

AN INTRODUCTION TO
INTERNATIONAL LAW
FOR AFGHANISTAN



Stanford
LawSchool

An Introduction to the

International Law for Afghanistan

First Edition
Published 2011

Afghanistan Legal Education Project (ALEP)
at Stanford Law School
<http://alep.stanford.edu>
alep@law.stanford.edu

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
<http://law.stanford.edu>



Protected by Creative Commons License (No Derivative Works)

ALEP – STANFORD LAW SCHOOL

Authors

Morgan Galland (Student Director, 2010-11)
Evan Berquist
Stephanie Gosnell Handler
Nicholas Reed
Michael Sulmeyer

Editors

Ingrid Price (Student Co-Director, 2012-13)
Julian Simcock (Student Co-Director, 2012-13)
Tres Thompson (Student Director, 2014-15)
Mansi Kothari
Catherine Baylin
Nicholas Reed

Faculty Director

Erik Jensen

Contributing Faculty Editor

Allen Weiner

Rule of Law Program Executive Director

Megan Karsh

Program Advisor

Rolando Garcia Miron

AMERICAN UNIVERSITY OF AFGHANISTAN

Contributing Editors

Wadir Wadeer Safi
Yama Keshawerz

Chair of the Department of Law

Taylor Strickling, 2012-13
Hadley Rose, 2013-14
Mehdi Hakimi, 2014-

PREFACE & ACKNOWLEDGEMENTS

To understate the obvious, Afghanistan is currently undergoing a critical transition period. The Afghan people now face the immense task of rebuilding a society and a country. This challenge, while daunting, is also an opportunity for the youth of Afghanistan to effect momentous and positive change as the future leaders of their country. To seize this opportunity, however, Afghanistan's human resources must be revitalized and replenished urgently. The decades-long conflict in Afghanistan has devastated the country's infrastructure and severely stunted the institutions that are central to educating and cultivating leaders. Consequently, the country faces a dire shortage of qualified lawyers. This shortage is felt ever more keenly during this time of transition, as the participation of skilled legal practitioners is crucial to rebuilding the Afghan republic.

In response to this need, Stanford Law School's Afghanistan Legal Education Project (ALEP) began in the fall of 2007 as a student-initiated program dedicated to helping Afghan universities train the next generation of Afghan lawyers. ALEP mandate and goals are to research, write, and publish high-quality, original legal textbooks, and to build out an equally high-quality law curriculum at the American University of Afghanistan. ALEP's broader vision is to help train the next generation of leaders who will drive Afghanistan's reconstruction and recovery.

The ALEP team would like to acknowledge those individuals and institutions who have made this project possible. ALEP's faculty advisors are Erik Jensen (Co-Director of Stanford Law School's Rule of Law Program) and Stanford Law School Dean Larry Kramer. ALEP has obtained generous support from public and private sources, including a three-year grant from INL at the U.S. Department of State. The ALEP team would also like to acknowledge the support of Deborah Zumwalt, General Counsel of Stanford University and member of American University of Afghanistan's (AUAF) Board of Trustees. ALEP is also delighted to continue its partnership with AUAF and is particularly grateful for the support of AUAF's President, Dr. Michael Smith and Dr. Bahar Jalali, Department Chair of Political Science, Humanities and Law.

Specifically for the Introduction to International Law, ALEP would like to thank Stanford Law School colleague, Allen Weiner, Senior Lecturer in Law with specialized expertise in international law. Professor Weiner provided extensive and invaluable chapter-by-chapter critical comments on an earlier draft of the manuscript. ALEP would also like to thank Dr. Wadir Wadeer Safi of the Faculty of Law and Political Science at Kabul University and Executive Director of the Independent National Legal Training Centre, for his insightful comments on the practice of international law in Afghanistan. And ALEP would like to thank Mr. Yama Keshawerz, of Al-Biruni University and a Visiting Scholar at Stanford Law School, particularly for his help on Chapter Three of this volume, which considers Afghanistan's domestic absorption of international law.

Erik Jensen, Faculty Advisor, ALEP
Palo Alto, California, June 2011

TABLE OF CONTENTS

Chapter 1: Introduction to International Law.....1

Chapter 2: The Sources of International Law.....11

Chapter 3: The Nexus Between International Law and Afghanistan’s Domestic Law.....38

Chapter 4: International Human Rights Law.....70

Chapter 5: The Peaceful Resolution of International Legal Disputes.....90

Chapter 6: Use of Force.....116

Chapter 7: International Criminal Law.....170

Chapter 8: An Introduction to International Trade and Investment Law.....201

Glossary.....227

CHAPTER 1: INTRODUCTION TO INTERNATIONAL LAW

I. INTRODUCTION

From cross-border trade, to membership in international organizations, to peace treaties, and to war, Afghanistan has benefited from and been regulated by international law. As an importer and exporter of goods, Afghanistan has signed commercial treaties and followed international norms that regulate the trade of goods across its borders and enable foreign investment. As a member of the General Assembly of the United Nations, Afghanistan has a voice and has voted on key measures that affect countries around the world. Through the creation of the state of Afghanistan, Afghanistan has benefited from peace-time treaties and norms that prohibit other countries from taking its land. And, Afghanistan has known more than its share of conflict and war. Yet even during these wars, international law has played an important role: it was used to validate the presence of international security forces on Afghan land, and it could lead to sanctions and trials for those who violated the Laws of War. As you can deduce from this list, international law is a vast field that touches many different aspects of our lives. This book will define and introduce international law by examining some of the most important fields of international law and then discussing their particular role and application in Afghanistan.

To place this topic in a greater legal context, other books by the Afghanistan Legal Education Project have discussed matters of domestic law: our criminal and commercial law textbooks address legal rules and procedures meant to govern the behavior of individuals *within* Afghanistan. You can think of our Introduction to Law book as really an Introduction to Domestic Law. Now, for the first time in the series, we explore interactions and transactions that occur between Afghanistan and the outside world. It is here that you can begin to learn about *international* criminal law or *international* trade law. If you can think of the various substantive fields of law, chances are there are both domestic and international elements to almost all of them.

Now that we have distinguished “international” law from much of the “domestic” law you have already studied, we can begin to discuss the core distinction within international law: that of *public* international law and of *private* international law. This book is primarily concerned with public international law, which addresses interactions and relations between nations. Nations like Afghanistan (or the United States for that matter) are the central actors of public international law. When nations sign agreements committing themselves to undertake certain responsibilities, such as an agreement to limit the proliferation of nuclear weapons, we can consider this a prime example of public international law.

There is, however, another side to international law: *private* international law. Much of the work international lawyers engage in is on behalf of private clients that have needs, issues or claims with international implications. For example, an attorney may represent an Afghanistan corporation that sells goods to buyers in Pakistan, Tajikistan and Uzbekistan. What kinds of contracts will the client enter into with these buyers in different countries? A lawyer in a private international transaction rarely negotiates directly with the governments of Pakistan, Tajikistan, or Uzbekistan—merely with other private actors, like corporations, manufacturers, shops, and resellers. Indeed, one issue that recurs often in private international law is the determination of

which country's laws apply in a dispute between parties of two different nations. If a company ships its product to Pakistan but the purchaser does not pay the entire agreed-to sum, the company will surely want to utilize any and all legal tools available to compel the Pakistani purchaser to make good on his commitment. But can the company sue under the laws of Afghanistan, Pakistan, or is the issue governed by an international treaty that all the countries have previously consented to, and the company, as a private actor, must follow? Private international law thus depends on the nature of each specific contract and the corresponding choice of law provisions. Each case will vary according to the relevant domestic law, and with the potential for some application of applicable international legal principles. In this book, however, we've chosen to focus on public international law because it is (a) a subject usually, but not always, studied before private international law, and (b) the scope of public and private international law is so broad that each deserves its own volume.

Thus, returning to the primary focus of this book, in the realm of *public* international law, nation-states are most often the central actor. The state, most likely represented by a lawyer or group of lawyers working for some branch or ministry of the government, can file complaints, and defend itself against complaints, much like private actors in a domestic legal case. As we will discuss, claims can be heard in a large variety of fora, including international courts, domestic courts, in front of arbitration bodies and international institutions. Again, similar to a domestic legal case, these different international courts, or court-like institutions, have rules, procedures and formalities that the lawyers and states must follow. So, when we discuss international law, it is always helpful to remember that in many ways certain elements are very much similar to domestic law. That said there are many differences too. The most important difference is that the parties themselves are, more often than not, sovereign nations.

Thus, before beginning the study of substantive international law, the topic for the remainder of this book, this chapter concludes with a discussion of some of the most important concepts that together provide a foundation for the analysis of international law. After further explaining the notion of sovereignty and its import in international law, we then discuss the origins of modern international law to place it within a historical context. Next, we outline some of the dominant analytical theories of international law. Finally we present a roadmap, a chapter-by-chapter summary, of the major fields of international law addressed throughout this book.

A. Sovereignty and Voluntary Compliance

That nations are sovereign is a crucial premise upon which much of international law and international relations are based. Sovereignty implies control of what occurs within a state's borders. No other state can compel or force another state to comply with its wishes or preferences: states negotiate, trade, and engage in other interactions based on the premise that each pursues its own interests. That Afghanistan is a sovereign entity allows it to be treated equally alongside every other sovereign state in the world. If we equate sovereignty with nationhood, and if we accept that the general barometer for nationhood is membership in the United Nations, then presently there are 192 sovereign nations in the world.

If we accept that all nations like Afghanistan are sovereign, then a nation's participation in international relations, agreements, and efforts are *voluntary*. On its own accord, Afghanistan joined the United Nations on 19 November 1946. In so doing, it voluntarily assumed the legal obligation to abide by the Charter of the United Nations.

One of the core principles of public international law, then, is that the agreements entered into by sovereign nations are voluntary. This proposition prompts us to ask: if the regime of public international law is voluntary, why would a nation voluntarily cede a portion of its sovereign power by agreeing to abide by the responsibilities and obligations of an international agreement? Within the answer to this question lies one of the most important notions in international law: by ceding sovereignty, by agreeing to international treaties or joining international organizations, countries demonstrate a preference that the benefits of these treaties and organizations outweigh the costs of non-participation. That is, countries willingly give away certain sovereign powers in exchange for some other perceived benefit, like peace, or regulated trading relations, or participation in international decision making bodies. Thus, although there are certainly costs involved in engaging in international cooperation, countries throughout time have demonstrated, via voluntary compliance with international law, that the benefits can be greater.

B. Origins of International Law

International law as we know it today is based on principles developed over the past 400 years in Europe.¹ As the birth-place of the modern concept of the nation-state, it makes sense that modern international law too would be born in Europe. Along with the development of the theory of sovereignty, political scholars, like Machiavelli, Hobbes and Locke, developed theories to capture the laws that seemed to govern state-to-state interaction and maybe more importantly the interaction between the state and its citizens.

However, even though many of the early notions that influenced the development of international law come from Europe, following the two world wars and decolonization, countries around the globe have played an increasingly important role in defining the rules, standards and application of modern international law. Post-war peace treaties led to the establishment of international organizations like the League of Nations, the United Nations, the International Monetary Fund (IMF), the World Bank and, more recently, the World Trade Organization (WTO) (see the appendix to this chapter for a more complete list of International Organizations with brief descriptions). And with these international organizations, laws and judicial institutions were created to define and enforce the rules; this list includes for example the International Court of Justice, the Permanent Court of Arbitration, and the dispute settlement body of the WTO. As one professor notes “[t]he vast increase in the number of international agreements and customs, the strengthening of the system of arbitration and the development of international organisations have established the essence of international law as it exists today.”² None of this would have been possible if countries on all continents had not participated in the creation and elaboration of these rules.

¹ A. Shearer, *Starke's International Law*, 7-12 (11th ed. 1994).

² Malcom N. Shaw, *International Law*, 30-31 (5th ed. 2003).

Furthermore, many of the most noteworthy contributions to international law in the past fifty years are a result of the rejection by the decolonized countries of otherwise Eurocentric components of international law. While certain bedrock notions like the nation-state and territorial boundaries remain, international law has come to emphasize a more universalist scope; after all, the UN General Assembly itself is composed of more formerly colonized countries than colonizers, bringing together a broad range of ideological, cultural, and religious traditions. More importantly, international law often codifies respect for the domestic laws of all countries and, at times, even allows for some local variance in its application (for example, countries often take reservations to treaties for those provisions that conflict with domestic law). Thus, international law, while based initially on ideals developed centuries ago in Europe, had to now reflect the great number of new societies in which it would be applied, and indeed, it has.

C. Theories in International Law

Before embarking on the study of modern international law, it is useful to understand some of the theories that scholars apply in their analysis. These theories will provide a framework within which you can think about international law, its application, and its usefulness:

Natural Law / Fundamental Rights: This school of reasoning treats international law as a set of natural rights, as though a country were a person born into this world with certain rights already in place. Following this logic, there is a predetermined natural state within which states interact, respecting fundamental rights. The list of rights includes notions like the right to self-determination, independence, equality among other nations, respect among states and interaction with others.

Positivism: Positivism at its core is a theory based on consent. According to this theory, international law encapsulates a set of rules that states agree upon. As a result, if a state does not consent to a rule, the rule is not law and the state is therefore not bound by the rule. Consent may take many forms: express consent is given via the signing of a treaty or entry into an international organization. A country can also give implied consent by following or acquiescing to a norm or custom. In the positivist view, states are equals and are only bound by those laws that they agree to be bound by

Law and Economics: This theory analyzes law as a reflection of the decision-making between rational actors seeking optimal economic outcomes. States must decide between various outcomes that have both costs and benefits. A rational state weighs the costs and benefits of its decisions and optimizes its decision-making to maximize its wealth. Theorists that use law and economics to explain international law employ economic frameworks to explain why countries consent to and adhere to international law (these include for example game theory and the prisoners' dilemma). Some obvious examples of where this has received substantial attention include environmental law (for example via cap and trade regulations on pollution) and trade law.

International Relations Theories: Formal scholars of international relations (IR) apply a variety of theories to explain the motivations of nation-states in the conduct of international politics and law. According to *realists*, states operate in an anarchic world, wherein there is no international police force to regulate their behavior. States must act in their own best interest to maximize peace and power. If compliance with international law helps to maximize a state's interest, it will consent to and follow the law. However, if compliance would inhibit a state from pursuing their interest, they simply won't follow it. By contrast, according to a *liberal* theory of international relations, states are merely a reflection of the sum total of the beliefs of the individuals within the states. Liberals believe that domestic law and politics are the most influential drivers of state action and thus understanding the complex relationship between domestic politics and domestic law helps explain how and when a state will use or comply with international law. Finally, *constructivists* look to practice to understand state action. Rejecting the notion that states are rational actors with concrete goals, a constructivist theory looks at the complex web of interaction between laws, norms and practice, to develop a map of what international law truly is.

Regardless of which theory seems most "correct" or "best" to apply, there is at least agreement as to one core idea; international law exists in some form. It may be followed to varying degrees and applied in varying manners, enforcement mechanisms may vary, but states, individuals and institutions tend to follow certain pre-defined international rules and norms more often than not, demonstrating the existence and usefulness of the international legal system.

II. ROADMAP

While this book provides an introduction to international law as it applies to all countries, it attempts to focus on issues that will be relevant to Afghanistan and an Afghan student in particular. International law, while having global implications and applications, is also country specific in that countries interact differently with certain laws based on their internal make-up and needs. Some countries are exporters of manufactured goods while others export agriculture; some countries have large maritime borders and are hence particularly interested in the Law of the Sea; and others yet are engaged in space exploration and contribute to the developing field of Space Law. Afghanistan, as a state that has known its fair share of international conflict, and Afghan law students, are more likely interested in how countries resolve international conflicts without resorting to war or maybe the laws regulating the use of armed force when countries cannot avoid war. As a country applying to be a member of the WTO, Afghan students should also know about preferential trade agreements and the WTO's dispute resolution body. To address these concerns and many more, this book is divided into 7 chapters, each covering a major area of substantive international law.

Chapter 2 discusses the sources of international law. In this chapter, we talk about where international law comes from going into detail with respect to each of its main sources: treaties, customary law, general principles of law, subsidiary means, including judicial decisions and scholarly teachings, and the most recent source of international law, international organizations. This chapter is central to any understanding or application of international law for the sources are the pillars of international legal practice and learning what they are and what they stand for is akin to learning how to read a statute or contract in domestic law. Remember that because there is no global parliament or legislature, and because state sovereignty is a guiding principle in

international relations, international law is largely created by states when they agree on important matters. These agreements are then captured in various forms (or sources), including treaties (a variety of an international contract), customs (the way countries interact with each other), general principles and so forth.

Chapter 3 examines the complicated relationship between Afghanistan's domestic law and international legal obligations. What happens when a domestic law conflicts with an international treaty to which Afghanistan is a party? What is the status of international law in Afghanistan as explained in the Constitution? Because the 2004 Constitution is still relatively new and young, many issues regarding the compatibility and enforcement of international law have yet to be decided. To help understand the various ways Afghanistan may resolve these issues, this chapter also offers several comparative examples discussing how other countries approach issues or discrepancies between domestic and international law.

Chapter 4 treats a subject of great import to Afghanistan, international human rights law. Whereas previous chapters discuss the foundational principles of international law and international law as it interacts with sovereign nations, this chapter discusses certain limits that international law places on a state's power. Human rights law after all declares that there are certain actions that when perpetrated against other humans are illegal: for example, states cannot exterminate a racial or ethnic group, the enslavement of another human being is never permitted, and many forms of torture are prohibited. The chapter also discusses the implementation and enforcement of human rights law—after all, if there are no international policemen, who is to stop a nation from violating one of these laws?

Chapter 5 presents an overview of the various ways countries resolve disputes without going to war. Countries of course resolve disputes peacefully far more often than they engage in armed conflict. From the less formal means of conflict resolution including mediation and negotiation, to the quasi-formal arbitration bodies, to the courts in The Hague, countries have a wide range of tools available to resolve disagreements. This chapter discusses the role of law in each of these various forums as well as the benefits and costs of using them.

Conversely, Chapter 6 explores how international law is applied when states cannot avoid armed confrontation; for even when states are at war, there are still protections afforded to civilians and even armed combatants. In fact, rules and codes that regulate military conduct during armed conflict date back to ancient times in Asia, Europe and the Middle East. In this chapter, we discuss both when war is permitted under international law, as well as that which is permitted. The discussion highlights some of the more significant international treaties including The Hague and Geneva Conventions and important customs such as the doctrines of *necessity* and *proportionality*. We also explain in detail how the UN operates, the relationship between the Security Council and the General Assembly, and the significance of Security Council resolutions. The chapter concludes with a discussion about terrorism, the use of force in Afghanistan in particular, and the UN resolutions that established the International Security Assistance Force (ISAF), the international military force that currently operates in Afghanistan.

Chapter 7 covers the subjects of international and transnational criminal law. As global criminal networks have grown and flourished benefitting from globalization and the availability

of new international markets for drugs, stolen goods and other contraband, laws have been created to enable the prosecution of the perpetrators of these crimes. In a first instance, we discuss transnational criminal law, the set of procedural steps used by courts and prosecutors to try international criminals in domestic courts, often times requiring coordination among several different countries. When can a country ask another country to arrest a criminal and extradite them to stand trial in the country where the harm occurred? This portion of criminal law covers issues relating to the drug trade, sexual exploitation, terrorism and corruption. We then delve into international criminal law as defined by treaties and customary law. In this section, we discuss crimes like genocide and torture that the international community has together declared illegal. Finally, we provide an overview of the courts specializing in international criminal law, like the International Criminal Court (ICC) and the various special criminal tribunals.

Finally, Chapter 8 provides an overview of the most important issues in international trade and investment law. As Afghanistan is an applicant to join the WTO and increasingly a member of international trade and investment contracts, Afghan lawyers, businessmen and politicians must understand these institutions, both the good and the bad. Like all aspects of international relations, international trade and investment is regulated by treaties, institutions, customs, and norms. This chapter, while not attempting to provide a comprehensive understanding of international trade law (a subject that merits a book by itself), provides an introduction to the core principles and laws that will define much of Afghanistan's economic relations with the rest of the world for years to come.

III. CONCLUSION

Critics contend that in an anarchic world devoid of an international police force with no judiciary or law-making body, that international law does not really exist – or that if it does, it is not really law because it does not have the “teeth” that define formal law. As this chapter and the rest of the book demonstrate, even without perfect corollaries to those institutions that we tend to think of when we think of domestic law, international law plays a prominent role in most of our lives.

In particular, as an Afghan, having experienced war and now reconstruction, the protections and sanctions provided by international law should be all the more important. Granted, international law as a field is comparatively young. Many of the treaties, customs and principles discussed in this book date to the past 50 or 60 years, and as a result, the application, interpretation and usefulness of international law are rapidly changing. However, there is a famous saying in the study of law, “ignorance of the law is no excuse.” As participants in the global community and global economy, understanding and mastering international law will help you best help the development of Afghanistan, and there is nowhere better to start than with the topic of the next chapter, the sources of international law.

OVERVIEW OF INTERNATIONAL ORGANIZATIONS

Global Entities:

- ◆ General Agreement on Tariffs and Trade (GATT): A precursor to the WTO (see below), the GATT was intended to provide an institutional structure for international trade matters. It was not intended to be the organization itself, but to facilitate the creation of such an organization, a goal that was finally accomplished with the establishment of the WTO in 1994.
- ◆ International Atomic Energy Agency (IAEA): Established as an autonomous agency under the UN (different from a Specialized Agency), the agency is charged with accelerating and enlarging the contribution of atomic energy to peace, health and prosperity via the promotion and regulation of atomic energy. It is also tasked with ensuring that nothing that it does is used for military purposes.
- ◆ International Monetary Fund (IMF): Established at Bretton Woods on December 27, 1949, the IMF promotes international monetary cooperation and the expansion and growth of international trade as well exchange stability. The IMF monitors the financial position of countries around the world, providing advice on balance of payments and reserve issues. It can serve as a lender of last resort during financial crises (an emergency financing facility to assist countries through banking crises) and it can provide loans to assist poverty reduction and growth goals.
- ◆ Organization for Economic Cooperation and Development (OECD): Established on December 14, 1960, the OECD has the mission of promoting the highest sustainable economic growth while maintaining financial stability, thus contributing to the development of the world economy, and to world trade on a multilateral, non-discriminatory basis. Any government ready to assume the obligations of the organization may join. At its core, the OECD works with governments to tackle problems and create solutions using advanced economic analysis. The OECD also works with businesses and civil society directly to achieve its stated goals.
- ◆ United Nations (UN): The UN was founded at the San Francisco Conference on June 26 1945. Today, the organization brings together 192 members (members are all States) for the purpose of maintaining international peace and security, to develop friendly relations among nations, to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and to be a center for harmonizing the action of nations. The principle organs of the UN are the General Assembly, the Security Council, the Economic and Social Council, the International Court of Justice, and the Secretariat. For an organizational chart showing all of the organs of the UN, see Chapter 2: Sources of International Law. For more information about the General Assembly and the Security Council, see Chapter 6: The Use of Force. For more information about the International Court of Justice, see Chapter 5: The Peaceful Resolution of International Legal Disputes.
- ◆ World Bank: One of the institutions that emerged from Bretton Woods (the conference following WWII at which the IMF and World Bank were created), this agency is in fact not a bank but a Specialized Agency of the UN. The World Bank supplies financial and technical assistance to developing countries. The goal of the World Bank is to reduce poverty by

providing countries with money and technical expertise to assist in the fields of education, health, infrastructure, communications, government reforms, and others.

- ◆ World Trade Organization (WTO): The WTO was established following the Uruguay Round of GATT negotiations in 1994 (in effect replacing the GATT). The organization has 153 members. The purpose of the organization is to provide facilitate the implementation, administration, and operation of multilateral trade agreements by providing a forum for negotiations among member states and dispute settlement via the Dispute Settlement Understanding (DSU). The WTO cooperates often times with the IMF and IBRD where appropriate.

Regional Entities:

- ◆ Association of Southeast Asian Nations (ASEAN): Established by the Bangkok Declaration of August 8, 1967, this organization brings together Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Myanmar, Laos, and Vietnam for the purpose of accelerating economic growth, social progress and cultural development throughout the region. The group further seeks to promote and maintain peace and stability through the region while adhering to the principles of the U.N. Charter.
- ◆ European Union (EU): The EU is the modern manifestation of a series of economic communities established in Europe after World War II. Beginning with the European Coal and Steel Community, then the European Atomic Energy Community and finally the European Economic Community, the EU consists of 27 member countries (France, Germany, Belgium, Luxembourg, Italy, The Netherlands, The United Kingdom, Ireland, Denmark, Greece, Spain, Portugal, Austria, Sweden, Finland, the Czech Republic, Latvia, Lithuania, Estonia, Poland, Slovakia, Cyprus, Poland, Slovenia, Hungary, Malta, and most recently Bulgaria and Romania. Originally an economic free trade zone, the EU has grown to encapsulate much more. The EU can create regulations that bind all member countries, superseding domestic law, and impose sanctions on those countries that do not comply. It not only coordinates economic interests, by also social, cultural, police-enforcement related and foreign policy and security issues. The EU also instituted a currency the Euro, which is used in 17 of the 27 member states.
- ◆ Mercosur (or *Mercado Commun del Sur*): Mercosur is an economic agreement between Argentina, Brazil, Paraguay and Uruguay. It is a free trade union, meaning an agreement between countries to promote the transfer of people, goods and services across the member countries' borders. Among other activities, the agreement brings the members together to eliminate customs and lift nontariff restrictions on the movement of goods.
- ◆ North American Free Trade Agreement (NAFTA): NAFTA is an agreement between the U.S., Canada and Mexico established with the objectives of (a) eliminating barriers to free trade and facilitating the cross border movement of goods, services and people, (b) promoting conditions of fair competition within the free trade area, (c) increasing investment opportunities across the member's borders ... (f) establishing a framework for trilateral cooperation. In effect, NAFTA was established to help further trade among the three neighboring North American countries to increase the economic prosperity in the zone.

