Introduction to International Law

- Public International Law is rapidly changing from a set of rules governing how sovereign (independent) states interact with each other, to a much broader network of global regulations and protections. Public International Law connects us all, wherever we live. It is closely interconnected with world politics and world history.
- While Public International Law still includes inter-state conduct, and while these more 'classical' aspects of International Law are important to understand, disputes and contentious issues in International Law increasing involve matters of human rights which are about the needs and rights of individuals and groups of individuals, rather than about states.
- In 2002 the International Court of Justice [ICJ] considered a complaint by the Democratic Republic of the Congo [DRC], against Belgium. Belgium had issued an international Arrest Warrant naming the Foreign Minister of DRC for crimes against humanity – inciting genocide.
- In other words international human rights concerns – concerns for the safety of DRC nationals – caused Belgium (many miles away) to issue the Arrest Warrant. If Belgium had been able to arrest the Minister (for example if he had taken a vacation in Brussels), then Belgium would have put him on trial.
- What would you expect – do you think that the Foreign Minister (or eg the Head of State) of one sovereign country should be subject to criminal prosecution in a foreign country? Is this unacceptable interference with 'sovereignty'? Or is it the proper implementation of the 'conscience' of the world community?
- People who have stepped down from senior office have been surprised to find that whatever protections they may previously have had, may now have evaporated. Ex-President of Chile Augusto Pinochet Ugarte visited London in 1998 for medical treatment among other reasons, but found himself the subject of an extradition application from Spain and placed under arrest.
- Ex-President of Liberia Charles Taylor was put on trial at the International Criminal Court [ICC] in The Hague (technically the trial was part of the Sierra Leone Special Court process, using ICC premises for reasons of security). Slobodan Milosevic died during his international criminal trial, also in The Hague.
- The ICJ also considers pressing matters of international legal concern that may not be strictly speaking a dispute between two states as in *DRC v Congo*. In an Advisory Opinion of 2004, the Court responded to a United Nations General Assembly request to consider the legality or otherwise of a 'Wall' being constructed by the government of Israel in the Occupied Palestinian Territory (territory occupied by Israel after regional conflict in the 1960s).
- As well as raising various political issues, which the Court did not attempt to comment on, the Wall raises human rights issues of various kinds given its impact on the Palestinian inhabitants of the Occupied Territory. Self-determination is recognised for Palestine as it is for Israel, yet the Wall seems to affect the possibility of Palestinian self-determination.
- A comment on language: course materials are in English (in fact the ICJ materials are published in French as well as in English, but not in any other languages. If you are fluent in French, check the ICJ website for the French language versions which are of equal status). Your assessment will be in English. If English is not your first (native) language, it may be your second or third or 'more.'
- There is no good reason for this world dominance of the English language other than historical chance. World history has included over at least 500 years the invasion by Europeans of the rest of the globe, imposing their languages and ways (including legal systems). The reason for the interest of Belgium in the DRC derives from its colonial history – the DRC is the former Belgian Congo (Joseph Conrad's *Heart of Darkness*). Both French and Spanish have been, and in many ways remain, world languages.
- The British, Vietnam and Cambodia by the French, Indonesia by the Dutch and the Portuguese invaded India. (China, perhaps for a combination of reasons, resisted European domination more successfully.) Africa was invaded by all the major European powers, its resources literally carved up between them. And when decolonisation occurred, mainly in the post-war decades, the borders between the newly independent African nations followed the old boundaries between (for

example) German South-West Africa (now Namibia) and (Dutch) South Africa; between the two 'Congo's' (former French and former Belgian); and so on.

