SESSION 5

HUMAN INTERNATIONAL LAW

INTERNATIONAL LAW INTRODUCTION

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A vast network of international law and dozens of international organizations make globalization possible. Treaties and other types of agreements among countries set rules for international trade and finance, such as the GATT; foster cooperation on protecting the environment, such as the Kyoto Protocol; and establish basic human rights, such as the International Covenant on Civil and Political Rights. Meanwhile, among many international organizations, the United Nations facilitates international diplomacy; the World Health Organization coordinates international public health and protection, and the International Labor Organization monitors and fosters workers' rights around the world.

The scope and authority of international law have thus expanded dramatically during the era of globalization. Historically, international law addressed only relations between states in certain limited areas (such as war and diplomacy) and was dependent on the sovereignty and territorial boundaries of distinct countries (generally referred to as "states").

But globalization has changed international law in numerous ways. For example, as globalization has accelerated, international law has become a vehicle for states to cooperate regarding new areas of international relations (such as the environment and human rights), many of them requiring states to rethink the previous notions of the inviolable sovereign state. The continued growth of international law is even more remarkable in this sense, since states, having undoubtedly weighed the costs and benefits of the loss of this valuable sovereignty, have still chosen to continue the growth of international law.

Because of the need for enhanced international (or as some call it, "transnational") cooperation, globalization has therefore given new meanings to classic issues. Questions of the authority of a country within its own borders—that is, its state sovereignty—the role of the individual in the international community of nation-states, and the authority of international organizations, have all evolved in light of the forces of globalization.

The following Issue in Depth describes the sources of international law and the subjects it covers; the international organizations that implement international law; and some of the controversial aspects related to international law and organizations as well as their relationships to state sovereignty.

What Is International Law

Basically defined, international law is simply the set of rules that countries follow in dealing with each other. There are three distinct legal processes that can be indentified in International Law that include Public International Law(The relationship between sovereign states and international entities such as International Criminal Court),Private International Law (Addressing

questions of jurisdiction in conflict), and Supranational Law (The set of collective laws that sovereign states voluntarily yield

to). But this basic definition must be supplemented with three more-complex explanations—is international law really law, the way the laws of the United States, enforced by courts and police, are? Where do we find the rules of international law? Are they written down somewhere? Finally, how is international law enforced, if there is no world government?

Is International Law Really "Law"?

There are several ways to think about law. In the domestic legal system, we think of law as the rules that the government issues to control the lives of its citizens. Those rules are generally created by the legislature, interpreted by the judiciary, and enforced by the executive branch, using the police, if necessary, to force citizens to obey. What is law for the international community if there is no one legislature, judiciary, executive branch, or police force?

Imagine a school playground with several children at play. The "law" is the set of playground rules that the teacher tells her students. For example, she might tell them, "Don't hit your classmate." Two different reasons can explain why the children will follow this rule. On the one hand, they may follow the rule only because they are afraid of being punished by the teacher. On the other hand, the students may believe that it is a bad thing to hit their classmates. Since it is a bad thing to do, they will follow the teacher's rule.

In the first case, they will obey the rule only if the teacher is there and ready to punish them. In the second case, students will obey the rule even if the teacher is not there. In fact, even if the teacher is not present, the children may obey the rule because they have become used to not hitting each other and have therefore enjoyed playing with each other.

Just as certain common understandings between children may make it easier for them to play, collective agreement on certain rules can often serve the interests of all the members of a community. Just as on a playground without a teacher, in the international setting there is no central authority. For the most part, however, states will follow the rules they have agreed to follow because it makes these interactions easier for all parties involved.

Thus, the fact that there is no overall authority to force compliance with the rules does not necessarily mean that there is no law. Law still exists in this setting, though it may be practiced and enforced in different ways. International law can therefore be called "real law," but with different characteristics from the law practiced in domestic settings, where there is a legislature, judiciary, executive, and police force.

What Are the Sources of International Law?

Since there is no world government, there is no world Congress or parliament to make international law the way domestic legislatures create laws for one country. As such, there can be significant difficulty in establishing exactly what international law is. Various sources, however—principally treaties between states—are considered authoritative statements of international law. Treaties are the strongest and most binding type because they represent consensual agreements between the countries who sign them. At the same time, as stated in the statute of the International Court of Justice (ICJ), rules of international law can be found in customary state practice, general principles of law common to many countries, domestic judicial decisions, and the legal scholarship.

