THE BASICS

OF

PUBLIC INTERNATIONAL LAW

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2005

Preface

The Basics of Public International Law is a translation of a publication titled "Internationaal recht," which is published in the Boom Basics series of the Dutch publishing house Boom Juridische Uitgevers.

This publication aims at providing students of law at universities of academic and professional education as well as non-lawyers, with a comprehensible overview of the basic and principle rules of public international law. It does not intent to provide a deeper insight or an exhaustive or balanced overview.

This print out is to be used solely for the purpose of teaching at the University of Andalas, Indonesia.

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Utrecht, January 15th 2005

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I Introduction

1 Definition of public international law

'Public international law' is the legal regime, which regulates the legal relations between subjects of international law (for example states and international governmental organizations). In literature, law and jurisprudence 'public international law' is also called 'international law'.

A typical activity governed by public international law is the conclusion of treaties between states. Treaties may cover different subjects such as: air traffic, taxes, human rights, endangers species, and intellectual property. The creation of international governmental organizations such as the UN, [local IGO, Local IGO] is also considered to be an act of public international law. Activities of states and international organizations can lead to state responsibility, international court cases and armed conflicts. These phenomena are also governed by rules of public international law.

2 The legal character of public international law

Public international law has its own unique legal character. Public international law distinguishes itself from national legal systems on the following points:

- Public international law lacks a centralized legislation, adjudication and enforcement.
- Sources of public international law such as treaties, customary international law and binding decisions of international governmental organizations are central in international finding of law.
- Unilateral law enforcement (self-help) is a legal if it constitutes a reaction to a prior international wrongful act.
- The legal relations between states (the most important subjects of international law) are still ruled by the paradigm of sovereign equality.
- Public international law is in principle of a reciprocal and contractual nature.

3 Historical development

Modern public international law emerged in the 17th century. Its construction is closely related to the coming into existence of the 'sovereign' (i.e. independent) state. The historical development of public international law can be divided in a number of different phases:

- The period before the peace of Westphalia (pre-1648). In this period, international law governs only a limited number of situations (law of the sea, trade law, diplomatic relations and treaties) and develops only incidentally.
- The development phase of public international law (1648 – 1850). The emerging sovereign state is a characteristic feature. Public international law is mainly concerned with the delimitation of national jurisdiction and state boundaries.
- The period of coordination (1850 – 1990). The characteristics of this period are:
  - The creation of international organizations;

- The institutionalization of international dispute settlement mechanisms; and
- The codification of customary international law.

The 'cold-war' signifies a shift with the pre-WW II idealism. Public international law becomes politicized. Decolonisation and development issues dominate the international agenda.

- The period of cooperation (from 1990). Increased international cooperation is reflected in:
  - The strengthening of international and regional organizations (WTO and EU);
  - The extension of the discretionary powers of the UN Security Council; and
  - The increase in the number of international conferences, which deal with global problems (i.e. the UN Conference on Environment and Development, UN Conference on Climate Change, UN Conference on Woman.

4 *Natural law and positivism*

The development of public international law id influenced by two important legal theories:

- The Natural Law Theory presupposes that:
  - Law is always present and unchangeable
  - The content of the law can be based on a number of fundamental norms, which can be deduced from God's will, nature or human ratio.
- Positivism assumes that:
  - Law is man made, and
  - Law can change according to time and place.

Positivism is the dominant legal theory in contemporary public international law.

5 Sub-disciplines of public international law

Public international law can be divided in a number of (sub) disciplines:

- Classical disciplines of public international law are:
  - The law of diplomatic relations;
  - The law of war; and
  - The law of the sea.
- Internationalized legal disciplines are based on principles from national legal systems such as:
  - International environmental law;
  - International economic law; and
  - International criminal law.

Within the legal disciplines, principles of public international law have been developed.

- Specialized (sub) disciplines have emerged from classical public international law, but are now considered to constitute autonomous legal fields. Examples are:
  - The law of international governmental organizations;
  - The law of the European Union;
  - The law of the World Trade Organization;
  - Air and space law; and
  - Human rights law.

The law of international organizations (see also Ch. XI)

- This discipline covers the institutional law of international governmental organizations. These are organizations, which are constituted by and consist of states.
- The basic laws of international governmental organizations are to be found in their constitutive documents. Legal developments in the fields of international governmental organizations indicate a trend towards an emerging international constitutional and administrative law.

The Law of the European Union

- The law of the European Union is an example of the increasing autonomy of international legal regimes.
- Traditionally, this legal field is often labeled as 'European law'. However, in contemporary terminology, 'European law' connotes 'transnational' European law, which includes the rules and principles from other European organizations such as the Council of Europe and the Organization for Cooperation and Security in Europe, and of national jurisdictions.

6 The Netherlands and international law

The Netherlands has a special relation with public international law for the following reasons:

- Historically:
  - Grotius (1583 – 1645) is recognized by many as one of the most important founding fathers of modern international law.
  - The Hague peace conferences constitute the beginning of the development of modern institutions for the settlement of international disputes.
- Institutionally:
  The Netherlands is the host to a variety of international tribunals and governmental organizations, such as:
  - The Permanent Court of Arbitration (since 1895);
  - The International Court of Justice (since1945);
  - The Iran – US Claims Tribunal (since 1981);
  - The 'Yugoslavia' tribunal (since 1992);
  - The International Criminal Tribunal (since 2003), and
  - The Organization for the Prohibition of Chemical Weapons (since 1997) .
- Legally:
  The Netherlands has opted for a legal system, which acknowledges the superiority of public international law and provides for the possibility of direct effect of specific rules of public international law. A rule of public international law with direct effect can be invoked in a case before a Dutch Court by individuals (see no. 10). Because of the increasing international law-making, it is likely that the Dutch courts will be increasingly confronted with rules of public international law.

II The position of public international law in the {Dutch} legal order

7 Direct effect

In many countries public international law has direct effect, which means that national courts can apply rules of public international law. Whether, to what extent and how public international penetrates the national legal order, is determined by national law.
In order to assess whether rules of public international law have direct effect one must determine:

- Whether national law allows for international law to have direct effect. If this is not the case, rules of public international law have to be transformed into national law before these rules become effective.
- Whether international rules have direct affect
- International rules can trump national rules

In the Netherlands, the relationship between international law and national law is determined in articles 93 and 94 of the Constitution and elaborated in jurisprudence (see no. 9 and 10)

8 Monism and dualism

The character of the relationship between public international law and national law depends on the theoretical perspective.

- Monism:
  - Law is one system; public international law and national law are not separated legal orders;
  - Self-executing effect: Public international law does not need to be transformed;
  - Public international law trumps national law in case of a conflict between two rules.
- Dualism:
  - Public international law and national law are separated systems;
  - Public international law must be transformed into national law in order to become effective;
  - Public international law is not superior to national law. Transformed international law is converted into national law.

Most national legal systems are not absolute monistic or dualistic. In reality elements of both ideas can be found in national legal systems.

Examples of national legal systems, with a predominantly monistic nature are Belgium and France. The United Kingdom, Germany and Italy are predominantly dualistic. The Netherlands system is characterized as 'qualified monism'.

9 Moderate monism

Monism is moderated in two ways in the Netherlands:

- The number of rules of public international law, which can be invoked in Dutch courts is limited. Article 93 of the Constitution stipulates that only those rules of public international law can be invoked which eminate from "treaties and binding decisions from international organizations, which according to their nature intend to create rights for individuals". Invoking international customary law.
- Not every international rule trumps domestic Dutch law. On the basis of article 94 of the Constitution, domestic law is not applied only when "application is not compatible with a rule binding on all persons."

10 Direct effect of rules of public international law

In order to invoke rules of international law, it must be clear that these rules are 'applicable to everyone according to its content.' This is called 'direct effect.' Courts determine per case whether rules of public international law are directly applicable or not. The following criteria are taken into account:

- *The intension of the parties to the treaty*. The treaty text or the *traveaux preparatoires* indicate that direct effect was intended by the parties.
- Character and content of the rule. Direct effect is assumed if:
  - The implementation and effect of the provision does not require additional action by the state;
  - The text is enough precise in order to be invoked by private parties.

11 Dutch governmental institutions and public international law

International public international law creates rights and obligations for the {name} state and its citizens. The legislative, adjudicative and administrative powers have different rights and obligations. National laws determine in which manner, governmental institutions are involved in the determination and application of public international law.

The admininistrative power

Article 90 of the Constitution of the Netherlands stipulates: "the government promotes the development of the international legal order." In order to do so, the government can involve the 'armed forces' (art. 97 Constitution). Members of the Government and mandated civil servants can represent the Netherlands abroad.

The legislative power

- The parliament has to approve the conclusion or termination of treaties (art. 91 Constitution) and the issuing of a formal declaration of war (art. 96 Constitution).
- The parliament must be informed on the deployment of Dutch armed forces abroad (art 100 (1) Constitution). Approval of the parliament is not required.

Several units of the Dutch armed forces have been deployed abroad in the framework of UN peacekeeping and enforcement action, and NATO operations in i.e. Lebanon, Former Yugoslavia, Eritrea, Iraq, Afghanistan and Liberia.

The adjudicative power

- Courts have their own, individual responsibility in the application of rules of public international law and the administration of international justice.
- Dutch courts are allowed to check Dutch statutory regulation against treaties. Dutch courts are not allowed to enter into a constitutional test (art. 120 Constitution). The constitutional test is a prerogative of the parliament.

III Subjects of international law

12 International legal personality

- International legal personality is an international legal status on the basis of which:
  - International rights and duties are acquired;
  - Other subjects of international law can be held responsible;
  - International treaties can be concluded.
- The existence of the capacity to constitute international legal acts presupposes the existence of international legal personality.
- International legal personality can be full or limited, depending in the question which legal acts can be entered into.

13 Forms of international legal personality

Content and scope of international legal personality can differ per subject of international law. Traditionally, the following qualifications of international legal personality can be identified:

- *Original legal personality*. Only {assigned} to states;
- *Derivated legal personality*. This kind of international legal personality is derived from original legal personality. The personality of international governmental organizations is and example of personality which is derived from the personality of its constituting states.
- *Unique legal personality*. Entities sui generis like the Holy Seat and the Order of Malta have a unique legal personality that is not based on the personality of other subjects of international law.
- *Limited or functional legal personality*. The content and scope of the legal personality is related to the function of the international entity. International governmental organizations often have a functional legal personality.

14 States

- The legal prerequisites for statehood are:
  - *Territory*,
  - *Population*, and
  - *Effective government*, which exercises state power over territory and population.
- In order to determine whether a state exists, the following considerations are <u>not</u> important:
  - *The quantity of territory or population*. Nauru is a state with 21 km2 and 11.500 inhabitants as well as the Peoples Republic of China with 9.500.000 km2 and 1300 billion inhabitants.
  - *Temporary loss of state power over territory and population*. States occupied during war continue to exist.
  - *Recognition by other states*.

15 Recognition

The term 'recognition' is used in public international law in various meanings and situations.

Recognition of states

- A state does not need to be recognized by other states in order to be qualified as a full subject of public international law.
- According to the *declaratory theory*, 'recognition' is only the confirmation of the factual existence of a state. This is the dominant theory in public international law. Recognition of states is not a legal act, but a political act.
- The *constitutive theory* requires recognition as a legal prerequisite for states to come into existence.

Recognition of governments and armed opposition groups

(Non) recognition of governments or armed opposition groups is a political act without legal effect. In case of a civil war, premature recognition of armed opposition groups as the legal representative of the state constitutes a violation of article 2(7) of the UN Charter (i.e. it constitutes an unlawful interference in the internal affairs of a state); premature recognition of a new, independent state constitutes an international wrongful act.

***De jure* and *de facto* recognition**

- *De facto* recognition is an implicit recognition of a factual situation. De facto recognition can be required for the purpose of international transactions. Non-recognition could result in unwanted legal consequences in the national administration of the law.
- *De jure* recognition will be the result of explicit declarations. States do recognize the legal status of the situation and the road to diplomatic relations is open.