- International Law is by nature conservative, (almost) always favouring the 'status quo' ... something dramatically exemplified by the Permanent Membership of the UN Security Council. (This permanent elite status for just five world states surely has to be changed before too long). Yet at its best it offers perspectives at the truly global level. It serves the interests and the spirit of internationalism, which have inspired people of goodwill and courage over the centuries to look beyond their national borders with human concern rather than with greed or fear.
- For around 400 years or so 'International Law' [IL] has been *almost* entirely about the interrelations between sovereign states. That is to say, it has been predominantly concerned with the ways that sovereign states have regulated their conduct towards each other over such issues as borders and resources; or the threat or use of force; or what the national of one state has done in the territory of another.
- The term **'sovereign state'** refers broadly speaking to a state, which has some independence and well-defined territory and population. Usually, states have a recognised representative whether that is a monarch, a president or other head of state, or an executive group, able to enter into agreements with others of similar status. Sometimes a state will be strongly identified with a particular ethnic group; often not. Many ethnic groups, or other collections of people with a strong-shared identity, such as the Kurds, live in geographical areas that cross the borders of states.
- It is from this historical basis, whereby international law regulated the conduct and interrelations between different sovereign states, that modern international law was born. One important aspect is that sovereign states were fairly successful in asserting that what went on within their own borders was not the responsibility or concern of any other state; rather that it would be governed domestically. Thus 'internal' (or what international law tends to call 'municipal') and 'external' matters were kept very separate and the separation is reflected in the legal systems of the states.
- Yet there has been for many centuries an acceptance that some aspects of law go beyond borders. The general idea of a 'law of nations' which goes back at least to the times of the Roman Empire, predates the idea that states could or should be isolated, independent entities with absolute freedom to govern themselves. There is therefore an inbuilt tension between 'self-determination' and the idea of an international community. Some of these tensions will be explored later in the unit.
- It is noted above that International Law (which we will often indicate by 'IL' in these materials) has been *almost* entirely about the interrelations between sovereign states. International law still largely exists upon the premise of the need to regulate the conduct between sovereign states. It has only been in the last 50 years or so that some internal affairs of a state have been recognised as a legitimate concern of other nations rather than purely a matter, which is of domestic concern.
- Thus the traditional mind-set and the need for international laws purely to regulate the relation between sovereign states is slowly changing as there is an increasing acceptance that some matters which occur within the borders of a sovereign state may also be of international concern. International agreements over matters of human rights are an illustration of this.
- Another illustration is **'humanitarian law'** which refers to international legal agreements relating to armed conflict, such as the Geneva Conventions. These humanitarian protections apply in some ways to internal conflicts (civil wars and so on), not just to wars between states. Despite this, international law still retains much of its focus on the ways that independent states cooperate and compete with each other – the regulation of conduct between different sovereign states.
- Another emerging area of international law is the regulation of international crimes and other issues of cross border significance, which relate to the conduct of individuals. So one way in which the 'mind-set' of IL is changing is that it is now seen as necessary to look at certain behaviour of individuals (e.g. criminal behaviour such as terrorism) and to put into place regulations or expectations between states in order to try to deal with such behaviour.
- The International Criminal Tribunal for the Former Yugoslavia [ICTY] and the International Criminal Tribunal for Rwanda [ICTR] are designed to deal with the most serious perpetrators of international crimes arising in specific conflict circumstances. They can be thought of as developments or descendants of the military tribunals set up after World War II, by the victors of that conflict, in Nuremberg and in Tokyo.

- While they differ significantly from 'mainstream' IL, in focusing on the conduct of individuals rather than of states, these international tribunals still reflect a concern for world peace. The ICTY and the ICTR are specifically intended to contribute to peace in their respective regions, following periods of conflict and the violation of human rights on a massive scale.
- The idea of maintaining state sovereignty as the key to world peace, in addition to having an international body of law, is the basis upon which the United Nations [UN] was set up. The UN is based upon the idea that each sovereign state is separate and each has one vote within the UN General Assembly. What goes on within the state to a large extent is still for the leadership of the state to decide. This 'freedom' is not absolute however.

Individuals as subjects of international law

- Individuals have some rights under international law, not only within their own domestic legal system – that is to say rights that can be defended at an international level. This is a significant step beyond the boundaries of sovereign state law and one of the major changes, which has occurred in relation to international law within the last 50 years. It has been seen to be necessary to protect individuals from some of the activities that take place within sovereign states.
- In a related development, while it has become increasingly important to protect individuals under international law, there has also been a push towards ensuring accountability of individuals committing various criminal activities. Thus internationally as noted above there has been an acceptance that international law should deal with matters such as the criminal prosecution of war crimes and crimes against humanity. The recent history of this process begins with the military tribunals in Nuremberg and in Tokyo after the end of World War II, and the UN recently has spearheaded more.
- The International Criminal Tribunal for the Former Yugoslavia [ICTY], the International Criminal Tribunal for Rwanda [ICTR] and the International Criminal Court [ICC] are all set up with an international criminal jurisdiction, in other words with the task of putting on trial individual people accused of very major crimes such as crimes against humanity, war crimes and so on.
- Both the ICTY and the ICTR were set up by direct United Nations Security Council initiative. Both are intended to complete their work in the foreseeable future.
- The International Criminal Court [ICC] is more open-ended in that it will continue to function so long as international criminal activities of sufficient seriousness, take place around the world. Reflecting this on-going status, as compared to an *ad hoc* initiative to respond to a particular set of events as in the ICTY and ICTR, the ICC is based on an international agreement (a treaty) – the Treaty of Rome. The UN sponsored and strongly supported the development of the agreement that constituted the ICC, but it did not set up the ICC in a direct manner as with the ICTs.
- In both the protection of the individual and the enforcement of liability for those who behave in a way that is abhorrent to the international community, the individual has become an important consideration in the shaping of international law.