GLOSSARY

- ◆ Arbitration: Arbitration is a form of dispute resolution that is between the formal and informal. Although not in a traditional court, arbitration bodies are composed of experts that hear cases and formulate opinions much like judges. Arbitration is discussed in depth in Chapter 5: The Peaceful Resolution of International Legal Disputes.
- ◆ International Organization (IO): This term can refer to many different kind of organizations. It can refer to a group of governments, a non-governmental organization, and even groupings of private entities. It is most often used to express inter-governmental organizations, meaning a group made up of governments or countries.
- ◆ International Relations (IR): IR is an inter-disciplinary field of academic study. It involves political science, history, economics, law and anthropology among other fields. In its most basic form, the study of IR relates to an analysis of the interaction of nation-states, studying their motivation and decision-making and attempting to understand why and how it is that nation-states interact with each other.
- ◆ Law of War: The Law of War is an entire body of law relating to (i) the justification for going to war (*jus ad bellum*) and (ii) that which is acceptable to do during war (*jus in bello*). This is among the main subjects of Chapter 6: The Use of Force.
- ◆ Sovereign nation: A precursor to the WTO (see below), the GATT was intended to provide an institutional structure for international trade matters. It was not intended to be the organization itself, but to facilitate the creation of such an organization, a goal that was finally accomplished with the establishment of the WTO in 1994.
- ◆ Substantive law: Law is often times divided into substance and procedure. Substantive law is the set of statutes or codes that together form the law as we know it, whereas procedural law is the set of rules that either a court or other body of justice use to enforce the law.
- ◆ Voluntary: In international law, voluntary means decided on one's own. Voluntary is generally used with respect to states that have agreed to enter into a treaty, agreement or pact without being forced by another party.

CHAPTER 2: THE SOURCES OF INTERNATIONAL LAW

I. INTRODUCTION

Where Does International Law Come From?

You are familiar with the Constitution and the laws of Afghanistan, as well as the legislative process involved in creating those laws. But, where does international law come from? There is no international legislature, no global constitution, and international courts have limited mandates. Despite the fact that we live in an increasingly globalized, interconnected world, state law still reigns supreme. And yet, people from different countries interact on a daily basis, from personal communications to massive transfers of commercial goods and services. We will learn that bilateral treaties—treaties between two countries about a particular issue, such as investment—are important facilitators for matters like international trade. But it would be impossible to handle every issue on a bilateral, state-to-state basis. Even if it were possible, it would be highly inefficient. States share many common interests, concerns, and experiences; therefore, it is often more efficient to discuss and resolve issues through a multilateral forum, or grant the power to specific groups of experts to make a decision that will be accepted by the broader international community. Instead, we turn to international law.

What is a “Westphalian” state and why is it important?

As you study international relations and international law, you are likely to come across the term “Westphalian” state every now and then. The term is intended as a short-hand characterization of what most people just think of as a “state.” We use the term “Westphalian” to distinguish the modern state from more decentralized groupings of territory that have historically been important actors—for instance, tribal regions, kingdoms, and empires.

The Treaty of Westphalia, signed in Europe in 1648, marked the emergence of the nation-state as the primary actor on the global stage. Europe became the first region in the world where the nation-state concept took hold, and the continent started to be recognized in its modern form, with states such as France, Italy, and Great Britain. Over the past few hundred years, the rest of the world has transformed into a community where the nation-state is recognized as the central actor.

Three overarching principles are attributed to the Westphalian system:

- 1) The principle of state sovereignty and the fundamental right of political self-determination,
- 2) The principle of legal equality between states, and
- 3) The principle of non-intervention of one state in the internal affairs of another state.

What is state sovereignty? Sovereignty means *supreme authority within a territory*. It is the power of a state to do everything that is necessary to govern itself, such as making, executing, and applying laws. It may also include imposing and collecting taxes, making war

and peace, and forming treaties or engaging in commerce with foreign states.³ In terms of the international community, states are the legal subjects, the “persons,” governed by the international system, just as natural persons and corporations are the “persons” governed by the domestic legal system.

State sovereignty is a critically important term in international law, and will be referenced frequently throughout this book. Indeed, all three of the aforementioned Westphalian principles form the cornerstone for international law, and will be the underlying current for much of what we will discuss throughout this chapter, and this book.

So how do we get international law out of a system dominated by the state-centric Westphalian structure? The answer is complex and complicated, but by the end of this chapter, you will be able to answer this question. Once we understand where international law comes from, we will explore how international law is created.

II. SOURCES OF INTERNATIONAL LAW: ARTICLE 38(1) OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

As we begin our quest to figure out where international law comes from, the first stop is Article 38 of the Statute of the International Court of Justice. The International Court of Justice⁴ is the principal judicial organ of the United Nations. It was established by the Charter of the United Nations, and has been hearing cases since 1946. The Court’s mandate is to use international law to settle legal disputes that States submit to the Court. It is also permitted to give advisory opinions on legal questions from authorized United Nations organs and specialized agencies.⁵ The creation of this Court in 1945 demonstrated that states recognized the importance of having an international forum to resolve legal disputes. That it continues to be prominent today reinforces the importance states give to international law. The United Nations provides a framework for the international community that both respects the sovereignty of individual states, as well as provides mechanisms for cooperation across the globe.

The International Court of Justice is tasked with deciding cases on the basis of international law, which makes it an excellent starting point for us to begin answering the question, “What is international law?” The Statute of the International Court of Justice answers this question in Article 38.

³ As described by the Stanford Encyclopedia of Philosophy, *available at* <http://plato.stanford.edu/entries/sovereignty/>. This website presents an excellent discussion on the evolution of sovereignty from Westphalia to the present.

⁴ To learn more about the International Court of Justice, visit <http://www.icj-cij.org/>.

⁵ <http://www.icj-cij.org/court/index.php?p1=1>.

**Sources of International Law under the
Statute of the International Court of Justice, Article 38(1):⁶**

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) The general principles of law recognized by civilized nations;
- d) [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Today, the sources identified in this article are widely recognized as a complete list of the sources of international law. Note that the statute does not list a hierarchy, or an order of the priority with which the different sources should be considered. In one draft of the statute, the word ‘successively’ appeared, indicating that the drafters did intend a hierarchy, but it was removed before the final version.⁷ In practice, the International Court of Justice tends to give precedence to a specific treaty provision over a more broad principle of customary international law. This has created a de facto hierarchy over the years. Given the different sources listed in Article 38, this should make sense to lawyers—one will always look to a more specific section of a Code over a more general provision if it is possible. International jurisprudence follows the same model. Of course there are some exceptions, which we will discuss later in the chapter. For now, it is important to spend some time thinking about these sources of international law, as they are a critical foundation for your understanding of international law. As you read through the chapter, imagine that you have been assigned the Discussion Questions and Optional Exercise. Think about how you would answer them and notice how your answers may change as you learn more about additional complexities in international law. These will be repeated at the end of the chapter, after you have learned about the sources of international law.

Discussion Questions

1. Which of the sources of international law do you think is the most important? Why? The least important?
2. Do you think these sources are relevant for Afghanistan and non-Western states?
3. Do you think this list is as comprehensive as it was six decades ago, when the International Court of Justice was created?
4. Are there any other sources of international law that you think should be included in this list?
5. Do you think any of the above sources are no longer relevant to the global community in the 21st century?

⁶ Statute of the Court, International Court of Justice, Article 38(1), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

⁷ See Brownlie, Ian. *Principles of Public International Law*, 7th edition, Oxford Press, 2008, p. 5.

In the next section, we will begin to examine what each of the Article 38 sources means. But, before we start to focus on each of the different sources of international law, we encourage you to complete the optional exercise below. Alternatively, the exercise is reprinted at the end of the chapter, so you may complete it after you have learned more about Article 38.

Optional Exercise

You are assigned to a committee tasked with updating/re-drafting Article 38 of the Statute of the International Court of Justice. Prepare a draft of a revised Article 38 that you feel reflects the modern sources of international law. You may choose to add onto the current sources in Article 38, clarify the sources, add or delete, or start from a completely blank slate. You may also place the different sources in a hierarchical order, although it is not required.

As you prepare your draft, think about why the current sources are listed, and remember that the Article is first and foremost intended to facilitate the judicial decisions of the International Court of Justice, but that it has also become a commonly referenced list of sources of international law for a broad spectrum of scholars and practitioners alike.

A. The Law of Treaties

A treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

-- Vienna Convention on the Law of Treaties, 1969⁸

Why Do We Have Treaties?

Before we begin to discuss treaties, it is important to understand how they fit into the international system. As you know, there is no global parliament or other international rule-making body that can legislate international law the way that the Wolesi Jirga and Mishrano Jirga legislate for Afghanistan. The sovereignty of states is highly regarded under the Westphalian system; even the United Nations has very limited authority to pass binding propositions (which we will talk about more in later chapters). In order for states to cooperate in the absence of an over-arching legislative assembly, they often turn to treaties. Treaties provide a forum for states to agree on important issues across the spectrum of regional and global topics. They are typically drafted by representatives from a number of different countries, signed by a powerful representative of a country, like the President, and come into effect most often once the country’s legislature agrees that the terms of the treaty are in the best interest of the country’s people. Although this may sound like a cumbersome process, it is a good compromise of recognizing the importance of state sovereignty and national interests, while also achieving necessary agreements at the bilateral, regional, and global levels.

⁸ Vienna Convention on the Law of Treaties, 23 May 1969, p. 3.

What Is a Treaty?

This section's opening quote from the Vienna Convention of the Law of Treaties is a useful starting point for understanding what Article 38(1)(a) of the Statute of the International Court of Justice means by "international conventions." It may be helpful to think of a treaty or convention as a contract. You are undoubtedly familiar with what a contract is, and how it creates a legal relationship between the signing parties. A treaty or convention is analogous to a contract, except that it creates a binding agreement between two states rather than two citizens. Thus, a treaty creates a legal obligation on the part of each signing state.

Treaties—a term we will use to discuss both treaties and conventions—can develop in a number of ways: bilateral and multilateral negotiations, resolutions of the United Nations, and international conferences. Treaties may also be drafts adopted by the International Law Commission, which was established by the United Nations General Assembly in 1948 for the "promotion of the progressive development of international law and its codification."⁹ It is important to note, however, that while treaties may develop and be negotiated a number of ways, treaties come into effect in only one manner—conclusion by states. Thus, while a number of actors may help to draft and shape a treaty, it only comes into force if a sovereign state chooses to be bound by the terms of the treaty.

Just as a contract can create a legal relationship regarding a wide range of different topics, a treaty can also vary greatly in content. Afghanistan is party to a wide variety of treaties, including such diverse topics as the Convention and Protocol Relating to the Status of Refugees, the International Treaty on Plant Genetic Resources for Food and Agriculture, and the Convention of the Privileges and Immunities of the United Nations.¹⁰

But despite the wide variety of topics a treaty may cover, it is important to keep in mind that not all written instruments between states are treaties. Directives, national action plans, statements from governments, and informal agreements may reflect a consensus between states on an issue, but do not rise to the level of a treaty. A key distinction is that treaties are governed by international law, whereas other arrangements, such as political commitments, may not be binding at all—and therefore not governed by law—or they may be governed by a state's national law. The effect is that disputes pertaining to non-treaties can be resolved in the appropriate national court system, whereas the international community must resolve treaty disputes.

⁹ United Nations General Assembly Resolution, A-RES-174(II), 21 November 1947. For more information on the International Law Commission, see <http://www.un.org/law/ilc/>.

¹⁰ For more information, please visit the United Nations Treaty Collection, *available at*: <http://treaties.un.org/Pages/Home.aspx?lang=en>. This Treaty Collection is an important resource, as under Article 102 of the Charter of the United Nations, "every treaty and every international agreement entered into by any Member of the United Nations ... shall as soon as possible be registered with the Secretariat and published by it." This database currently contains over 500 major multilateral treaties.

Clarification: The Vienna Convention on the Law of Treaties

If the above description of what constitutes a treaty sounds confusing to you, you are not alone. In 1969, procedural steps were taken to codify the background rules for treaties in an attempt to reduce the confusion. The result, the Vienna Convention on the Law of Treaties (VCLT),¹¹ effectively serves as a “treaty on treaties.” The VCLT standardizes key aspects of treaty agreements; as such, it is an important and comprehensive reference point for treaties between states.¹² Professor Sean Murphy groups the VCLT’s rules into five general categories:¹³

- (1) Defining what constitutes a treaty;
- (2) Making treaties;
- (3) Filing reservations to treaties;
- (4) The operation of treaties; and,
- (5) Terminating or suspending treaties.

Exercise

While we will not explore the contents of the Vienna Convention on the Law of Treaties in depth in this chapter, we encourage you to read over this “treaty of treaties” to gain a heightened understanding of these five different categories and how treaties operate.

Is it helpful to have a standardized “treaty on treaties?” While this may make things easier procedurally, can you think of situations where substantive material may be compromised for procedural standardization?

Bringing a Treaty into Effect: Signing versus Ratifying

As we continue to explore the basics of treaty law, it is important to distinguish between *signing* and *ratifying* a treaty. At the end of the drafting process, states will sign a treaty to formalize their consent to the treaty. In most countries, including Afghanistan, this signing alone will not be sufficient to establish consent to be bound by the terms of the treaty. In such cases, the signature—often by a state’s president or prime minister—is largely symbolic and demonstrative of the intent to formally consent to the treaty at a later date. Formal consent comes from ratification.

Why the distinction? Most states have a separate domestic process that they must fulfill before the state can be legally bound, and the treaty will be binding only after ratification by the necessary national process. This requirement, which in the case of Afghanistan ensures that no treaty comes into effect without the consent of the elected representatives of the Afghan people,

¹¹ See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹² The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations clarifies the existing body of norms as they apply to international agreements; it has not yet entered into force.

¹³ Murphy, Sean, *Principles of International Law*, 66. For more analysis of the VCLT, please refer to his book.

has both positive and negative consequences. On the positive side, it is appropriate in a democratic system that the people, or their duly elected representatives, have the final say as to whether or not they want to be bound by an international treaty. But, from the perspective of an efficient international system, this requirement often results in the failure to get important agreements made and placed in effect in a timely matter. For a number of reasons, including the political, treaties often get mired down in the domestic legislative ratification process for lengthy periods, and some never even make it to the ratification stage.

For instance, we mentioned above the Vienna Convention on the Law of Treaties (VCLT). Afghanistan signed the VCLT on 23 May 1969; however, it has not ratified the treaty.¹⁴ Therefore, the treaty's provisions are not legally binding in Afghanistan. Another example is the United Nations Convention on the Law of the Sea in 1983, which Afghanistan signed but never ratified. Again, this convention's provisions are not legally binding in Afghanistan. We will discuss the signing and ratification process as it pertains to Afghanistan in more depth in Chapter III: The Nexus between International Law and Afghanistan's Domestic Law.

Exercise

Using the United Nations Treaty Collection database, available at <http://treaties.un.org>, find an example of a treaty or convention that Afghanistan has signed but not ratified. Are you surprised that Afghanistan has not ratified this treaty? Why do you think it has not taken the step of ratification?

Bringing a Treaty into Effect: Reservations, Understandings, and Declarations

As we learn more about the nuances of treaties, it is also worthwhile to discuss *reservations, understandings, and declarations*. Multilateral treaties are often the result of a broad consensus on a particular topic; as such, there are often states that have serious concerns regarding certain provisions of a treaty that may be acceptable to the majority. In addition, sometimes the precise interpretation of vague text may not be unanimous across the board. Many (although not all) multilateral treaties permit the filing of reservations, understandings, and declarations for those states with concerns.¹⁵ These tools provide a mechanism for a state that agrees with most of the treaty language to overcome a problem it has with a certain portion or portions of the text. If this mechanism did not exist, there would be far fewer treaties in existence today, as it is very difficult for many states to agree on the entirety of a document. Although lengthy negotiations and multiple rounds of drafting can often achieve a high-level of consensus (agreement), at times, some details are left unresolved. These tools are available to fill in those final gaps necessary to achieve the signature and ratification by a state.

¹⁴ See Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#EndDec.

¹⁵ VCLT Article 19 governs when a state may and may not file a reservation to a treaty. See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

A reservation is defined by the VCLT as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Note that under the VCLT, a reservation may only modify a “certain provision.” It is important to emphasize this point as a reservation is intended to address serious concern with a small portion of a treaty; a reservation may not defeat the object and purpose of a treaty. For instance, if a state enters a reservation that would defeat the object and purpose of the treaty, the reservation is not valid and the state is deemed not to have accepted the treaty, meaning it is not a party to the treaty under international law.

In addition to filing reservations to a treaty, a state may also file an “understanding” or a “declaration.” For various reasons, including the need to gain multilateral consensus, some treaty provisions are written more broadly and vaguely than others. In addition to being imprecise, sometimes provisions may, upon close analysis, have more than one interpretation. This practice may be important to achieve agreement on a treaty, but it can lead to different interpretations later on. The filing of understandings and declarations are important tools to overcome potential disputes by clarifying how a particular state interprets the meaning and scope of a treaty from the beginning.

This clarification is important because states have an obligation to interpret a treaty in *good faith*. Filing an understanding or declaration allows a state to be pro-active *ex ante* in order to reduce uncertainty and ensure that its good faith efforts to uphold the treaty are recognized in the case of a potential dispute after the treaty is implemented. Such tools may be especially important if the terms of the treaty are vague or lack a clear definition. A declaration or understanding is therefore different from a reservation because it is not a rejection of a certain provision, but rather an explanation of what a state thinks that provision means. An example can be found in the statement Afghanistan made upon signing the VCLT. Afghanistan explicitly described their understanding of article 62 (fundamental change of circumstances), which is that “Sub-paragraph 2 (a) of this article does not cover unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination. This view was also supported by the Expert Consultant in his statement of 11 May 1968 in the Committee of the Whole and on 14 May 1969 (doc. A/CONF.39/L.40) to the Conference.”¹⁶

How Does a Treaty Work?

We have spent the last few pages talking about the law of treaties, our first source of international law. While we are on the topic of treaties, it is helpful to briefly discuss how a treaty functions as international law before examining the second source of international law, international custom. As we mentioned before, the state is the primary actor on the global stage. While the modern international system has a highly developed framework, much depends on the voluntary participation in this framework by the states themselves.

¹⁶ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#EndDec.

In the modern world, treaties work based on the fundamental principle of *pact sunt servanda*. This is roughly translated into “pacts must be respected.” States voluntarily sign treaties. That is, they freely give up sovereignty rights to participate in an international framework because they seek the affirmative benefits of cooperation and coordination. The international system works because states respect the commitments they make through treaties. This concept is very important, and was codified in Article 26 of the Vienna Convention on the Law of Treaties. That article states, “every treaty is binding upon the parties to it and must be performed by them in good faith.” If a state ever finds itself unable or unwilling to continue to adhere by the terms of a treaty or convention, it can generally withdraw from that treaty. It is important to note that some treaties do not permit withdrawal.

Because the state is the primary actor in our global system, there is often little recourse if a state decides not to uphold its treaty obligations, and fails to withdraw. In such cases, other states may pressure the uncooperative state to uphold its obligations. The United Nations Security Council, the International Court of Justice, the International Criminal Court, and other entities all play roles in enforcing international law, but they often lack the mandate to carry out enforcement if a state does not cooperate. For instance, the Rome Statute (which despite its name is actually a binding treaty, and not a statute as we think of one in domestic law) created the International Criminal Court, a permanent tribunal to punish individuals who commit genocide, crimes against humanity, and war crimes. Over 110 countries, including Afghanistan, are States Parties to the binding Rome Statute. In some instances, the Court has brought to trial individuals charged with crimes of genocide.

However, in other cases, the Court has been unable to bring alleged criminals to justice because it has a limited mandate that prevents it from following the same procedures a domestic court would follow. For example, the Court has the power to issue warrants for the arrest of those charged with the aforementioned crimes. However, it does not have the authority to send in its own police force (indeed, such a force does not exist) to arrest the alleged perpetrator. Instead, it must rely on a State Party to arrest the individual, and to turn him over to the International Criminal Court to be tried. If a state does not wish to cooperate, the Court has little recourse against the state. Such has been the case with several warrants that have been outstanding for years. The most vivid example of the Court’s lack of enforcement power and the shortcomings of *pact sunt servanda* is the situation that has unfolded since the indictment of Sudanese President Omar al-Bashir in March 2009. Since that time, not only has the Sudanese police force not arrested al-Bashir, he has also been able to travel to several other African countries, who despite being party to the Rome Statute, have ignored their treaty obligation and not arrested him.

While the example of the International Criminal Court helps to highlight the problem of compliance, it is important to note that it is an unusual situation because unlike most treaties, it does not involve a reciprocal exchange of benefits. In many situations in international law, there are methods of horizontal enforcement that include the suspension or termination of benefits if a state breaches a treaty, sanctions and counter-measures, as well as reputational loss within the international community. Compliance is therefore heavily influenced by the benefits—and potential losses—of reciprocal exchanges and cooperation/coordination. The effectiveness of a treaty will ultimately depend on whether the state decides that it is in its interests to uphold the

principle of *pact sunt servanda*. In an increasingly globalized and interconnected world, the treaty system will continue to play a prominent role in international law. States should be judicious and circumspect about entering into treaty commitments, as it is in the long-term interests of all states to continue to respect the obligations incurred by entering into a treaty agreement and, therefore, to promote a strong and viable international system.

Discussion Questions

1. Do you agree with the concept of *pact sunt servanda*? What do you think about the case of the International Criminal Court and the failure of member states to arrest al-Bashir after his indictment?
2. Does this concept, articulated further in Article 26 of the Vienna Convention on the Law of Treaties, ultimately benefit all states equally? Or, does it favor those states that were more influential in the drafting process?
3. Is there a better way to ensure states remain committed to the goals of a treaty and uphold the obligations they have entered into? Should there be?
4. Should a treaty remain binding if a state has a significant change in its domestic leadership? For instance, should Afghanistan be required to recognize the obligations that were made during the Soviet occupation, or during the Taliban rule? Why or why not? How would your view affect the effectiveness of treaties on an international scale?

B. Customary International Law

We have already established that there is no international legislative body that can create laws that are binding on all states in the international community. Treaties help to bind states that affirmatively agree to be bound, but what happens in situations where there is no applicable treaty law or a treaty is not signed by certain states? In such cases, we turn to customary international law to fill in the gaps. Customary international law consists of “rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.”¹⁷ This is the second source of international law cited in Article 38(1) of the Statute of the International Court of Justice, which describes it as “international custom, as evidence of a general practice accepted as law.”¹⁸

What precisely does this mean? In practice, it means the principles of state responsibility, the notion that states have the authority to control immigration into their countries, and the norm that states cannot expropriate the property of aliens without compensation. These three examples are very different, and yet they are all examples of customary international law. Unfortunately, there is no single source on what constitutes customary international law and how it may be formed. It is often times not even written down, and there is no “Vienna Convention on Customary International Law.” In fact, customary international law is often criticized as an imprecise source of international law because it is not

¹⁷ Rosenne, *Practice and Methods of International Law*, p. 5.

¹⁸ Statute of the Court, International Court of Justice, Article 38(1), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

affirmatively agreed upon, but rather evolves out of state practice over an unspecified period of time.

While no precise rule exists to determine a threshold at which state practice becomes customary international law, there are two basic elements that are helpful in determining if a practice constitutes customary international law:

- (1) State practice: the practice is sufficiently uniform, consistent and general, and,
- (2) *Opinio juris*: the acts must be taken because a state believes that it is legally necessary or obligatory to do so.¹⁹

The next two sections will explore each of these prongs in more depth. As we examine customary international law, please keep in mind that treaty law and customary international law coexist in the international community. There is no hierarchy, and customary international law applies when there is a relevant customary rule, whereas treaties apply where there is a relevant treaty. A specific norm—whether treaty law or customary international law—will be prioritized over a vague one.

State Practice: Uniform, Consistent, and General

The first test of customary international law is to determine if a relatively uniform, consistent, and general practice exists amongst states on a particular issue. In other words, we look at state practice with regards to the issue of concern. The state practice test is subjective, and it will likely be up to a court or tribunal to determine if (1) uniformity, (2) consistency, and (3) generality of practice exists. There is no standard rubric for calculating how a practice stands up for each of these criteria, or how the criteria should be weighed against each other. Nonetheless, it is important to understand what these criteria are, and how they impact what is and is not considered to be international customary law. We will examine what each of these terms mean in turn.

Uniformity

If a sufficient number of states have accepted a practice, or that practice is widespread, that practice is said to be uniform. But what constitutes a “sufficient number” or “widespread” practice? There is no precise, quantifiable number of states used to determine when a practice meets the threshold and when it does not. Instead, a more qualitative approach is used. How many states accept the practice? Is it all, nearly all, a majority, or very few? How many states reject the practice? Is there polarization of the practice, with states taking opposite stances? These are all helpful questions to think of when examining a practice to determine if it is uniform. Also, it is important to note that complete uniformity is not required; the International

¹⁹ Frequently Asked Questions on International Law Aspects of Countering Terrorism, UN Office on Drugs and Crime, New York, 2009, p. 10.