If state A would not recognize state B, which factually exists, state A could not recognize stat B's laws. Marriages or trade-contracts concluded under such laws, could also not be accepted as legally valid. This would not be practical in family and trade affairs.

16 International governmental organizations (see XI)

The legal personality of international governmental organizations can be established on the basis of two different sources:

- Legal personality based on national law (see for example article 104 UN Charter). This legal personality is necessary for the purpose of being able as an IGO to perform civil actions on the territory of the host state or member states. One can think of buying buildings, hiring personnel, or purchasing office equipment.
- International legal personality is for example necessary for acting at the international level such as concluding treaties, claiming immunities and bringing cases against other international legal subjects.

  The international legal personality of IGOs can be established in two manners:

- The constitutive treaty explicitly stipulates that the organization has international legal personality (see for example art. 4 of the Statute of the ICC), or
- The international legal personality can be teleological deduced from the objectives and functions of the organization.

The ICJ concluded in the Reparation for Injuries case that the existence of international legal personality of the UN could be deduced from the tasks and objectives of that organization. The UN should be capable of holding states responsible as an independent organization for the death of one of its staff members who was working under a UN mandate in the territory of the state in question.
In the case concerning the legality of nuclear weapons, the ICJ concluded on the basis of an interpretation of the objectives and functions of the WHO that this organization could not independently ask for an Advisory Opinion of the ICJ.

17 Liberation movements

The international legal personality of armed opposition movements is based on:
- The right to self-determination. Every peoples has the right to oppose colonial or racial suppression;
- The Vienna Conventions concerning humanitarian warfare;
- The recognition of states through the conclusion of treaties between states and liberation movements; and
- The recognition by IGOs by granting observer status to liberation movements and enabling them to participate in and speak at meetings and conferences.

The African National Congress (ANC) and the Palestinian Liberation Organization (PLO) are well known and recognized subjects of international law with a limited, functional international legal personality.

18 New forms of international legal personality

International legal personality is no longer limited to states, international governmental organizations and armed opposition groups. The following international actors increasingly claim international legal personality:
- *Individuals*. Their international legal personality is limited. It is based on:
  - The possibility to invoke human rights at the international level;
  - The recognition of individual criminal responsibility.
- *Multi- or transnational corporations*. International legal personality of MNCs is debated. A possible recognition of international legal personality of MNCs can be based on:
  - The internationalization of civil contracts between states and MNCs. These contracts are often governed by international law because the parties are unable to agree on the *lex fora*;
  - The internationalization of commercial disputes between states and MNCs;
  - Claimed international accountability of MNCs for violation of international human rights and environmental law.

Non-governmental organizations (NGOs) have not acquired international legal personality yet. NGOs might have a special status on the basis of international treaties or within international organizations.

The International Red Cross (ICRC) has a special status under the 1949 Geneva Conventions (The ICIC is inter alia co-responsible for the implementation of the treaties) and has an observer status in the UN General Assembly (the ICRC has the right to participate and speak, but not the right to vote). Other NGOs like Greenpeace, Amnesty International or the International Chamber of Commerce have a consultative status within the Economic and Social Council (See art. 71 UN Charter. These NGOs only have limited participation rights.

IV Sources of Public International Law

19 The sources of rules of public international law

International legal rules are to be found in the sources of public international law. The traditional sources are enumerated in article 38 of the Statute of the International Court of Justice:

- International treaties;
- International customary law as evidence of general practice accepted as law;
- General principles of law;
- Jurisprudence;
- The opinion of highly qualified scholars.

In addition, the following sources are mentioned in jurisprudence and doctrine:

- Unilateral declarations;
- Binding decisions of international organizations; and
- Peremptory norms of international law (*ius cogens*).

In practice, treaties, international customary law and binding decisions from international organizations are the most important sources. Conflicts between rules of international law are mostly conflicts between rules based on these sources.

20 Treaties (see also Chapter V)

- The importance of treaties as sources of international law is increasing. A written agreement offers more legal certainty then customary law. However, treaties are less flexible and adaptive to legal developments.
- A treaty can be defined as:
  - An international agreement;
  - Between two or more subjects of international law;
  - Which as legally binding;
  - Subjected to rules of public international law; and
  - Based on the consent of the parties.
- Treaties can be classified on the basis of their content as:
  - *Law-creating (traités-lois).* This type of treaty creates new, general rules of public international law (e.g. the Vienna Convention on the Law of Treaties);
  - *Contracts (traités-contrats).* This international agreement creates reciprocal rights and obligations. They can be compared to contracts governed by civil law. (e.g. air services agreements);
  - *Constitutional (traités-constitution).* These treaties constitute international organizations (e.g. the UN Charter).
- On the basis of the parties, one can differentiate between:
  - Bilateral treaties (two parties);
  - Multilateral treaties (three or more parties);
  - Mixed treaties (states and international governmental organizations);

- Treaties are known under various names and forms. Legally speaking these features are unimportant.

The Memorandum of Understanding (MoU) between the {Netherlands} and the {United States} on {the stationing of US customs officers in the Rotterdam Port} is an international treaty as well as the Charter of the United Nations or the Statute of the International Court of Justice. The Charter of Economic Rights and Duties is an example of an international document, which is not a treaty notwithstanding its name. It is a non-binding resolution of the UN General Assembly.

21 International customary law

International customary law is – due to the absence of a centralized law-making authority – one of the most important sources of public international law. International customary law is based on:

- The practice of states, and
- A corresponding legal opinion that this practice is obligatory (*opinion iuris*).

State practice

State practice:

- Must be uniform and consistent;
- Can be relatively short and create so-called instant custom;
- Can exist both at a global as well as at a regional level, and exists between two parties only (bilateral custom).

Opinio Iuris

- The opinion that one is legally obliged to behave in a specific manner is *called opinio iuris*. The assessment of a specific opinion as a legal opinion is more problematic than observing a relevant legal practice. *Opinio Iuris* can be found in:
  - Declarations and acts of representatives of states;
  - Voting declarations within international organizations;
  - Reactions on the behavior of other states;
  - National legislation.
- A state is not bound by a rule of customary international law if it consistently demonstrates opposing behavior or objects the formation of a rule (dissenting *opinio iuris*). An opposing state is called a *persistent objector*.

An example of international customary law is the qualified right of states to take unilateral measures of self-help against states, which refuse to repair an internationally wrongful act (see no. 60).

22 Decisions of International Governmental Organizations

The term *resolution* is a very common and general term for decisions of organs of international governmental organizations. Decisions of international governmental organizations can be binding and non-binding.

Binding decisions
Most decisions of organs of IGOs are recommendations and therefore not binding. Examples of binding decisions are:

- Decisions of the UN Security Council under articles 41 and 41 of the UN Charter.
- Decisions with internal effects in the IGO such as budgetary decisions (e.g. art 17 UN Charter).

Non-binding decisions

- Non-binding decisions of IGOs are legally speaking not totally irrelevant. They can be considered to constitute evidence of customary international law.
- Non-binding decisions can also evidence the development of a specific rule of international law. Such rules are after qualified as "soft-law', which indicates that they have not yet matured to a full rule of positive public international law.

23 Additional sources of international law

The following sources are recognized in jurisprudence and literature:

- *General principles of law*. Both general principles common to national legal systems, like good faith, as well as specific general principles of international law like *pacta sunt servanda* are considered to be a source of public international law.
- *Jurisprudence.* Both national as well as international jurisprudence.
- *Doctrine.* Publications of authoritative scholars are loosing importance as a source of international law. However, doctrine is still relevant as a framework of reference and as tools of interpretation.
- *Unilateral legal acts.* Unilateral acts and declarations can constitute obligations under international law. The number of examples is limited. *When Australia and New Zealand protested against French nuclear tests, the French president declared that France would stop testing after these last tests. The ICJ considered this declaration as legally binding upon France.*
- *Peremptory norms.* These are also called rules of *ius cogens.* These rules have an *erga omnes* character, i.e. they apply to all states. *An example is the prohibition of the use of force, (*see nos. 63-63).

24 the relationship between sources or rules of international law

A conflict between sources or rules of international law is governed by the following rules:

- *Ius cogens* trumps all other rules. Rules, which violate rules of Ius Cogens are considered to be null and void.
- Treaties, international customary law, decisions of IGOs, unilateral decisions and general principles of law are considered to be equal in rank. Conflicts between these sources are solved on the basis of the following addagia:
  - New trumps old;
  - Special trumps general; and
  - Old and special trumps new and general.
- Jurisprudence and doctrine are considered to constitute additional sources and are therefore hierarchically of a lower rank.

V The Law of Treaties

25 Sources of the law of treaties

General rules of law governing treaties are to be found in:

- The 1969 Vienna Convention on the Law of Treaties. This Treaty contains rules governing treaties between states;
- The 1986 Vienna Convention on the Law of Treaties between states and IGOs; and
- International customary law, which contains:
  - Rules, which are not to be found in one of the two treaties mentioned above, and
  - Specific rules, which came into existence after the conclusion of one of the two treaties.

Special rules concerning the execution and implementation of a treaty are to be found in the final provisions of treaties.

26 The entry into force of treaties

- Treaties enter into force after the following requirements have been met:
  - *Signature*. A signature demonstrates that the signatory agrees with the text. A signature concludes a treaty. The text of a signed treaty cannot be changed unilaterally. A signatory to a treaty can:
    - Make a reservation concerning subsequent ratification. The consequences are:
      - The treaty does not enter into force; and
      - No treaty obligations are being created.
    - However, under specific circumstances pre-contractual accountability may be created (art. 18 1969 Vienna Convention).
  - *Ratification*. Ratification is a formal act of a signatory state and has to be explicitly. In most cases this will be done after parliamentary approval.
  - *Accession*. States, which have not signed the treaty, can only become parties to the treaty through accession.

- A treaty can enter into force at different moments:
  - After it has been signed and no reservations have been made or other requirements for the entry in to force have been stipulated;
  - At a specific time as stipulated in the treaty;
  - After a number of ratifications and/or accessions have been met as stipulated in the treaty.

The text of the 1969n Vienna Convention has been agreed upon on May 23 1969. States were enable to sign the treaty before April 30 1970. The treaty entered into force on January 29th 1980. This is 30 days after the 35th state had ratified the treaty or acceded to it (art. 35 (1) 1969 Vienna Convention).
The Netherlands signed the treaty on May 23rd 1969 and ratified the treaty on 9 May 1985. At that moment the Treaty entered into force for the Netherlands.

Indonesia signed the treaty on „„„„„„and ratified the treaty on ……. At that moment the Treaty entered into force for the Indonesia.

27 Reservations

A reservation is an explicit declaration, which stipulates that the state is not bound by specific rules in the treaty. In order to determine which obligations result from the treaty it is necessary to know:

- Whether reservations have been made. This can be done at the moment of:
  - Signature;
  - Ratification;
  - Accession.
- Which reservations are admissible. Check whether:
  - The treaty allows/prohibits reservations;
  - The reservation is in accordance with the treaty rules on reservations;
  - The reservation is compatible with the treaty's objectives and subject (art. 19 1969 Vienna Convention).
- Which reservations are accepted by the other parties. If the treaty is silent on reservations, the practice and opinion of the other parties is conclusive.

28 Interpretation of Treaties

- Article 31 of the 1969 Vienna Convention codifies the general rules on treaty interpretation.
  - A treaty has to be interpreted in good faith;
  - In accordance with the ordinary meaning of the text of the treaty;
  - In its context, and
  - Taking into account the purpose and subject of the treaty.
- The article does not stipulate a hierarchy concerning the use of a textual, contextual or teleological interpretation. Historical interpretation is according to article 32 of the 1969 Vienna Convention to be considered as complementary means of interpretation.

