonio Cassese (1<sup>st</sup> head judge of the ICTY)**

**(1) ‘action of NATO countries radically departs from the Charter system for collective security**

**a. group of states deliberately resorted to armed action against a sovereign state without authorization to do so by the Security Council.**

**(2) ‘from an *ethical* viewpoint resort to armed force was justified, but this moral action is *contrary to current international law.*’**

**(3) May become trend - criteria**

**[a] gross and egregious breaches of human rights**

**[b] central authorities - unable to put an end to those crimes**

**[c] central authorities refuse**

**1]to call upon or**

**2] to allow other states or international organizations to enter the territory to assist**

**[d] Security Council is unable to take any coercive action to stop the massacres - disagreement among the Permanent Members**

**[d] all peaceful avenues ≡ exhausted,**

**[e] a group of states decides to try to halt the atrocities**

**[f] armed force - used for the limited purpose of**

**1] stopping the atrocities and**

**2]restoring respect for human rights,**

**3]not for any goal going beyond this limited purpose**

**e. If purpose of force is not to overthrow the government or seize territory AND the purpose of the action is consistent with the Purposes of the UN = OK???**

**A. Pre-Cold War**

**1. Corfu Channel case**

**b) UK intervened in Albanian waters to recover evidence (recover evidence)**

- c) ICJ – no - too dangerous, could lead to violence
- 2. (1976) Israel
  - a) Israel rescues citizens in Uganda (protection of nationals)  
Israelis hijacked on aircraft bound for Tel Aviv
  - b) Not condemned by Security Council (except Sweden)
- 3. (1978) Vietnam invaded Cambodia to overthrow Pol Pot (3 years of genocide by Khmer Rouge)
- 4. (1983) United States
  - a. US invades Granada (protect nationals)
  - b. US claims: ‘the prohibitions are contextual, not absolute. They provide justification for the use of force in pursuit of other values also inscribed in the Charter, such values as freedom, democracy, peace.’”

#### **B. Post 1990**

- 1. (1991) UNITED NATIONS ≡ Iraq - UNSC res 688 – call on Iraq to end repression of its civilians (no authorization of use of force and recalls Article 2(7))
  - a. US, UK and France intervene to protect Kurds and Shiites against Iraq
  - b. Proclaim safehavens and forced Iraqi troops to leave the area. Subsequently proclaim no-fly zones over north and south Iraq and patrol those areas. [Claim implied authorization under UNSC res 688]
- 2. (1999) NATO ≡ Kosovo
  - a. 26 March 1999 – UN Security Council refused to condemn NATO action: 3 votes in favor – 12 votes oppose
  - b. NATO claims ‘implied authorization’ – where UNSC passed numerous resolutions calling for end of the violence
  - c. 10 June 1999 - UNSC res 1244 – agreement on principles of a political solution to end the Kosovo crisis – passing control back to hands of UN

**Article 43 - Members agree to make armed forces available to Security Council – obligation of MS to place armed forces at disposal of UN through agreement ( reality – states do so voluntarily)**

**Article 51 [EXCEPTION to Article 2(4): ‘inherent right to self defense’ – via individual or collective action; until Security Council takes measures; require use of force be reported to Security Council]**



# THE COURTS

## A. State Responsibility – State v. State



THE INTERNATIONAL COURT OF JUSTICE

## UN CHARTER

**Article 92 - International Court of Justice part of UN; ICJ Statute is incorporated into UN Charter**

**Article 93 - All Members (States) are parties to ICJ; jurisdiction of ICJ is non-compulsory (see ICJ Statute)**

**Article 94 - All Members agree to comply with ICJ decisions; if fail to comply with ICJ decisions – refer to Security Council**