Treaties. Treaties are similar to contracts between countries; promises between States are exchanged, finalized in writing, and signed. States may debate the interpretation or implementation of a treaty, but the written provisions of a treaty are binding. Treaties can address any number of fields, such as trade relations, such as the North American Free Trade Agreement, or control of nuclear weapons, such as the Nuclear Non-Proliferation Treaty. They can be either bilateral (between two countries) or multilateral (between many countries). They can have their own rules for enforcement, such as arbitration, or refer enforcement concerns to another agency, such as the International Court of Justice. The rules concerning how to decide disputes relating to treaties are

even found in a treaty themselves—the Vienna Convention on the Law of Treaties (United Nations, 1969).

Custom. Customary international law (CIL) is more difficult to ascertain than the provisions of a written treaty. CIL is created by the actual actions of states (called "state practice") when they demonstrate that those states believe that acting otherwise would be illegal. Even if the rule of CIL is not written down, it still binds states, requiring them to follow it (Dinstein, 2004).

For example, for thousands of years, countries have given protection to ambassadors. As far back as ancient Greece and Rome, ambassadors from another country were not harmed while on their diplomatic missions, even if they represented a country at war with the country they were located in. Throughout history, many countries have publicly stated that they believe that ambassadors should be given this protection. Therefore, today, if a country harmed an ambassador it would be violating customary international law.

Similarly, throughout modern history, states have acknowledged through their actions and their statements that intentionally killing civilians during wartime is illegal in international law. Determining CIL is difficult, however, because, unlike a treaty, it is not written down. Some rules are so widely practiced and acknowledged by many states to be law, that there is little doubt that CIL exists regarding them; but other rules are not as universally recognized and disputes exists about whether they are truly CIL or not.

General Principles of Law. The third source of international law is based on the theory of "natural law," which argues that laws are a reflection of the instinctual belief that some acts are right while other acts are wrong. "The general principles of law recognized by civilized nations" are certain legal beliefs and practices that are common to all developed legal systems (United Nations, 1945).

For instance, most legal systems value "good faith," that is, the concept that everyone intends to comply with agreements they make. Courts in many countries will examine whether the parties to a case acted in good faith, and take this issue into consideration when deciding a matter. The very fact that many different countries take good faith into consideration in their domestic judicial systems indicates that "good faith" may be considered a standard of international law. General principles are most useful as sources of law when no treaty or CIL has conclusively addressed an issue.

Judicial Decisions and Legal Scholarship. The last two sources of international law are considered "subsidiary means for the determination of rules of law." While these sources are not by themselves international law, when coupled with evidence of international custom or general principles of law, they may help to prove the existence of a particular rule of international law.

Especially influential are judicial decisions, both of the International Court of Justice (ICJ) and of national courts. The ICJ, as the principal legal body of the United Nations, is considered an authoritative expounder of law, and when the national courts of many countries begin accepting a certain principle as legal justification, this may signal a developing acceptance of that principle on a wide basis such that it may be considered part of international law.

Legal scholarship, on the other hand, is not really authoritative in itself, but may describe rules of law that are widely followed around the world. Thus, articles and books by law professors can be consulted to find out what international law is.

How Is International Law Enforced?

A treaty may have incorporated into its own text enforcement provisions, such as arbitration of disputes or referral to the ICJ. However, some treaties may not expressly include such enforcement mechanisms. Especially in situations where the international law in question is not explicitly written out in a treaty, one can question how this unwritten law can be enforced. In an international system where there is no overarching authoritative enforcer, punishment for non-compliance functions differently. States are more likely to fear tactics used by other states, such as reciprocity, collective action, and shaming.

Reciprocity. Reciprocity is a type of enforcement by which states are assured that if they offend another state, the other state will respond by returning the same behavior. Guarantees of reciprocal reactions encourage states to think twice about which of their actions they would like imposed upon them. For example, during a war, one state will refrain from killing the prisoners of another state because it does not want the other state to kill its own prisoners. In a trade dispute, one state will be reluctant to impose high tariffs on another state's goods because the other state could do the same in return.