29 The Validity and force of Treaties

- The validity and force of treaties can be subject to objections. Specific circumstances, which were unknown at the moment of the conclusion of the treaty or which came into being afterwards can result in:
  - Voidability (ab initio);
  - Termination;
  - Suspension.

Legal consequence/ circumstance	Art.Vienna Convention	Null & Void	Voidability	Termination	Suspension
Violation of national powers	46-47	no	no	no	no
Error	48		yes		
Fraud	49		yes		
Corruption	50		yes		
Coercion	51	yes			
Conflict with peremptory norm	52	yes			
	53 and 64	yes			
Breach of treaty	60			yes, unless	yes
Impossibility to perform	61			yes, if	
Fundamental change of circumstanced s	62			yes, unless	

- A treaty can also be terminated if:
  - The parties agree on termination
  - One of the parties terminates according to the treaty requirements
  - The duration of the treaty has ended an no extension has been agreed upon

30 State succession

The merger or breaking up of states may have consequences for the treaty obligations of the 'new' state(s). The following situations can be envisaged:

- A state is breaking up. In this case one has to determine, whether one state can be considered to be the successor state of the original state. If the answer is:
  - Yes, the successor state will inherit treaty rights and duties from the original state.

The Soviet Union has been dissolved by agreement between the former federal Soviet republics. The Russian Federation has been denominated as successor state and is as such accepted by the international community and in international organizations.

  - No, the *clean slate* or *Tabula Rasa* principle will be applied. The new state(s) are not bound by the obligations of the original state, except for obligations flowing for boundary treaties. In practice, new state(s) tend to continue most of the existing treaties.

Yugoslavia has been dissolved by force and without prior agreement between the former republics. No state has been accepted to be the successor state. Al states at the territory of the former Yugoslavia had to re-apply for the membership of international organizations for example.
The two republics of Czecho-Slowakia have decided by mutual agreement to separate and to form two new states. Both states have reapplied for the membership of organizations. Financial and treaty obligations have been arranged by mutual agreement.

- Different states agree to form one state or the territory of one state will be extended. In this case the principle of movable boundaries applies, i.e. the obligations of the 'new' state will extent to the new territory.

The German Democratic Republic (DDR) has merged into in the Federal Republic of Germany (FRG). In this case, the scope and content of the treaty obligations of the former DDR were subject of debate. The seat of the DDR in international organizations was repealed.

- A peaceful or non-peaceful change of government. A change of government does not affect the treaty obligations of the state. Even if the new government decides to change the name of the state.

In 1917, the Bolsheviks decided to changes Russia's name in to Union of Socialist Soviet Republics and declared that the new state was not bound by the treaties concluded by the Tsar. This declaration has not been adopted by other states.

31 Entry into force of Treaties in the Netherlands

For the entry into force of treaties in the Netherlands, two moments are important:

- Parliamentary approval. This is a constitutional requirement for concluding and termination treaties (art. 91 (1) and (2) Constitution of the Netherlands). The Law on the regulation of approval and announcement of treaties and the announcement of decisions of international organizations form 1994 stipulates that approval can be done in different ways:
  - *Explicit approval* has to be done by law (art. 4);
  - *Approval is considered to be given implicitly* if the parliament has not requested explicit approval within 30 days of the day that the treaty has been send to parliament for approval.

Approval is according to art. 7 not required for:

- Executive treaties;
- Treaties with a term of less then two years or with limited financial obligations;
- Treaties with a secret or confidential character.

- *Announcement*. Treaties, which are approved by the parliament, have only effect in the Dutch legal system after they are 'announced' (art. 93 Constitution NL). This is done through a notification in the Dutch '*Tractatenblad*' [Dutch treaty series].

VI Jurisdiction

32 The Definition of Jurisdiction

- The jurisdiction of a state is in principle exclusive, meaning that a state has the exclusive sovereign power over its territory and the people living on that territory. The jurisdiction of a state has three components:
  - The jurisdiction to legislate (legislative power);
  - The jurisdiction to adjudicate (adjudicative power); and
  - The jurisdiction to administer and enforce (administrative power).
- The scope and content of the exclusive jurisdiction of a state is defined by:
  - The territory of the state (territorial jurisdiction);
  - Personal statutes and criminal laws of the state (personal jurisdiction); and/or
  - International obligations. International law can both extend the jurisdiction of the state (functional jurisdiction) as well as limit the jurisdiction of the state (immunities). The jurisdiction of states over maritime zones is regulated in the United Nations Convention on the Law of the Sea (UNCLOS).

33 Territorial Jurisdiction

- The most comprehensive jurisdiction of a state related to its territory. The territory of a state consists of:
  - Landmass;
  - Internal waters; and
  - Territorial sea,
- The territorial jurisdiction of a state also extends to the subsoil (including natural resources) and the airspace apportioned to these territorial components.
- The scope of the maritime component of the territory of a state is determined by the so-called base-lines. Two different base-lines can be distinguished: The low-water line (art. 5 UNCLOS) and the straight base-line (art. 7 UNCLOS).
  The low-water line is determined by the effects of the tides.
    - Straight base lines may be drawn between two points on a coats if the total length of the line is no more then 24 nautical miles (for example between …..and …….).
  - Internal waters are located on the 'landside' of the straight base lines.
- The territorial sea is measured from the baseline, not exceeding 12 nautical miles. Foreign ships within the territorial sea have the right of 'innocent passage' (art. 17 – 19 UNCLOS). This right constitutes and exception to the territorial jurisdiction of the coast state.

34 Functional Jurisdiction

- Coast states exercise functional jurisdiction of some maritime zones in order to be able to secure their rights and manage specific tasks. On the basis of the United Nations Convention on the Law of the Sea (1982), states can claim jurisdiction

over specific maritime zones and/or the parts of the seabed outside the territorial sea.

- *The Contignious Zone* (art. 33 UNCLOS) of 24 miles (max. 12 nautical miles beyond the maximum territorial sea) can be claimed for the purpose of protecting the national public order. Especially in the fields of customs, health and immigration.
- *The Continental Shelf* (Part VI UNCLOS) extends maximal 350 miles measured from the base-lines. The coastal state has the exclusive right (by law) to explore and exploit the natural resources present in or under the seabed of the continental shelf.
- The *Exclusive Economic Zone* (EEZ) (Part V UNCLOS) extends maximal 200 miles measures from the baselines. The exclusive right of the coastal state to explore and exploit includes both the EEZ's seabed as well as its waters. In this, the EEZ differs from the Continental shelf regime. Within the EEZ regime living resources can be exploited. An EEZ has to be claimed by the coastal state.

- The following maritime zones cannot be subjected to the jurisdiction of any state:
  - *The High Seas*. The high sea is the maritime zone that extends beyond the internal waters, territorial sea and EEZ of states. (Art 86 UNCLOS). All states have the right to: navigate, over-flight, exploration and exploitation, communication and research. Ships sailing on the high seas are exclusively subjected to the jurisdiction of the flag state, unless:
    - The ship will be stopped after being continuously pursuited for offences committed in the territorial waters or contignious zone of the pursuing state, or
    - A reasonable cause exists to board and search the ship. For example on the basis of suspecting slave trade or piracy.
  - *The Deep Seabed* has the status of '*common heritage of mankind'*. In order to preclude that states would claim jurisdiction over the deep seabed, the Area has been brought under the jurisdiction of the International Seabed Authority. This institution has the power to issue licences for the exploitation of the deep seabed (Part X UNCLOS).
  - *Outer Space and Celestial Bodies* are like the deep seabed classified as common heritage of mankind. The law concerning the use of outer space and the status of celestial bodies is codified in a great number of treaties including the Treaty concerning the Moon (1979) and the Treaty concerning the Use of Outer Space (1967). These treaties preclude that states claim sovereignty over these 'territories'.
  - *Antarctica*. Due to the enormous quantity of natural resources, Antarctica has been the subject of territorial claims by states. In the Antarctica Treaty states have agreed to 'freeze' these claims and pledges not to exploit Antarctica's natural resources.

35 Delimitation of Boundaries

Boundaries are delimited by mutual agreement. Specific principles and rules apply to the delimitation of maritime boundaries and boundary rivers and lakes.

- A boundary in a river is determined by:

  - *The median-line*, which is drawn at an equal distance from delimitation points on its shores, or
  - *The channel*, which enables both states to profit from the transport capacity of the river.
- Maritime zones belonging to two states are delimited by the equidistance line. Each pint at this line has the same distance from a point on the coast of the adjacent states or a point on a straight baseline. (See map.) In a number of cases the technical application of this principle can have unreasonable results. Therefore, the UN Convention on the Law of the Sea does not refer to the equidistance line as delimitation principle. In a number of cases, the ICJ has decided that the principle of equity and reasonability should be considered as a principle, which takes into account the interest of the adjacent coastal states.

The delimitation of the continental shelf between the Federal Republic of Germany (FRG), and Denmark and the Netherlands caused a dispute between the states, which was brought before the ICJ. The FRGT did not agree to apply the equidistance principle because it was detrimental to its interest. The FRG denied that 'equidistance' was a principle of customary international law. The ICJ acknowledged that the application of this principle would result in an unreasonable delimitation, considering the shape of Germany's coastline. As the FRG has persistently objected to the use of this principle it could not be considered to be bound to it as a principle of customary international law. The Court 'ordered' the disputing states to reopen negotiations and to take into acoount the Courts decision.

36 Personal Jurisdiction

The jurisdiction of states over their nationals outside their territory is determined by:
- Nationality laws,
- Criminal law; and/or
- Personal statutes.

Nationality
- Nationality is important in order to determine whether a national of state Y being abroad would fall under state Y's criminal law, which perdonal statute and family law id applicable and whether diplomatic protection can be granted by state Y (see also no. 49).
- States decide for themselves how nationality is granted. In most instances the nationality of a state is acquired by birth. A newborn acquires the nationality of
  - One or both parents, or (*ius sanguines* principle); or
  - The territory on which it is born (*ius soli* principle).
- After birth, nationality can be granted by a state upon request. International law requires that a real link exists between the person and the state granting nationality. (See Notebohm case). Differences in nationality laws may create multiple nationalities or statelessness.

Assume that (1) each parent has the nationality of a different state, the nationality law of which is based on the ius sanguinis principle (Germany and the Netherlands for example) and (2) the child is born on the territory of a state which applies the ius soli principle (e.g. USA). In that case the child could get three different nationalities. In

the opposite case, I child born out of parents from a state that applies the ius soli principle, on the territory of a state which applies the ius sanguinis principle will might be stateless.

- In case multiple nationalities create disputes between states, for example concerning the question, which state is allowed to exercise diplomatic protection, it is necessary to determine which nationality is dominant. Domicile and labor records are relevant.
- The nationality of internationally operating legal persons is determined on the basis of the real seat pronciple (state of establishment) or statutory seat principle (state of registration). The ICJ opted for the statutory seat in the *Barcelona Traction* case

37 Principles of Criminal Jurisdiction

A state may claim jurisdiction on the basis of one or more of the following principles:
- *Subjective territoriality principle*, when the crime starts at its territory;
- *Objective territoriality principle*, if the crime ends of the territory of the state (effects doctrine);
- *Active nationality principle*, if the suspect is a national of that state;
- *Passive nationality principle*, if the victim is a national of that state. The application of the principle has been subject of considerable debate. Due to the increase of terrorism, this principle is increasingly accepted by states;
- *The protection principle* gives states the right to criminalize and prosecute intrusions of state security or public order. Terrorism, forgery and conspiracy against the state are examples such crimes;
- *The universality principle* provides the power for states to penalize international recognized crimes such as for example piracy, slave trade, genocide and war crimes. Such a crime needs no connection whatsoever with the territory or nationals of the state, which invokes that principle.

A national of state A puts a bomb on board of a plane of state B while this plane is making a stop-over in state C. The bomb is supposed to detonate over state D in order to destabilize the political order. However, The bomb detonates over state E killing the plane's crew and passengers, some of which were of state F as well as local people on the ground.