# **STATUTE OF INTERNATIONAL COURT OF JUSTICE** (June 26, 1945)

## **CHAPTER II – COMPETENCE OF THE COURT**

*Article 34* - Only STATES = parties

*Article 36* –

**JURISDICTION:**

### ***Ratione personae***

- a. Parties agree, OR
- b. Treaties – require that disputes arising under Treaty be settled in ICJ, OR
- c. **OPTIONAL CLAUSE**
  - i. declaration signed by Member State (“optional clause”)
  - ii. agree to compulsory jurisdiction
    1. in relation to other state also accepting compulsory jurisdiction where,
    2. Reservations/time limits
    3. ***Ratione materiae***:
      - [a] interpretation of a treaty
      - [b] any question of international law
      - [c] breach of international obligations and amount of reparation for breach;

*Article 38*

**SOURCES OF LAW** to be considered by ICJ:

- a. international conventions/treaties,
- b. international custom (evidence of general practice)
- c. general principles of law [generally accepted in domestic laws of Member States]
- d. judicial decisions and scholarly writings.

*Article 59* [Power of decision – not precedent; reality – court refers to past ICJ cases, as do scholars.]

*Article 60* [No appeal from Court decision]

## B. Individual Responsibility



## INTERNATIONAL COURTS

1. Nuremberg trials -
2. 1990 ad hoc criminal Tribunals
3. **INTERNATIONAL CRIMINAL COURT**

Rome Statute (1998, effective July 1, 2002 - expected opening of facility - March 2003)



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### a. Jurisdiction

#### a. Ratione temporis –

1. crimes committed after July 1, 2002
2. crimes committed after State ratifies Rome Statute

#### b. Ratione materiae – most serious crimes of concern to the international community as a whole

1. Amendments: No amendments to Rome Statute until 7 years after July 1, 2002 (Article 121)
2. Crimes - Article 5: **crime of genocide, crimes against humanity and war crimes (crime of aggression – not yet a part of the Statute)**



**a. Article 6 – Genocide**

(a) Mens rea (intent) – ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’

- May look at the “total context in which the physical destruction is carried out.” ¶590
- Within a limited geographical area - intent to destroy a part of the group that is located in the small geographical area (ICTY, Krstić – judgment 2 August 2001 ¶560, 589, 590.
- only men of military age – lasting impact upon the entire group. (¶595-597
- combination of killings with deportation of women and children would lead to the physical disappearance of the population ¶595-597

(b) Crimes



**b. Article 7 – Crimes Against Humanity**

a. Mens rea –

1. committed as part of a widespread or systematic attack
2. May not have been planned or prepared, but still widespread
3. directed against any civilian population,
4. with knowledge of the attack

b. Actus rea – Murder, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid, other inhuman acts

1. Nexus to State action
2. Not necessary to have nexus to armed conflict (War) – as required by Nuremberg trials
3. Crimes



**c. Article 8 - War Crimes**

a. Mens rea –

(1) Intent to commit

b. Actus rea – create individual criminal liability (Geneva Convention = State responsibility, recommends domestic jurisdictions to pass domestic laws prosecuting individual crimes)

(1) “Grave breaches of Geneva Conventions (1949)”

(2) directed against civilians (non-combatants)

(3) nexus to international armed conflict

(4) nexus to internal armed conflict (Common Article 3 and/or Protocol II



**b. Crimes of aggression**

(1) not defined, no prosecution until defined (Article 5)

(2) Planning and preparation of illegal use of force.

(3) “Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” (UN CHARTER - Article 2(4) and Article 51 ??)