Collective Action. Through collective action, several states act together against one state to produce what is usually a punitive result. For example, Iraq's 1990

invasion of Kuwait was opposed by most states, and they organized through the United Nations to condemn it and to initiate joint military action to remove Iraq. Similarly, the United Nations imposed joint economic sanctions, such as restrictions on trade, on South Africa in the 1980s to force that country to end the practice of racial segregation known as apartheid.

Shaming. (Also known as the "name and shame" approach) Most states dislike negative publicity and will actively try to avoid it, so the threat of shaming a state with public statements regarding their offending behavior is often an effective enforcement mechanism. This method is particularly effective in the field of human rights where states, not wanting to intervene directly into the domestic affairs of another state, may use media attention to highlight violations of international law. In turn, negative public attention may serve as a catalyst to having an international organization address the issue; it may align international grassroots movements on an issue; or it may give a state the political will needed from its populace to authorize further action.A recent example of this strategic tactic was seen in May 2010, when the U.N. named the groups most persistently associated with using child soldiers in Asia, Africa, and Latin America (United Nations,

2010).

The Issue of Sovereignty

State sovereignty is the concept that states are in complete and exclusive control of all the people and property within their territory. State sovereignty also includes the idea that all states are equal as states. In other words, despite their different land masses, population sizes, or financial capabilities, all states, ranging from tiny islands of Micronesia to vast expanse of Russia, have an equal right to function as a state and make decisions about what occurs within their own borders. Since all states are equal in this sense, one state does not have the right to interfere with the internal affairs of another state.

Practically, sovereignty means that one state cannot demand that another state take any particular internal action. For example, if Canada did not approve of a Brazilian plan to turn a large section of Brazil's rainforest into an amusement park, the Canadian reaction is limited by Brazil's sovereignty. Canada may meet with the Brazilian government to try to convince them to halt the project. Canada may bring the issue before the UN to survey the world's opinion of the project. Canada may even make politically embarrassing public

complaints in the world media. However, Canada cannot simply tell Brazil to stop the rainforest project and expect Brazil to obey.

Under the concept of state sovereignty, no state has the authority to tell another state how to control its internal affairs. Sovereignty both grants and limits power: it gives states complete control over their own territory while restricting the influence that states have on one another. In this example, sovereignty gives the power to Brazil to ultimately decide what to do with its rainforest resources and limits the power of Canada to impact this decision.

Globalization is changing this view of sovereignty, however. In the case of the Brazilian rainforest, Brazil may consider a rainforest located wholly within its property an issue solely of internal concern. Canada may claim that the world community has a valid claim on all limited rainforest resources, regardless of where the rainforest is located, especially in consideration of issues like endangered species and air pollution.

Similarly, states no longer view the treatment of citizens of one state as only the exclusive concern of that state. International human rights law is based on the idea that the entire global community is responsible for the rights of every individual.

International treaties, therefore, bind states to give their own citizens rights that are agreed on at a global level. In some cases, other countries can even monitor and enforce human rights treaties against a state for the treatment of the offending state's own citizens.

What Does International Law Address

International law has developed certain areas of practice, guided by their own principles, documents, and institutions. Even though these areas of expertise can stand alone, to a certain extent, boundaries drawn in international law are arbitrary because the underlying principles of each field both inform and compete with one another.

For example, both the laws of armed conflict and human rights support each other in the belief that state official torture is condemnable. The condemnation is doubly reinforced by its affirmation in both fields. On the other hand, principles of international economic law may counteract principles in international

environmental law, as evidenced by the possible conflicts between industrial development and environmental preservation.

International issues also do not often fit neatly into a single category; the treaty on Trade-Related Aspects of Intellectual Property Rights (TRIPs), for example, combines concerns in both economic and human rights fields, with the principles of each field dictating different results. The following sections of this Issue in Depth address some of the major areas addressed by international law.

Law of Armed Conflict

The law of armed conflict (also called the "law of war") can be divided into two categories. The first concerns the legitimate reasons for starting a war, known by its Latin terminology, jus ad bellum ("Right to Wage War"). The laws during war, jus in bello ("Justice in War"), are also called international humanitarian law.

- Ius ad bellum. Article 2(4) of the UN Charter states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (United Nations, 1945). Some regard this as the prohibition of the use of force outside of UN-approved actions. On the other hand, others consider this clause only non-binding rhetoric, especially considering the history of armed conflict since the UN's birth in 1945.