In this case all of the states can claim jurisdiction on a different principle and start prosecution. However, only the state, which can apprehend the suspects on its territory, may lawfully arrest the suspects and enforce its law (see no. 38). Bringing suspects forcefully from another jurisdiction in one owns jurisdiction in order to enforce the law is in violation of international law. An example of (illegal) kidnappings is the Eichmann case.

38 Extradition

Previously we saw that jurisdiction consists of three components (see no. 31). In case a state wants to enforce its law (arrest or detention), the accused or convicted person

has to be in the territory of the state. States are not allowed to enforce their laws on the territory of another state, without the permission of that state. In order to obtain the jurisdiction to enforce over a person that is *not* in the territory of a state, that state has to request extradition. There is no general duty to extradite unless an extradition treaty has been concluded.

Principles of extradition

Many states take the following principles into account when deciding on an extradition request:

- Double criminality. The crime must be punishable in both states.
- Speciality principle. The person extradited can only be prosecuted for the offense for which he or she is extradited.
- People are not extradited for 'political' crimes. Attacks on heads of state are *not* 'political' crimes ('*attentat'* clause).
- The *ne bis in idem* principle excludes extradition in cases of double prosecution or impossibility of prosecution.
- On the basis of treaties, states might be under an obligations either to prosecute or to extradite: *aut dedere aut iudicare*. This principle is especially to be found in treaties for the protection of air transport.

39 Jurisdiction of the Netherlands

Nationality legislation.

- The Law on Dutch Nationality (RwNl) determines who is entitled to the nationality of the Netherlands. Dutch nationality is acquired:
  - *By law*: (1) children born out of Dutch parents, or (2) to be found on Dutch territory, or (3) of which one parent and one grandparent have their dominant domicile in the Netherlands (third generation provision) (art. 3 RwNl), or (4) adopted (art. 5 RwNl).
  - '*Granting by the Crown*' on request of a foreigner. (art 8. RwNl).
    Under specific circumstances, it is also possible to loose the Dutch nationality (art 14-16 RwNl).

Criminal jurisdiction

- The scope of the application of Dutch criminal law is determined in the first 8 articles of the Dutch criminal code (Sr). The Dutch criminal code is based on:
  - The territoriality principle (art. 2 Sr);
  - The active nationality principle (art. 3 Sr) concerning special categories of crimes;
  - The passive nationality principle. Only with respect to special categories of victims (art. 4 Sr.);
  - The protection principle (art. 4 Sr.); and
  - The universality principle (art. 4 Sr).
- Article 8 of the Dutch criminal code recognizes that the application of criminal jurisdiction by the Netherlands can be limited by international obligations (see Ch. VII).

Functional jurisdiction

The Netherlands has proclaimed a territorial sea of 12 nautical miles and a exclusive economic zone. No contignious zone has been proclaimed. The Netherlands has a continental shelf by law.

VII Immunities

40 limitations of territorial jurisdiction

- Immunities limit the territorial jurisdiction of states. Persons and/or entities, which are immune, cannot be subjected to the power of the territorial state to adjudicate or enforce.
  However, they are bound by the laws of the state!
- The most important categories of persons and entities entitles to immunity are:
  - States;
  - Representatives and property of the state;
  - Representatives and property of international governmental organizations.
- The most important forms of immunity are:
  - Immunity form criminal jurisdiction;
  - Immunity form civil jurisdiction;
  - Immunity from taxation.

41 State immunity

- States enjoy immunity in other states. This is called *state immunity* or *sovereign immunity*. State immunity is a limited immunity, which means that:
  - Only state or governmental acts (*acte iure empirii*) enjoy immunity. The state acts in its public capacity.
  - Commercial acts of states (*acte iure gestiones)* are *not* covered by immunity. The state acts in a private capacity. The state participates in legal transactions as any other legal person.
- The notion of absolute immunity for commercial acts of states has been abandoned. If a state invokes immunity in a foreign court, the judge has to determine whether that state acted in a public or private capacity.
  In some countries courts make their own assessment on the basis of:
  - The nature of the act, or
  - The object of the act.

The classical example is the purchase of uniforms for the army. The nature of the transaction (buy/sell) is a commercial/private law. The object of the transaction (dressing the army) is a public one.

42 Derivated immunities

The highest representative of a state (Head of State) enjoys the same immunities as the state itself. The absolute character of this category of immunities is increasingly disputed. On the basis of recent treaties and jurisprudence, the following principles can be established:

- Acting Heads of State, Heads of Government and Secretaries of State enjoy absolute immunity while in function (*ICJ: Congo v. Belgium*).

- The Statute of the International Criminal Court (ICC) stipulates that representatives of states do not enjoy immunity for the crimes enumerated in the statute (art. 27(2) Statute ICC). The statute seems to differ from international customary law.
- Former representatives of states enjoy a functional immunity. After the end of their term, they can be prosecuted for internationally recognized crimes. These international recognized crimes can not be considered to be justified by the governmental function or state position. (*UK: Pinochet case*).
- Warships and other non-commercial vessels belonging to a foreign state enjoy immunity in the ports, internal waters and territorial sea of the coastal state.

43 Diplomatic immunities

- Diplomatic missions are considered to be necessary for maintaining bilateral relations. The law concerning diplomatic relations is one of the classical fields of international law.
- The most important rules concerning diplomatic immunities are to be found in the 1961 Vienna Convention on Diplomatic Relations and international customary law. Diplomatic immunities are granted by receiving country, after the head of state has accepted the credentials of the ambassador of the sending state (art. 4 Convention on Diplomatic Relations).
- The rules of diplomatic immunities provided that:
  - Diplomatic agents and their family members enjoy complete immunity from criminal jurisdiction;
    Immunity for civil and administrative jurisdiction does not include:
    - Private actions concerning real estate,
    - Actions involving succession,
    - Professional and commercial activities not related to the function of the agent (art. 29 and 30).
  - Technical and administrative personnel enjoy the same immunity from criminal jurisdiction. Immunity from civil and administrative jurisdiction is only granted with respect to acts related to their function (art. 37 (2).
  - Diplomatic mail and correspondence are inviolable (art. 27);
  - Embassy buildings and diplomatic residences may not be entered by police without permission (art. 22 jo 30);
  - Diplomatic agents are exempted from local taxes (art. 23 jo. 34).
- Diplomatic immunities preclude the administration of justice and law enforcement activities. Diplomatic agents are bound by national legislation: they are not outside the law! A foreign embassy is NOT foreign territory. Local law id applicable, but cannot be enforced.

A staff member of an embassy, who shoots from the embassy building at a demonstrating person, commits a crime under the law of the hosts state. Diplomatic immunities precludes the host state to prosecute and enforce the law. The diplomatic bag may not be scanned for fire arms. A deserted embassy building is generally searched in the presence of another foreign diplomatic agent.

Waiver of immunity

- The sending state can waive immunity:
  - *Explicitly*. This is done on the basis of an official notification of the sending state (art. 32)
  - *Implicitly*. If the diplomatic agent appears in court to defend herself or file counterarguments.
- If the sending state waives immunity, the host state may prosecute or initiate a civil or an administrative procedure. An additional waiver of the sending state is required for the enforcement of the decision of the court.

Measures against diplomatic personnel

- In case diplomatic agents are no longer acceptable, the sending state may
  - expel one or more diplomatic agents by issuing a *persona non-grata* declaration (art. 9(1), or
  - terminate or suspend the diplomatic relations. The diplomatic agents involved are required to leave the host-state.
- These measures are not only taken in cases of misbehavior of diplomatic personnel. As these measures do not violate rules of diplomatic relations or general international law, they can also be taken for political reasons. In case diplomats are expelled are diplomatic relations are terminated, the diplomatic personnel must be granted appropriate time to leave the host-state.

In 1979, a group of Iranian students seized the US Embassy in Tehran and took the diplomatic personnel hostage; they justified their action by invoking alleged espionage activities of the embassy and the role of the embassy in suppressing the Iranian people. The action against the embassy and embassy staff has been manifestly condemned by the ICJ. The Court refused and accepted neither the justification nor the hostage taking.

44 Immunities and privileges of International Governmental organizations

- Hardly any customary international law exists in this field of international law. Privileges and immunities of international organizations can be qualified as functional. Basic general and specific rules are to be found in the following treaties:
  - Specific treaties like the Treaty concerning privileges and immunities of the UN (CPIUN). The rules in this treaty have been copied by many other treaties.
  - Constitutive agreements (see for example art. 105 UN Charter); and
  - So-called *Headquarter agreements*. These agreements are concluded between the organizations and the host-state.
- Four different categories of beneficiaries of immunities can be identified:
  - The international organizations as a whole.
    - Property, archives and diplomatic mail are inviolable;
    - Bank accounts, properties and income are exempted from taxation; and
    - Communication may not be interfered with (art 2-3 CIUPN).
  - Staff-members of the organization.

They enjoy privileges and immunities that are necessary for executing their tasks and function. These include:
  - Immunity for acts and declarations done in carrying out their function, and
  - Immunity for criminal and civil jurisdiction (in exceptional cases).

- Representatives of member states, members of national delegations and observers.
  These categories enjoy privileges and immunities that can be compared with diplomatic immunities (art. 4 CPIUN).
- Experts of the organization. These are not considered to be staff-members, but enjoy immunity form prosecution. Their luggage and mail are inviolable.

The International Court of justice has -in two different Advisory Opinions- clarified the content and scope of the status of 'experts' of the UN. In the Advisory opinion concerning article 4 of part 22 of the CPIUN the ICH decided that the term 'expert' should be interpreted rather broadly and that the mission of an expert extents in time as long as the mission has not been completed. In the Advisory opinion concerning the immunity if criminal jurisdiction of a special rapporteur of the Commission for Human rights, the ICH declared that the UN rapporteur also enjoys immunity if he speaks as UN rapporteur in his own country. It is the Secretary-General of the UN who decides whether the statements were done in the function of rapporteur.

VIII State Responsibility

45 The Law of State Responsibility

- The most important rules on state responsibility are to be found in the *Draft Articles on State Responsibility* of the International Law Commission. The draft, that is NOT a treaty contains 2 kinds of articles:
  - *Codified customary international law*. These rules y create rights and duties for states, because they are part of existing customary international law;
  - *New rules*. These are developed and formulated by the International law Commission. It is an example of the progressive development international law. These rules do not create obligations for states.
- The draft articles are concerned with the general requirements for and consequences of state responsibility. The traditional rules of state responsibility, i.e. the rules concerning the treatment of aliens, are not included in the draft articles on state responsibility.

46 The international wrongful act

- State responsibility arises from an international wrongful act (art. 1).
- An international wrongful act can be defined as "an act or omission, which is:
  - Attributable to the state under international law, and
  - Constitutes a breach of an international obligation of that state" (art. 2).

Attribution
The conduct of a state can be attributed to that state of it constitutes an act or omission of:

- State organs with particular legislative, executive, adjudicative or other powers. A state cannot invoke the independence of a state organ as a justification. *A court decision and decisions of local regional and administrative authorities can constitute a violation of international law, which causes the responsibility of the state.*
- (A group of) persons, which are recognized by or act under influence of the state, including civil servants. *The seizure of the US Embassy by a a group of students in 1979 in Tehran triggered the responsibility of Iran.*
- Liberation movements. State responsibility arises at the very moment, the liberation movement takes over governmental power. *South Africa is responsible for the acts and omissions of the ANC since this liberation movement obtained power over South Africa.*
- Citizens. A state has a duty under international law to to due diligence. States have to prevent reasonably foreseeable damage to property of other states and their nationals. When the due diligence obligation is violated states commit a wrongful act. *If a demonstration against a particular state is announced, states have to take precautionary measures to protect the Embassy of that state. Riots are foreseeable.*

Violation of international law

- States violate rules of international law if and when their acts or omissions are not in accordance with international obligations.
- The basis of the international obligations as well as its character is irrelevant.
- International wrongful acts can continue as long as the factual or legal consequences are not eliminated or repaired.