Court of Justice ruled in the Anglo-Norwegian Fisheries case²⁰ that “substantial” uniformity is the necessary threshold.

Discussion Questions

1. Why do you think the International Court of Justice has accepted “substantial” uniformity over “complete” or “unanimous” uniformity of practice?
2. Do you think it is fair that a practice can be deemed international customary law even if some states are opposed to that practice?
3. Would there be any international customary law if the necessary threshold was “complete” uniformity? Would this be good or bad?

Consistency and Generality

In addition to the requirement of uniformity, there are two other factors that we must consider to determine state practice. Those factors are consistency and generality. They are complementary requirements, and seek to determine if the custom in question is consistently and generally practiced by states. Again, this is more of a qualitative assessment, rather than a strict quantitative analysis of a practice. The length of time a practice has been in existence, and how consistent that practice has been throughout that period of time are factors to consider. Yet, it is important to note that there is no minimum period a practice must be practiced for it to be deemed customary international law. Nor is there an automatic acceptance of a practice as customary law once it has been around for a certain number of years. In making a determination, both consistency and generality of the practice will be considered. It may help to think of the relationship between length of time and uniformity as being on a sliding scale with one another. If there is a higher degree of uniformity (the practice is more widespread), then less time is required. The International Court of Justice examined the relationship of these elements in the *North Sea Continental Shelf* cases.²¹

Another factor that will be analyzed in determining whether a rule reflects customary international law or not is how other states react when a state acts in a manner that is inconsistent with a purported customary international law norm. Do they protest or object and claim that the first state has violated the law? Also, how does a state react when another state claims that its actions violate customary international law? Does it deny that the claimed rule is a customary rule? Or, does the state dispute the facts about whether it has done the thing it is accused of doing—or justify its actions according to some other legal principle. This process of protest and response is an important way to determine what states think customary international law does or does not require.

²⁰ *Anglo-Norwegian Fisheries Case*, International Court of Justice, Judgment of December 18, 1951.

²¹ *North Sea Continental Shelf Cases*, International Court of Justice. Judgment of 20 February 1969. <http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5>.

As an Afghan, you may be wondering about practices that may be accepted regionally, but not practiced on a global scale. Can these be considered customary international law? Or, does customary international law only apply for practices that are truly global in scope? The intuitive answer is that customary international law should respect regional practices that have evolved due to unique situations in particular areas. The International Court of Justice agrees. It has ruled that while rules of customary international law may be global in scope, they may also be regional.²²

After reading this definition of state practice, do you believe you can pinpoint what constitutes state practice? It is very difficult to determine, and only after careful analysis into the facts of a particular case will you be able to determine if a practice meets the criteria for these elements of international customary law. Therefore, it is important for you to understand these concepts, and to be able to apply them in a vigorous analysis based on case-centric facts. In sum, determination of what constitutes uniform, consistent, and general practice is both an art and a science.²³

Opinio Juris et Necessitatis: Legally Necessary or Obligatory

Once we have determined that a practice meets the requirements established under the first test of state practice, we must also determine if it meets the requirements of the second test— is the practice legally necessary or obligatory? If both the state practice and the *opinio juris* tests are met, then the practice will be held as customary international law. This obligation may seem confusing—how can a test to determine if a practice is international law be based on whether a state regards it as law? This test is seemingly challenging to reconcile. By thinking about the goal of the test, the answer becomes more apparent. The purpose of *opinio juris* is to distinguish customary international law practices from those practices that evolve out of courtesies, habits, a sense of fairness, or morality. This latter group does not meet the threshold for customary international law. Only those practices that are inspired by a state’s belief that it is compelled by international law to undertake the practice meet the standard for customary international law.

Exercise

Can you identify a practice that Afghanistan engages in out of courtesy, habit, a sense of fairness, or morality? What about a practice that at its core derives from belief that it is compelled by international law to undertake the practice? Do you agree that international law should treat these practices differently based upon how they evolved? Why or why not?

Evidence

Now that we have explored the two tests to determine what state practice constitutes customary international law, we will touch on some of the sources of evidence used for these tests. In 1950, the International Law Commission listed the following as material sources of

²² See International Court of Justice, *Asylum* (Colom. V. Peru), 1950.

²³ Murphy, Sean, 79.

custom: international and national court decisions, state legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organizations.²⁴ This list was not intended to be comprehensive, and one renowned international lawyer adds the following to the list: official manuals on legal questions, manuals of military law, policy statements, press releases, comments by governments, and resolutions relating to legal questions in the United Nations General Assembly.²⁵

Exercise

Working alone or in groups, can you think of any other sources of state practice? Do you agree with the sources listed? Do you think some should be weighed more heavily than others?

A helpful resource to explore the types of sources in more depth is *Sources of State Practice in International Law*, edited by Gaebler & Smolka-Day; Ardsely, NY: Transnational Publishers, 2001.²⁶

While evidence will be often used to demonstrate that a state has conformed with a particular norm, evidence is also important in determining if a state has persistently objected to a particular norm. Under the “persistent objector rule,”²⁷ a state will not be bound by a new practice in customary international law if it has refused to consent to it. Indeed, the rule becomes customary international law only for the non-objecting states. In sum, if the majority of states do agree to the norm, and the practice passes the aforementioned tests, it will become customary international law regardless of a few persistent objectors. If a state decides to object to a rule only *after* it has formed, it cannot invoke the persistent objector rule to argue that it is not bound by the rule.

Jus Cogens

Within the body of customary international law, some norms are recognized as having a peremptory character and carry a special importance within the international community. *Jus cogens* norms are an abstract category of norms that create obligations that states owe to the international community as a whole. Under Article 53 of the Vienna Convention on the Law of Treaties, they can only be modified by a “subsequent norm of general international law having the same character.” Professor Sean Murphy suggests that we think about *jus cogens* as “super” customary international law, law that is “so fundamental to the inter-relationship of states that a state cannot, through its treaty practice or otherwise, deviate from the law.”²⁸

²⁴ [1950] 2 *Y.B. Int'l L. Comm'm* 367, U.N. Doc. A/CN.4/Ser.A/1950/Add. 1 (1957).

²⁵ Brownlie, Ian, *Principles in Public International Law*, 6.

²⁶ The Law Library of the University of California-Berkeley also has a very helpful website for those interested in researching customary international law and generally recognized principles. That site is available at: <http://www.law.berkeley.edu/library/classes/iflr/customary.html>.

²⁷ For more information on this topic, see Charney, Jonathon, *The Persistent Objector Rule and the Development of Customary International Law*, 56 *BRIT. Y.B. INT'L L.* 1 (1985).

²⁸ Murphy, 82.

The question of what constitutes *jus cogens* is often controversial, although there is widespread acceptance of classifying as *jus cogens* norms that prohibit genocide, torture, the use of force [outside the bounds created by the UN Charter], and slavery. The right to self-determination is another important aspect of *jus cogens*. It may be helpful to think of a *jus cogens* norm as a norm that is non-derogable, and that no state can claim not to be bound by the rule.

Discussion Questions

1. Treaty law is the result of affirmatively-accepted obligations by states, whereas customary international law is inferred from general state practice, or positive action by states. Conventional doctrine regards both types of international law as equally authoritative.²⁹ Do you agree that they should be regarded on the same level?
2. As an attorney, which would you rather have to support your case, treaty law or international customary law? Why?
3. Referring to the above list of *jus cogens* norms, can you think of any norms that should be added to this list? Do you disagree with the norms listed? How do you think these norms should be impacted by the principle of state sovereignty? Do you accept that states must follow these norms, or do you think that state sovereignty should be more important?

C. General Principles of Law

We have discussed the first two types of international law recognized by the Statute of the International Court of Justice. This section will focus on the third source, “general principles of international law.”³⁰ To remind you of the exact details of Article 38(1), we have reproduced below the text box we introduced at the beginning of this chapter. Before you begin learning about the third type of international law, please take this opportunity to refresh your memory on what the sources of international law are.

²⁹ Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 669 (1985-1986).

³⁰ Statute of the International Court of Justice, Article 38(1)(c).

**Sources of International Law under the
Statute of the International Court of Justice, article 38(1):³¹**

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) The general principles of law recognized by civilized nations;
- d) [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

So what is meant by the “general principles of law recognized by civilized nations?” The general principles of law refer to those principles recognized by or common to the world’s major legal systems. General principles include principles of fairness and justice—principles that are applied universally. These general principles may also be derived from concepts of natural law, principles intrinsic to the idea of law, or from the specific nature of the international community. They may involve either substantive or procedural matters.

One example of a general principle is *res judicata*, the notion that once an issue has been finally judged between two parties and is not subject to further appeal it cannot be reopened for litigation.³² Another example is one we mentioned earlier, *pacta sunt servanda*. This is the principle that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”³³ More broadly, general principles of international law include the principles of consent, reciprocity, equality of states, impartiality of judges and the freedom of the seas.

³¹ Statute of the Court, International Court of Justice, Article 38(1), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

³² ICJ, Judgment—Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), paras. 114-120, 26 February 2007; ICJ Statute art. 60 in relation to the judgments of the ICJ.

³³ Vienna Convention on the Law of Treaties.

General Principles of International Law:

While these principles will be discussed in more depth later, the following information briefly introduces these terms:

- (i) *Consent*: States, as sovereign entities, cannot be forced to adhere to the terms of a treaty.
- (ii) *Equality of States*: The notion that all states, regardless of their geographic size, population, location, or resources are equal as sovereign nations in the international community.
- (iii) *Reciprocity*: The principle that favors, benefits, or penalties granted by one state to the citizens or legal entities of another should be returned in kind. This principle is commonly used for reducing tariffs, relaxing travel restrictions and visa requirements, and granting copyrights to foreign authors.
- (iv) *Impartiality of Judges*: The notion that a judge will determine outcomes based on legal principles and the facts of the case; national origin, culture, etc. shall not influence a judge sitting on an international court or tribunal.
- (v) *Freedom of the Seas*: This is the principle that “the high seas are open to all states, whether coastal or land-locked.” Article 87(1) (a) to (f) of the United Nations Convention on the Law of the Sea gives a non-exhaustive list of freedoms including navigation, overflight, the laying of submarine cables, building artificial islands, fishing and scientific research.

Historically, this source of international law was very important. However, in more recent times, it has become much less significant. This is in large part due to the significant growth in multilateral treaty law. It is also due to the conversion of many general principles of law into customary international law through practice. Still, it remains an important source to fill in the gaps that sometimes arise between treaties and customary international law.³⁴

Discussion Question

1. How do you feel about the recognition of general principles as a source of international law? Do you believe this favors Western, democratic states, or do you think all states in the international system can make an equal contribution to these general principles?
2. Do you believe that this source of international law is an acceptable recognition of universal principles?

³⁴ Researching tip: general principles are often referenced in the decisions of courts and tribunals, as well as in scholarly writings. Also, a book that may be helpful if you want to research this topic in more depth is *General Principles of Law, as Applied by International Courts and Tribunals*, by Bin Cheng, London, Stevens, 1953.

D. Subsidiary Means: Judicial Decisions and the Teachings of Scholars

Treaties, customary international law, and general principles of law form the core of international law. However, the Statute of the International Court of Justice recognized that there are subsidiary sources of international law as well; these sources include judicial decisions and the teachings of scholars. They are classified as “subsidiary means” of international law because judges and scholars do not create law, but rather they interpret the meaning of the law. Judicial interpretations and scholarly literature is not binding, nor does it create precedent. The International Court of Justice (ICJ) does not generally observe the doctrine of precedent, known as *stare decisis*. The decisions of the ICJ are binding only on the parties to that case, and to no other parties—even if they have the exact same legal issue.³⁵ Therefore, these subsidiary means may serve only as a persuasive source, or evidence, of international law.

The rulings of the International Court of Justice are the most authoritative forms of subsidiary sources of international law. The decisions of other tribunals will also be considered. In the next section, we will list some examples of other international courts and tribunals. Further, the judicial decisions made in national and regional courts may be considered as subsidiary sources, although they will carry less weight than those of international judicial decisions.

Before we discuss some of the international courts and tribunals—the first category of subsidiary sources identified by the Statute of the International Court of Justice, we will finish our discussion of subsidiary sources. The second part of subsidiary sources is comprised of the teaching of the “most highly qualified publicists.”³⁶ The Statute does not define precisely who fits into this esteemed category, but it is generally recognized as including the views of highly regarded international law scholars and experts. It also extends to include opinions from high-quality international law journals, publications, and commissions.

Brief Overview of Select International Courts and Tribunals

This section will serve as a starting point for your understanding of those different courts and tribunals that exist within the international community. There are a multitude of international and regional courts and tribunals. The list below provides a very limited sampling of these organizations.³⁷ Some of these courts and tribunals will be discussed in greater depth in later chapters.

International Court of Justice (ICJ): The ICJ is the principal judicial organ of the United Nations, and is tasked with settling legal disputes submitted by states in accordance with international law. It is also authorized to give advisory opinions on legal questions that are

³⁵ But note, if the same original parties bring their dispute back to the ICJ, the Court will look to its earlier decision in deciding the later case.

³⁶ Statute of the International Court of Justice, Article 38(1)(d).

³⁷ If you are interested in learning more about international and regional courts and tribunals, visit <http://www.pict-pcti.org>.

referred to the ICJ by authorized international organs and agencies. The Court has made significant contributions to our understanding of modern international law since it began work in 1946.

International Criminal Court (ICC): The adoption of the Rome Statute in 1998 marked the first permanent, treaty-based international criminal court in history. The ICC is a court of last resort, which means that it will only act if a national judicial system is unable or unwilling to conduct fair judicial proceedings. The ICC has a limited mandate that allows it to try only the most grave crimes: genocide, crimes against humanity, and war crimes. It does not have universal jurisdiction, so may only exercise jurisdiction if the accused is a national of a State Party, the crime took place on the territory of a State Party, or the United Nations Security Council refers the situation to the ICC's Prosecutor.

International Tribunal for the Law of the Sea (ITLOS): The ITLOS was created as a specialized tribunal to resolve disputes arising out of the United Nations Convention on the Law of the Sea. The Convention specifically identifies mechanisms for peaceful dispute resolution, one of which is the ITLOS (the ICJ is also recognized). The ITLOS is located in Germany.³⁸

European Court of Human Rights (ECHR): The Court was established in 1959, and since then has made over 10,000 judgments of alleged violations of civil and political rights. Located in Germany, the Court monitors the human rights of 800 million Europeans in the 47 European states that have signed the European Convention on Human Rights.³⁹

European Court of Justice (ECJ): The ECJ is the common judicial organ of the three European Communities: the European Coal and Steel Community, the European Atomic Energy Community, and the European Community. It was originally created in 1952, and in 1957 became the common judicial organ of the three above European Communities. It has become a model for many other regional courts, including the Court of Justice of the Andean Community, the Benelux Court of Justice, and the Court of Justice of the Common Market for Eastern and Southern Africa.

Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Trials) (ECCC): The ECCC is a domestic court supported with international staff that was established in accordance with Cambodian law and pursuant to an agreement between the United Nations and the government of Cambodia to bring to justice leaders of the Khmer Rouge (1975-1979) who were most responsible for crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia. The ECCC is part of the Cambodian court system, and applies Cambodian law, which is supplemented with international law as a "hybrid" court.⁴⁰

Inter-American Court of Human Rights (IACHR): The IACHR is an autonomous organ of the Organization of American States (OAS), with a mandate from the Organization of

³⁸ For more information, see http://www.itlos.org/start2_en.html.

³⁹ For more information, see <http://www.echr.coe.int/echr>.

⁴⁰ For more information, see <http://www.eccc.gov.kh/english/default.aspx>.

American States Charter and the American Convention on Human Rights. It is a permanent body whose mandate includes the promotion and protection of human rights of the member states of the OAS.⁴¹

International Criminal Tribunal for the Former Yugoslavia (ICTY): United Nations Security Council Resolution 827 established the ICTY in 1993 to adjudicate very serious violations of international humanitarian law committed in the former Yugoslavia. Many of the legal issues adjudicated by the Tribunal have not been adjudicated since the Nuremberg or Tokyo trials after World War II, if ever. Thus, the judgments rendered by this tribunal are precedent setting in the areas of international criminal and humanitarian law. Among other principles, the ICTY laid the foundations for the now accepted norm for conflict resolution and post-conflict development that leaders suspected of mass crimes will face justice. The ICTY is situated in The Hague, and is expected to complete its mandate by 2014.

International Criminal Tribunal for Rwanda (ICTR): The ICTR was also established pursuant to a United Nations Security Council Resolution, following recognition that serious violations of humanitarian law were committed in Rwanda in 1994. The ICTR was established to prosecute individuals responsible for genocide and other serious violation of international law within the Rwandan territory. The Tribunal sits in Arusha, United Republic of Tanzania.

Permanent Court of Arbitration: Established by treaty in 1899, the Court is the oldest global institution for the settlement of international disputes. The Court has no sitting judges, but rather the parties themselves select the arbitrators. The Court handles disputes involving states, state entities, intergovernmental organizations, and private parties.

Special Court for Sierra Leone (SCSL): The SCSL was established jointly by the Government of Sierra Leone and the United Nations pursuant to a 2000 Security Council Resolution. The SCSL was established in Freetown, Sierra Leone. However, due to security concerns, the trial of former Liberian president Charles Taylor was moved to The Hague, The Netherlands.⁴²

Special Tribunal for Lebanon (STL): An international criminal court established pursuant to United Nations Security Council Resolution 1664, the Tribunal is located near The Hague, The Netherlands due to security concerns. The STL's mandate is to try those suspected of the attack that resulted in the death of former Lebanese Prime Minister Rafiq Hariri in 2005. This tribunal is a "hybrid" court, which means that it applies Lebanese law, rather than international law. The tribunal started functioning on 1 March 2009.

World Trade Organization Dispute Settlement Body (WTO DSB): The WTO was established in 1994 to replace the General Agreement on Tariffs and Trade, which provided a normative framework for international trade. The DSB is composed of representatives of all WTO members, and it supervises the process of consultation between disputing members,

⁴¹ For more information, see <http://www.cidh.oas.org>.

⁴² For more information, see <http://www.stl-tsl.org/action/home>.

establishes panels to settle disputes, adopts or rejects panel recommendations, and tracks the implementation of rulings and recommendations.

Exercise

As a group, research what international courts and tribunals impact Afghanistan and/or Afghan citizens abroad. For instance, we have already mentioned that it is a signatory to the Rome Statute that created the International Criminal Court. Are you surprised by the list you come up with?

III. MODERN SOURCES OF INTERNATIONAL LAW: INTERNATIONAL ORGANIZATIONS

There has been growing recognition that the four sources of international law identified by the Statute of the International Court of Justice are not comprehensive enough for international law in the 21st century. After all, as we learned earlier, the Statute went into effect in 1946, just as the international community was taking the first major steps to create substantive international organizations. Over the past six decades, international organizations have played an increasingly significant role. Today, they are commonly recognized as an additional source of international law, although this is an over-simplification. International organizations (which are distinct from Non-Governmental Organizations) are created by states through treaties. In some cases states delegate to treaty bodies the authority to make decisions. In most cases, those decisions cannot impose binding obligations on states without their consent, so the regulatory practices of international organizations may be thought of in terms as a specialized form of treaty-law making.

We will explore two examples below:

- *Transnational Public Regulation:* How do you mail a letter from Afghanistan to France? How is international airspace de-conflicted to allow you to board a plane in Kabul and fly to Dubai? How does international shipping work? All of these examples happen on a daily basis because of transnational public regulation. The international community has agreed to work together to develop and enforce rules that govern areas that include our examples, as well as telecommunications, health, food safety, environmental protections, and other important sectors of transnational interest. Some of these regulations, such as those promulgated by the International Civil Aviation Organization, are highly effective and absolutely critical in our modern, globalized world.
- *United Nations Security Council Resolutions:* The United Nations Charter confers upon the U.N. Security Council the authorization to take action. One example of the action authorized is that under Chapter VII of the Charter, to determine the existence of any “threat to the peace, breach of the peace, or act of aggression.” As we will discuss in more depth in a later chapter, Chapter VII of the United Nations Charter authorizes the Security Council to take all measures up to and including the use of force to reestablish

peace and security.⁴³ Under Article 25 of the Charter, *all* member states are bound by the decisions of the U.N. Security Council. Professor Murphy points out that because of this authorization in the U.N. Charter, “When the Security Council adopts a measure under Chapter VII, it creates a legal norm that previously did not exist and that binds all U.N. member states.”⁴⁴

How complex is the United Nations system? We have focused in this section on a number of different organizations that are part of the United Nations bureaucracy. While this is an area we will focus on elsewhere in the book, it is helpful to reprint the following chart to explain the complexity of the United Nations System.⁴⁵

⁴³ U.N. Charter, Articles 39, 41, and 42.

⁴⁴ Murphy, 90.

⁴⁵ An online version of this chart is available at: http://www.un.org/aboutun/chart_en.pdf.

Discussion Questions

1. How are these two types of international law—transnational public regulation and U.N. Security Council Resolutions—different?
2. Does one body create more “legitimate” international law than the other?
3. Should the U.N. Security Council, which only has 15 members at any given time, be allowed to pass resolutions that are binding for all 192 member states?
4. Are you surprised at how complex the United Nations System is? Do you think it is necessary for it to be involved in all of these areas of international law? Why or why not?

Exercise

Either in groups or on your own, create a list of how international organizations impact daily life in Afghanistan. We mentioned a few examples in the text above—postal service, flights, and transportation of goods. We also briefly touched upon the ability of the United Nations to authorize the use of force to reestablish peace and security. These examples cross the spectrum of daily life in Afghanistan. What other examples can you think of? Do you think it is beneficial to the average Afghan that we live in such an interconnected, globalized world where international organizations play an increasingly significant role? Why or why not? If you could make modifications to the system, what would you change?

III. CONCLUSION

We return now to the Discussion Questions and Optional Exercise presented at the beginning of the chapter. If you completed the exercise at the beginning, compare your answers now that you have read more about the sources of international law.

Discussion Questions

1. Which of the sources of international law do you think is the most important? Why? The least important?
2. Do you think these sources are relevant for Afghanistan and non-Western states?
3. Do you think this list is as comprehensive as it was six decades ago, when the International Court of Justice was created?
4. Are there any other sources of international law that you think should be included in the list stated in Article 38?
5. Do you think any of the above sources are no longer relevant to the global community in the 21st century?

Optional Exercise

You are assigned to a committee tasked with updating/re-drafting Article 38 of the Statute of the International Court of Justice. Prepare a draft of a revised Article 38 that you feel reflects the modern sources of international law. You may choose to add onto the current sources in Article 38, clarify the sources, add or delete, or start from a completely blank slate. You may also place the different sources in a hierarchical order, although it is not required.

As you prepare your draft, think about why the current sources are listed, and remember that the Article is first and foremost intended to facilitate the judicial decisions of the International Court of Justice, but that it has also become a commonly referenced list of sources of international law for a broad spectrum of scholars and practitioners alike.

As this chapter has demonstrated, the sources of international law are often not clearly defined, and will require careful and thoughtful deliberations when analyzing a particular case. While Article 38(1) of the Statute of the International Court of Justice is an excellent resource for understanding the sources of international law, one must also appreciate how the international system has expanded and evolved over the past six decades. As you continue to learn about international law in this book, and as you experience the impact of international law in your daily life, think about the interplay between these sources of international law. Also think about the how the sources of international law impact the relationship between international law and domestic law. This relationship is often complex, and is the subject of the next chapter.

GLOSSARY

- ◆ Convention: A convention often refers to multilateral treaties that result in the creation of international law, as in The Hague, Geneva or Vienna Conventions. However, a convention can refer to a bilateral treaty as well.
- ◆ Declarations: In addition to reservations, a State may file a declaration or understanding relating to a treaty or a provision of treaty to clarify that State's interpretation of what may otherwise be ambiguous or unclear.
- ◆ De facto: In law, *de facto* refers to something that is of a legal nature in practice, but not officially established as such.
- ◆ Ex ante: This term is Latin for "before the event" referring to an action or decision made prior to the event in question occurring.
- ◆ Good faith (bona fides): This principle is fundamental in international law. It governs the creation and performance of all legal obligations. At its most basic level, it signals that States agree to be honest and sincere with respect to commitments they enter into.
- ◆ Hierarchy (of sources): A hierarchy is an arrangement of terms that indicates one term's superiority to another. As relates to the sources of international law, the drafters did not intend to create a hierarchy but in practice the ICJ seems to respect the ordering.
- ◆ Jus cogens: A law that is *jus cogens* is binding even without the consent of individual parties. In international law, certain laws are considered to be preemptory norms meaning that they are so well accepted by the international community that they are non-derogable.
- ◆ Non-derogable: To derogate from means to deviate from or not follow. Thus, as used in international law, a norm that is non-derogable is one that must be followed.
- ◆ Opinio juris: Although contentious and difficult to define precisely, this term refers to customary international law, as accepted by States not just via practice but some level of indication that the States consider the custom to represent a binding legal obligation.
- ◆ Pacta sunt servanda: This Latin term refers to certain principles that although uncodified (not officially recorded) must be performed or followed. In international law, States are expected to be bound by treaties for which they enter into and act in good faith.
- ◆ Ratifying a treaty: Ratification can refer to two distinct processes. In a domestic context, ratification is the process whereby a State follows domestic procedures to indicate that it agrees to be bound by an international treaty. As regards the international context, ratification of a treaty is an action by a state indicating its consent to be bound on an international context that is to other States Parties. It further indicates that the State agrees to the treaty with no additional reservations, declarations, or understandings.
- ◆ Reservations: For the purposes of the Vienna Convention, a reservation is a unilateral statement made by a State when signing, ratifying, accepting or acceding to a treaty that seeks to modify or exclude some provision(s) of that treaty.
- ◆ Signing a treaty: The Vienna Convention on the Law of Treaties states that a treaty is authentic and definitive by 'signature ... by the representatives of those States of the text of

the treaty ...” A signature does not necessarily equate to ratification. It can also express an intent to be bound pending ratification, acceptance or approval if the treaty so permits.