The UN Charter and CIL do recognize that a state is entitled to use force without international approval when it is acting in self-defense. However, the events that trigger this right to self-defense are subject to debate. Most international lawyers agree that self-defense actions must.

Timeline

1815 The Congress of Vienna expresses international concern for human rights. Freedom of religion is proclaimed, civil and political rights discussed, and slavery condemned.

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1864 The First Geneva Convention protects the wounded in battle and gives immunity to hospital staff and the Red Cross during war.

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1919 The League of Nations is established with the aim of guaranteeing and protecting the basic rights of members of minority groups.

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1945 The United Nations is formed to build peace, protect human rights, oversee international law and to promote social progress and better standards of life.

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1948 The Universal Declaration of Human Rights (UDHR) outlines protection of rights for all people.

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1949 The Fourth Geneva Convention provides for the humane treatment and medical care of prisoners of war.

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1965 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) resolves to abolish racial discrimination and promote understanding between races.

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1966 The International Covenant on Civil and Political Rights (ICCPR) protects the individual from any misuse of government power and affirms the individual's right to participate in the political processes of their nation.

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1966 The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees access to the resources needed for an adequate livelihood, such as food, health care, clothing, shelter, education and personal safety, and ensures participation by all in the life of society, religion and culture.

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1979 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women and sets up an agenda to end it.

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1984 The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines tortures and similar activies in order to prevent their use.

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1989 The Convention of the Rights of the Child (CRC) sets out the civil, political, economic, social and cultural rights of children, defined as those under 18 year of age.

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1993 The Vienne Declaration from the Second World Conference on Human Rights reaffirms the Universal Declaration on Human Rights, emphasising that human rights are universal and indivisible and rejecting arguments that some should be optional or subordinated to cultural practices and traditions.

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1995 The Beijing Declaration of The Fourth World Conference on Women declares "Women's rights are human rights".

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1999 The Convention concerning the Prohibiton and Immediate Action for the Elimination of the Worst Forms of Child Labour is adopted by the International Labour Organisation (ILO)

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2002 The International Criminal Court (ICC) is established. It is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.

civilian any person who is not a combatant

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civilian object any object that is not a military objective

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combatant member of armed forces, member of an armed group under the orders of a party to the conflict

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military objective object which by its nature, location, purpose or use makes an effective contribution to military action and whose destruction offers a definite military advantage

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hors de combat means "out of the fight" describes combatants who have been captured, wounded, sick, shipwrecked, and no longer in a position to fight

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principle of proportionality the expected number of deaths or injuries to civilians or damage to civilian objects must not be excessive compared to the anticipated military advantage

What is public international law? Rules that govern relationships involving states and international organizations. Covers a huge field involving war, human rights, refugee law, international trade, the law of the sea, environmental issues, global communications, outer space

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What is private international law? Concerned with the class between laws from different jurisdictions and is sometimes referred to the conflict of laws.

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What is the International Court of Justice and what does it do? Part of the UN and based Hague, Netherlands

Only hear cases relating to conflicts between states

Also gives legal advice to UN bodies

Doesn't follow a precedent system

NZ is one of the 60 nations that has accepted the IJC's compulsory jurisdiction

All UN members must comply with IJC decisions that apply to them

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What is the International Criminal Court and what does it do? It was established in July 2002

Jurisdiction of the ICC includes genocide, crimes against humanity and war crimes

Put individuals on trial not their states

ICC can only act when nations won't or are unwilling to

Can only hear cases from participating nations or the SC can call upon others

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What is the United Nations? Formed in 1945 after WWII

Charge with the task preventing a WWIII

Encourages cooperation and compromise among different nations

Constitutional document establishing the UN is called the Charter of the UN

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What is the Security Council? It is an executive body made up of the 5 most powerful members of the allied forces that defeated Nazi Germany and imperial Japan

Us, Russia, China UK and France permanently sit on the SC and each has the power to veto any SC decision

These are joined by 10 other nations each of which get a 2 year temporary membership

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What does Article 24 of the charter state? The SC has primary responsibility of the maintenance of international peace and security and acts on behalf of UN members nations

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What does article 42 of the charter state? The council can order military action to maintain or restore international peace and security

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What does article 43 of the charter state? It instructs member nations to make military service available for UN use if necessary