47 Circumstances precluding wrongfulness

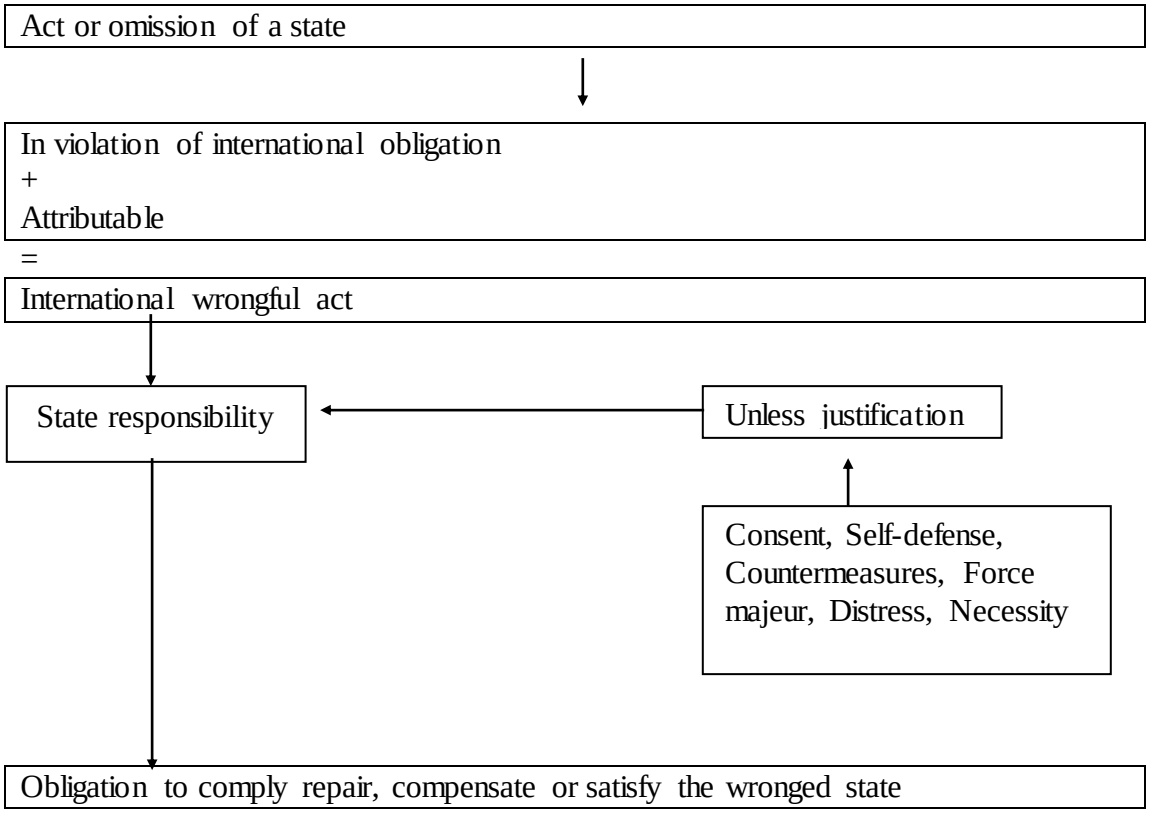
The wrongfulness of an attributable violation of international law may be precluded under certain circumstances. These circumstances are:

- *Consent*. Acts or omissions in accordance with prior consent preclude wrongfulness.
- *Self-defence*. Measures of Self-defence do not constitute a wrongful act as such.
- *Countermeasures*. Unilateral measures of self-help in reaction to a prior international wrongful act are not wrongful if these measures are taken in accordance with specific legal requirements. The rules on countermeasures are subject to controversies.
- Force majeure. This circumstance can be invoked if a state cannot fulfill its obligation due to "an irresistible force or unforeseen event, beyond the control of the state, making it materially impossible" to do so.
- *Distress*. The wrongfulness of actions are precluded if these actions were necessary to protect lives and do not constitute a 'greater peril'.
- *Necessity*. This circumstance may only be invoked if an action is necessary to protect "an essential interest against a grave and immediate peril and does not seriously impair another essential interest."

48 Compliance and reparation

- The state whose rights are violated can demand that the wrongful state:
  - Ceases the wrongful act,
  - Performs its (material) obligation,
  - Refrains from repeating the wrongful behavior, and
  - Repairs possible damage.
- Forms of reparation
  - Restitution. The original legal and material situation has to be reestablished.
  - Compensation. If restitution is impossible, the financial compensation (including loss of profits) must be provided.
  - Satisfaction. If both restitution as well as compensation are impossible, the wronged state may demand the acknowledgement of the wrongful act, and expression of regret or an apology.

State responsibility scheme



49 Diplomatic protection

- Diplomatic protection is NOT the same as diplomatic immunities.
- Diplomatic protection is exercised by states on behalf of their nationals or companies whose rights are violated in another state. The right to grant diplomatic protection is a discretionary right of the state. Citizens and companies can neither demand diplomatic protection nor waive it.
- A state can exercise diplomatic protection if the following conditions are fulfilled:
  - The other state has acted wrongfully vis-à-vis the citizen or company of the state. There are two opinions as to the question hoe aliens have to be treated.
    - *National treatment*: aliens are treated in the same way as the states own nationals.
    - *International minimum standard*. Aliens should be treated according to international agreed standards.

    The recognition of the existence of international human rights seems to have surpassed the controversies on the applicability of the standards.
  - Nationalization of private property has been undertaken in violation of international rules:
    - Nationalizations should serve a general value.
    - Discrimination is prohibited.

- Compensation should be real and paid immediately in convertible currency. The Compensation should be prompt, adequate and effective.
- Exhaustion of local remedies. All local judicial remedies have to be exhausted unless it is absolutely clear that exhaustion is impossible or ineffective. *This might be the case if the person involved is expelled and it is impossible to return to bring the case to a local court or if courts do not decline jurisdiction in cases involving aliens*.

IX The Settlement of Disputes

50 General and special rules

- States are obliged to settle their disputes by peaceful means. This general principle of international law is codified and elaborated in:
  - International treaties like the UN Charter (see art. 2(3) and 33);
  - Resolutions of the UN General Assembly such as:
    - The *Declaration on Principles of International Law concerning Friendly Relations and Co-operation* (resolution 2625); and
    - The *Manilla Declaration on the Peaceful Settlement of International Disputes* (resolution 37/10).
  - Regional Treaties, like the *Treaty of Bogota concerning the peaceful settlement of International Disputes* (1948).
- Freedom of choice and consent are dominant concepts in the law of international dispute settlement. Compulsory jurisdiction of courts is the exception. International dispute settlement is characterized by the following interrelated developments:
  - *Fragmentation*. Every international organization and every treaty regime has its own specific dispute settlement procedure and method.
  - *Institutionalization*. Alternative means of international dispute settlement (diplomatic means) are increasingly institutionalized.
  - *Specialism*. New procedures are being developed and new tribunals created for specific cases.

51 Diplomatic means

- Diplomatic means are often more flexible and less procedural then arbitration and adjudication.
- These 'alternative' means of settling international disputes are formalized and institutionalized in treaties and organizations.
- The outcome is not legally binding upon the parties.
- The following 'diplomatic' methods can be identified:
  - *Negotiation/consultation*: no third party is involved. Procedure and process are complete determined by the disputing parties.
  - *Good offices*. The third party is passive and functions as a channel of communication.
  - *Mediation*: the third party is active and contributes to the settlement of the dispute.
  - *Inquiry*: The third party has a 'fact-finding' task and reports.
  - *Conciliation*: the third party is active and proposes solutions which my lead to the settlement of the dispute.
- Many arbitrations and court cases are preceded by one or more of these diplomatic means.

52 International Arbitration.

- Arbitration can be either ad hoc or institutionalized. The influence of the parties on the procedure and the nomination of the arbitrators diminished as the arbitration is more institutionalized.
- The arbitral award is binding upon the parties.
- Arbitrations can, considering the parties involved, be qualified as:
  - *interstate arbitrations*. The Permanent Court of Arbitration (PCA) was created in 1899. The PCA has a secretariat, a list of arbitrators and special facilities. It has its seat in the Peace Palace in The Hague;
  - *commercial arbitrations* between private parties;
  - *mixed arbitrations* between states, international organizations and private parties. Disputed on agreements between states and multinational companies can be subjected to rules of international law. Investments disputes between states and MNCs can be submitted to the treaty based International Centre for the Settlement of Investment Disputes (ISCID).
- In order to settle an great number and variety of outstanding legal claims states sometimes created so-called mixed claims tribunals. These tribunals can decide on, both, interstate as well as private and mixed cases. Recent examples are the 1981 Iran-US Claims Tribunal and the 2000 Eritrea-Ethiopia Claims Commission.

53 The International Court of Justice (ICJ)

The International Court of Justice is considered to be the proto-type of institutionalized international dispute settlement. The ICJ bears a number of specific characteristics.

- The ICJ is the primary judicial body of the United Nations. The member states of the UN are parties to the Statute of the ICJ. However, these states are not obliged to accept the jurisdiction of the ICJ (see art 92 UN Charter).
- The ICJ has a permanent character. The Court has 15 Judges. States that are not represent on the bench in a dispute with another state before the ICH may appoint a Judge ad-hoc. The judges represent the most important judicial systems in the world and are elected for 9 years by the UN General Assembly and the UN Security Council.
- The ICJ has a double function:
  - To decide upon disputes in contentious cases submitted to it by states, and
  - To give an *advisory opinion* on legal questions upon request of an international organization or UN organ.
- The procedures of the ICJ are stipulated in the Statute of the Court and it's Rules of Procedure.
- The decision in contentious cases is binding (art. 94 UN Charter).

The Jurisdiction of the ICJ

The ICJ does not have compulsory jurisdiction as such. States have to accept the jurisdiction of the Court. This can be done through:

- *A Special Agreement (compromis)*. This is a bilateral agreement in which both parties recognize the jurisdiction of the Court for a defined dispute, which is submitted to the Court.
- *A Compromissory Clause*. This is a special dispute settlement clause in a bilateral or multilateral agreement on the basis of which one of the parties to the agreement can unilaterally bring a dispute before the Court.
- *A unilateral declaration*, which recognizes the jurisdiction of the Court vis-à-vis every other state that has made the same declaration. These Declarations can be subjected to reservations. Reservations relating to time and subject matter prevents the creation of the intended system of compulsory international adjudication. This so-called optional clause system is based on reciprocity, which diminishes its compulsory effect.
- Forum Prorogatum. States can accept the jurisdiction of the Court by actually participating in the procedure.
- Transferred jurisdiction: jurisdiction is transferred from the former Permanent Court of International Justice to the International Court of Justice.

Interstate (contentious) procedures.

- Proceedings are started by the filing of an application.
- A case may consists of two phases:
  - The merits phase: In this phase the merits of the case are pleaded and decided upon.
  - The preliminary objections phase. States may try to preclude entering in the merits of the case by raising preliminary objections against the Court's jurisdiction or the admissibility of the case.

  If any of the arguments are upheld, the case ends.
- Each phase consists of a written (memorial <- counter-memorial <- reply <- rejoinder) and an oral phase (pleadings).
- Upon request of one of the parties, the Court my order interim (provisional) measures of protection if the Court has found 'prima facie' jurisdiction.
- Third states may seek to intervene in the case if:
  - They are party to a convention of which 'the construction in is question" (art 63), or
  - They have an "interest of a legal nature" (art. 62).

The Decision

- The ICJ decides by majority voting. Individual judges may add their 'dissenting opinion' (opinions of judges which do not agree with the decision) or their 'separate opinion' (opinions of judges which, agree with the decision, but who might have different considerations) to the decision of the Court.
- An appeal against a decision of the ICJ is not possible. A judgment can be brought to the attention of the Security Council of the United Nations or states can request for interpretation or revision of the judgment.