Regional legal regulation

- In addition to the role of the individual becoming increasingly important to international law, the role of regional legal regulation has also become increasingly important. The term regional regulation refers to the way in which sovereign states have allowed control of some state functions to be taken over by some regional system.
- An excellent example of how regional legal regulation has been important for international law may be seen with the European Union where there is a degree of agreement over legal regulation in a region, between the different member states of that region.
- Some European Courts exercise jurisdiction over a wide range of states. For example the European Court of Human Rights exercises jurisdiction over states, which are members of the Council of Europe. This set of European states overlaps with membership of the European Union but is not quite the same (in many ways it is broader).
- This illustrates the ways in which regional legal regulation is not a simple matter of 'nesting' of one set of legal systems into a higher level system, but is more complex.

Theories of international law

- There are two main alternative theoretical traditions within international law.
- These are the:
    1. Natural law perspective
    2. Positivist approach.
- There are many varieties and combinations of these two broad approaches that are also important, and there are also recent theoretical approaches, which try to go beyond both of these traditions. But these remain the key organising frameworks for conceptual work on international law, and are certainly important to understand as such.

1. Natural Law Perspective

- This is based upon broader values and assumptions from which in turn rules concerning international conduct are derived. The clearest example of a legal system, which is based upon a natural law perspective, is any legal system, which derives from a religious basis. The reason that a legal system, which derives from a religious basis, would be a natural law system is that the legal system would be derived from the values of the particular religion and thus the values, which are cherished under the particular religion, would have the force of law.
- It is perhaps less common for legal systems in modern times to be based upon religious systems in this way, than in past centuries. But Islamic legal systems whereby the legal system is intended to embody the values of Islam would be an important contemporary example.
- The natural law perspective focuses on norms (ie rules about what should happen). Contemporary examples of norms within IL include the so-called 'peremptory norms' prohibiting slavery and genocide – norms that might be said to have an ethical or moral basis (what is right and what is wrong). Such norms (also known by the Latin term *jus cogens*) are thought of as non-negotiable either by states or by individuals.

2. Positivist Perspective

- The most important alternative perspective is the positivist perspective, which focuses upon actualities and observable facts, on conduct and written agreements as the basis of legitimacy by which a legal system can operate. Positivist approaches focus for example on situations where two or more states have entered into a treaty. (This is consistent with a legal positivist approach to municipal law, which similarly focuses on Acts of Parliament and on judicial decisions, rather than on values and norms).
- The focus is on 'consent' that is to say on the voluntary agreements and obligations which sovereign states enter into. The positivist approach to international law is sceptical about the validity of customary forms of international law, because these 'tradition'-based norms seem not to have a concrete basis.

Human rights law

- Human rights law illustrates both the natural law perspective and the positivist perspective. The natural law perspective is that human rights law is premised upon the basis that people worldwide have the right to be protected especially when they have certain vulnerabilities. The values which need protection are based upon the natural law perspective whereby it is claimed for example that arbitrary imprisonment, torture, racial discrimination and people smuggling are universal vulnerabilities from which any human should be protected.
- Although human rights law may seem to derive from natural law it also illustrates the positivist perspective. The basis upon which the positivist perspective sees human rights is that sovereign states have chosen to bind themselves such that their conduct will be regulated in such a way that human rights abuses will not occur. In other words the positivist perspective recognises and focuses on the international agreements ('instruments'), which set out the protections, rather than on underlying norms.

Websites

http://www.icj-cij.org

- As you can see from the website, the term 'icj-cij' refers to the name of the Court both in English and in French. Decisions are provided in both these languages.
- Documentation from other international courts and tribunals is also available from official websites. For example the International Criminal Tribunal for the Former Yugoslavia [ICTY] in The Hague:

http://www.icty.org/

- And the International Criminal Court [ICC]:

http://www.icc-cpi.int

- Also highly recommended (but needs downloaded software to access the sound):

http://www.un.org/law/avl/

- As other very useful material on the UN, you will find under International Law/Legal Theory (headings) a number of very useful 'lectures' by recognised authorities.