- ◆ Stare decisis: Precedent (or *stare decisis*) in common law establishes that judicial decisions are a source of law. Although in international law, this concept is not accepted or applied, decisions of international courts still have considerable influence as supporting arguments made by jurists.
- ◆ State Party: A State Party is a State that has ratified or acceded to a particular treaty.
- ◆ Treaty: As defined in the Vienna Convention on the Law of Treaties, a treaty is an international agreement concluded between two or more states, in writing, governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.
- ◆ Understandings: see Declarations.
- ◆ Unilateral / Bilateral / Multilateral: These terms refer to the number of parties involved in an action. A unilateral action is taken by one State without the agreement of others. Bilateral refers to an action or treaty between two states and multilateral denotes more than two.

CHAPTER 3: THE NEXUS BETWEEN INTERNATIONAL LAW AND AFGHANISTAN'S DOMESTIC LAW

I. INTRODUCTION AND OPENING INQUIRIES

Now that you are familiar with the basic concepts and sources of international law, this chapter focuses on the interaction between Afghanistan's domestic law and international law. Domestic law, sometimes also called "municipal law," is the binding legal system enacted through the state's legislative process. In Afghanistan, the system of domestic law includes the Constitution of Afghanistan (which also incorporates Islamic law through Article 3), state codes, state laws, decrees, and regulations. Some states treat international law and domestic law as part of the same binding system. Others require some process of incorporating international laws into the domestic system before they treat it as binding within the state. Still more questions surround which governmental body has the authority to determine the compatibility of newly adopted international laws with existing domestic laws and vice versa. In what circumstances can they make these determinations? And what happens if an international law and a domestic law conflict? Does it matter which was law adopted first or does some hierarchy of sources of law dictate which law prevails?

Many of these foundational questions are still unanswered in Afghanistan. This chapter explores how different interpretations of Afghanistan's 2004 Constitution and domestic laws could lead to different answers. Of course, it will be up to the branches of Afghanistan's government to choose the interpretation that governs. This chapter also uses examples and case studies from countries around the world to explore the different ways states have addressed these questions.

Discussion Questions

1. Why is it necessary to discuss the interaction between international law and domestic law?
2. What sources of domestic law in Afghanistan do experts examine to determine how international law interacts with it?
3. Why do some countries have domestic laws that incorporate international laws? Shouldn't the country follow international law anyway?
4. Can the international community sanction a country that does not incorporate an international law into its domestic system? Should it be able to?

Separation of Powers

When unanswered questions arise about how international law fits into Afghanistan's domestic legal system, legal experts first ask: Who has the authority to decide the answer? The doctrine of *separation of powers* dictates that powers are spread among different branches of government. In Afghanistan, the government is divided into the executive branch (President, ministers, and executive agencies), the legislative branch (National Assembly), and the judicial branch (Courts). In theory, the Constitution grants each branch separate and distinct powers, even if some of those powers overlap. This prevents any one branch from exercising too much

power, and therefore protects the country from the tyranny of any one branch. The branches' powers are somewhat balanced and each branch provides a check on the other two.⁴⁶

The doctrine of *separation of powers* is particularly applicable here because no single branch of government has the power to determine how international law fits into Afghanistan's domestic legal system. Each branch plays a role in determining which international rules and norms are enforceable within Afghanistan.

First, the Constitution grants certain *enumerated powers*. These are powers that the Constitution expressly grants to specific branches of government. For example, the Constitution grants the President the power to conclude international treaties in accordance with the provisions of the law (Art. 64, cl. 17).

The National Assembly has the power to ratify international treaties and agreements, as well as abrogate Afghanistan's membership in them (Art. 90, cl. 5). It also has the power to legislate (According to Article 94, "Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise"). This legislative power could include the authority to incorporate international law into the domestic system. In other words, the National Assembly may possess the power to dictate which provisions of international law are enforceable within Afghanistan and how. This, of course, is still subject to the President's approval unless the *Wolesi Jirga* votes by two-thirds majority to override a presidential veto (Article 94).

The Supreme Court has the power to review international treaties and covenants for compliance with the domestic laws and to interpret them in accordance with the law, but only at the request of the Government or courts (Art. 121). The Supreme Court also has the power to decide cases in accordance with the provision of the law, which may include the power to resolve conflicts between governing international and domestic laws (Art. 120). However, the Constitution also establishes an Independent Commission for supervision of the implementation of the Constitution to be appointed by the president with the endorsement of the *Wolesi Jirga* (Art. 157).

The Constitution may also grant certain *un-enumerated powers*. For example, Article 60 of the Constitution gives the President the authority to execute his duties in accordance with the provisions of the Constitution (Art. 60). While the Constitution grants the President specific powers, does this provision give the President the authority to do whatever he deems necessary to execute his duties so long as his actions do not violate some other provision of the Constitution? Or, conversely, does Article 60 simply dictate that the President is bound by the provisions of the Constitution?

This chapter explores these powers in more detail. In each substantive discussion in the chapter, the text asks "which branch of government has the power to decide?" You should keep in mind the roles of the different branches of government as we discuss how international law fits into Afghanistan's domestic legal system and who has the authority to make decisions.

⁴⁶ See R. Grote, *Separation of Powers in the New Afghan Constitution*, 64 Heidelberg J. Int'l L. 897 (2004).

II. THE TREATY-MAKING PROCESS IN AFGHANISTAN

This section explains the procedures that Afghanistan follows to sign and ratify treaties. Remember, however, that these procedures are not mandated by international law. International law recognizes a treaty as binding on Afghanistan only after Afghanistan has consented to the treaty and the treaty has entered into force. It is of no importance to international law whether Afghanistan has satisfied its domestic legal procedures for incorporation into domestic law or not.

Signature

The Constitution of Afghanistan gives the President powers over signing bilateral and international treaties.

Constitution of 2004 – selected provisions

Chap. 3 Art. 64: The power and duties of the President are as follows:

17. Issuing credential letter for the conclusion of bi-lateral and international treaties in accordance with the provisions of law.

Furthermore, under the Law of International Treaties (1989), the President or Minister of Foreign Affairs may conclude international treaties and agreements by signature or may issue credentials for the conclusion of international treaties to a representative.⁴⁷ However, only the President has the authority to sign treaties on peace and conclusion of war, geographic boundaries, friendship and cooperation, use of force, establishment of international organizations, and the legal status of citizens as well as treaties requiring modifications to Afghanistan's domestic laws.

Ratification

As you learned in Chapter 2, once a treaty or agreement is signed by all parties, some countries, like Afghanistan, then require ratification of the treaty for it to enter into force. Many states' constitutions provide the procedure for ratification. For example, in the United Kingdom, treaties are generally placed before parliament for 21 days, but ultimately Her Majesty's Government, led by the Prime Minister, has the power to ratify treaties.

Although the Constitution of Afghanistan does not expressly lay out a ratification process, Article 90 grants the National Assembly the power to ratify international treaties and agreements.

⁴⁷ It also gave the President the authority to delegate to the Prime Minister. In the current governmental structure, since passage of the Constitution in 2004, there is no longer a Prime Minister position. Even so, some provisions in this statute may still be good law under the 2004 Constitution, which invalidated only those laws contrary to its provisions (Art. 162).

Constitution of 2004 – selected provisions

Chap. 5 Art. 90: The National Assembly has the following authorities:

5. Ratification of international treaties and agreements, or abrogation of the membership of Afghanistan to them.

Furthermore, the Law of International Treaties (1989) dictates that once a treaty is signed, the Government must send it to the National Assembly for ratification. According to Chapter 5, Article 97 of the Constitution, the National Assembly shall give priority to treaties, at the request of the government, that require urgent consideration and decision. In practice the National Assembly uses its normal legislative process to ratify treaties, a majority vote in favor with no corresponding presidential veto.

III. ARE INTERNATIONAL LAW AND DOMESTIC LAW DISTINCT SYSTEMS?: THE THEORIES OF MONISM AND DUALISM

The Theories of Monism and Dualism

Two theories deal with the preliminary question of whether international law and domestic law form distinct legal systems or parts of the same system: *monism* and *dualism*. Under the theory of monism, international and domestic laws are both parts of one overarching legal system. Under dualism, international law and domestic law are two separate legal systems and only domestic law is internally binding within a state.

In practice, in a purely monist state, a treaty or custom becomes binding as domestic law as soon as the state ratifies the treaty or the international norm becomes recognized as law. The government must enforce it, the courts must apply it, and the people must follow it. Often, a constitutional provision recognizes international law as part of the domestic legal order. For example, the Constitution of Austria (2004) provides: “The generally recognized rules of International Law are valid parts of Federal law.” (Article 9). The Constitution of Colombia (1830): “The law of nations is part of the national legislation. The provisions of said law shall specially prevail in cases of civil war. In consequence, such wars shall be terminated by treaties between the belligerents, who are to observe the humane practices of Christian and civilized nations.” (Article 91). The Constitution of the Philippines (1940): “The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation.” (Article 2.3).

In a purely dualist state, international law must be incorporated into the domestic legal structure to become internally binding and enforceable. Like monism, the adoption of dualism is often made explicit in a state’s constitution. For example, the Constitution of the Seychelles (1979) provides: “The sovereignty of Seychelles over its territory is and shall remain absolute, subject only to such obligations at international law as are freely accepted by Seychelles.” (Article 2.2). The Constitution of the Dominican Republic (1994): “The Dominican Republic recognizes and applies the norms of general and American international law to the extent that its public powers have adopted them and declares itself in favor of the economic solidarity of the

countries of America and will support any initiative proposed to protect its basic products and raw materials.” (Article 3). The Constitution of Guatemala (1965): “The rule of law extends to all persons found within the territory of the Republic, with the exception of limitations established in the Constitution in international treaties, and by provisions of general international law accepted by Guatemala.” (Article 144).⁴⁸

Dualist states can be divided into two categories. The first are states where “formal parliamentary approval [usually in the form of ratification] is sufficient to incorporate a treaty into domestic law. A treaty is treated as international law even after its incorporation into domestic law with the result that the treaty can be applied directly within the domestic legal system.”⁴⁹ The second category is states where “parliamentary approval is not formal but takes the form of substantive implementing legislation. The treaty loses its international law character in this process and, therefore, cannot be applied directly.”⁵⁰

Importantly, under the 1969 Vienna Convention on the Law of Treaties, all countries are bound to comply with treaties as soon as they enter into force, which is either after both parties have consented to the treaty or at a specified time following consent, as noted in the treaty.⁵¹ In other words, a state can be bound by its international legal obligations as a matter of international law, even if it has not incorporated the obligation into its domestic laws. If it violates one of its international law commitments, international courts may hold it liable for breach and international organizations or other sovereign states may bring enforcement actions.⁵² Similarly an individual may be charged with an international crime, even if he acted in accordance with his national law at the time.⁵³

Discussion Questions

1. Compare the constitutional provisions adopting monism to the constitutional provisions adopting dualism. Which language distinguishes monist states from dualist states?
2. What distinguishes the two kinds of dualist states?

⁴⁸ Examples are from *Customary International Law*, Constitutionmaking.org Option Reports (January 27, 2009), available at http://www.constitutionmaking.org/files/customary_international_law.pdf.

⁴⁹ Karen Kaiser, *Treaties, Direct Applicability*, Max Planck Encyclopedia of Public International Law, D.1.10 (2006).

⁵⁰ *Id.*

⁵¹ Articles 11-16 of the Vienna Convention on the Law of Treaties explain the various means by which states may consent to a treaty, including “signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

⁵² See the Alabama Claims arbitration (1872), Moore, *Arbitrations*, Vol. 1 (653); *Case of the Free Zones of Upper Savoy and the District of Gex*, August 19, 1929, Permanent Court of International Justice, PCIJ, Ser. A., No. 22, 1929 (“[I]t is certain that France cannot rely on her own legislation to limit the scope of her international obligations . . .”).

⁵³ See *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v. Mettes, Holland*, Court of Appeal of the Hague, (1955), supreme court (1956), international law reports, 584 (1957).

However, the reality is that few states can be classified as pure monist or dualist in practice.

Every textbook on international law still uses the concepts of monism and dualism to describe the main perspectives on the relationship between international and national law. However, most textbooks also take the position that these perspectives are of little use in making students understand practice. A common position is that practice is not in conformity with either monism or dualism, and that one should therefore turn to practice. Brownlie noted that an increasing number of jurists wish to escape from the dichotomy between monism and dualism, holding that the logical consequences of both theories conflict with the way in which international and national organs behave.[] In that vein, other textbooks also take the position that the dogmatic disputes on issues of monism and dualism is now irrelevant, that international law has nothing to say on the matter except that a State cannot invoke national law to justify non-compliance with international law, and that otherwise one simply has to turn to national law.⁵⁴

Before we turn to current practice – both in Afghanistan and in foreign states – it is worth understanding why the monism/dualism debate has pervaded in the literature for so many years and questioning whether it is still relevant today. As the following passage describes, monism and dualism both seek to weigh competing concerns about the sovereignty of the state on the one hand with the protection of individual rights on the other. As you read the passage below, notice how different scholars weigh these competing concerns. Can you see why some states might choose to follow one system while other states choose to follow the other?

⁵⁴ J. Nijman and A. Nollkaemper, Introduction, in *New Perspectives on the Divide Between National & International Law* 1, 2 (2007).

Excerpt: Monism and Dualism

J. Nijman and A. Nollkaemper, *Introduction, in New Perspectives on the Divide Between National & International Law* 1, 7-12 (2007).

Dualism was predominant in orthodox 19th century international law theory and often inspired by Hegelian Thought. The State was then understood as a *real* metaphysical Being, mystifying the personality of the State and sanctifying its sovereignty. International law was conceived of merely as *external* law of the State. Under this view, international law concerns the external life of the state but is not about the State since it has its source *in* the State (will). Internal and external public law, international law and municipal law are completely separate orders. The State's sovereignty and power are not limited by international law, on the contrary international law is used as an instrument to exercise them. Rather than be protected against the State, in this view individual freedom can only be realized by self-sacrifice in service of the State, by the individual (will) being submerged into the State (will). . . . Hegelian thought marked international law theory significantly because of its glorification of the State and its sovereignty. Hence the separate, independent existence of international law as truly *law* was often denied, or its identity was defined as nothing more than each State's external law. In Triepel's theory we see clearly how this conception of the State as a real personality leads him to accept dualism as the only possible perspective: 'two spheres that at best adjoin one another but never intersect'.

This origin could open the door to extremes. Viewed as rooted in a Hegelian-marked concept of State and (International) Law, dualism was soon conceived of as going hand in hand with 'the idolatry of the State' as well as favouring absolutist and authoritarian tendencies. Having these philosophical conceptual origins, (statist) dualism—confronted by renewing (often monist) scholars—was set (perceptually) in the corner of absolute sovereignty, nationalist fanaticism, state mysticism, and the sacrifice of the individual to the State.

However, not all scholars who favoured the dualist model worked from a Hegelian State perspective. Those who had left the (orthodox) origins of dualism behind focused more on the confirmation of the legal nature of positive international law. A peaceful international community depends on basic rules of conduct agreed upon by sovereign States who keep away from each others internal affairs. As such, dualism operated as a model to uphold the 'positive law' identity of self-obligation, and recognized the Family of Nations as an inter-State order (only). Yet its presumption of the State as an actual pre-and meta-legal, social phenomenon, or person included a normative dimension of securing sovereign space and independent presence at the international stage. International law did not and should not govern national social relations. But dualism was also increasingly based on more inductive reasoning, as during the 20th century more and more States were recognized as independent members of the international community and the 'dualist' model dominated constitutional arrangements.

Still, it is fair to posit that the rise of monism within (international) legal scholarship was a response to these mainly 19th century theories of State and Law. Not merely in early 20th century German and Austrian scholarship but also in, e.g. French, British, and Dutch scholarship we find monism as a feature of a forceful response to Hegelian driven theories of State, Sovereignty, and (International) law.

Many Interbellum international law scholars responded with total rejection of dualism and adherence to the monist perspective to liberate the individual and its freedom. Scholars such as Kelsen, Scelle, and Brierly aimed at strengthening the position of the individual, democracy, and subjecting power to the universal rule of law by arguing the existence of international law as a law limiting the state's actions. More than being a response to the technical legal argument of (statist) dualism on the relationship between national and international law it responded rather to its moral and political implications. Monism was first and foremost an attempt to restrict power of the State and to empower the individual and protect human dignity.

For instance, Scelle, who saw a global society of humankind rather than of States . . . thus conceived international law as normative federalism, monism without disguise. . . . In Scelle's perspective international law defined and constrained domestic (legal and political) competences. He argued the hierarchical superiority of global solidarity and of the universal society and its law. Monism was in essence about the distribution of competences, about constraining (abuse of) power . . . by law. . . .

The monist and dualist models which emerged from this debate and continued to structure international law thinking, were thus primarily a response to political problems rather than legal ones. They both took up their own conceptual life within international law arguments with fundamental consequences for our perception of the relationship between international and domestic law. Monism came to be understood as a relative denial of a fundamental divide between international and domestic law, connected with universal, cosmopolitan, or even utopian connotations. Dualism tends to be understood as an articulation and appreciation of a solid divide between international and domestic law, connected with a conceptual (apologetic) affirmation of state sovereignty and international law as inter-State law. In this way, the monism-dualism paradigm has come to structure international law scholarship.

However, as the terms are used today, the models are disconnected from their contextual origins and the urgent problem of endangered European democracy with which they actually dealt. What was in origin an intensely political and moral debate became an issue approached rather pragmatically. From being a debate loaded with political and moral elements it became a more 'normal' doctrinal topic although always marked, consciously or subconsciously, by a conviction of either the moral supremacy of international law or the supremacy of the State will. Late 20th century textbooks at the same time increasingly expressed the relative importance of monism and dualism, as in practice both models rarely apply satisfactorily. With the relatively minor importance of both perspectives and the more general withdrawal of philosophical elements, the monism-dualism debate dried up.

4. Reasons for revisiting the issue

The political and social context that inspired the original theories of dualism and monism is a very different one from that of today. The emergence of new nonlegal developments, different from those that inspired traditional monism and dualism, call for alternative theoretical approaches that allow us to systematize, explain, and understand changes in the relationship between international and national law and, at the same time, to give direction to the future development of international and national law.

While protection of sovereignty, individual freedom, and rule of law remain relevant external factors, they are now part of more complex processes and interests. Above all, they have been redefined and submerged by the process of globalization. Increasing cross-border flow of services, goods and capital, mobility, and communication have undermined any stable notion of what is national and what is international.

Neither dualism nor monism in their traditional form are able to capture the diversity of the processes of globalization. The reduction of the factual power of States to control the entry of international law in their domestic legal orders reduces the explanatory power of dualist theory. In an interdependent world, the boundaries of national legal systems are not watertight. Economic and political processes have led to ever stronger pressure on States to adapt domestic laws. Domestic law can no longer be treated in isolation from outside influences, legal or otherwise.

Superficially, it might be thought that the process of globalization would lead to a piercing of the veil between the international and the domestic domain, and to a situation that one might characterize as monistic. Individuals are no longer invisible, shielded by the domestic legal order; the subject matter of national and international law look more and more alike and sources are less and less controlling of any particular order. However, the reality is more complicated. We also face what can be called a 'new nationalism' that leads to fragmentation rather than a construction of a universal society. Differences between States and regions are such that the explanatory power of monistic theories is very limited. In many States one may be hard-pressed to find evidence of an evaporation of the shield between the national and the international. Indeed, globalization may lead States and communities to protect their national values and identities against undefined and unwanted foreign influences and lead to a reassertion of sovereignty.

Modern developments thus do not point in one direction and are indeed contradictory.

Discussion Questions

1. Nijman and Nollkaemper argue that early dualist scholars viewed international law as rules of conduct which states agreed to follow in order to conduct international affairs, but which had no bearing on the internal affairs of each state. Monists, on the other hand, viewed international law as a way of protecting individuals against authoritarian regimes by limiting the state's actions. If you were writing the Constitution of a new country, would you adopt monism or dualism? Why?
2. As Nijman and Nollkaemper identify at the end of this excerpt, globalization changes the practical ways that international law influences national practice. Is the distinction between monism and dualism still relevant today? Can you think of any alternatives?
3. In practice, the difference between monism and dualism often comes down to a technicality. For example, in Chilean practice, a treaty must be published in the *Official Journal* to be considered "incorporated" into Chilean law. This requirement theoretically means that Chile is dualist for purposes of treaty law. Should minute procedural requirements like this one be

given the weighty significance that Nijman and Nollkaemper argue separates dualism from monism?

4. As we learned earlier, many current scholars disfavor using the monism/dualism distinction to classify countries. Why do you think that is? Can you see how the line between monism and dualism could be blurred?
5. On its website, the Australian Government, Department of Foreign Affairs and Trade summarizes its treaty enforcement policy as follows: “The general position under Australian law is that treaties which Australia has joined, apart from those terminating a state of war, are not directly and automatically incorporated into Australian law. Signature and ratification do not, of themselves, make treaties operate domestically. In the absence of legislation, treaties cannot impose obligations on individuals nor create rights in domestic law. Nevertheless, international law, including treaty law, is a legitimate and important influence on the development of the common law and may be used in the interpretation of statutes.”⁵⁵ Does Australia adopt a dualist or monist approach regarding treaties?

IV. INCORPORATION OF INTERNATIONAL LAWS INTO DOMESTIC LAW IN PRACTICE

In practice, most countries are neither purely monist nor purely dualist. First, many countries treat international laws established by treaty differently from those established by custom. Some countries even differentiate between different kinds of treaties. Many countries distinguish treaties that are “self-executing” from treaties that are “non-self-executing.” In these countries, domestic courts treat self-executing treaties as binding upon their ratification. For non-self-executing treaties to be treated as binding law, the courts require the legislature to pass implementing legislation. The implementing legislation, not the treaty itself, then becomes internally binding.⁵⁶ In the United States, the courts (ultimately the United States Supreme Court) determine whether a treaty is self-executing or not. They make the determination based on various factors including the intent of the parties, whether the language of the treaty lends itself to enforcement, whether the treaty seeks to regulate a matter over which the United States Congress has the sole competence to legislate, and whether the treaty purports to create a private right of action.⁵⁷

Afghanistan’s approach to reconciling international law and treaties with Afghanistan’s domestic legal system is still unclear. To date, neither the Supreme Court of Afghanistan nor the Independent Commission for the Supervision of the Implementation of the Constitution have ruled on the issue.⁵⁸ Therefore, to determine the various practices Afghanistan may follow, we

⁵⁵ <http://www.dfat.gov.au/treaties/making/making3.html>.

⁵⁶ *Murphy* at 222.

⁵⁷ *Id* at 222-23.

⁵⁸ As you will learn in a constitutional law course, it is still unclear whether the Supreme Court of Afghanistan or the Independent Commission for the Supervision of the Implementation of the Constitution has the authority to interpret the constitution. See Alex Their & John Dempsey, *Resolving the Crisis over Constitutional Interpretation in Afghanistan*, USIP, available at <http://www.usip.org/publications/resolving-crisis-over-constitutional-interpretation-afghanistan>. (2009).

turn to the text of the constitution, laws, and legislative decrees. Note this textbook does not purport to tell you how the law is or should be interpreted. It offers you only some approaches to interpreting the law. To help accomplish this aim, we include case studies from foreign states that demonstrate how other governments have approached the same issues.

International Law in Afghanistan's Constitution

Since there is no clear general law of incorporation stipulating that international law is automatically incorporated into Afghanistan's domestic law, we turn first to the constitution as the highest domestic legal authority (Art. 162).⁵⁹ The constitution first mentions international law in its Preamble.

Constitution of 2004 – selected provisions

Preamble: We the people of Afghanistan: . . . Observing the United Nations Charter as well as the Universal Declaration of Human Rights . . . Have, herein, approved this constitution . . .

According to one possible interpretation of this language, the members of the Loya Jirga intended the people of Afghanistan to be bound by the United Nations Charter and the Universal Declaration of Human Rights. This suggests that they are therefore binding as part of the domestic law of Afghanistan. Academics have long debated whether constitutional preambles are binding and, for that matter, whether preambles should be considered part of the constitution at all.⁶⁰ On one hand, the preamble of the constitution is ratified just the same as the body of the constitution. On the other hand, the preamble is separate from the body, and therefore might not contain binding normative law.

In practice, different countries regard their constitution's preambles with different levels of significance. The preamble to the Constitution of France (1958) for example is accorded binding effect equal to the body of the constitution. The preamble provides that:

The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.