The Advisory Opinion Procedure

Upon request of the General Assembly, the Security Council or other authorized UN organs and organizations, the ICH can give an Advise on matters of a legal nature. Examples are the use of nuclear weapons, the construction of a 'wall' by Israel on

occupied territory, or the status of Western Sahara and Namibia. Advisory opinions are not binding.

54 The International Tribunal for the Law of the Sea (ITLOS)

- The ITLOS has been created in 1986 within the framework of the 1982 UN Convention on the Law of the Sea.
- The Tribunal has its seat in Hamburg and has 21 judges. Its procedures can be compared those of the ICJ.
- The jurisdiction of the Tribunal covers first of all questions concerning the interpretation and implementation of the UN Convention on the law of the Sea. In addition, some treaties have included dispute settlement clauses that refer to the ITLOS. For disputes concerning questions of the International Seabed Authority a special Chamber is created. The Tribunal may decide to refer cases to special chambers.

55 The WTO panel procedures

The contemporary WTO panel procedure finds its basis in the dispute settlement procedure of the General Agreement on Tariffs and Trade (GATT). The procedure is stipulated in the Dispute settlement Understanding. This Annex to the WTO treaty creates three relevant organs:

- The *Dispute Settlement Body* (DSU). The DSU consists of the representatives of the WTO member states. This organ has the authority to:
  - Create panels;
  - Adopt Panel reports and Appellate Body reports;
  - Supervise the implementation of reports and to authorize retaliatory measures.
- *Panels*. Panels judge a dispute in first instance. Panels are created ad hoc for a specific dispute. The panel report should enable the DSU to make a recommendation or to take a decision in the dispute. Panel reports are not legally binding precedents. The reports however are part of the WTO aqcuis.
- *The Appellate Body*. This organ reconsiders the panel report upon appeal of one of the parties to the dispute. Only legal questions and questions concerning legal interpretation may be raised in appeal.

The procedure

The WTO panel procedure consists of different phases:

- *The investigation* phase. The panel (created in consultation with the parties) investigates the complaint.
- *The interim review phase*. The Panel presents its description of the dispute and interim conclusions to the parties.
- *The Final Report phase*. The panel sends it final report to the DSB and the Parties. The parties can appeal against the conclusions of the panel.
- *The Appeal Phase*. The *Appellate Body* decides on the case in appeal.
- *The Implementation Phase*. The DSB adopts the Panel or Appellate Body report. The 'loosing' party indicated how it intends to implement the report. The DSB can authorize retaliatory measures against a recalcitrant party. Arbitration is possible against the decision of the DSB.

56 The World Bank Inspection Panel.

In 1993, the World Bank created a procedure, which provided individuals and NGOs with a possibility to file claims against a specific project. The claimants must argue that the project has been initiated in violation of the procedures and/or policies of the World Bank have been violated. An inspection panel consists of three panel members. The procedure consists of three phases:

- *The preliminary review phase*. On the basis of a preliminary review, the panel advises the *Board of Directors of the World Bank* to conduct an investigation. The Board has the discretionary power to adopt or reject the advise. If rejected, the case is referred back to the panel.
- *The investigation phase*. The *Inspection Panel* has the power to collect information and start a full investigation.
- *The decision phase*. On the basis of the final report of the Panel, the Board of Directors decides on the claim. All reports, recommendations and decisions are public.

57 The Netherlands and International Dispute Settlement

Except for being the Host of various international tribunals (see no. 6), the Netherlands has also been a party in various disputes with other states.

The Netherlands and the ICJ

The Netherlands has accepted the compulsory jurisdiction of the ICJ "in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of said Court in all disputes arising or which may arise after 5 August 1921, with the exception of disputes in respect of which the parties, excluding the jurisdiction of the International Court of Justice, may have agreed to have recourse to some other method of pacific settlement."

The Netherlands was involved in the following cases:

- Netherlands v Sweden (1958), concerning guardianship. The Court rejected the Dutch claim.
- Netherlands v. Belgium (1959) concerning sovereignty over territory. The Court ruled in favour of Belgium.
- Netherlands v. Germany (1969), concerning the delimitation of the continental shelf. The Court upheld the arguments of Germany.
- Serbia-Montenegro v. Netherlands (pending), concerning the Dutch participation in NATO bombings of Serbian territory.

The Netherlands and arbitration

The Netherlands had been (is) involved in the following arbitrations:

- The Island of Palmas case (Neth./USA 1928) concerning the sovereignty over the island. The arbiter decided that the Netherlands had a valid title to the territory.
- The Iron-Rhine Railway case (Belgium/Netherlands pending), concerning the maintenance and use of a railway track.
- The River Rhine pollution case (Netherlands/France 2004), concerning the interpretation of the convention concerning the protection of the Rhine.

X The Enforcement of International Law

58 Characteristics of the enforcement of international law

The international legal system:

- *Lacks centralized enforcement*: states have to protect their own rights.
- *Allows self-help*. States can unilaterally and collectively employ non-forceful unilateral measures of self-help. Collective measures of self-help are often resorted to within the framework of international organizations.
- *Prohibits the use of force*. Exceptions are stipulated in the UN Charter:
  - Self-defence (art. 51), and
  - Permission of the UN security Council (art. 42).

59 Retorsion

- 'Retorsion' denotes a category of unilateral measures, which are per se lawful as the do not violate rules of international law.
- 'Retorsion' is an unfriendly act.
- Retorsion measures can be directed towards both wrongful as well as unfriendly behavior of other states.
- Most unilateral measures of self-help fall in the category of retorsion.

Expelling or recalling ambassadors, the suspension of negotiations, the boycott of international conferences and the issuing of stricter visa requirements are examples of unfriendly but legal measures.

60 Reprisals

Reprisals (also knows as countermeasures) constitute a violation of one or more obligations towards another state. The unlawful character of a reprisal is precluded if the reprisal is taken in accordance with specific requirements (see articles 49 – 54 of the State responsibility draft):

- A reprisal must be related to a prior international wrongful act.
- The reprisal has to be proportionate. In order to assess the proportionality the consequences and nature of the wrongful act as well as the nature of the norms violated has to be taken into account.
- The measure has to be ended as soon as the wrongful act has stopped and the consequences repaired. Punitive reprisals are prohibited.
- Reprisals may not violate obligations arising from preemptory norms, human rights are diplomatic immunities.

Freezing foreign the assets of a foreign state and the refusal to implement reciprocal treaty obligations are examples of reprisals.

61 Collective measures

Constitutive treaties of international organizations may provide for the possibility to take collective measures (sanctions) against one of the member states. The violation of material or institutional rules op the organizations by one of the member states may result in the withdrawal of specific rights or the ordering of sanctions. The UN Charter proves several remedies against violations of the Charter:

- Member states, which 'persistently violate' the Charter may be expelled from the UN (art. 6 UN Charter).
- Member states that have failed to pay their financial contributions may lose their right to vote (art. 19 UN Charter).
- Against states and other non-state actors that constitute a threat to the international peace and security, the UN Security Council can order military and nonmilitary sanctions (Chapter 7 of the UN Charter).

Economic measures ordered by the UN Security Council.
The UN Security Council may order the UN members states to implement and enforce binding decisions of the Security Council. These measures may " include the partial or complete interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (Art. 42 UN Charter).

Examples

Measure	*Against*	*Based on*	*Year*
Diamonds import restrictions	*Liberia*	*SC res. 1343*	*2001*
Air transport prohibition	*Sudan*	*SC res. 1054*	*1996*
Diplomatic Boycott	*Sudan*	*SC res. 1070*	*1996*
Oil embargo	*Haiti*	*SC res. 841*	*1993*
Arms embargo	*Yugoslavia*	*SC res. 713*	*1991*
Trade and arms embargo	*Iraq*	*SC res. 661*	*1990*

62 The use of armed force

Article 2 (4) of the UN Charter prohibits "the threat or the use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the purpose of the United Nations." This prohibition is constitutes a preemptory rule of public international law.

63 Exceptions on the prohibition to use armed force

The UN Charter only allows the use of armed force in two exceptional cases:

- (Collective) self-defense (art. 51 UN Charter). A state may (eventually assisted by other states) defend its territory against and 'armed attack'. The following conditions apply:
  - An 'armed attack' has occurred. Anticipating self-defense is prohibited. What exactly constitutes an 'armed attack' is subject to debate.
  - The use of force in self-defense must be proportionate and directed towards stopping and reversing the armed attack.
  - Military actions in self-defense must be reported to the UN Security Council.
  - Self-defense must be stopped as soon as the UN Security Council has "taken measures necessary to maintain international peace and security". Which 'measures' are considered to fall in this category is debated.
- Enforcement Action. The UN Security Council can authorize states to use force in order to enforce its decisions. Such a mandate can be given after the UN Security Council has determined that:
  - International peace and security is threatened and/or a act of aggression has been committed (art. 39 UN Charter), and that
  - This situation continues.

Controversial exceptions to the prohibition on the use of force

In addition to the exceptions mentioned above, states invoke two other circumstances to justify the use of force:

- The liberation or protection of nationals abroad. Employing military units abroad for the protection of a state's own nationals is not uncommon. In civil war and hostages-taking states often opt for a military solution. The use of force in such situations cannot be justified on the basis of self-defense and constitutes a violation of the territorial integrity of the other state
- Humanitarian intervention. Another frequently heard justification for the use of force is the gross and massive violation of human rights, including genocide. Interventions on behalf of a part of the suppressed population of a foreign state are judges very critically due to the tendency to abuse and selective use.

Examples

Qualification	*Use of force against*	*Based on*	*Year*
Enforcement action	*Iraq*	*SC res. 678*	*1990*
Enforcement action	*Somalia*	*SC res. 794*	*1992*
Enforcement action	*Rwanda*	*SC res.*	*1994*
Humanitarian intervention	*Serbia*	*NATO decision*	*1999*
Self-defense	*Argentina*	*Art 51 UN Charter*	*1982*
Protection of national abroad	*Grenada*		*1984*

64 UN Peacekeeping operations

Un 'peace-keeping' differs from 'enforcement actions' under article 42 of the UN Charter on the following points:

- There is no treaty basis. Peacekeeping operations have developed on the basis of UN practice.
- The employment of UN peacekeeping forces depends on the consent of the states involved. States are not obliged to accept peacekeeping troops on their territory.
- The mandate to use force is limited. The use of force is of a defensive nature.
- Peacekeeping troops are neutral; they are not a party to the conflict.
- The United Nations exercises supreme command.

Characterization of peacekeeping operations

- The differences between peacekeeping and enforcement action is declining. The mandate to use force of peacekeeping troops broadens and the type of conflict in which peacekeepers are employed is changing. The following peacekeeping operations can be identified:
  - *Classical peacekeeping*. Troops are employed in an interstate conflict as a buffer between the warring states and for truth supervision purposes. The employment is predominantly military.
  - *Humanitarian peacekeeping*. Peacekeeping troops are deployed in internal armed conflicts and intend to:
    - Reinstitute internal peace and order and governmental power. Military and police tasks are combined;
    - Facilitating humanitarian aid. Military and humanitarian tasks are combined.
  - *Supportive peacekeeping*. This rather new from of peacekeeping seeks to contribute to the rebuilding of a society. Military unites are gradually substituted by legal, political and society organs.
- Peacekeeping forces can be employed preventively. The success of peacekeeping depends on the will of the conflicting states. Consent is a necessary condition for the initiation and the success of peacekeeping. Participation in UN peacekeeping operations is not compulsory.