c. **Ratione personae**

- (1) individuals (not States)
- (2) referred to Court by:
  - (a) Other Member States
  - (b) Security Council
  - (c) ICC Prosecutor - when the Prosecutor decides to initiate an investigation his or her own decision and on the basis of information received. However, in this last case, the Prosecutor must seek the authorization of the Pre-Trial Chamber before proceeding with the investigation
- (4) **COMPLEMENTARITY** – domestic court gets first shot! [ICC - no primary jurisdiction/not concurrent]
  - (a) State domestic legal system may investigate and prosecute 1<sup>st</sup>
  - (b) ICC judges may decide if State is able or willing to take case
  - (c) ICC judges decide if State is aggressively and fairly pursuing –  
“Unjustified delays in proceedings as well as proceedings which are merely intended to shield persons from criminal responsibility will not render a case inadmissible before the ICC.”
- (5) State membership required – nationality or territorial jurisdiction
  - (a) Accused is national of Member State (nationality)
  - (b) Crime was committed on territory of Member State (territoriality)
- (6) Exceptions:
  - (a) Security Council refers the case to the ICC - the Court may exercise its jurisdiction in all cases and no preconditions are applicable, OR
  - (b) if either the State of territoriality or the State of nationality of the suspected person accepts the exercise of jurisdiction of the Court by declaration lodged with the Registrar.
- (7) 3<sup>rd</sup> Parties
  - (a) UNSC resolution 1422 (2002): one year immunity provided to peace keeping forces of non-member States
  - (b) Article 98 - bi-lateral agreements signed with the United States to avoid extradition of US citizens (begun –2002)





## **Article 27: "OFFICIAL CAPACITY"**

**Official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official does not exempt a person from criminal responsibility.**

- 1. *Ratione materiae* – crime committed**
- 2. *Ratione personae* – head of state or foreign minister or diplomat**
  - 1. Domestic prosecution - Available (Belgium v. Congo)**
  - 2. Customary law - protected State official**
    - a. act committed as part of duties for State (include senior military commanders)**
    - b. every State official performs such duties**
    - c. act is act of State (attributable to State)**
    - d. unlimited immunity in time as to official acts**
  - 4. International tribunals and ICC – unavailability of personal immunities**
    - a. ICTY and ICTR – Security Council resolution creates Tribunals and Statutes to Tribunals**
      - 1) Statute eliminates functional and personal immunities**
      - 2) Member States required to comply with Chapter VII measures through Article 25 of UN Charter**
      - 3) UN Charter, Article 103 makes Chapter VII take precedence over customary and treaty obligations**
    - b. ICC**
      - 1) Article 27(1) -- ‘functional immunity’ or domestic law providing immunity - not available to senior officials**
      - 2) Member States sign Rome Statute, relinquishing sovereign immunity rights**
      - 3) 3<sup>rd</sup> Parties? - see Article 98(1)**
- 3. But, Article 98(1) –**
  - a. Non Member States**
    - 1) Diplomatic and functional immunity apply**

**“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a 3rd State, unless the Court can first obtain the cooperation of that 3rd State for the waiver of immunity.”**
    - 2) 2002 - United States bi-lateral agreements with Member States – prohibiting extradition of U.S. personnel sent by U.S. government to Member State’s territory**



### **Article 28: "COMMAND RESPONSIBILITY"**

**Commanders and superiors will also be held liable for criminal offences committed by forces under their effective command and control or effective authority and control.**

- 1. Knew or should have known that forces were committing crimes**
- 2. Failed to prevent or stop crimes or failed to submit crimes for investigation and prosecution**
- 3. ICTY - Bosnian Serb General, Radislav Krstic - first man convicted of genocide by ICTY (August 2001) for the massacre of an estimated 8000 men and boys in Srebrenica. He was convicted for failing to use his authority to halt the killings, and for allowing his unit's assets to be used in the connection with the executions.**