In 1971, the *Conseil Constitutionnel* – the court imbued with the power to interpret the constitution in France – first struck down a provision of a law for breach of the fundamental

⁵⁹ There is an argument to be made that Islamic law is actually the highest legal authority. However, since Islamic law does not speak to the way in which domestic law incorporates international law, this Chapter will not discuss the role of Islamic law.

⁶⁰ See Javier Tajadura Tejada, *El Preámbulo Constitucional* (1997); Justin O. Frosini, *The Role of Preambles in Establishing New Trends in Latin American Constitutional Law*, Instituto de Investigacion Jurídicas, available at <https://www.juridicas.unam.mx/wccl/ponencias/13/224.pdf>.

rights protected by this preamble.⁶¹ The National Assembly sought to pass a law barring certain groups from securing legal status as associations based on the groups' objectives.⁶² Under its powers to interpret the constitution, the Constitutional Council ruled that the law would violate the fundamental right to freedom of association, as adopted in the preamble of the Constitution. Since that decision, certain fundamental rights, as well as the text of the Declaration of 1789 and the other sources mentioned in the preamble, are accorded legal affect in France.⁶³

Note that unlike the Constitution of Afghanistan, the Constitution of France does not contain any enumeration of individual rights within its text. Do you think that had any effect on the way that the Constitutional Council interpreted the preamble?

The United States, on the other hand, does not give the constitution's preamble substantive legal authority. In the preeminent case on the subject, the United States Supreme Court held:

We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question is in derogation of rights secured by the Preamble of the Constitution of the United States. Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom.⁶⁴

In Argentina, the preamble is regarded as an important "instrument of interpretation" that can be used to show the intent of the framers, even if the language does not create law.⁶⁵ In other words, it can be used to help interpret the body of the constitution.

⁶¹ CC decision no. 71-44 DC, 16 July 1971, *Associations Law*, Rec. 29, GD, no. 19; SB 64; J. Rivero, *Le Conseil constitutionnel et les libertes* (Aix, 1984), part I, ch. 1; J. Beardsley, (1972) 20 *American Journal of Comparative Law* 431, 87-92.

⁶² John Bell, *French Constitutional Law*, 272-73 (1992).

⁶³ University of Oxford, <http://ox.libguides.com/content.php?pid=108878&sid=821371>.

⁶⁴ *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

⁶⁵ Justin O. Frosini, *supra* n.13.

Discussion Questions

1. If Afghanistan adopts Argentina's approach of according significance to the preamble of the constitution, does the preamble to Afghanistan's constitution incorporate the United Nations Charter and the Universal Declaration of Human Rights as part of the domestic law? What if Afghanistan adopts France's approach? The United States' approach?
2. Look closely at the text of the preamble to the France Constitution of 1958 excerpted above. How is the text of the preamble to the Afghanistan Constitution which discusses the United Nations Charter and Universal Declaration of Human Rights, similar? How is it different? Do you think the differences in the text warrant different interpretations (i.e. even if Afghanistan gives the preamble substantive legal effect, the preamble does not incorporate the United Nations Charter and the Universal Declaration of Human Rights)?

The next mention of international law in the Constitution of Afghanistan is in its body.

Constitution of 2004 – selected provisions

Chap. 1 Art. 7: The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

Does Article 7 incorporate the United Nations Charter, inter-state agreements, international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights into Afghanistan's domestic legal order? The use of the word "shall" suggests that the state is obligated to comply with them. On the other hand, this provision speaks only to the state, it does not say that the text of these documents are law.

Although little is written about this clause of the Constitution of Afghanistan, Scholars have written more extensively about a similar provision in the Constitution of Poland:

Article 9 mandates that "the Republic of Poland respects international law binding upon it." The meaning of this provision and its operational significance is not clear and has already been subject to varying interpretations in Polish legal literature. It has been suggested that Article 9 should be treated as a general incorporation clause introducing *all* international law norms, including customary ones, into Polish municipal law. Such interpretation of Art. 9 was criticized as ignoring other relevant constitutional provisions, particularly those grouped in Chapter III ("Sources of Law") and directly addressing the status of international law in the Polish municipal order. Professor Czaplinski, for example, claims that Article 9 has no bearing upon the matter. In his view it merely represents an elevation of the maxim *pacta sunt servanda* ["agreements must be kept"] – or even broader – *obligationes sunt servandae* ["obligations must be kept"] to the level of a Constitutional principle. Thus, presumably, high public officials who violate Poland's international obligations, by the same token, can be charged with violations of the Constitution and prosecuted before the Tribunal of State. It seems that closer to the mark is Professor Szafarz who takes a position falling somewhere between the two extremes. Professor Szafarz believes that Article 9

formulates the principle of general compatibility of the Polish internal legal order towards international law binding upon the Republic of Poland.

In my opinion – writes Szafarz – had the Constitution not included any other provisions regarding the matter here discussed, Article 9 would have caused incorporation (adaption) of international law norms binding upon the Republic of Poland in the municipal legal order. It would include international agreements as well as customary law and law making resolutions of international organizations. As things stand now, however, Article 9 of the Constitution must be considered in conjunction with Chapter III which deals with sources of law . . . the catalogue of sources of law is exhaustive. All of the above have the effect that the meaning of Article 9, as well as its significance for incorporation of international law, for the effectiveness of international law in the municipal legal order is limited . . . Article 9 will serve as a general guide for interpretation of provisions included in Chapter III of the Constitution.⁶⁶

Discussion Questions

1. Why does it matter to Professor Szafarz that the Constitution of Poland has a separate section outlining the hierarchy of sources of law in Poland, which includes ratified international agreements?
2. Does this analysis also apply to Article 7 of the Constitution of Afghanistan? Unlike Article 9 of Poland's Constitution, which says that Poland will respect all international law, Article 7 of Afghanistan's Constitution lists specific sources of international law that Afghanistan shall abide by. Still, the same question of whether the Article's text constitutes an incorporation clause applies in both cases. Are there other differences in the way the provisions are written that might lead to different interpretations? From what the excerpt tells you about the Constitution of Poland, are there other differences between the two constitutions that might lead to different interpretations? (Hint: does the Constitution of Afghanistan contain a section delineating the hierarchy of sources of law?)
3. Article 7 of the Constitution of Afghanistan speaks only to state action ("The *state* shall abide"). Does this mean that we should read it to bind the actions of the state, but not the actions of individuals?

Unlike the Constitution of Poland, the Constitution of Afghanistan does not have a separate chapter, or even provision, dealing with the sources of law. However, there is another provision – Chapter 5, Article 94 – that might be relevant to a discussion of the incorporation of international law into Afghanistan's domestic legal system.

⁶⁶ Stanislaw Pomorski, *International Law in the Polish Municipal Legal Order: A Historical Overview and the Current Constitutional Status*, in *International and National Law in Russia and Eastern Europe: Essays in Honor of George Ginsburgs* 295, 305-06 (Roger Clark, Ferdinand Feldbrugge, & Stanislaw Pomorski eds., 2001) (citations omitted).

Constitution of 2004 – selected provisions

Chap. 5 Art. 94: Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise.

Article 94 suggests that any international agreements that obtain approval by both houses of the National Assembly and endorsement by the president are thereby incorporated into the domestic legal system. The Constitution and the Law of International Treaties (1989) require these approvals for ratification of at least some international treaties, conventions, and agreements.⁶⁷

But what about customary international law, which as you will recall binds countries without their express ratification? And what about agreements that the president makes with foreign states, but that the National Assembly does not ratify?

One way of interpreting Articles 7 and 94 of the Constitution together is that the acceptance of the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights adopted in Article 7 fall under the exception to the approval requirement of Article 94. In other words, Article 7 is a place where “this Constitution states otherwise.” Therefore, these international obligations are binding on Afghanistan even without the National Assembly’s approval and the President’s endorsement. Remember that pursuant to Article 162 of the Constitution of Afghanistan, provisions of the Constitution override any inconsistent provisions of the Law of International Treaties.

But that is not the only possible interpretation. Like Professor Czaplinski’s interpretation of Poland’s Article 9, some scholars could argue that Afghanistan’s Article 7 is not an exception to the definition of law under Article 94. It merely “represents an elevation of the maxim *pacta sunt servanda* [“agreements must be kept”] . . . to the constitutional level.” After all, the phrase “unless this Constitution states otherwise” more obviously refers to law created without the endorsement of the President, i.e. when the National Assembly overrides a presidential veto under the second clause of Article 94. Under this interpretation, the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights still need to be incorporated into domestic law to be internally binding.

Customary International Law and Other Sources of International Law Not Named in the Constitution

As for customary international law and agreements that the president makes with foreign states, but that the National Assembly does not ratify, the constitution is completely silent. In fact, the Constitution does not contain any mention of custom, general rules of international law, nor the law of nations at all. Given that Afghanistan is a civil law country that does not recognize domestic custom, we might assume that the courts will not recognize international custom either. Clearly, the state can incorporate customary international law into domestic law

⁶⁷ This is true both in practice, see Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 Heidelberg J. Int’l L. 897, 909 (2004), and by implication from Article 97 of the Constitution (“In deciding about the proposed laws, the National Assembly shall give priority to treaties . . . that, according to the proposal of the government, require urgent consideration.”)

through the normal legislative process. However, without that incorporation, the effect that the government and the courts will give them is still unclear.

V. THE COMPATIBILITY OF DOMESTIC AND INTERNATIONAL LAW PROVISIONS

What happens if a provision of international law conflicts with one or more of Afghanistan's domestic laws? The answer to this question depends on both the source of the international law and when the conflict arises.

Note that this discussion assumes that international law has some direct legal affect in Afghanistan. After all, if international law has no direct legal affect, then a conflict between international law and domestic law will not matter because the state only recognizes domestic law. As we discussed above, there is no conclusive answer to whether international law is directly applicable in Afghanistan. However, for the rest of this chapter, we assume that at least some types of international law are.

Let's start with international law in the form of a treaty. If before acceding to a treaty, the Government of Afghanistan determines that one of the treaty's provisions is incompatible with Afghanistan's domestic law, Afghanistan can enter a reservation to that provision. Remember from Chapter 2 that most treaties allow states to enter reservations to certain provisions when the state has a particular serious concern related to that provision. A reservation is defined by the Vienna Convention on the Law of Treaties as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Entering a reservation allows the government to accede to the convention without agreeing to a term that violates its domestic laws.

Although Afghanistan has acceded to numerous multilateral treaties recently, it has not filed any reservations.

Consider the Rome Statute of the International Criminal Court, to which Afghanistan acceded on February 10, 2003. By acceding to the convention, Afghanistan agreed to give to the Prosecutor of the International Criminal Court jurisdiction to prosecute crimes of genocide, crimes against humanity, war crimes, and crimes of aggression of concern to the international community as a whole (Article 15). However, Article 28 of the Constitution of Afghanistan 2004, states that "No citizen of Afghanistan accused of a crime shall be extradited to a foreign state without reciprocal arrangements as well as international treaties to which Afghanistan has joined." One could imagine that herein lies a potential conflict between the Constitution and an international treaty that has been signed and ratified, with no reservations taken. Look at the text of the Rome Statute. Which portions may conflict with the Constitution of Afghanistan? How do you think this (or these) conflict(s) will be resolved?

Islamic Law and Multilateral Treaties

One particular set of conflicts between international law and domestic law receives quite a bit of international attention: conflicts between provisions of multilateral treaties and Islamic Law. Article 3 of the Constitution of Afghanistan says that “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan,” yet Afghanistan has never entered a reservation to an international treaty for violating this provision. Islamic Republics and states with Constitutional provisions similar to Afghanistan’s Article 3, however, have entered reservations to treaties to which Afghanistan is also a party. One question that pervades this discussion is which branch of government in Afghanistan has the authority to determine whether a provision of a treaty conflicts with a provision of Islamic Law? Think about that question and why its answer matters as you read the following two examples.

1. Saudi Arabia entered the following reservation to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Afghanistan signed on August 14, 1980 and acceded to on March 5, 2003: “1. In the case of contradiction between any term of the Convention and the norms of Islamic Law, the Kingdom is not under obligation to observe the contradictory terms of the Convention. . . .”

The United Arab Emirates also entered reservations to the CEDAW:

“The United Arab Emirates makes reservations to articles 2 (f), 9, 15 (2), 16 and 29 (1) of the Convention, as follows:

Article 2 (f):

The United Arab Emirates, being of the opinion that this paragraph violates the rules of inheritance established in accordance with the precepts of the Shariah, makes a reservation thereto and does not consider itself bound by the provisions thereof.

Article 15 (2)

The United Arab Emirates, considering this paragraph in conflict with the precepts of the Shariah regarding legal capacity, testimony and the right to conclude contracts, makes a reservation to the said paragraph of the said article and does not consider itself bound by the provisions thereof.

Article 16

The United Arab Emirates will abide by the provisions of this article insofar as they are not in conflict with the principles of the Shariah. The United Arab Emirates considers that the payment of a dower and of support after divorce is an obligation of the husband, and the husband has the right to divorce, just as the wife has her independent financial security and her full rights to her property and is not required to pay her husband's or her own expenses out of her own property. The Shariah makes a woman's right to divorce conditional on a judicial decision, in a case in which she has been harmed. . . .”

Several state parties to the convention object to both Saudi Arabia and UAE's reservation on grounds that they are too broad and that they affect compliance with obligations that are essential for the fulfillment of the convention's object and purpose.

Is Saudi Arabia's reservation too broad? Is UAE's reservation too broad? (Find and read the provisions of the CEDAW to which UAE's reservations apply) Afghanistan did not enter any reservations to the convention before acceding to it. Does that mean that Afghanistan is bound by all of its provisions, even those that violate Islamic Law?

2. Jordan entered the following reservation to the Convention on the Rights of the Child, which Afghanistan signed on September 27, 1990 and ratified on March 28, 1994: "The Hashemite Kingdom of Jordan expresses its reservation and does not consider itself bound by articles 14, 20 and 21 of the Convention, which grant the child the right to freedom of choice of religion and concern the question of adoption, since they are at variance with the precepts of the tolerant Islamic Shariah."

Afghanistan did not enter any reservations to the convention before acceding to it. Does that mean that Afghanistan is bound by all of its provisions, even those that violate Islamic Law? Should it matter that Afghanistan acceded to the convention in 1994, during the reign of the Mujahedeen?

Once Afghanistan accedes to an international treaty, Article 14(2) of the Law of International Treaties (1989) requires that the Ministry of Foreign Affairs and other relevant government departments implement the obligations arising from them. But, what happens if a conflict between a provision of the treaty and a provision of Afghanistan's domestic law arises after Afghanistan has already acceded to it? That question will be addressed later in this chapter, under the section about the hierarchy of sources of law in Afghanistan.

Who Has the Authority to Determine Compatibility?

Avoiding a conflict between a provision of international law and Afghanistan's domestic law requires that an authority determine the compatibility of Afghanistan's international legal commitments and its domestic laws. But which institutions have the power to do this and in what situations? This Section will examine Afghanistan's procedures for determining the compatibility of its international legal commitments and domestic laws. The next Section will examine which law prevails if there is a conflict.

a. Ministry of Justice

The first institution with some authority to determine the compatibility of domestic and international law is the Ministry of Justice (MoJ). The MoJ is tasked with reviewing statutory laws for their compliance with Afghanistan's international legal commitments, including international contracts, conventions and foreign trade agreements. Pursuant to Article 7, Clause 4 of the Regulation Governing the Operations and Activities of the Ministry of Justice (part of the Law on the Publication and Enforcement of Legislative Documents in the Islamic Republic of Afghanistan, 1999 Official Gazette no. 787), the Ministry of Justice shall have the specific duty of "commenting on the compatibility of legal and international contracts, protocols (conventions) and foreign trade agreements with the law of the Islamic Republic of Afghanistan

and preparing proposals on amending the laws in accordance with international contracts, protocols, and agreements.”

The Regulation Governing the Operations and Activities of the Ministry of Justice (part of the Law on the Publication and Enforcement of Legislative Documents in the Islamic Republic of Afghanistan, 1999 Official Gazette no. 787), however does not give the MoJ the power to alter or create legislation, regulations, or decrees. Rather, it gives MoJ the advisory role of commenting on compatibility and preparing legislative proposals. This suggests that the MoJ’s determinations are not binding. If the MoJ finds a domestic law incompatible with an existing international commitment, but the National Assembly fails to either amend the domestic law or abrogate the international commitment, then the two laws remain on the books even though they are incompatible.

Given that the MoJ cannot alter or declare legislation void, is there any other authority that might have such powers?

First, under its traditional legislative powers, the National Assembly can always voluntarily vote to alter or strike a law that contravenes international law or to pass a law compatible with international law which supersedes an old law that was incompatible. The ministries can do the same with regulations.

Second, the Constitution grants the Supreme Court some powers to determine compatibility of domestic laws and international legal commitments.

b. The Supreme Court

Constitution of 2004 – selected provisions

Chap. 7, Art. 116: . . . The Supreme Court shall be the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan.

Chap. 7, Art. 120: The authority of the judicial organ shall include consideration of all cases filed by real or incorporeal persons, including the state as plaintiffs or defendants, before the court in accordance with the provisions of the law.

Chap. 7 Art. 121: The Supreme Court on the request of the Government or the Courts shall review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law.

Together, Articles 116, 120 and 121 give the Supreme Court the dual roles of advisor to the Government as well as highest court of the judiciary. Both of these roles are relevant in determining the compatibility of Afghanistan’s binding international legal obligations with domestic laws.

i. Supreme Court's advisory role

Let's start with Article 121. This provision gives the Supreme Court the power to review international treaties and covenants for their compliance with the Constitution, but it limits the power to situations where the Government or lower courts request it. The provision does not specify *when* the Government or lower courts may request such review. Can the Government request review of a treaty to which Afghanistan is not yet a party? Can it request review of a treaty to which Afghanistan is already a party?

Suppose that the Government of Afghanistan is deciding whether to become a party to treaty X. The Government requests that the Supreme Court review the contents of treaty X to determine whether it is compatible with Afghanistan's Constitution. Suppose that the Supreme Court determines that treaty X is not compatible with Afghanistan's Constitution. Must the Government file a reservation to the inconsistent provision of the treaty if it decides to accede to the treaty?

What happens if the Government accedes to a treaty without first requesting Article 121 Supreme Court review? Does Article 121 give the Supreme Court the authority to review the compatibility of a treaty that Afghanistan has already acceded to for its consistency with the Constitution? On the face of the provision, the answer appears to be "yes." Again, however, the answer to this question has yet to be tested in practice.

It is easy to see why the Government's power to request Supreme Court review of legislation for its compliance with the Constitution has important separation of powers underpinnings. Although the President must endorse laws created by the National Assembly, the Wolesi Jirga can override a presidential veto with a two-thirds majority vote. Article 121 lets the President and his government retain the limited power to challenge legislation passed without the president's endorsement when it suspects that the National Assembly acted in violation of the Constitution. It affirms the President's duty to uphold the Constitution. However, by making the Supreme Court the body that ultimately makes the constitutionality determination, the Constitution ensures that neither the executive nor the National Assembly have absolute authority.

It is not as easy to see why the Constitution grants the Government the power to request Supreme Court review of international treaties and conventions for their compliance with the Constitution. After all, acceptance of an international treaty or convention absolutely requires the signature of the President. Why then would the executive branch request Supreme Court review for a treaty or convention's compliance with the Constitution? Perhaps the president did not request Supreme Court review of the treaty or convention before signature and ratification. His government might later decide that review is prudent. Or even if the president who signed the treaty or convention thought that it was compatible with the Constitution, maybe a later President does not agree. In that case, the later President might seek Supreme Court review.

ii. Supreme Court's adjudicative role

Article 120 offers a different way that the Constitution imbues the courts with powers to interpret the compatibility of international law and Afghanistan's domestic laws. Article 120 gives the courts the power to consider cases filed between two parties and to resolve them in

accordance with the law. In these cases, then, the courts will need to determine what the law actually is. And if the case turns on a potential conflict between a domestic law and international law, the court may need to decide whether a conflict really exists, and if so, which law applies.

Although Article 120 grants the courts in general the power to consider cases, remember that Article 121 allows lower courts to request Supreme Court review of international treaties or conventions for compatibility with the Constitution. This provision suggests that when a question of the compatibility of an international treaty or convention and a domestic law arises in a case before a lower court, it can ask the Supreme Court to decide the question of compatibility.

To better demonstrate how Article 120 works, let's use a hypothetical example. Say that a person was convicted of a crime he committed when he was 16 years old and sentenced to the death penalty. He (the "plaintiff") sues the government (the "defendant") to stop it from putting him to death. He argues that under Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), which Afghanistan acceded to on January 24, 1983, the death penalty may not be carried out for a crime that the person committed at an age of 18 years or younger. As a defense, the government argues that he was rightfully charged of having committed the crime and that under the domestic criminal code, that crime carries the penalty of death. In this case, the court will have to decide whether Article 6(5) of the ICCPR is compatible with Afghanistan's domestic law.⁶⁸

There are two different ways that the court could find that Article 6(5) of the ICCPR and the domestic law are incompatible. The first way is called *facial incompatibility*. This means that there are no situations where Article 6(5) of the ICCPR and the domestic law could coexist without conflict. Going back to our example, the court would find that a domestic law which permitted the death penalty for minors under 18 years of age is facially incompatible with Article 6(5) of the ICCPR. If a court finds that provisions of international law and domestic law are facially incompatible, it will give priority to one of them. The result is that the law that does not receive priority can never be applied. In essence, it is void.

The second is called *incompatibility as applied*. This means that the way that the law applies in this case makes Article 6(5) of the ICCPR and the domestic law incompatible, but there are some situations where the two may coexist without conflict. For example, if the domestic law specifies the death penalty for all people that commit a certain crime, the court would find it incompatible with Article 6(5) of the ICCPR as applied to minors under 18 years of age. When a court finds incompatibility as applied, the result is that the law without priority is not applied in that case, but it might still be applicable in other cases (the next section of this chapter will discuss which law the court should prioritize if such a conflict arises).

While these roles for the courts and for the Supreme Court as Afghanistan's highest court have not yet been tested in practice, France's Constitutional Council offers a good comparison case study because it also plays a dual advisory and judicial role. But before getting to the

⁶⁸ This example is simplified to demonstrate the way that the courts might determine the compatibility of international and domestic laws through adjudicating cases. In this example, the court could find reasons to deny a plaintiff's claim without even determining the compatibility of international and domestic laws. For example, it might decide that the government has immunity from suit.

Constitutional Council, all proposed legislation, including legislation to implement international treaties and conventions, must be reviewed by the Council of State (Conseil d'Etat).

Consultation with the Conseil d'Etat, which must take place on every government bill (but not on private members bills) is not binding. The opinion expressed by the Conseil remains confidential as long as the government does not agree to its publication. . .

France has had a Constitutional Court since 1958 and, since 1974, on the initiative of 60 members of parliament any Act of Parliament can be challenged in that Court before the President promulgates it as law. If the Conseil d'Etat has expressed the opinion that the bill would raise constitutional problems there is a very strong probability that the Constitutional Court, which can have access to the proceedings in the Council of State and which has the same 'case law' as the Conseil d'Etat, will declare the act null and void. This is a very strong incentive for the government to follow the Conseil d'Etat's opinion. However, other constitutional issues may arise as a result of parliamentary amendments which will not be reviewed by the Conseil d'Etat.

From a more technical point of view, there is a rule that, after the Conseil d'Etat's advice, the government has only three options: either (i) adopt the text of the Conseil d'Etat, (ii) adopt its original draft or (iii) abandon the matter. . .⁶⁹

The government of France must submit all draft legislation to the Conseil d'Etat for advice on the law's conformity to the Constitution, international treaties, and principles of the law. However, in the end, the government is free to accept or entirely reject the Conseil's proposed changes. The role of the Constitutional Council is different. Consider the following provisions of the Constitution of France which establish the Constitutional Council. What makes the Constitutional Council different from the Conseil d'Etat? How does the joint operation of the Constitutional Council and the Conseil d'Etat differ from the operation of the Supreme Court in Afghanistan? How is it similar?

Selected Provisions: Constitution of France

ARTICLE 61. Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.

To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.

⁶⁹ Jean Massot, *Legislative Drafting in France: The Role of the Conseil D'Etat*, 22 Statute L. Rev.96, 100 (2001).

In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days.

In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation.

ARTICLE 61-1. If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period.

An Institutional Act shall determine the conditions for the application of the present article.

ARTICLE 62. A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented.

A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.

Writing assignment

France's Conseil D'Etat comments on every piece of legislation that the government drafts. However, its comments are purely advisory – the government does not have to adopt them before passing the law. On the other hand, if France's Constitutional Council determines that a proposed piece of legislation is unconstitutional, it may not be promulgated or enacted. Further, if the Constitutional Council determines that an enacted law is unconstitutional, the law is immediately repealed.

You are an advisor to the Chief Justice of the Supreme Court. Write a 2-page memorandum answering the following two questions:

Do the Constitution or laws of Afghanistan dictate whether the Supreme Court's opinions on the constitutionality of international treaties are advisory or binding? Analyze all of the relevant constitution and law provisions and explain your answer.

If you determine that the Constitution does not dictate the nature of the Supreme Court's opinions, do you think they should be advisory or binding?

c. Article 157 Independent Commission

Finally, the Independent Commission created by Article 157 of the Constitution may have some role in determining the compatibility of Afghanistan's domestic law and international law stemming from its powers to interpret the Constitution. Article 157 of the Constitution establishes The Independent Commission for Supervision of the Implementation of the

Constitution (“Article 157 Commission”). According to the Constitution, members of the Commission shall be appointed by the President with the endorsement of the Wolesi Jirga. The Constitution does not enumerate the powers of the Article 157 Commission. The only guidance it gives on the commission’s powers is its title: “The Independent Commission for Supervision of the Implementation of the Constitution.”