Examples of peacekeeping operations with Dutch participation

Type of mission	*Deployment area*	*Units*	*Period*	*Name*
Classical	*Lebanon*	*Military*	*1979-1985*	*UNIFIL*
Classical	*Yemen*	*Observers*	*1964*	*UNYOM*
Humanitarian	*Angola*	*Observers & police*	*1991-1995*	*UNAVEM II*
Humanitarian	*Somalia*	*Police*	*1994-1995*	*UNOSOM II*
Supportive	*Cambodia*	*Observers & police*	*1992-1993*	*UNTAC*
Humanitarian	*Bosnia*	*Observers, police and military*	*1992-1995*	*UNPROFOR*
classical	*Eritrea*	*Military*	*2002*	*UNMEE*

XI The law of International Governmental Organizations

65 The development of International Governmental Organizations

- The creation and development of IGOs can be explained from the need of states to co-operate. The first IGOs had a predominant functional character. After World War I IGO started to develop a political nature. The development if IGOs after 1945 has been influenced by the following phenomena:
  - *Globalization*. Global organizations have quadrupled since 1945.
  - *Regionalisation*. States increasing co-operate at the regional level. Examples are the African union and the Association of South East Asian Nations.
  - *Socialization*. States create international organization which focus on a social problematic like the environment (United Nations Environment Program) and development (UN Development Program).
- These developments have created a highly complex structure of organizational schemes, decision-making procedures, and power distribution. These developments justify the study of international institutional law as a separate field of law. The fundamental institutional provisions of international organizations are to be found in the constitutive treaty of the organization.

66 Classification of international organizations

International organizations can be classified according to different criteria:

- *Membership*. On the basis of the membership provision of international organizations, one can differentiate between open and closed organization. Only states with specific and objective characteristics, such as geographical location or possession of natural resources are allowed to become members of closed organizations. Many of the open organizations belong to the so-called UN-family (see Chapter XII).
- *Objectives*. Organizations can on the basis of their purpose be qualified as political (general) organizations or functional (specific) organizations.
- *Powers*. Supranational organizations are to be distinguished from intergovernmental organizations. Supranational organizations can take binding decisions by majority voting. Pure intergovernmental organizations take decisions on the basis of unanimity or consensus. Most organizations are of en international character. However, some of these organizations have supranational elements. The UN Security Council can be labeled as a supranational organ in an international organization.

Organization	Membership	Objective	Powers
United Nations	Open	Political	International
World Trade organization	Open	Functional	International
European Union	Closed	Political	Supranational
Organization of Oil Producing and Exporting Countries	Closed	Functional	International

67 Membership

International organizations have various forms of membership to allow states and non-state actors to participate in the work of the organizations at various levels.

- *Full membership* is generally granted to states and sometimes to other international organizations.
- *Associated membership* can be granted to territorial unites of a state or potential new members to participate in the decision-making process of the organizations.
- *Observer status* can be granted to non-governmental or non-state actors or states who do not want to become full members.

The conditions and procedures for granting the various forms of membership are stipulated in the constitutive treat or secondary legislation.

Loss of membership

States can lose their membership if:

- The state or the international organization is dissolved. It is uncommon for international organizations to dissolve. In some cases international organizations merge into a larger organization.
- States may withdraw from the organization. The organizations may provide procedures that facilitate withdrawal. If the right to withdraw is not explicitly stipulated, such as in the UN Charter and the European union treaty, questions may arise as to the legitimacy of the withdrawal.
- The organization expels the state.

68 Organizational structure

The organisational structure is to be found in the constitutive treaty. Most organizations have various organs with different tasks and powers. The most common organs are:

- *A plenary organ*. All members are represented in this organ. The plenary organ decides on general policy issues and finances. Most plenary organs do not have a permanent character. They meet once or twice a year. Examples are the general assembly of the UN, The Ministerial Conference of the WTO and the Council of the NATO.
- *Non-plenary organs*. These organs consist of a limited number of the members of the organization. Their tasks are specific and functional. Depending on the relevance, such an organ can be permanent or not, an example is the Security Council of the United Nations.
- *A secretariat*. Secretariats are of a permanent character. It is charged with the administration and implementation of the work of the organization. Staff members of the secretariat are considered to be independent, (geographically) representative and professional.
- *An organ for the settlement of disputes* between members of the organization and between the personnel of the organization and the organization itself.

69 Powers

- The powers of international organizations are directly or indirectly attributed to them by states:
  - Explicitly attributed powers are to be found in the constitutive treaty.
  - Implicitly attributed powers have to be deduced from explicitly formulated tasks and objectives through the *concept of implied powers*.
  - The powers of the organizations are to be distinguished from the powers of the organisations's organs.
  - In addition to powers and rights, international organizations have obligations and can therefore be held responsible for international wrongful acts.

70 Decision

Decisions of international organizations can be characterized as:

- *Binding or non-binding*. The majority of decisions of international organizations are non-binding.
- *Decisions with internal or external legal effect*. Decisions with internal legal effect are appointment decisions and budgetary decisions.
- *Procedural or non-procedural decisions*. Decisions concerning the content of meetings and agenda's are procedural. Decisions concerning a specific conflict are of a non-procedural nature.

The constitutive treaty indicates in most cases what the legal effect of decisions are and how decisions are to be taken.

71 Decision making

Decisions are taken on the basis of consensus or voting.

- *Consensus*. If consensus is required, voting is excluded. Therefore 'consensus is not the same as 'unanimity'. The 'sense of the meeting', which is out into words by the chairperson, becomes the decision if no protest is raised.
- *Voting*. If decisions are taken by voting, two elements in the voting process require special attention.
  - The weighting of votes:
    - One-state-one vote is the leading principle in most international organizations. Each member has one vote without specific qualification.
    - Weighted voting. Votes carry a certain' weight', which can for example be based on the financial contribution of the member states (IMF), or production or consumption quota (OPEC) or population (EU).
    - Veto's are negative votes. These votes are meant to block the decision.
  - The proportion of votes, which carries three modalities:
    - *Unanimity*. This voting modality requires that no votes are casted against.
    - *Simple majority*. A simple majority requires 50% of the votes plus one.

- *Qualified majority*. A qualified majority requires that the number of votes casted in favour represent a specific portion of the member states. For example 2/3 or 3/4 .

The counting of the votes. In order to determine whether a proposal has been adopted or rejected, it must also be clarified which 'votes' should be counted.

- The votes of *all members*, including those not present. In case the majority of the members is absent, decision-making by majority rule is precluded.
- The votes of the *members present*. Absent members are not taken into account. Decisions may be taken by a minority if the majority of member states is absent. Abstentions influence the decision-making.
- The votes of the *members present and voting*. Abstentions do not influence the decision making.

72 Budgetary matters

- The adoption of annual accounts and budgets of international organizations are binding decisions.
- Income can be acquired through:
  - Contributions, which are determined annually on the basis of equality or financial capacity;
  - Donations from private or public funds; and /or
  - Own means of subsistence (taxes, patents or investments).
- Expenditures can be divided in:
  - Administrative expenditures (salaries and buildings),
  - Operational or project expenditures (e.g. peacekeeping missions, humanitarian aid, education.

XII The United Nations (UN)

73 Establishment and developments

- The UN is established on October 24th 1945.
- The Headquarter is located in New York. Other important UN organs and organizations are to be found in The Hague, Geneva and Vienna.
- Since its establishment, the United Nations has:
  - Increased its membership from 51 to 191 states. The voting proportions between developed and developing countries has accordingly shifted.
  - Created additional UN related organizations.
  - Developed policies and initiated new executive tasks in a increasing variety of fields including peacekeeping, humanitarian aid, human rights and environment.

74 Objectives and principles

- Art. 1 of the UN Charter lists the following objectives:
  - Maintenance of international peace and security;
  - Development of friendly relations between states;
  - Development of international co-operation to solve social-economic, cultural and humanitarian problems;
  - To function as a center for harmonizing the actions of nations.
- Art. 2 of the UN Charter stipulates the principles which are applicable in attaining these objectives:
  - Sovereign equality;
  - Prohibition of the use of force;
  - Peaceful settlement of disputes;
  - Respect for the territorial integrity of other member states.

75 UN Organs

Within the UN three different categories of organs can be identified:

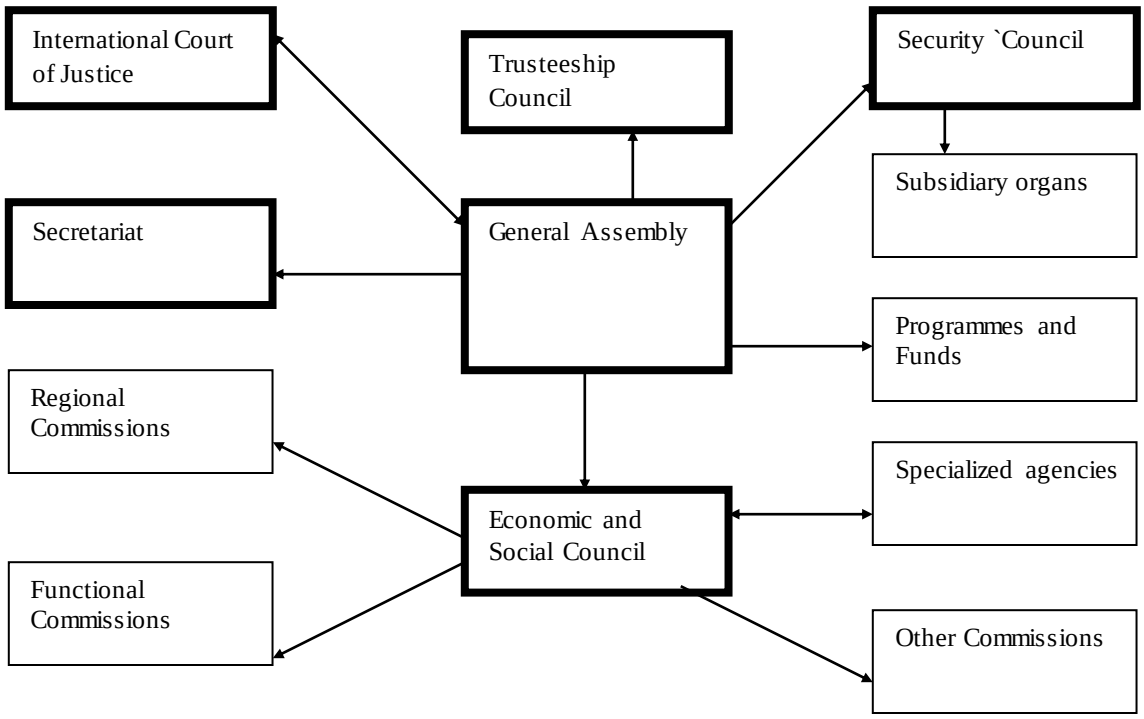
- The six principal organs:

Organ	Composition	Meetings	Location
General Assembly (UNGA)	All members	1 x a year	New York
Security Council (UNCS)	15 members (5 permanent)	Permanent	New York
Economic and Social Council (ECOSOC)	54 members	1 x a year	New York Geneva
Trusteeship Council	Permanent members UNGA	If needed	New York
Secretariat	Independent stafmembers	Permanent	New York
International Court of	15 judges	Permanent	The Hague

Justice (ICJ			

- *Subsidiary organs*
  These organs can be established by a UNGA, UNSC or ECOSOC resolution if this is necessary for the execution of the tasks of the UN. Examples are:
  - Regional Commissions like the Economic Commission for Europe.
  - Functional Commissions, like the Commissions on Narcotic Drugs, on Population or on Statistics.
  - Other Commission like the Commission on NGOs; and Subsidiary Bodies such as the Military Staff Committee.
- *Autonomous Organs*
  These organs can be established by the UNGA. They have their own budget and secretariat. Non-Un member states may participate in these organs:
  - Programs and Funds' like the United Nations Development programme (UNDP) and the United Nations Children's Fund (UNICEF).
  - Research and Trainings Institutes; and
  - Other UN entities like UNAIDS.

The UNITED NATIONS (http://www.un.org/aboutun/chartlg.html)



Some international governmental organizations are also considered to belong to the UN-family as *specialized agencies*. These are established by a separate treaty. The relationship between the UN and these organizations like the IMF and the ILO is also based on a treaty and institutionalized within ECOSOC.