**Article 33: "SUPERIOR ORDERS" (London (Nuremberg) Charter, Article 8 – 1<sup>st</sup> int'l document)**

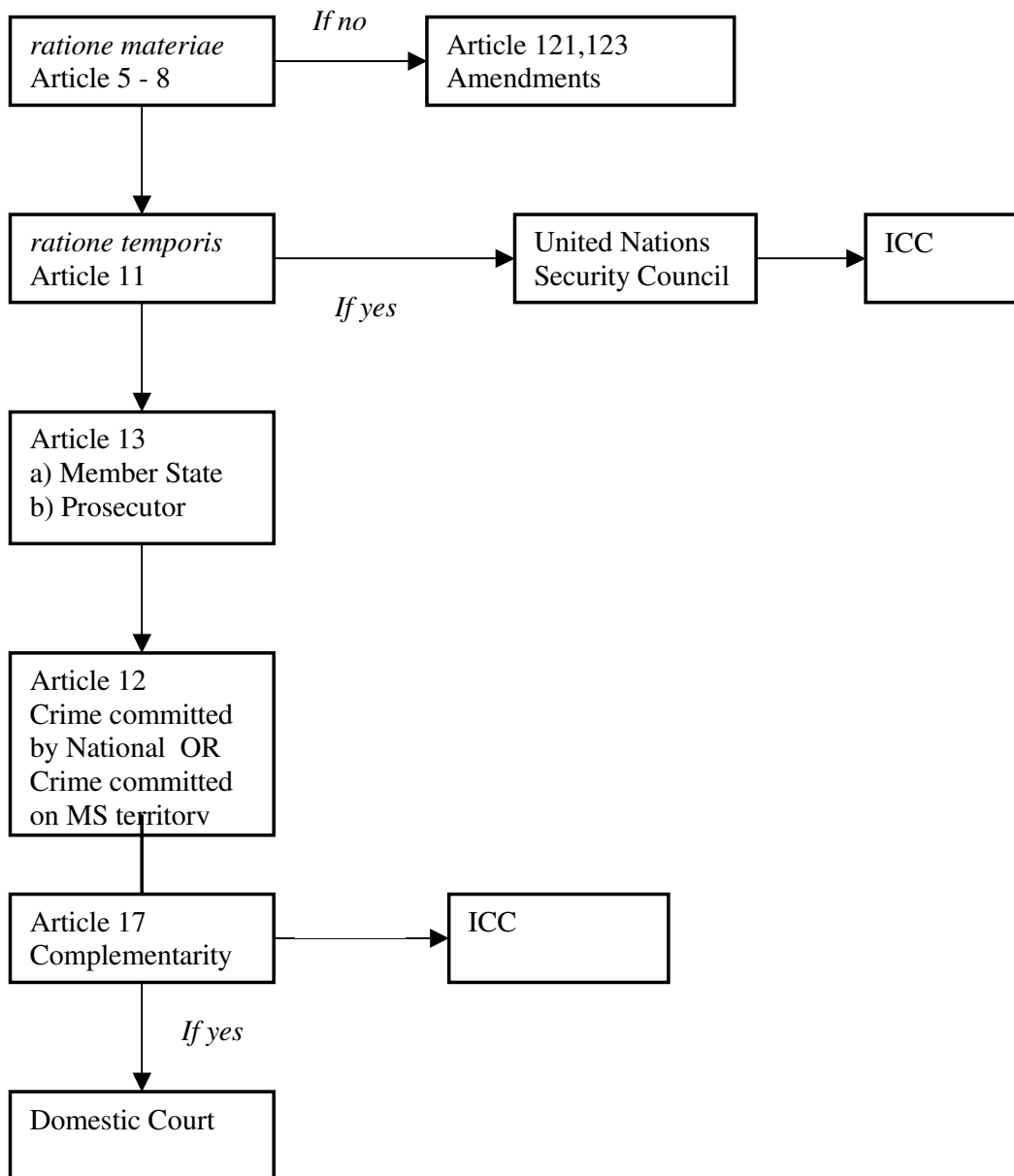
- 1. no excuse if crime committed by person following order of Gov't or superior**
- 2. no exception: genocide, crimes against humanity**
- 3. exceptions: person under legal obligation and did not know order was illegal and order not obviously illegal**



**Article 33: "PRESCRIPTION of LAW"**

**NO DEFENSE ≡ crime not in violation of domestic law or was committed in compliance with domestic law**

## **ICC –jurisdiction**



## Unilateral State Action

## A. Abduction and Assassination

### 1. Abduction of Hussein –

#### a. NO authorization of State

- 1) violation – UN CHARTER: prohibition of use of force, Article 2(4) see Nicaragua case.
- 2) Violation - 1970 **DECLARATION ON FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES**  
“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. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.”