The branches of government have debated extensively over the correct role of the Article 157 Commission, particularly as it relates to the Supreme Court. The most well-known example is the dispute over Foreign Minister Spanta in 2007.⁷⁰ As of the date this textbook was published, the Article 157 Commission Legislation governs the authority of the commission.

Selected Provisions: Article 157 Commission Legislation

Article 8: For effective overseeing of the implementation of the provisions of the Constitution, the commission shall have the following authorities and responsibilities:

1. Interpretation of the Constitution on the request of President, National Assembly, Supreme Court and the executive.

Article 9: The following competent authorities can refer the issues arising from implementation of the constitution to commission for the purpose of giving legal opinion:

1. The President
2. Any house of the National Assembly
3. Supreme Court
4. Independent Human Rights Commission, Independent Election Commission and Administrative Reform and Civil Service Commission.

While the legislation does not speak directly to international law, the Article 8 power to interpret the Constitution may include the power to interpret whether it is compatible with Afghanistan’s international legal commitments or with provisions of international law that Afghanistan is considering whether to adopt. Similarly, the Article 9 power to give legal opinion on issues arising from the implementation of the constitution may include the power to determine whether provisions of international law that have entered into force comply with the Constitution.

Consider the following interpretation of these provisions by two scholars of Afghanistan’s Constitution:

[Article 8] appears to be a broad grant of jurisdiction to the Commission to interpret the constitution by the request of any of the three branches. However, it is unclear whether this is exclusive jurisdiction and whether their decisions are binding. If the jurisdiction is exclusive, then there would appear to be contradiction between this article and Article 121 of the constitution, which grants

⁷⁰ See Alex Their & John Dempsey, *Resolving the Crisis over Constitutional Interpretation in Afghanistan*, USIP, available at <http://www.usip.org/publications/resolving-crisis-over-constitutional-interpretation-afghanistan>. (2009).

authority to the Supreme Court to interpret the constitution in order to determine the compatibility of laws.⁷¹

Comparison of the language in Articles 8 and 9 yields a clue that the decisions made under Article 8 are meant to be binding. The language in Article 9 explicitly provides for “legal opinion” (nazar-i-huqooqi) rather than “interpretation” (tafsir)

Furthermore, the fact that additional bodies can request an opinion under Article 9 rather than under Article 8 suggests that the drafters clearly meant to differentiate between these two powers of the Commission.

It is more difficult to determine whether the jurisdiction granted to the Supreme Court in Article 121 or to the Article 157 Commission in its legislation are exclusive. Interpretation of the constitution is, in certain respects, the job of every branch. For example Article 63 requires the President to take an oath to—respect and supervise the implementation of the Constitution, which would require the President to exercise his own interpretation. There are similar requirements in Art. 74 for Ministers.⁷²

Discussion Questions

1. In drafting the Constitution, the Constitutional Drafting Commission originally included a provision that would have created a constitutional commission with the authorities listed below. Is the fact that this provision was rejected before the Constitution was passed persuasive evidence of intended limitations on the authority of the Article 157 Commission?
 1. *Examining the conformity of laws, legislative decrees and international agreements and covenants with the Constitution.*
 2. *Interpretation of the Constitution, laws and legislative decrees.*
2. If the Article 157 Commission has the power to interpret the Constitution, does it have advisory powers to determine whether provisions of international law comply with the Constitution? What are the arguments that it does? What are the arguments that it does not? If yes, is its advisory opinion binding?
3. How would the vesting of power to the Article 157 Commission determine whether provisions of international law comply with the Constitution affect separation of powers in

⁷¹ But note that many parliamentarians and others (including some of President Karzai’s own legal advisors) have rejected the notion that Article 121 grants the Court authority to interpret the Constitution, arguing that Article 121 only grants the authority to review a law’s compliance with the Constitution (but not the authority to “interpret” the Constitution’s meaning). However, it is unclear how can one determine “compliance with” the Constitution without interpreting what the Constitution means. (original footnote).

⁷² Alex Their & John Dempsey, *Resolving the Crisis over Constitutional Interpretation in Afghanistan*, USIP, 5-6, available at <http://www.usip.org/publications/resolving-crisis-over-constitutional-interpretation-afghanistan>. (2009).

Afghanistan? Does it matter whether the Article 157 Commission's opinion is advisory or binding?

VI. THE HIERARCHY OF SOURCES OF LAW IN AFGHANISTAN

When the courts find a provision of domestic law to be incompatible with a provision of international law that is internally binding, which law prevails? The order with which a state's domestic courts prioritize different sources of law when they conflict is referred to as the *hierarchy of sources of law*. The final section of this chapter will address the hierarchy of sources of law in Afghanistan.

The UN Charter, International Treaties, International Conventions that Afghanistan has Signed, and the Universal Declaration of Human Rights

Earlier in this chapter, we examined Article 7 of Afghanistan's Constitution to ask whether it tells us how international law becomes internally binding within Afghanistan. Now, we turn back to Article 7 to ask whether it tells us which source of law prevails when a provision of the UN Charter, an international treaty, an international convention that Afghanistan has signed, or the Universal Declaration of Human Rights conflict with a provision of Afghanistan's domestic law. We look first to the Constitution because it is the highest authority.

Remember that Article 7 declares that, "The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights."

The relevance of this Article to the hierarchy of sources of law once again depends on how we interpret this Article. I will lay out three possible interpretations.

First, Article 7 of the Constitution of Afghanistan could be interpreted to mean that provisions of the UN Charter, international treaties and conventions that Afghanistan has signed, and the Universal Declaration of Human Rights are accorded the force of the Constitution. This is the interpretation that best encapsulates the Government's current practice.

Under this interpretation, the named international laws would prevail over domestic laws in the same way that provisions of the Constitution do. This means, though, that other provisions of the Constitution may limit the priority of these international laws. For example, perhaps Article 3 prioritizes the tenets and provisions of Islam above the named sources of international law. Scholars have floated this interpretation for a similar provision of the Constitution of Chile.

[F]rom the point of view of a Constitutional court, it is most probably that the Constitution will be upheld unless *it* provides for the supremacy of the international rule.

This last situation is, to some extent, reflected in the Chilean Constitution's treatment of the position of treaties on human rights. Article 5 of the Constitution restricts the exercise of sovereignty to the extent required by the obligation to assure the fulfillment of fundamental rights emerging from human

nature. The same article provides that “it is the duty of the organs of the State to observe and promote such rights guaranteed by this Constitution as well as by the treaties ratified by Chile and which are in force.” This provision has the effect of incorporating the international treaties on human rights to which Chile is a party into the national legal order. In one view it also affirms that such treaties now have in Chile a ranking above that of ordinary statutes and at least equal to the Constitution. . . .⁷³

Second, Article 7 could be interpreted to give the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights ultimate priority over all domestic law, including the Constitution. This interpretation would be very similar to the way that the Netherlands treats international law. Consider the following passage:

. . . As a small country with large overseas interests, the Netherlands, more than other countries, depend on a faithful application of international law throughout the world. Dutch lawyers have always been in the forefront in advocating that national courts out to apply the rules of international law with priority over any domestic rules. Finally in 1953, it was expressly laid down in the Dutch Constitution that laws shall not be applicable if their application would be in conflict with provisions of treaties or decisions of international organizations that are binding on all persons. At the same time, the Constitution provided that all treaties need parliamentary approval before they may be ratified.

Thus, the Dutch courts obtained the power to overrule Parliament, not on the ground that the laws adopted by Parliament might infringe the Constitution, but on the ground that they might infringe provisions of treaties or resolutions of international organizations. When, on August 31, 1954, the Netherlands adopted the European Convention on Human Rights, many traditionally constitutional provisions, such as freedom of religion, freedom of speech, and freedom of assembly, became treaty obligations. In fact, the courts now have the power not to apply legislation when in a specific case they consider it a violation of human rights, provided these human rights are codified in an international treaty. The human rights codified in the Dutch Constitution cannot be taken into account.⁷⁴

⁷³ Francisco Orrego Vicuña & Francisco Orrego Bauzá, National Treaty Law and Practice: Chile, *in* National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh (Duncan B. Hollis et al. Eds. 2005) 123, 139.

⁷⁴ Henry G. Schermers, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 10 MICH J. INT’L L. 266, 268 (1989).

Discussion Questions

1. According to the author of this excerpt, what policy reasons make the priority of international law over domestic law so attractive in the Netherlands? Do these policy reasons apply to Afghanistan? Can you think of other policy reasons why Afghanistan might want international law to take priority over domestic law? Reasons why Afghanistan might want domestic law to take priority over international law?
2. Traditionally, the Dutch courts did not have the power to overrule legislation for violating the Constitution. According to Dutch law, the Parliament is sovereign, and therefore no other authority is entitled to question the constitutionality of the legislation it creates. However, the constitutional amendment, which prioritized international law above all domestic law, gave the Dutch courts the power to decide not to apply domestic law in cases where an international law provision also applied. Did this shift the balance of power between the branches of government? Give some reasons why it did and some reasons why it did not.

Third, Article 7 could simply be interpreted as a guiding principle for the legislature, the government, and the courts. Under this interpretation, these international laws are accorded no direct legal effect. Instead, they are used as principles to guide the three branches of government. This interpretation is similar to Professor Szafarz's interpretation of the Polish Constitution, which we read at the beginning of this chapter.

Discussion Questions

1. While you just read about the three plainest interpretations of Article 7 of the Constitution of Afghanistan, you should know that the hierarchies of the various states of the world vary widely. For example, some countries, such as the United States, France, and Egypt, adopt a "last in time" rule. Under this rule, the prevailing law is the one that was passed last in time. Therefore, if a treaty was ratified after a countervailing domestic law, the treaty takes priority. If, however, the domestic law was passed after the ratification of the treaty, the domestic law takes priority. The application of the treaty provision, however, depends on the clarity of the provision. If the provision is not sufficiently clear, it cannot be applied by a judge.⁷⁵
2. In Mexico, "international treaties are placed hierarchically above federal laws, second in rank to the Constitution. Thus, treaties and federal law shall be in accordance with the Constitution but are different kinds of legal instruments. A treaty cannot abrogate a federal law, and federal laws cannot override treaties. If a treaty and a federal law regulate the same subject, the treaty will be applied because the principle of specificity applies. In other words, the treaty applies because it regulates specific cases that are generally covered by the federal

⁷⁵ See Pierre Michel Eisemann & Raphael Rivier, National Treaty Law and Practice: France, *in* National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh (Duncan B. Hollis et al. Eds. 2005) 253, 268-69.

law. In contrast, the federal law continues to be applicable to all those cases outside the scope of the treaty.”⁷⁶ The Supreme Court of Justice adopted this hierarchy from Article 133 of the Constitution of Mexico, which reads: “This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of the all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States.” After reading Article 133, would you have adopted the same hierarchy as the Supreme Court of Justice did?

Because there is still no conclusive interpretation of Article 7 nor is there any other constitutional provision that expressly provides a hierarchy of sources of law, we will look to provisions of Afghanistan’s laws and regulations as guides to how the Constitution should be interpreted. Remember, however, that a future conclusive interpretation of the Constitution will prevail over provisions of laws and regulations.

The Regulation Governing the Operations and Activities of the Ministry of Justice (part of the Law on the Publication and Enforcement of Legislative Documents in the Islamic Republic of Afghanistan, 1999 Official Gazette no. 787) suggests that perhaps domestic law prevails over provisions of treaties when the two conflict. For example, Article 7, Clause 4 says that the Ministry of Justice shall have the specific duty of “commenting on the compatibility of legal and international contracts, protocols (conventions) and foreign trade agreements with the law of the Islamic Republic of Afghanistan and preparing proposals on amending the laws in accordance with international contracts, protocols, and agreements.” If international conventions and protocols automatically prevailed over domestic law, then there would be no reason for the Ministry of Justice to amend the laws in accordance with them.

Similarly, Article 16 of the Law of International Treaties (1989) says that, “If the implementation of treaties requires new legislation, or modification of applicable laws, relevant agencies shall take action to enact new law or modify the applicable law.” Again, this suggests that domestic law prevails over provisions of treaties when the two conflict because otherwise, there would be no reason to change domestic law to accommodate the provisions of a treaty.

Customary International Law

We already discussed the Constitution’s silence on customary international law earlier in this Chapter. It remains to be seen whether customary international law is directly applicable in Afghanistan at all, let alone where it stands in the hierarchy of sources of law.

VII. OTHER CONSIDERATIONS

Even where states give international law priority over domestic law, courts often find ways to ensure that states retain sovereignty and do not remain bound by out-of-date, unfair, or

⁷⁶ Dr. Luis Miguel Díaz, National Treaty Law and Practice: Mexico, *in* National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh (Duncan B. Hollis et al. Eds. 2005) 440, 453-54.

overly broad principles. The following excerpt explains some of the ways that states, which directly apply international law and prioritize it as the highest applicable law, are still able to get around certain provisions.

Excerpt: Practical Considerations in Incorporating International Law

John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int'l L. 310, 327-28, 33-34 (1992)

Even when the rule of direct application covers most, or theoretically all, treaties or certain broad categories of treaties, courts will find ways to avoid applying the treaty norm in particular cases, perhaps by relying on one or another concept that can be lumped under the rubric of invocability (e.g., standing), or by holding that the treaty norm is designed to constrain or assist certain government agencies and not private litigants. Or the court may refuse to apply a treaty directly because it is not "specific and precise" enough for that purpose, a concept akin to 'justiciability.' Other disqualifying concepts may also be employed.

Various specific cases and practices suggest that courts will often strive to seek a "way out" from the rigidities and other policy problems they face when a [directly applicable higher status] rule exists in a legal system. An example is the jurisprudence of the European Court of Justice. The Court early refused to grant direct application to the GATT treaty (General Agreement on Tariffs and Trade), for reasons that have been criticized. On the other hand, if the EC Court at that time was worried that a directly applicable norm might also have a higher status . . . , one can readily see why a court and all other policy makers in the Community would have been nervous about directly applying the GATT. Thus, if the court has some leeway regarding direct applicability, but worries that it may not have such leeway regarding higher status, it would be highly tempted to discover an appropriate way to refuse direct application.

A 1990 Japanese Supreme Court case had some similar characteristics. Once again the GATT was invoked. The case was brought by Japanese necktie producers, who argued that their Government's restraints on the importation of silk for neckties (to protect domestic silk producers) violated rules of the GATT. The complainants claimed that the GATT was directly applicable and that, under the Japanese Constitution (Article 98), directly applicable norms were endowed with a higher status than legislation or other legal norms. The lower courts (in 1984 and 1987) concluded that the GATT did not apply to the situation, but their reasoning (or lack thereof) has been criticized, and on appeal the Supreme Court of Japan merely affirmed with very little analysis. It can again be surmised that a court would find great difficulty in directly applying the GATT, with its many elaborate constraints on national government actions in international trade, in circumstances where those GATT norms would also have a higher status than even later-in-time legislation or other acts. Thus, it comes as no surprise when a court somehow manages to evade this consequence.

The Netherlands, in the view of some, may be the most monist legal system in the world, but even there, according to eminent commentators, courts have ways to avoid the direct application of treaty norms that would take precedence not only over later legislation, but also over the Constitution itself. The empirical observation that national courts in systems with

[international law as directly applicable with higher status] try to avoid its logical consequences suggests that legal systems that have not yet fully decided the question should exercise great caution before [adopting a system making international law directly applicable and according it higher status].

[Such a] system can also significantly inhibit a national government's willingness to enter into international treaties. A recent example occurred in the European Communities. Although there may be an argument that Community-level law has not yet been fully determined to [make international law directly applicable and give it higher status], the apprehension that it would be apparently influenced the negotiations between the Community and the Government of Switzerland concerning a treaty on international trade in insurance services. The Community side feared that if it entered into such a treaty, and it became both directly applicable (as many desire) and superior to even later EC legislation, the Community would be greatly hampered in its ability to develop harmonization of national law and other regulatory principles on insurance in the future. The solution chosen by the negotiators was a fairly elaborate clause in the draft treaty permitting a contracting party to opt out of some provisions in certain circumstances.⁷⁷

Discussion Questions

1. List some ways that states get around applying provisions of international law, even when the Constitution directly applies international law and prioritizes it over domestic law.
2. The author of the excerpt says that courts use doctrines of invocability and justiciability to prevent enforcement of international law. The doctrine of invocability limits who can invoke the protections of international law in court. For example, a court might decide that international law applies, but that an individual citizen does not have the right to invoke it before a court. This is also referred to as “standing.” Under the doctrine of justiciability, courts will not apply a provision of law that is too broad. The law’s language must be specific enough to for the court to apply it with force. Can you see why states have these doctrines?

VIII. CONCLUSION

The way that international law and domestic law interact in Afghanistan is still mostly unknown, but this Chapter gave you the tools to ask the right questions, to find the relevant legal provisions, to interpret the relevant language, and to consider policy implications of various possible interpretations.

In the next chapter, you will read about International Human Rights law. As you read, think about which customary and public human rights laws are enforceable in Afghanistan. Think also about what decisions the Supreme Court, the President, and the National Assembly could make that would shape the way that international human rights laws applies in Afghanistan.

⁷⁷ John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int'l L. 310, 327-28, 33-34 (1992).

GLOSSARY

- ◆ Facial Incompatibility: A treaty is facially incompatible with domestic law if there is no way to reconcile the two laws, without changing one or the other.
- ◆ Incompatibility as Applied: By contrast to two laws that are facially incompatible, an international and domestic law may only be incompatible in the way that they are applied. Thus, there may exist a way to reconcile the two laws, but via current application, it is not possible.
- ◆ “Last in Time” Rule: In some countries, like the United States, when a court finds a conflict between a domestic law and an international law, whichever law was most recently signed, or ratified takes precedence.
- ◆ Monism / Dualism: Monists believe that international law and domestic comprise one legal system and that within this system international law is superior, thus overriding domestic law. By contrast, dualists argue that international law and domestic law are completely separate and only coexist to the extent that a State adopts international law into their domestic system.
- ◆ Self-Executing Treaty: A treaty is self-executing if its provisions are automatically applicable within a State upon signing, ratifying, or acceding to the treaty. In other words, no action by the domestic legislature is needed for the treaty to be applicable.

CHAPTER 4: INTERNATIONAL HUMAN RIGHTS LAW

I. INTRODUCTION

What Is International Human Rights Law?

Previous chapters have focused on the major building blocks of international law, including concepts such as state sovereignty and consent. These bedrock structures help ensure that states will be free to determine their own futures. Under today's international legal regime, each state is more or less the master of its own domain. For example, states have a wide degree of discretion over which treaties they choose to join (or not), and how they will conduct their own domestic affairs. You have seen how preserving this atmosphere of state sovereignty can help to promote peace between states and allow countries a healthy degree of autonomy.

But aren't there also limitations on how a state can choose to behave? What happens if one state perpetrates actions so heinous that they "shock the conscience of mankind"? Are there any legal tools that can help guide our response to such questions? By now, you have probably guessed that the answer to these questions is "yes." Since the end of World War II, the advent of modern human rights has had revolutionary consequences for international law. At its most forceful, the law of human rights is based on a fundamental human insight: there are certain ways human beings must never be treated, under any circumstances. The Latin word for this principle is *jus cogens* (as we learned in Chapter 2).

With varying degrees of success, human rights advocates have struggled over the last sixty years to give legal character to this basic moral principle. By now, many of us have internalized the central lesson of human rights law: that certain actions towards other human beings are always legally prohibited. No matter who the perpetrator or victim, or what the justification, there are certain universal laws of human conduct that must always be obeyed. By now you should recognize that this idea stands in deep tension with prior existing international law. The idea that even the world's most powerful leaders might be called to account for human rights violations that take place within their own borders is a truly revolutionary concept.

Discussion Questions

1. Which rights do you think the world recognizes as universally binding, or *jus cogens*? Which rights should they recognize?
2. Do you think that the world has become better off since the beginning of human rights law sixty years ago? If so, why? In what ways?

Of course, human rights violations continue to occur with great frequency around the world. How can this be, you might ask? Although human rights law has made many important advances, there are still huge obstacles to universal enforcement. One of the main obstacles to enforcement is the lack of assured access to courts. Many violations go unpunished, because often there is no obvious forum to enforce human rights law.

Also, not all of human rights law has become universally binding. Although some human rights law has become universally mandatory (as in the concept of *jus cogens* mentioned above),

much of human rights law still depends on state consent. Many countries choose not to enter into international agreements promoting human rights. These countries may have political, ideological, strategic or even religious reasons for deciding not to enter into human rights agreements. Even if a country does sign onto a treaty, it may not live up to its obligations. One prominent scholar from Yale Law School has even argued in her research that countries that sign human rights treaties are no less likely to engage in human rights violations than those who do not.⁷⁸

There is one other key difference between human rights law and traditional international law that makes enforcement difficult: namely, the victims. When one country violates traditional international law, for example a trade agreement or diplomatic immunity, the victim is usually a powerful state. States that have been wronged directly have strong incentives, as well as the resources, to press their claims in international courts. In human rights law, the victims are often much less powerful. When one state violates human rights law, the victims are usually the vulnerable citizens of the breaching state itself. Poor citizens who are mistreated by their own government often do not have adequate means to see that international law is enforced. Also, when the only victims of human rights violations are the citizens of one state, there is little direct incentive for other states to intervene. The violation has occurred outside their borders and has only an indirect effect on the international community.

Finally, one should point out that judicial enforcement is not the only way human rights can be applied. Countries also engage in a variety of other strategies to change behavior, including shaming, sanctions or countermeasures. Before we get any further, we must first understand the actual mechanics of human rights law. The following are some of the questions this chapter will address. Where did human rights law come from, and how are human rights defined? Which institutions are responsible for enforcing human rights? Which are the major treaties? While the idea may sound intuitive, the body of law known as “human rights” is in fact a wide-ranging and complex area that generates vigorous debate from scholars, lawyers and citizens around the world. In addition to the UN Charter and the major human rights treaties, there are numerous other human rights instruments that may come into play. After reviewing the foundational concepts, this chapter will then discuss the legal status of international human rights in Afghanistan.

II. PRECURSORS TO HUMAN RIGHTS LAW

While the codification of international human rights law is a relatively recent phenomenon—occurring mostly in the last sixty years—the justifications for protecting human rights have been around for centuries. As early as the sixteenth century, in fact, Spanish philosophers Francisco de Vitoria and Suarez argued that the Spanish Crown had a moral and legal obligation to observe the fundamental rights of indigenous peoples in Latin America. During a time of great religious fervor and support for Spanish conquest of the New World, Vitoria and Suarez called on their compatriots to avoid cruel treatment of the native inhabitants of Latin America. According to their philosophy, no economic or religious motive could justify atrocities towards the Crown’s indigenous subjects. Later, in the seventeenth century, the Dutch jurist Hugo Grotius helped lay the foundation for modern international humanitarian law, by

⁷⁸ Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935 (2002).

arguing that even in times of war, all parties have a responsibility to treat civilians and soldiers in a humane fashion. This idea helps explain why even prisoners of war today are entitled to basic legal protections.⁷⁹

The nineteenth and twentieth centuries also saw important improvements in the treatment of minority and abused populations. Beginning in 1815, the United Kingdom persuaded countries to enter into treaties in an effort to end the global slave trade. This was an effective example of a state using its commercial and diplomatic power to induce moral behavior by other states. In the early twentieth century, in the wake of World War I, several peace treaties helped guarantee the protection of minority populations in Eastern and Central Europe. These treaties were designed to prevent the reoccurrence of one of the perceived causes of World War I—that ethnic and religious conflict within states could have powerful destabilizing effects on an entire region. Peace treaties after World War I also helped produce the International Labor Organization, an intergovernmental agency that continues to uphold basic labor standards around the world.

Discussion Questions

1. Can you think of leaders or ideas in either Afghan or Islamic history that laid the foundation for modern human rights or that had ideas similar to those that led to the creation of modern human rights?

While important precursors to modern human rights law, each of these developments was different from today's legal regime in key respects. You can see that each of the actions above responded to a limited and specific problem: the treatment of indigenous peoples in Latin America, slaves in Britain, or minorities in Eastern Europe. For the most part, states were still free to treat their inhabitants in any way they wished; there was no universal legal standard that could regulate a state's internal behavior. Until the development of modern human rights, only states possessed rights, and individuals were only objects, not subjects, under international law. Even now, individuals have only partial, rather than full, legal personality. One partial exception to this rule was the principle of state responsibility: states could protest if their own citizens were mistreated by another state. Still, this was in some ways short of full legal personality; individuals had to go through their own state in order to pursue their rights. Apart from this very limited exception, individuals had no personality under international law.⁸⁰ This landscape would dramatically change after the horrors of World War II, and the adoption of the Universal Declaration of Human Rights⁸¹, a topic to which we now turn.

Discussion Questions

1. Why is it important that individuals, not just states, became subjects of international law? What rights and duties would full legal personality allow for individuals?

⁷⁹ See generally Peter Malanczuk, Akehurst's Modern Introduction to International Law 210-212 (7th ed. 1997).

⁸⁰ Malanczuk, at 212.