76 Powers and Functions of the principle organs of the United Nations

- The General Assembly (articles 10 -17 UN Charter):
  - May discus all questions relevant to the UN.
  - Must take the powers of the Security Council with respect to the maintenance of international peace and security into consideration.
  - Does not take any binding decisions except for budgetary decisions and some decision with internal legal effect. Resolutions adopted by the general Assembly are formally merely declarations and recommendations.
- The Security Council (articles 23 – 54 UN Charter) is responsible for the maintenance of international peace and security (art. 24). It may determine that international peace3 and security have been breached or threatened and restore peace and security through military and non-military enforcement actions (articles 39, 41 and 42 UN Charter).
- The Social and Economic Council (articles 61 – 74 UN Charter) can:
  - Initiate studies and reports concerning economic, social-cultural and educational matters.
  - Adopt recommendations in the filed of human rights, and
  - May prepare draft treaties.
- The Trusteeship Council is (co) responsible for administrating of UN trust territories. Due to the diminished number of trust territories this organ has a limited function nowadays.
- The International Court of Justice (articles 92 – 96 UN Charter is the principal judicial organ of the UN.
  - It settles disputes between states which have accepted the Court's jurisdiction, and
  - It provides Advisory opinions on legal questions upon request of UN organs.
- The secretariat (articles 97 – 101 UN Charter):
  - Supports the other Principal organs,
  - Is headed by the UN secretary general, who has the authority to bring matters concerning international peace and security to the attention of the UN Security Council.

77 Voting procedures in the UN

The UN organs vote on the principle of one state one vote. The proportion of voted is determined by the nature of the decision.

Important matters UNGA	1/3 of members present	Decisions ECOSOC	Majority of members present
Ordinary and procedural matters UNGA	Majority of members present	Decisions trusteeship council	Majority of members present
Procedural matters UNSC	9 out of 15 votes in favour	ICJ	Majority of judges present
Non-procedural matters	9 out of 15 votes in favour including the permanent		

	members		

XIII International Human Rights and Duties

78 Recognition and development

- International human rights and international criminal responsibility of individuals has been accepted after World War II.
- Most contemporary human rights are developed on the basis of the 1948 Universal Declaration of Human Rights. This declaration is a non-binding document. Today's Human rights regime includes a great number of regional and international treaties, national and international jurisprudence and a variety of declarations and resolutions.
- The duties of individuals are codified in the Statute of the International Criminal Court and The Hague and Geneva conventions on humanitarian warfare. The development of individual criminal responsibility stopped after the Nuremberg and Tokyo war tribunals until the creation of the Yugoslavia Tribunal, the Rwanda Tribunal and the International Criminal Court.

79 Categories of Human Rights

Human rights can be classified as:

- *Civil and political rights* (classical freedom rights). Characteristic for this set of rights are:
  - The focus on the protection of individuals against the state. Political freedom of citizens and state non-interference are central principles;
  - States have aan obligation to achieve a specific result; and
  - The connection between these rights and liberal philosophy.

Examples: The freedom of religion, speech, association.

- *Social- economic and cultural rights*. Characteristics are:
  - The Focus on both the social and economic well being of the citizen as well as their cultural identity and freedom;
  - The state has an obligation to perform to the best of one's abbility. States have to actively promote and secure these rights actively. States do not have to secure a specific result; and
  - The connection between these rights and the social-economic philosophy of Marxism and developing countries.

Examples: Right to labor, education, food.

- *Collective rights*. Characteristics are:
  - The focus on the protection of individual transcending (public) interests;
  - Recognition of the existence of minorities and indigenous peoples; and
  - The abstract and political nature of these rights

Examples: the right to self-determination and healthy environment.

Due to historical and political reasons, the civil and political rights, and the social-economic and cultural rights are codified in different sets of treaties. In specific issue oriented human rights treaties like the treaties concerning the rights of woman or the rights of the child, both kinds of rights co-exists in one instrument.

80 Human rights instruments

Human rights are to be found in various binding and non-binding international instruments:

- The Universal Declaration on Human Rights (UDHR) contains a compilation of political, social, economic and cultural rights. The Declaration itself is not binding. However, most of the rights stipulated in the Declaration are binding because they are codified in treaties or accepted as being customary international law.
- The UN Conventions concerning:
  - Civil and political rights;
  - Economic, social and cultural rights;
  - The rights of the child;
  - The elimination of all forms of racial discrimination;
  - The elimination of discrimination against woman;
  - The prohibition of torture and other cruel, inhuman or degrading treatment or punishment.
- Special treaties such as:
  - The UNESCO Convention against discrimination in education, or
  - The ILO conventions for the protection of employees.
- Regional treaties like:
  - The European Convention for the protection of Human Rights and Fundamental Freedoms;
  - The European Social Charter; and
  - The American Convention on Human Rights.

81 Implementation and enforcement mechanisms in human rights treaties

Each of the above mentioned treaties contains instruments and procedures in order to secure the rights provided in the treaties. Four different implementation mechanisms can be distinguished.

- *The individual complaint procedure*. This procedure provides individuals with a course of proceedings without state intervention. Individuals can file cases with international human rights committees and court in their own behalf.
- *The State complaint procedure*. This procedure authorizes states to file complaints against other states on the basis of alleged violations of human rights, which are codified in the treaty in question. This possibility is not used extensively.
- *State reporting*. Under most treaties the parties are obliged to report on the implementation and transformation of the rights protect in the treaty in their national legal system. These reports can be checked against information from other sources (NGOs for example).

- *Investigation*. Some human rights committees have the authority to conduct investigations on assumed violations of human rights, or situations or developments in specific countries or concerning a specific right.

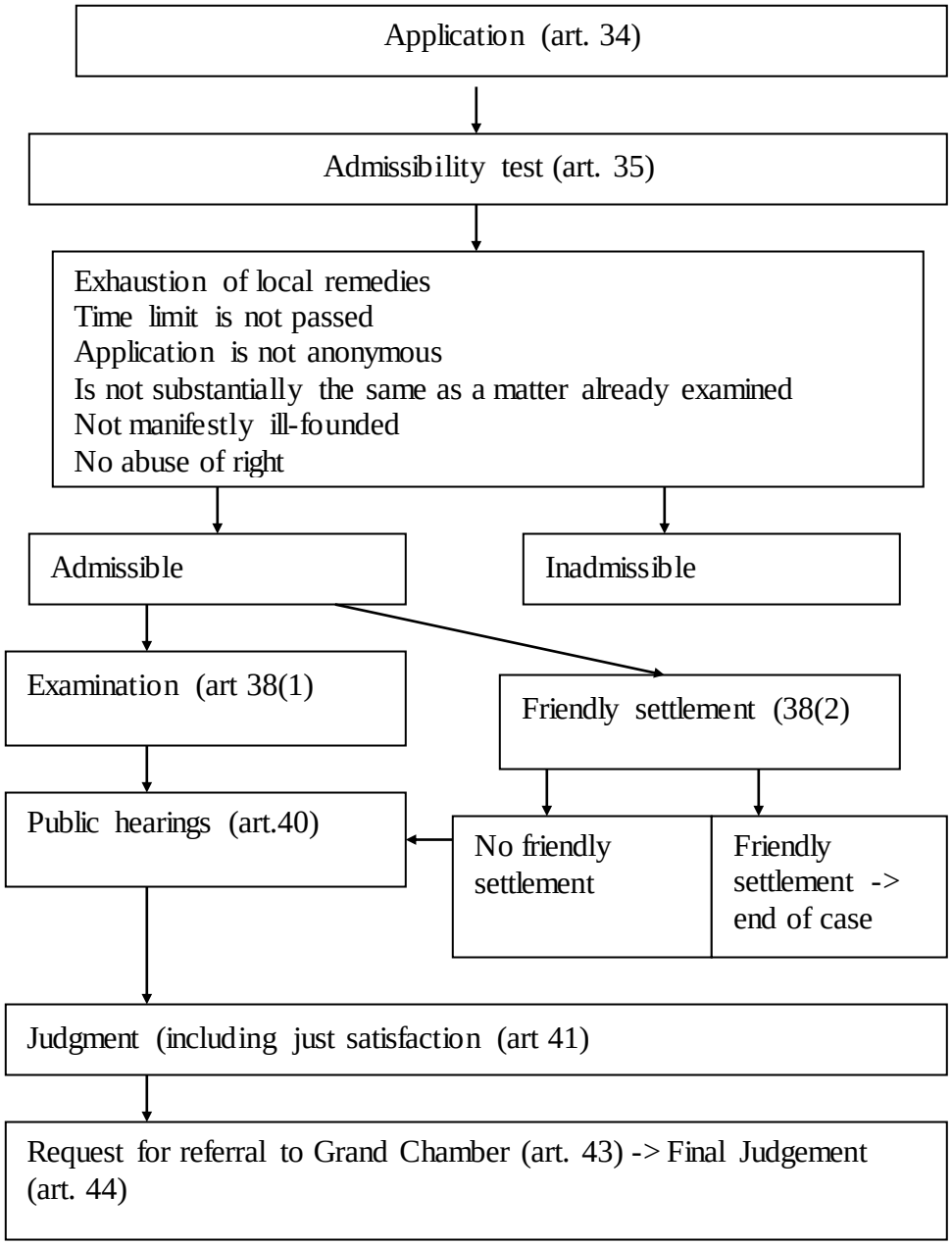
Treaty	Individual complaint	State Complaint	State reporting	Investigation
Civil/political rights	Optional	Optional	Yes	
Socio-economic, cultural rights	Optional	Optional	Yes	
Women right	Optional	Optional	No	
Against torture	Optional	Yes	Yes	Yes, unless
Eur. Civil and political right	Yes	Yes	Upon request of S-G of council of Europe	
European Social Charter	Optional	Optional	Yes	

82 Supervisory organs

Supervision is an additional instrument to secure and promote compliance with human rights. Important supervisory mechanisms are:

- *The UN Commission for Human Rights*. The Commission has its won authority and actors upon its own initiative. It appoints rapporteurs and working-groups in order to specifically investigate problematic themes and countries.
- *The United Nations High Commissioner for Human Rights*. The High Commissioner has a predominantly signaling and co-ordinatory function. She facilitates other human rights initiatives.
- *The Organizations for Security and Co-operation in Europe (OSCE)* provides for an investigation mechanism. The organization is authorized to send an inquiry commission to states to investigated assumed violations of human rights.
- *The OSCE High Commissioner for National Minorities*. The High Commissioner has the Authority to initiate activities in the field of minority protection on the OSCE member states.

83 The Individual complaint procedure under the European Convention on Human Rights and Fundamental Freedoms.



84 Criminal Responsibility of Individuals

Individuals can be held responsible under international criminal law for:

- *Piracy* (art. 101 UNLOS);
- *Slave trade*;
- *Genocide*, i.e. acts with the intention to destroy a group on religious, national, racial or ethnical grounds (art. 6 ICC);
- *Crimes against humanity*, i.e. intentional action against civil population (art 7 ICC);
- *War crimes* are violations of the Geneva Conventions and international humanitarian law (art. 8 ICC);
- *Torture* (art 5 Anti Torture convention).

85 prosecution and punishment of international crimes

- If international crimes are part of the domestic law, national court may exercise jurisdiction on the basis of the Universality principle, no matter (1) who committed these crimes and (2) where these crimes were committed.

Example: The Pinochet case (UK). A Spanish request for the extradition of the former Chilean dictator Pinochet, was accepted by the highest court in the UK, because the anti torture treaty had been transformed in to British law in 1988.

- After World War II five different international criminal tribunals haven been established.
  - The Nuremberg and Tokyo Tribunals for the prosecution and punishment of German and Japanese political and military leaders. These Tribunals have been created by the winners of WW II.
  - The international tribunal for former-Yugoslavia and Rwanda are established on the basis of UN SC resolutions.
  - The International Criminal Court has been established on the basis of the Rome Treaty. It is the only international criminal tribunal with a permanent character.