#### b. United States law

*United States v. Alvarez Machain* (U.S. Supreme Court, 1992)

- a. A defendant may not be prosecuted in violation of the terms of an extradition treaty. However, when a treaty has not been invoked, a court may properly exercise jurisdiction even though the defendant's presence is procured by means of a forcible abduction. Thus, if the Extradition Treaty does not prohibit respondent's abduction, the rule of *Ker* applies and jurisdiction was proper.

While respondent may be correct that his abduction was "shocking" and in violation of general international law principles, the decision whether he should be returned to Mexico, as a matter outside the Treaty, is a matter for the Executive Branch.

#### c. ⊗ ICCPR – not applicable to foreign State

- 1) ICCPR, Article 2 (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

d. ICCPR– may reflect customary international law

1) Article 9(1) – right to liberty, no arbitrary arrest

1) **‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. ...’**

2) BUT - Article 4 – derogation in emergency

**‘1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.**

**3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.’**

**2. Assassinate Hussein**

**a. Universal Declaration of Human Rights: *Article 3.***

**“Everyone has the right to life, liberty and security of person.”**

**b. ICCPR - not applicable through obligation – may reflect customary international law**

**(1) Article 6(1) and (2)**

**“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”**

**“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”**

**(2) No derogation from Article 4**

**“Article 2 (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”**

**c. Advisory Opinion on Legality of Nuclear Weapons (1996)**

- a. “The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war**
- b. the right - applies also in hostilities.**
- c. The test of arbitrary deprivation of life = Geneva Conventions**

**d. UN Charter**

**(1) Article 103**

**In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.**

**(2) Article 51**

**e. United States law**

**(1) Presidential Order**

**a. U.S. President Ford, Reagan, Carter, Bush, Clinton and Bush**

**b. Executive Order -Dec. 4, 1981: Prohibition on Assassination.**

**“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”**

**(2) Not applicable during war ?**

**B. ‘Self -defense’ – individual and collective**

**1. General rule: collective security**

**a. Use of force = FORBIDDEN**

**2) UN Charter, Article 2(4)**

**a) UN ≡ monopoly on use of force: Chapter VII**

**b) Exception Article 51**

**3) 1970 Declaration of Friendly Relations and Cooperation (UNGA)**

**4) 1974 Definition of Aggression (UNGA)**

**2. UN Charter, Article 51**

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

**a. Requirements**

- 1) individual self defense
- 2) collective self defense – Nicaragua rules
  - a. victim State must have legitimate claim to self defense under Article 51
  - b. victim State - declares itself is victim
  - c. victim State - requests help
  - d. self defense - immediately reported to SC
- 3) “armed attack”
  - a. Nicaragua case rule - only can act with force if ‘armed attack’ took place
  - b. ARMED ATTACK ≡ SELF DEFENSE
    - (c) action by regular armed forces across an international border
    - (d) "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein".
  - c. Threat of use of force ∴ armed attack
    - 1) “[A State’s] assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States – but not armed attack”
    - 2) Within exclusive authority of Security Council
- 4) until Security Council takes measures
  - a. necessary to maintain international peace
  - b. who can take any measures it deems necessary
  - c. Members must report self defense measures to Security Council

- b. Customary international law
  1. State practice (Nicaragua case)