⁸¹ Universal Declaration of Human Rights, Dec. 10, 1948, GA res. 217(A) III [hereinafter Declaration].

III. HISTORICAL DEVELOPMENT OF HUMAN RIGHTS LAW

A. The UN Charter

Between 1939 and 1945, Adolf Hitler and his Nazi forces exterminated over six million Jews. This was equivalent to two-thirds of all the Jews in Europe at the time. In addition, the Nazis also targeted and killed large numbers of gypsies, homosexuals and people with disabilities. This massacre of innocents and targeting of Jews became known as the “Holocaust.” Faced with this awesome tragedy, many of the world’s powers came together after World War II and vowed “never again” to let such a war occur. They vowed that no country would be allowed to target another ethnic group for extermination, as the Nazis had the Jews. Such tactics became known as “genocide” or “ethnic cleansing.”

In the wake of World War II, the dominant world powers were determined to avoid a reoccurrence of world war. To accomplish their goals of world peace and prosperity, many countries came together to create the United Nations in 1945. Figuring prominently in Article 1 of the UN Charter is the goal to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁸² Article 55 of the UN Charter states that “the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”⁸³ In Article 56, all members of the UN “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”⁸⁴

Many skeptics argue this language in the Charter is too vague or imprecise to give rise to any legal rights or obligations.⁸⁵ A skeptical reading of the text suggests that these “goals” in the UN Charter are purely aspirational, leaving states free to choose how quickly they will bring themselves into compliance. This is a good illustration of how protection of human rights is still often dependent on the voluntary consent of states. By committing States Parties to work towards achieving these goals, the Charter creates a positive ethical atmosphere that encourages, but does not enforce, equal treatment of all peoples. The real progress in codifying binding human rights law came later, when sovereign states began entering binding legal obligations, such as the ICCPR and ICESCR.

There is some evidence to suggest that the UN Charter does impose real legal obligations on states. For example, in the *Namibia* case, the United Nations and International Court of Justice (ICJ) issued an advisory opinion condemning the apartheid policies of South Africa. Because of South Africa’s unequal treatment of its own black citizens, as well as its continued occupation of neighboring Namibia (despite UN Security Council resolutions decrying the occupation as a violation of international law), the ICJ held South Africa to be in violation of

⁸² U.N. Charter, art. 1.

⁸³ U.N. Charter, art. 55.

⁸⁴ U.N. Charter, art. 56.

⁸⁵ Malanczuk, at 212 (7th ed. 1997).

Articles 55 and 56.⁸⁶ Perhaps even more importantly, Articles 55 and 56 also gave the UN a legal footing to define and codify a more ambitious list of international human rights. The first, and in many ways most important instrument that began to do this was the Universal Declaration of Human Rights.

Discussion Questions

1. Has the world lived up to its promise to “never again” allow acts of genocide? In those conflicts where genocide or something similar has occurred, what are the arguments that make the cases different from genocide as defined by the UN?
2. What are the biggest legal challenges to living up to the promise of “never again”?

B. The Universal Declaration of Human Rights

The UN General Assembly adopted the Universal Declaration of Human Rights in 1948, by a vote of forty-eight states to nil, with eight countries abstaining. (Saudi Arabia, South Africa and the Communist Countries abstained). The document opens with the words, “All human beings are born free and equal in dignity and rights.”⁸⁷ In discussing the provisions of the UDHR, scholars have found it helpful to distinguish between the two kinds of human rights the document enacts. The first (and less controversial) kind might be called civil and political rights. These rights prohibit slavery, inhuman treatment, arbitrary arrest and arbitrary interference with privacy; similar to the UN Charter, these rights also forbid distinctions based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or status. Civil and political rights also protect the right to a fair trial, equal protection before the law, and due process in criminal proceedings; freedom of movement and residence; the rights to seek political asylum, possess and change nationality, to marry and own property, freedom of belief and worship, opinion and expression, freedom of peaceful assembly and association, and free elections and equal opportunities for access to public positions.⁸⁸

The second category of rights embodied in the Declaration is often referred to as economic, social and cultural rights. These rights go beyond the scope of civil and political rights, by declaring many affirmative rights to things like social security, full employment and fair labor conditions, adequate standards of living, health and education and full participation in the cultural life of a community. Can you see how these rights are fundamentally different than the civil and political rights listed above? Achieving this second set of rights would require affirmative actions on behalf of government to redistribute resources. These topics will be discussed in more detail below, under the sections on the ICCPR and ICESCR.

⁸⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa), 1971 I.C.J. (June 21).

⁸⁷ Declaration, art. 1.

⁸⁸ Universal Declaration of Human Rights, Dec. 10, 1948, GA res. 217(A) III.

Discussion Questions

1. Which of these two categories of rights—civil and political, or economic and social, do you believe are most important to development in Afghanistan?
2. Do you see these two categories of rights as interrelated, or separate? Do you think it's possible to achieve one category of rights without the other?

Article 29 of the Declaration leaves considerable discretion to states regarding how they choose to implement its principles. Rather than binding states in hard law, the Declaration was intended to be a normative force that motivates states to behave better. The Declaration leaves some wiggle room for states to achieve its goals at their own pace; the Declaration's rights may be subjected to "such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Many justifications could conceivably fit into these categories of "morality, public order and the general welfare." The Declaration makes a moral plea for governments to "strive...by progressive measures" to comply with its goals. Some skeptics argue that this vague and non-binding language leaves states too free to disregard the Declaration's principles.⁸⁹ On the other hand, supporters argue that the Declaration's moral force has succeeded in persuading states to adopt its norms, and that these practices have now become binding as "customary international law." We will address this topic under the heading, "The Role of Customary International Law in Human Rights."

Discussion Questions

1. How well do you think states respond to moral pressures, or shaming, from other countries? What power does human rights law have if it is difficult to enforce in court?

IV. CONTEMPORARY INTERNATIONAL HUMAN RIGHTS LAW

A. International Covenant for Civil and Political Rights (ICCPR)

If the Universal Declaration of Human Rights articulated a "common standard" for countries to work towards, two treaties drafted by the UN in 1966 helped transform that standard into a binding legal obligation. The International Covenant on Civil and Political Rights⁹⁰ (ICCPR) and International Covenant on Economic, Social and Cultural Rights⁹¹ (ICESCR), together with the Declaration, make up what is known as the "International Bill of Human Rights." These covenants, which came into force in 1976, reflect many of the same principles contained in the UDHR, but with greater binding force. Afghanistan has acceded to both conventions (although having stated a declaration that we discuss later in this chapter).

⁸⁹ Malanczuk, at 211.

⁹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁹¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

The ICCPR is perhaps the most significant international human rights treaty because it is legally binding. That is, states that ratify the treaty must also implement domestic legislation to give effect to the treaty's provisions (Article 2(2)), as well as provide an effective remedy for violations of those rights (Article 2(3)).⁹² Today, more than 165 countries are party to the treaty, including Afghanistan. The treaty itself contains numerous guarantees of rights. Articles One of both the ICCPR and ICESCR are identically worded, guaranteeing a people's right to self-determination and to dispose freely of their natural resources. Many observers believe these two rights have now become customary international law.⁹³ Article Two of the ICCPR echoes the Declaration's commitment to non-discrimination by mandating that the treaty's provisions be guaranteed to all peoples, without distinction to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Article Three pledges states to ensuring that both men and women fully enjoy all of the civil and political rights guaranteed in the treaty.

The ICCPR also contains numerous guarantees of specific, substantive rights. Affirming a right to life, Article Six prohibits states from imposing the death penalty in all but the most serious cases, and never in the case of minors under the age of 18 or pregnant women. Articles Seven and Eight ban cruel, inhuman and degrading treatment and slavery, while Article Nine guarantees the right of liberty and security in one's person. This means that states are required to avoid arbitrary detentions, and must allow prisoners a timely opportunity to contest their detentions in front of an impartial judge in a trial, or be released. Freedom of movement within a state is another right guaranteed in Article Twelve. Similar to the Declaration, the ICCPR also guarantees the rights to freedom of thought, conscience and religion,⁹⁴ as well as the freedom to hold any opinion without interference.⁹⁵ Articles 21 and 22 mirror the Declaration's grants of freedom of association and freedom of expression.

There are some differences between the Declaration and the ICCPR. For example, while the Declaration recognizes a right to property, the ICCPR does not.⁹⁶ Conversely, the ICCPR includes some rights that the Declaration lacks, such as Article 27's guarantee that minorities shall be able to practice their own culture, language and religion within a state. There are other articles in the ICCPR you may find interesting: for example, Article 23 recognizes the family as the "natural and fundamental group unit of society," and mandates that no marriage shall be entered into without the "free and full consent" of both entering spouses. In a similar vein, Article 24 protects the rights of children to be recognized as minors and to receive a name after birth.⁹⁷ Article 20 has generated some controversy for barring war propaganda as well as any incitements to national, religious or racial violence or hostilities.

⁹² ICCPR, *supra* note 10, art. 2.

⁹³ Thomas Buergenthal, *Human Rights*, in Max Planck Encyclopedia of Public International Law, Online Edition, (Rudiger Wolfrum ed., 2010), citing I.C.J. Advisory Opinion on Israeli Wall.

⁹⁴ ICCPR, *supra* note 10, art. 18.

⁹⁵ ICCPR, *supra* note 10, art. 19.

⁹⁶ Buergenthal, at 5.

⁹⁷ ICCPR, *supra* note 10, art. 24.

Finally, Article 25 includes some protections for political democracy; its language states that “every citizen shall have the right...to take part in the conduct of public affairs, directly or through freely chosen representatives” and “to vote and be elected at genuine periodic elections.”

Discussion Questions

1. Some supporters of the Convention claim that the language in Article 25 requires or imposes democracy on those that ratify. Is this the only possible interpretation? Can you think of an interpretation that would allow an undemocratic regime to comply with the Article?
2. What kind of election is necessary in order for representatives to be “freely chosen”?
3. What do you think it means to “take part in the conduct of public affairs”?

Certain of the rights proclaimed by the ICCPR are subject to derogation. These rights include the freedom from detention, freedom of movement, and certain political rights. Article Four allows states to derogate these rights:

In time of public emergency which threatens the life of the nation...to the extent strictly required by the exigency of the situation, provided such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, religion or national origin.⁹⁸

Additional rights, such as the freedom of religion found in Article 18, may also be subject to “limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others.”⁹⁹ Note, however that certain rights protected by the ICCPR can *never* be derogated. These include the right to life and the right not to be tortured or enslaved. The general presumption of the ICCPR is that state parties “undertake to respect and ensure” all of the rights contained in the document. States also are prohibited from withdrawing from the ICCPR.

Discussion Questions

1. Under what circumstances, if any, do you think it would be acceptable for a country to curtail the right to freedom of religion, protected in Article 18?

B. International Covenant for Economic, Social and Cultural Rights (ICESCR)

The International Covenant for Economic, Social and Cultural Rights is the second major international treaty, along with the ICCPR, that underlies much of today’s human rights law. The ICESCR proclaims that all citizens shall have a right to fair labor conditions and a decent wage,¹⁰⁰ to social security and insurance,¹⁰¹ to adequate physical and mental health,¹⁰² to

⁹⁸ ICCPR, *supra* note 10, art. 4.

⁹⁹ ICCPR, *supra* note 10, art. 18.

¹⁰⁰ ICESCR, *supra* note 11, art. 7.

¹⁰¹ ICESCR, *supra* note 11, art. 9.

¹⁰² ICESCR *supra* note 11, art. 12.

universal compulsory primary education,¹⁰³ to freedom from hunger,¹⁰⁴ as well as the right to form trade unions¹⁰⁵ and benefit from, and take part in, scientific progress.¹⁰⁶ The ICESCR also reaffirms many of the same rights protected in the ICCPR, including provisions related to self-determination and economic autonomy,¹⁰⁷ gender equality¹⁰⁸ and the family.¹⁰⁹

There are also important differences between the two covenants. Whereas both covenants are binding on States Parties, the ICESCR allows states a wide degree of discretion over how quickly they will achieve its goals. According to Article Two, a state party “undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized.”¹¹⁰ There is no requirement under the ICESCR, for example, that states must implement domestic legislation to realize its goals. This has led some commentators to observe that the ICESCR “lacks teeth.”

Many countries have acknowledged the value of the ICESCR rights, but chosen different ways to achieve them. The United States, which has signed but not ratified the treaty, explains that adopting the ICESCR makes little sense, given its free-market system of allocating resources. People sympathetic to this position might argue that decisions about resource allocation are best left in the hands of legislatures and the executive. On the other hand, many opponents of this view argue that without a treaty obligation akin to the ICESCR, societies will fail to ensure adequate resources for all peoples. On this view, ratifying the ICESCR is a necessary first step in the struggle to ensure equality for all. Much of the world has acknowledged the importance of the ICESCR principles; as of 2009, the ICESCR had 160 parties, including Afghanistan.

Afghanistan, having acceded to the ICESCR, has made a declaration that applies to both its accession to the ICESCR and ICCPR:

The presiding body of the Revolutionary Council of the Democratic Republic of Afghanistan declares that the provisions of paragraphs 1 and 3 of article 48 of the International Covenant on Civil and Political Rights and provisions of paragraphs 1 and 3 of article 26 of the International Covenant on Economic, Social and Cultural Rights, according to which some countries cannot join the aforesaid Covenants, contradicts the International character of the aforesaid Treaties. Therefore, according to the equal rights of all States to sovereignty, both Covenants should be left open for the purpose of the participation of all States.

¹⁰³ ICESCR, *supra* note 11, art. 13.

¹⁰⁴ ICESCR, *supra* note 11, art. 11.

¹⁰⁵ ICESCR, *supra* note 11, art. 8.

¹⁰⁶ ICESCR, *supra* note 11, art. 15.

¹⁰⁷ ICESCR, *supra* note 11, art. 1.

¹⁰⁸ ICESCR, *supra* note 11, art. 3.

¹⁰⁹ ICESCR, *supra* note 11, art. 10.

¹¹⁰ ICESCR, *supra* note 11, art. 2(1).

Discussion Questions

1. How do you interpret the declaration Afghanistan made the ICESCR and ICCPR? Is Afghanistan referring to its own position when making the declaration or thinking of other countries?
2. How good a job do you think Afghanistan is doing in complying with the ICCPR and ICESCR? Do you see any improvements in recent years? If so, why?
3. What do you think is the best way of ensuring universal access to basic necessities, such as food and water? Do you think ratifying the ICESCR is helpful to achieving these goals?

C. Additional UN Human Rights Instruments

In addition to the UDHR and covenants that make up the “International Bill of Human Rights,” there are a number of other important UN human rights treaties at the universal level. In chronological order, these include the 1948 Convention on the Prevention and Punishment of Genocide¹¹¹, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination¹¹², the 1979 Convention on the Elimination of All Forms of Discrimination Against Women¹¹³, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹¹⁴, and the 1989 Convention on the Rights of the Child¹¹⁵. Many of these treaties have received widespread ratification. For example, the Convention on the Rights of the Child, which requires states to amend their laws to protect children, received almost universal ratification in 1996. A record 187 state parties ratified the treaty, including Afghanistan.¹¹⁶

The previous paragraph lists the most important and widely adopted sources of international law. Yet there are still many other instruments, designed protect such diverse categories as refugees¹¹⁷, indigenous peoples¹¹⁸, cultural and labor rights, and even prisoners of war.¹¹⁹ For example, two large organizations that fall under the authority of the UN—the United Nations Educational, Scientific and Cultural Organization (UNESCO), as well as the International Labor Organization (ILO)—adopt their own conventions that countries may ratify. The ILO has even adopted a Declaration that it says is binding on member states, regardless of whether the state has ratified the relevant conventions. Its Declaration on Fundamental

¹¹¹ Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

¹¹² International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

¹¹³ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. res. 34/180.

¹¹⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹¹⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹¹⁶ Malanczuk, at 216.

¹¹⁷ Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150.

¹¹⁸ UN Declaration on the Rights of Indigenous Peoples, Sep. 12, 2007, A/61/L.67/Annex.

¹¹⁹ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, discussed in Chapter 6.

Principles and Rights at Work¹²⁰ calls on states to ensure that workers have rights to collective bargaining and freedom of association, and to abolish compulsory and child labor. States that have not ratified the treaty are asked to report each year on the progress they have made in each of the four core areas. Beyond its power to ask for reports and issue findings, however, there is little the ILO can do to ensure that member states respect its mandates.

Discussion Questions

1. Do you think the rights of children are well protected in Afghanistan? What kinds of labor do you think children should be allowed to perform?
2. Do laws protecting children from being forced into labor make sense given Afghanistan's current economic realities? What are arguments for and against children being able to work in Afghanistan or any other country?

D. Role of Customary International Law in Human Rights

Until now much of our discussion of international human rights has focused on treaty made law. Major human rights covenants, including the ICCPR or the Convention on the Rights of the Child, become binding only when states ratify them as treaties. Customary international law, a concept you read about in Chapter 2, forms another crucial source of human rights law. As you learned in Chapter 2, customary international law is binding on states, regardless of whether they have ratified any particular treaty. Because customary law is derived from widespread consensus – as evidenced by verbal pronouncements, state practice and *opinio juris* – its exact provisions can be difficult to ascertain. Yet many observers agree that certain provisions contained in the Universal Declaration of Human Rights have now become binding on all states as customary international law.¹²¹ One powerful statement of the reach of customary international law can be found in the Restatement¹²², perhaps the most authoritative summary of black letter U.S. law. Section 702 provides that:

U.S. law - Restatement §702

[A] state violates international law if, as a matter of state policy, it practices, encourages, or condones:

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) the torture or other cruel, inhuman or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

¹²⁰ Declaration on Fundamental Principles and Rights at Work, ILO 86th Session, Geneva, 1998.

¹²¹ Barry E. Carter, Philip R. Trimble & Allen S. Weiner, *International Law* 795 (Aspen Publishers 5th ed. 2007).

¹²² Restatement §702 (1987), *reprinted in* Carter, et al, 2007.

There are several real-world examples of the binding power of customary international law regarding human rights. For example, Professor Richard Lillich¹²³ cites the UN-sponsored International Conference of Human Rights, which in 1968 issued a Proclamation of Tehran, declaring that “the Universal Declaration of Human Rights...constitutes an obligation for members of the international community.”¹²⁴ Many scholars and human rights advocates have also pointed to the increasingly common invocations of the Declaration by lawyers, states and non-governmental organizations.¹²⁵ In 1980, a U.S. Federal Court of Appeals recognized the binding obligations of customary international law. In a case between two Paraguayan parties, the U.S. court held that torture was a violation of customary international law under the Declaration of Human Rights.¹²⁶ The court reached this result even though the U.S. had not yet ratified the ICCPR, which prohibited torture. Thus, the court recognized that even without a binding treaty or domestic legislation, both individuals and the U.S. government were bound to respect certain fundamental human rights under customary international law. This was indeed a major breakthrough for human rights advocates.

Why is customary international law so important, you might ask? One answer is that customary international law helps provide a solid backdrop to an otherwise messy “patchwork” of treaty made law.¹²⁷ With all the overlapping and sometimes inconsistent treaties, it is useful to have a clear statement of which actions are illegal in all countries at all times. There is also the problem of universality: not all countries have ratified the major human rights treaties. Customary international law prohibits even non-States Parties from engaging in actions like torture and forced disappearances. Scholars Bruno Simma and Philip Alston argue that this seductive appeal leads some advocates to exaggerate the true extent of customary law. These scholars argue that while verbal pronouncements and declarations are important indicators of customary law, one must also look to state practice. In order to determine whether certain norms have in fact become widely accepted principles of *jus cogens*, these scholars argue, one must pay close attention not only to what states say, but also what they do.

Discussion Questions

1. Which is more important to determining custom: a state’s action or its words? Do you think that signing a treaty is helpful in achieving these goals?
2. When you look out at the world, do you see evidence of a widespread consensus on human rights? If so, which rights? Is the list contained in the Restatement too broad, or not broad enough? Why?

¹²³ Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 Ga. J. Intl. & Comp. L. 1, 1-7 (1995-1996), *reprinted in* Carter, et al, 2007.

¹²⁴ United Nations, Final Act of the International Conference on Human Rights, Tehran, 13 May 1968, available at: <http://www.unhcr.org/refworld/docid/3ae6b36f1b.html> [accessed 9 February 2010].

¹²⁵ Lillich, at 2.

¹²⁶ *Filartiga v. Pena Irala*, 630 F.2d 876 (2nd Cir. 1980).

¹²⁷ Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Intl. L. 82, 82-90, 107 (1988-1989), *reprinted in* Carter, et al, 2007.

V. ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW

By now in your legal studies you may have heard the oft-repeated adage: “where there is a legal right there is also a legal remedy.”¹²⁸ This famous expression contains a fundamental understanding of the power (and limitations) of law. Put another way, one might ask, What good does it do to have a right, if there is no way for me to enforce it? This line of analysis should be familiar to you by now. Effective lawyers are always thinking realistically about what remedies are available to their clients. This concern with remedies and enforcement is no less important in the realm of international human rights.

In fact, there are few judicially binding procedures that can redress international human rights abuses. The main powers available to human rights bodies are to monitor state compliance and issue reports about their findings. These reports can be helpful in putting pressure on states to alter their behavior and respect human rights. However, the lack of readily available binding procedures has led many skeptics to argue that human rights law is not as powerful as other kinds of law. Without a formal procedure that can compel states to alter their behavior, human rights protection is subject to the whims of states. For states that choose not to ratify the major human rights treaties, there is little the world can do to intervene.

A. Enforcement of the UN Charter and Declaration of Human Rights

In analyzing the implementation of human rights law, it will be helpful to distinguish between the law of the Declaration and UN Charter, and the world of treaty made law. Each of these two branches has its own implementation measures. Within the UN, the main body responsible for monitoring human rights is the UN Economic and Social Council [hereinafter ECOSOC]. Pursuant to Article 68 of the UN Charter, ECOSOC established a Human Rights Commission in 1946 that monitored human rights abuses within individual countries and globally, and issued reports. However, concerns about the integrity and effectiveness of the Commission led the UN finally to dismantle the organization in 2006, replacing it with today’s Human Rights Council [hereinafter Council].¹²⁹ Critics of the Commission argued that the states with the worst human rights records sought membership on the Commission in order to blunt criticism of their own abuses. Today’s Council is designed to avoid those problems; it is governed by 47 member states elected by the General Assembly. Voting states are instructed to “take into account the contribution of candidates to the promotion and protection of human rights.”¹³⁰

Similar to the Commission before it, the UN Human Rights Council pursues “mandates” to investigate and issue findings on human rights abuses within individual countries, as well as at a global level. Currently the Council is pursuing “country mandates” in Burundi, Cambodia, Haiti, Myanmar, North Korea and Sudan. As of 2010, the Council maintained 31 active mandates that report on global issues ranging from human trafficking to violence against women.¹³¹ A Sub-Commission on the Protection of Racial, Religious and Linguistic Minorities also performs studies and issues recommendations about how states can improve their treatment

¹²⁸ *Marbury v. Madison*, 5 U.S. 137, 163 (1803), *quoting* William Blackstone, *Commentaries*.

¹²⁹ Resolution: Human Rights Council, G.A. Res. 60/251 (April 3, 2006).

¹³⁰ G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2008), *reprinted in* Carter, et al, 2007.

¹³¹ *Available at* <http://www2.ohchr.org/english/bodies/hrcouncil/>.

of minorities. Created in 1993, the Office of the UN High Commissioner for Human Rights (UNHCHR) draws additional attention to human rights, primarily by raising public awareness and issuing calls to action. Finally, in 2007, the Human Rights Council adopted a new procedure called Universal Periodic Review (UPR). Under UPR, the Council reviews the human rights record of each one of the UN's 192 member states once every four years. Each country also has the opportunity to declare what actions it has taken to improve the protection of human rights within its borders.

Discussion Questions

1. Do you think the UN is well positioned to advocate effectively for human rights? Why or why not?
2. How much tolerance should the world have for countries that routinely perform poorly on human rights reports? In your view, can there be legitimate reasons for such poor performance?

B. Enforcement of Human Rights Treaties

Monitoring and reporting are the two most important implementation measures established by the human rights treaties. Most human rights treaties, including, for example, the ICCPR or the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), establish monitoring bodies that conduct studies and issue reports about states' compliance (or failure to comply) with the treaty's obligations. The ICCPR has established a Human Rights Committee, composed of 18 members, who are individual experts in the field of human rights, and do not represent states. Under the ICCPR, States Parties must submit their own reports that detail their efforts to improve the condition of human rights within their country. The Committee then reviews the reports and issues "comments" and "observations" about how the country can improve its record.

Additional efforts to increase the enforcement power of the ICCPR have met with only limited success. Article 41 of the ICCPR allows states to bring claims against another state, but only if both states have previously given their consent to this procedure. To date, less than half of the States Parties to the treaty have ratified the Article, and the procedure itself has never been used. A larger number of countries (109) have ratified the ICCPR's First Optional Protocol, which allows the Committee to hear complaints from individuals (Afghanistan to this date has not ratified the protocol).¹³² Thousands of individuals have filed complaints under this Protocol. Still, the only action available to the Committee after it reviews the complaint is to call on the state to improve its record, and make recommendations.¹³³

Reservations, understandings and declarations (RUDs) can also have important consequences for a treaty's enforcement power. For example, the U.S. has attached significant reservations to its ratification of the ICCPR. These reservations allow the U.S. to continue to

¹³² UN Treaty Collection Database, <http://treaties.un.org>; or follow http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

¹³³ See generally Malanczuk, at 216.

impose capital punishment on juvenile offenders, despite the ICCPR's limitations of these practices. The U.S. has also clarified that under the Torture Convention, it will continue to derive the meaning of "cruel, inhuman or degrading treatment or punishment" according to its own Constitution, rather than from the interpretations of the Convention.¹³⁴ The U.S. has also passed several reservations declaring that treaties in the U.S. will not be "self-executing"; this means that the treaties will not be automatically enforceable in U.S. courts, unless the Congress also passes domestic legislation to codify the treaty provisions. Some critics argue that these reservations render the U.S. ratification of human rights treaties virtually meaningless.¹³⁵ After all, what good is it to sign a treaty if the U.S. refuses to observe key portions, or declares that its Congress is unwilling to enforce the law as domestic legislation?