**a. In order to deduce the existence of customary rules**

**[1] State practice (*usus*)**

**(1) the application of the rules in question are NOT perfect,**

**(2) conduct of States should in general, be consistent with such rules, and**

**(3) breaches of that rule are treated as exception, not as indications of the recognition of a new rule.**

**(4) If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.**

**[2] State acceptance of the rule (*opinio juris*)**

**2. 'Inherent right' of individual self defense - pre-UN customary international law**

**The Court ..finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature (Nicaragua case)**

**3. SCOPE OF SELF-DEFENSE**

**1. General rule:**

- a. **Immediate**  
Falkland Island exception (see Akehurst)
- b. **Necessary**
- c. **Proportional**
  - [1] limit the power of the state responding
  - [2] not 3000 for 3000
  - [3] measured - basis of appropriateness and reasonableness to the aim pursued by the reacting state
  - [4] Four standards
    - a. A normative standard – re-establish the status of the state and security before the attack.
    - b. A retributive standard – inflict on the wrongdoer a cost for injury suffered
    - c. A coercive standard – force the wrongdoer to cease the breach and abide its obligation
    - d. An executive standard – countermeasure is to wipe out the adverse effects produced by the breach and to produce unilaterally the benefits expected from the breached rule.

- 2. Daniel Webster, U.S. Secretary of State – Caroline case (1837)
- 3. Nicaragua case (ICJ – 1986)
- 4. Advisory Opinion on the use of Nuclear Weapons (ICJ - 1996 )
  - a. The threat of nuclear weapons used as a deterrent to war
  - b. right of state of self defense and survival - may be necessary in extreme cases
- 5. Academic discussion
  - a. Must not be retaliatory or punitive
  - b. limited - necessary to stop or prevent infringement
  - c. Not restricted to same weapons or same size armed force
  - d. ‘Pin prick’ theory – repeated cross-border incursion justify otherwise disproportionate response
  - e. Long occupation following armed force ∴ proportional/necessary

#### 4. “Anticipatory self - defense”

- a. Narrow interpretation

1. armed attack must already occurred
  2. NO - threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome.
  3. no right of anticipatory self-defense against an imminent danger of attack.
  4. justification can be abused
- b. Broad interpretation
- (1) National survival - "if overwhelmingly likely that weaponry is possessed by a nation willing to use that weaponry directly or through surrogates, some kind of anticipatory self-defense may be a matter of national survival"
  - (2) Exclusion of the right - deprives the 'innocent' state of the military advantage of striking the first blow."
  - (3) Nicaragua case - "the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue."
- c. State practice and *opinio juris*
- 1) (1962) United States
    - a. President Kennedy - in photographic evidence ≡ Soviet Union installing medium range missiles in Cuba, capable of hitting United States
    - b. imposed a naval "quarantine" on Cuba in order to stop ... delivery of offensive weapons and associated material.
    - c. No UN condemnation
  - 2) (1967) Israel
    - a. Israel - preemptive attack on Egypt and other Arab states after President Nasser had moved his army across the Sinai toward Israel
    - b. Syria, Iraq, Jordan, and Saudi Arabia moved troops to the Israeli borders
    - c. Six days – Israel routed Egypt and its Arab allies, occupied the Sinai Peninsula, the West Bank, and the Gaza Strip.
    - d. No UN Condemnation
  - 3) (1981) Israel
    - a. attacked Iraq, destroy nuclear reactor under construction
    - b. Iraq considered itself to be in a state of war with Israel
      - 1) Iraq participated in aggressive wars against Israel in 1948, 1967 and 1973.
      - 2) Iraq's nuclear program was for the purpose of developing weapons capable of destroying Israel
      - 3) Israel was fighting for survival
    - c. Security Council universally condemned as illegal



## 5. Protection of nationals

### 1. General rule

**"Attacks on a state's nationals resident abroad do not entitle the state to use force in order to defend its nationals without the consent of the foreign government."**

### 2. State practice (note: Nicaragua comment)

- d. 1964 – US and Belgium intervened in Congo to save nationals at a time when civil disorder.
- e. 1965 – US intervened in the Dominican Republic
- f. 1971 – India intervened in East Pakistan
- g. 1976 – Israel raid on Entebbe (Uganda) – no un sanctions
- h. 1979 – Tanzania intervened in Uganda – not considered by UN
- i. 1983 – USA intervened in Grenada
- j. 1989 – us in Panama
- k. 1990s – Australia in Fiji



**nvtech.com**      **6. TERRORISM (protection of nationals, anticipatory self-defense, self defense)**

**1. Unconventional combat**

- a. trans-border, trans citizenry
- b. low level weapon technology
- c. combatant: suicide bombers
- d. soft targets
  - 1) unable to reach hard targets (military, leaders)
  - 2) non-military targets
    - (1) civilians, aid workers
    - (2) recreational centers, business, malls

**2. State responsibility**

- a. nexus to State
- b. “wrong doing” of State (draft of ILC)
- c. consequences  $\equiv$  no use of force

**3. Threat to peace v. Armed Attack**

**Article 51 exception?**

- 1) armed attack versus use of force/threat to peace
- 2) armed bands, groups, irregulars or mercenaries versus suicide bomber/hijacker
- 3) non-State actor, but incursion of territory of State to destroy without permission of State
  - a) prohibition armed force
  - b) prohibition of interference
- 4) Nexus to State (degree of State involvement)
  - a) **ARMED ATTACK** = State sending armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack by regular force
  - b) **THREAT TO PEACE** = State provisions of arms to the nationals of a state who are seeking to overthrow their government, for instances, assistance to rebels in the form of provision of weapons or logistical or other support
  - c) **BUT: ‘Pin prick’ theory** – repeated cross-border incursion justify otherwise disproportionate response
- 5) Threat to peace = Chapter VII  $\equiv$  UN

#### 4. State practice

- d. (1986) Us bombs Libya– in response of bomb in disco in Berlin
- e. (1998) – US launched attacks on 6 Terrorist sites in Afghanistan
- f. (ongoing) Israel – actions against Palestinian freedom fighters?  
(outside support from Arab states – Iraq, Iran)
- g. (2001) US and UK attack Afghanistan. Remove Taliban government

#### 5. UN response

- a. (1972) UN General Assembly – 1<sup>st</sup> time puts on agenda
- b. (1998) UNSC res 1189
  - 1) response to bombing of embassies in Tanzania, Kenya
  - 2) each state - refrain from organizing, instigating, assisting or participating in terrorist acts
- c. (Sept 12, 2001) UNSC res 1368– 1<sup>st</sup> to refer to Article 51  
(28 Sept 2001) UNSC res 1373– acting under Chap VII, require Members to
  - h. prevent financing of terrorist acts
  - i. freeze funds
  - j. refrain from providing support
  - k. take steps to prevent the commission of terrorist acts
  - l. deny safe haven
  - m. prevent the movement of terrorists



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## 7. Weapons of Mass Destruction

**a. Treaties**

- 1. Non-proliferation of nuclear weapons**
- 2. Chemical weapons**
- 3. Biological weapons**

**b. UN Security Council resolutions against Iraq's development of weapons**

- 1. Res. 687 (3 April 1991) - Required Iraq to disarm against nuclear, chemical and biological weapons**
- 2. Resolutions 1991 to 2002 – demand that UN weapons inspectors be allowed to inspect to insure disarmament**
- 3. NONCOMPLIANCE by Iraq**

**b. Iraq – past aggressive acts and use of weapons of mass destruction**

- a. 1983 - 1988: use of mustard and nerve gas against Iranians and Kurds (internal and international use) : 25,000 deaths +**
- b. use of missiles against Israel**

**d. State practice**

- 1. 1961 - Cuban Missile Crisis – US creates blockade, threatens to use force until removal of weapons**
- 2. 1981 - Israel attacked Iraqi nuclear plant: to prevent Iraq from building of bomb (Israel p.m – threat to Israel security – condemned by UN Security Council resolution**
- 3. Operation Desert Fox (December 1998) – US and UK bomb Iraq for failure to comply with UN SC resolutions requiring disarmament.**

**F. Unacceptable uses of Force**

- 1. To gain territory**
- 2. To change leadership**
- 3. To impose Reprisal- revenge**
- 4. To Impose or Restore democracies ??(exception: humanitarian intervention)**