The same type of questioning may well be applied to Afghanistan's 2003 ratification of the Convention on the Rights of the Child (CRC). Remember in the previous chapter, we discussed that Afghanistan has not made reservations to various treaties to which other Islamic countries have, including the CRC. However, similar to the case we discussed regarding the ICCPR and ICESCR, Afghanistan has made the following declaration to the CRC:

The Government of the Republic of Afghanistan reserves the right to express, upon ratifying the Convention, reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari'a and the local legislation in effect.¹³⁶

What does it mean for Afghanistan to reserve the right to express "reservations on all provisions" of the Convention given that it otherwise ratified the treaty? Does the criticism of the U.S. that we just discussed also apply to Afghanistan given this broad reservation?

The UN Human Rights Committee has sought to mitigate the effect of reservations, by reserving to itself the power to accept or reject a country's reservations under the ICCPR.¹³⁷ In its General Comment 24, the Committee argues that the "special characteristics of the Covenant" allow the Committee to reject any reservation not "compatible with the object and purpose of the Covenant."¹³⁸ In other words, the Committee has argued that the U.S. (or any other country) may be bound by the full effect of the ICCPR, notwithstanding any limiting reservations the country has made. It is normally the Vienna Convention on the Law of Treaties that governs these questions about the consequences and permissibility of treaty reservations. Countries such as the U.S. and U.K. have strenuously protested that the Vienna Convention does not allow the Committee to apply treaties in full, despite a country's limiting reservations.¹³⁹ This contentious

¹³⁴ Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 416-423 (2000) reprinted in Carter, et al, 2007.

¹³⁵ Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Intl. L. 341, 344, 345-349 (1995), reprinted in Carter, et al, 2007.

¹³⁶ UN Treaty Collection Database, <http://treaties.un.org>; or follow http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

¹³⁷ UN Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994), reprinted in Carter, et al, 2007.

¹³⁸ General Comment 24, sec. 17-18.

¹³⁹ Observations by the United States on General Comment No. 24, 3 Intl. Hum. Rts. Rep. 265-269, reprinted in Carter, et al, 2007.

and important issue that has gone largely unresolved; without a judicial body to decide this dispute, countries such as the U.S. and U.K. are likely to continue to insist that their interpretations are legal, and will act accordingly.

Discussion Questions

1. If you were Afghanistan's Ambassador to the United Nations, what reservations would you urge your country to make to the major treaties we have studied?
2. What do you think about Afghanistan not making reservations to many of the international treaties it has signed and ratified or acceded to?
3. Do you think that countries' limiting reservations weakens their moral power to advocate for human rights? Why or why not?

VI. INTERNATIONAL HUMAN RIGHTS IN AFGHANISTAN

The Afghan Constitution

The Afghan Constitution contains several important protections for international human rights. In fact, the Constitution's embrace of the UN Charter and its commitment to observe international human rights is unprecedented in the history of Afghanistan.¹⁴⁰ Article 6 declares: "the state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes..."¹⁴¹ Article 7 states further that "the state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights."¹⁴² This constitutional provision in Article 7 – obligating Afghanistan to respect its treaty obligations – is consistent with the law of treaties under the Vienna Convention, which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."¹⁴³ The ICCPR, to which Afghanistan is a party, also obligates Afghanistan to adopt domestic legal structures that guarantee the enforcement of the treaty's provisions.¹⁴⁴

Article 58 of the Afghan Constitution empowers an Independent Commission for Human Rights in Afghanistan (hereinafter AIHRC) to monitor and protect human rights.¹⁴⁵ Originally contemplated by UN Resolution 134/48 in 1993, as well as by the Bonn Agreement in 2002, the AIHRC also has a mandate to hear complaints from individuals, collect evidence, investigate and refer cases to the legal authorities of Afghanistan for redress.¹⁴⁶ The Commission, appointed by the President of Afghanistan, is composed of nine members, male and female, each with

¹⁴⁰ Mandana Knust Rassekh Afshar, *Max Planck Manual on Afghan Constitutional Law*, Max Planck Manual on Constitutional Practice and Human Rights (Max Planck Institute for Comparative Public Law and International Law, Munich, Germany), July, 2007.

¹⁴¹ Constitution of the Islamic Republic of Afghanistan [hereinafter Afghan Constitution], art. 6.

¹⁴² Constitution of the Islamic Republic of Afghanistan, art. 7.

¹⁴³ Vienna Convention on the Law of Treaties.

¹⁴⁴ ICCPR, *supra* note 10, art. 2.

¹⁴⁵ Afghan Constitution, art. 58.

¹⁴⁶ Afghan Constitution, art. 58.

academic backgrounds and practical experience in the field of human rights.¹⁴⁷ The AIHRC also has a duty to provide recommendations on improving protections for the rights of children, women, disabled and other vulnerable populations.¹⁴⁸ Pursuant to its duties under Article 21, the AIHRC works closely with international non-governmental organizations and the UN to report on and improve the condition of human rights in the country. Below is an excerpt from the Executive Summary of the 2009 Annual Report that discusses challenges the Commission faced as well the ways that it has achieved its mission and plans for the future:

The AIHRC continued to face numerous challenges in achieving its objectives and implementing its activities including the deteriorating security situation, which not only adversely affected the work of the AIHRC but also posed a serious threat to the life and wellbeing of Afghan citizens. Other obstacles included a weak presence of the rule of law, a persistent culture of impunity and the abuse of power by government officials as well as a weak judicial system. The human rights of women and children continued to be undermined by reports of egregious crimes, including rape and violence, and failure to bring perpetrators of such crimes to justice.

Continuing civilian casualties resulting from the ongoing conflict also exacerbated the human rights situation and the ongoing conflict hindered the progress of development and construction in many areas throughout the country...

Promotion of Human Rights

As a result of the AIHRC's promotion efforts, by the end of 2009, 17,217 people had increased understanding and awareness about general human rights issues, women's rights, children's rights and the rights of persons with disabilities. During the year, the Commission celebrated five important human rights days and used these occasions as platforms to raise public awareness about human rights. The AIHRC also played a leading and influential role to mainstream human rights into the country's security institutions, education and higher education systems. There was a 70% increase in AIHRC's radio and television broadcasting compared with 2008. Finally, the AIHRC supported CSOs in building their capacity to effectively promote human rights, drew in 50 human rights volunteers and actively promoted a culture of peace, justice and reconciliation, including the opening of a museum in Badakhshan to recognise the suffering of Afghans during decades of armed conflict.

Protection of Human Rights

The AIHRC achieved five main results to meet its overall objective of human rights protection across Afghanistan. First, 99% of human rights cases received by

¹⁴⁷ Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission [hereinafter AIHRC Law], Decree No. 16 (May 14, 2005), art. 7.

¹⁴⁸ AIHRC Law, art. 26.

the AIHRC were investigated and 62% resolved. Second, the AIHRC took an active part in the drafting and amending of six laws with implications for human rights. Third, as a result of AIHRC's joint advocacy efforts with the UN, international organisations and civil society, ISAF and the Afghan government forces were urged to intensify their efforts to prevent civilian casualties. These efforts and recommendations helped contribute towards a decrease in number of civilian casualties by NATO and Afghan government forces in 2009... Finally, 716 women received legal advice and 60 family disputes, including cases of violence against women, were mediated which ended in resolutions or improvements in the situation.

Monitoring of Human Rights

... The report identifies rights to marry and found a family, work, health, food, water, property, education, due process of law, adequate standard of living and liberty and security of person as the most frequently violated rights in the country... Coupled with these monitoring activities, the Child Rights Field Monitoring (CRFM) teams conducted 7,850 interviews with children in 134 districts in 28 provinces around the country. CRFM data collected revealed that the most frequently violated child rights include the rights to education, marry and found a family due process of law and personal integrity. The final result of AIHRC's monitoring activities was that 60% of prisons, detention centres and child correction centres showed improvements in terms of living conditions and the treatment of detainees and prisoners. More significantly, there was a decrease of 34 per cent in the rate of torture and ill treatment perpetrated in prisons and detention centres.

Discussion Questions

1. How can monitoring human rights abuses help to lessen them? From the AIHRC report, can you identify what the purpose of monitoring is?
2. Now you have learned about the history of International Human Rights Law, as well as specific cases of breaches of these laws in Afghanistan. Given this knowledge, what actions would you suggest the AIHRC take to move Afghanistan move toward better compliance with the treaties it has signed?
3. This final question requires some research. Look up other International Human Rights Treaties and find several that Afghanistan has yet to ratify. If you were a member of the AIHRC, and you were asked to prioritize the list and recommend to the President to enter into three new treaties, which would they be and why?

VII. CONCLUSION

Afghanistan has ratified many of the world's most important and far reaching human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); Convention Against Torture and Other Cruel or Degrading Treatment; International Convention on Elimination of all Forms of Racial Discrimination (CERD); and the Convention on the Rights of the Child (CRC). By ratifying these treaties, Afghanistan has agreed to recognize and uphold a broad range of human rights, including the rights in the treaties that we discussed above.

The decision to ratify these treaties is an important sign of Afghanistan's commitment to human rights. But ratification alone does not guarantee that these rights will be upheld. As in any country, the struggle to enforce human rights in Afghanistan may be long and difficult. The legitimacy of international human rights norms is still not a precept that all Afghans accept. Those seeking to enforce human rights may be asked to justify their beliefs. It is our hope that this chapter has provided you with the tools for understanding the principles of international human rights. Now it is your turn to begin a broader conversation about what role these rights can and should play in your own country.

GLOSSARY

- ◆ Codification: Codification is the process of forming a legal code. It is the actual act of taking a rule and putting it into “code” by passing a statute or other form of law.
- ◆ Ethnic cleansing: This word is used to describe the actions of a nation-state or other group when they attempt to destroy members of an ethnic group. The term ethnic cleansing became used commonly during the 1990s in reference to that which occurred in the former Yugoslavia. Ethnic cleansing in international law does not amount to genocide.
- ◆ Genocide: Genocide is the deliberate and systematic destruction of a racial, political, or cultural group (it tends to imply the destruction or attempted destruction of an entire ethnic group, not just members of that group).
- ◆ Heinous: Something that is heinous is terrible, or abominable—very, very bad.
- ◆ The Holocaust: The Holocaust was the state-sponsored murder and persecution of about six million Jewish people in Germany and beyond, led by the Nazis. The Holocaust refers to the actual killing of the Jewish people, following the time when they were imprisoned and placed in concentration camps in Europe by Hitler and his allies. During the Holocaust, the Nazis targeted not only Jewish people but also Gypsies, people with disabilities and some Slavs. The Jewish people however were the predominant group targeted and around half of the Jews living in the world at the time were subsequently killed by order of the government of Germany.
- ◆ Ideological: Ideology or ideological refers to a set of ideas that lead someone to believe or act in a certain manner. Often times, in an international text, we refer to leaders that are led by ideology, ideas that they have, as opposed to what is best for the people at times.
- ◆ Normative: In law, normative is used to refer to the way something ought to be done according to a value position.

CHAPTER 5: THE PEACEFUL RESOLUTION OF INTERNATIONAL LEGAL DISPUTES

I. INTRODUCTION

One of the recurring themes of this textbook, to say nothing of international law more broadly, is that the international system contains countless institutions to encourage states to solve their disputes peacefully without resorting to armed force. As we discussed in Chapter 2 when examining the sources of international law, we noted that even though there are few formal methods to compel or force a state to comply with these laws, most states have agreed to forfeit certain measures of sovereignty in the name of peace and global cooperation. For reasons that we probably consider to be obvious, peaceful relations with other countries are in the national interest of most states; peace facilitates domestic security and stability, encourages trade across national boundaries, and it enables growth and development in ways that cannot be accomplished with internal resources alone.

But what happens when two countries that tend to have peaceful relations with each other, or that are parties to a treaty, enter into a dispute? What mechanisms exist for these countries to resolve the dispute without going to war? We have already learned about one of the principal international judicial organs tasked with resolving disputes among nations, the International Court of Justice. As we will discuss in detail later in this chapter, the ICJ hears disputes that are submitted to it by UN member states. That is, a member to the UN, like Afghanistan, can, in those instances where the ICJ has jurisdiction, present to the Court a claim against another member state for violating international law and this could potentially result in a hearing in front of the judges of the ICJ. (We discuss the jurisdiction, procedure and opinions of the ICJ at the end of this chapter.) In fact, Article 2(3) of the UN Charter states that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” In other words, facilitating peaceful resolution of international disputes is one of the core missions of the UN and achieving that end is an obligation that all members agree to respect.

But formal appearances in an international court are not the only mechanism by which countries peacefully resolve disputes. In international relations, there are a number of non-judicial and quasi-judicial forms of dispute resolution that are employed more often than recourse to a court. Much like in Afghanistan, where *shuras* and *jirgas* serve the role of a judge to resolve a local dispute, the international community has developed similar experts. Mediators, negotiators and arbitral commissions all perform certain functions that resemble those of village or provincial leaders that form *shuras and jirgas*. Furthermore, nations use informal methods of dispute resolution for many of the same reasons that Afghans do; it can be cheaper, faster, and less complex than recourse to the formal court system, and it can be a means of realizing mutually beneficial outcomes, potentially different from the sort of remedies that a court or arbitration would award.

In this chapter, we will discuss the principal means of peaceful dispute resolution in the international system. We begin with the informal methods of dispute resolution and then look at the quasi-judicial form of dispute resolution called arbitration. Finally we will discuss their formal counterparts, the ICJ and other regional courts.

Discussion Questions

1. What are some of the reasons that Afghans use informal methods of dispute resolution? Are these systems more efficient?
2. Create a table that lists the advantages and disadvantages of informal and formal methods of dispute resolution. Are there certain issues that are better suited to one or the other?
3. Now consider informal dispute resolution among nation states. Perform the same exercise. In what situations are countries more likely to resort to informal forms of dispute resolution? Why?

II. INFORMAL METHODS OF INTERNATIONAL DISPUTE RESOLUTION

Much like Pashtuns often use *jirgas* to settle internal disputes, nation-states engage in negotiation, conciliation, mediation, and arbitration to resolve international disputes, at times even to pre-empt the dispute. Most often, a *jirga* involves some level of communication between the parties in dispute, a presentation of facts or evidence regarding the parties' claims, and the consultation of a third party to help resolve the issue. In this manner, *jirgas* resemble in part, if not in entirety, all of the various methods of informal dispute resolution employed among nations. As previously discussed, the reasons that informal methods of dispute resolution are used in the international community are actually quite similar to the reasons that Afghans submit their disputes to *jirgas*: cost, speed, simplicity, degree of formality, confidentiality and sometimes necessity.

But these informal forms of dispute resolution also have drawbacks when compared to their more formal counterparts, most importantly in their enforcement and the potential binding nature of the decision. (Note that arbitration falls somewhere between, because it is less formal than a traditional court but more formal than other means of dispute resolution. This is discussed in detail later in this chapter.) A decision by an international tribunal like the ICJ is potentially 'more' binding in nature, for a nation-state risks harming its international credibility in future pacts, treaties and relations by not adhering to a particular judicial decision. By contrast, if a nation-state chooses to not respect the advice of a mediator, its credibility in international relations may suffer no impact at all. As depicted in the matrix below, each of the methods we will discuss in this chapter display varying degrees of these potential benefits and costs.

Table 1: Factors Countries Consider in Choosing among Forms of Dispute Resolution*

	Cost	Length/ Duration	Procedural Complexity	Formality	Confidentiality	Binding Power	Flexible Outcomes
Mediation	Low	Low	Low	Low	High	Low	High
Negotiation	Low	Low	Medium	Medium	High	Medium	High
Conciliation	Medium	Medium	Medium	Medium	Medium	Low	High
Arbitration	Medium	Medium	Medium - High	Medium - High	Medium	High	Medium
Judicial	High	High	High	High	Low	High	Low

* All of the factors contained in this matrix can vary based on the nature of the issue and the desires of the parties involved. For example, should the parties wish, mediation can be made public. However, in general, mediation occurs in private and the results are only made public if public knowledge helps the parties for some political gain.

The UN Charter, in discussing the pacific settlement of disputes, notes that countries involved in a conflict should pursue one of the forms of dispute resolution mentioned in the preceding matrix:

UN Charter – Chapter IV, Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

* * * *

In this next section, we discuss the predominant methods of informal dispute resolution among nation-states, including both the non-judicial (negotiation, mediation, good offices and conciliation), as well as the quasi-judicial (arbitration).

A. Negotiation, Mediation, Good Offices and Conciliation

Negotiation

Negotiation is often cited as the most frequently employed method of dispute resolution, potentially more frequently used than all other methods put together.¹⁴⁹ Even when not the primary means of resolution, negotiation is likely to play a role in any dispute resolution, be it in agreeing to key terms to a settlement or resolving peripheral but related issues. Recall that negotiation is the first method of peaceful dispute resolution referenced in Article 33(1) of the

¹⁴⁹ J.G. Merrills, *International Dispute Settlement*, in Carter; Trimble & Weiner, *International Law* 5th Ed. (2007), p. 286.

UN Charter. This is in part because negotiations are not just a tool for resolving disputes, but they can also be used to prevent disputes before they arise.

What is a negotiation? At its core, negotiation is a discussion between empowered parties with the goal of agreeing to terms or arriving at a common understanding without having to go to a court or any other higher power to resolve the issue. Negotiation demonstrates all the qualities that make informal methods of dispute resolution attractive; it brings both parties together to discuss an issue, with the goal of arriving at a mutually agreed and potentially mutually beneficial conclusion, while saving time and money and most likely avoiding any complex procedures. It can be as confidential as the parties desire and the outcomes can be both binding or non-binding. For all these reasons, it is the preferred method of dispute settlement by countries, courts, and individuals.¹⁵⁰

The actors responsible for the negotiations are typically the heads of foreign offices, diplomats, or diplomatic delegations composed of members of those departments interested in the particular negotiation. The actors can also be ministers or members of a ministry with expertise in a certain field. A relevant example is the role of the Ministry of Commerce in Afghanistan, who is responsible for negotiating the provisions of the Afghan Transit Trade Agreement (ATTA) with Pakistan. The Minister of Commerce does this directly with his or her Pakistani counterpart. Should a dispute arise, the two ministers convene and attempt to resolve the dispute through negotiations prior to escalating the issue or closing trade routes. This recourse to negotiation saves both sides time and money that would otherwise be expended if the parties used a formal court system to resolve the dispute.

Negotiations can be conducted in private, as many are, or in public. The deliberations and conclusions of the ATTA itself were shared with the public and have been the subject of intense controversy in the press. Why would the parties agree to make this negotiation public, when the two ministries seems to agree on the major provisions, although other constituents in their countries do not? One argument for public negotiations is that it enables the parties to share with the “entire” world, including other countries as well as their own constituents, the negotiations leading to an agreement and hence claim transparency in the process. It also may increase the binding nature of the negotiated settlement, for the act of informing other parties ensures that neither party can later deny the terms and intent of an agreement. The downside can be that negotiations are delayed due to public opinion or “grandstanding” by the negotiators – a situation during which the parties make unrealistic demands to increase their popularity amidst their own interest groups, potentially to the detriment of the agreement. Generally, negotiations among states are partially public and partially private. While this make it more difficult to arrive at negotiated solutions to issues discussed in public, private negotiations enable states to agree to other more confidential, and maybe more important, matters among themselves.

¹⁵⁰ The Permanent Court of International Justice (PCIJ) has noted, “the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties.” ([Order] PCIJ Rep Series A No 22, 13.)

Discussion Questions

1. When, if ever, should treaties mandate recourse to negotiations?
2. Why would a country accept a treaty that mandates the use of negotiations?
3. Many negotiations between parties in Afghan politics occur in public. Create a list of several of these. What are the common points among them that led the politicians or negotiators to make these discussions public?

It is important to remember that negotiation is not just a tool used after a dispute exists, but it can also be used to stop a dispute before it comes to be. When using negotiations *ex-ante* (e.g. before a dispute) in a preventative manner, a government is said to engage in consultation or an exchange of views. Consultation occurs when a government seeks advice from another state as to whether a particular action may cause harm or be prohibited by that state. Consultation can be incredibly beneficial because it employs limited resources and can help avoid a potential future dispute. Often times, the outcome of a consultation results in a country modifying its approach to a given course of action to ensure its legality. An example of consultation being used to achieve international goals is the US-Afghanistan-Pakistan Tri-lateral Consultations.¹⁵¹ In these series of consultations, the Presidents of each country have discussed bilateral and trilateral actions to enhance their strategic partnership. This includes border operations, transit, agricultural reforms, counter terrorism, counter narcotics and rule of law issues. By engaging in these consultations, the countries hope to avoid disputes in the future by sharing information about their respective plans in each area prior to executing on those plans.

Consultation also plays an important role in antitrust proceedings. Antitrust, or competition law as it is known in Europe, is a branch of law and enforcement in which governments regulate business most often to preserve or enhance competition.¹⁵² Prior to blocking or delaying a large international deal (like a merger or acquisition), governments, represented by their relevant regulatory agencies, may consult with each other regarding the law as it is applied in each country respectively and as it should be applied to a particular deal. They then sometimes engage the companies concerned as well. The reason for conducting a consultation in these cases is to determine if a slight modification to a plan can result in a higher likelihood of approval *ex ante*, before the deal occurs. This may be beneficial to both the sovereign countries, as it enables greater international trade and efficiency, and certainly may

¹⁵¹ U.S.-Afghanistan-Pakistan Trilateral Consultations, Office of the Spokesman, Department of State, May 8, 2009, <http://www.state.gov/r/pa/prs/ps/2009/05/123196.htm>.

¹⁵² Antitrust law can be defined as “[l]egislation enacted by the federal and various state governments to regulate trade and commerce by preventing unlawful restraints, price-fixing, and monopolies, to promote competition, and to encourage the production of quality goods and services at the lowest prices, with the primary goal of safeguarding public welfare by ensuring that consumer demands will be met by the manufacture and sale of goods at reasonable prices.” (West’s Encyclopedia of American Law). Antitrust laws first originated in the United States in response to public outrage against companies having monopolies over certain products and industries. These laws now exist in a variety of forms all over the world, sharing in essence, the goal of promoting competition among businesses and fair pricing practices to protect consumers.

benefit the companies. For private companies, the benefits can be in the order of hundreds of millions of dollars, as is the case when a merger that would otherwise be blocked is approved based on modifications resultant from a consultation. Consultation enables communication before an issue arises, often times where one could be anticipated, to avoid having an issue at all.

One last note on these two forms of informal dispute resolution, although often voluntary, both consultation and negotiation can be mandated as well. Certain treaties and organizations, like the World Trade Organization to which Afghanistan is a prospective member (Afghanistan applied for membership in 2004), specifically provide that member countries must engage in consultation when a dispute arises, and even stipulate a time frame during which the countries must negotiate prior to moving to more formal methods of dispute resolution. (We discuss dispute resolution in the WTO later this chapter.) This mandate is intended to force communication among the organization's members, prior to using more costly formal methods involving the organization's arbitral or judicial bodies (discussed in the next section on arbitration).

Mediation, Good Offices and Conciliation

It is often noted that a *jirga* is part mediation, part arbitration. Prior to convening in front of a *jirga*, elders approach the parties to the dispute and discuss the issues, the emotions and the facts to calm tensions and prepare for the *jirga*. In this manner, the *jirga*'s members are in fact acting as mediators – third party actors who aim to help parties to a dispute peacefully resolve the issues by bringing the parties together. A mediator's role may be confined to bringing the parties together for discussion, or transmitting messages between parties that otherwise refuse to talk face-to-face, or it can result in a proposal for a solution. Note, that the proposal of a mediator is just that – a proposal suggesting what the mediator considers to be mutually acceptable terms, or a fair settlement. It is non-binding and only followed to the extent the parties choose.

When a third party's role is confined to encouraging parties to open channels of communication, hosting parties in dispute, or encouraging them to resume negotiations in case one or both parties has walked away, that party is said to provide "good offices." Is this level of service, which seems rather low, is truly useful in international dispute resolution? Although it is hard to say how often good offices have been used (many instances begin with good offices and become mediation or even negotiation), one of the most often cited in modern history involves Afghanistan.

In 1988, as part of the Geneva Accords,¹⁵³ the UN established the United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP).¹⁵⁴ The UNGOMAP was tasked with monitoring the Soviet troop withdrawal, in essence ensuring that communication channels between the various parties to the accords remained intact. UNGOMAP received the plans for withdrawal from the Soviets, set-up outposts to monitor the withdrawal and received complaints

¹⁵³ The Geneva Accords are known formally as the Agreements on the Settlement of the Situation Relating to Afghanistan.

¹⁵⁴ "Afghanistan / Pakistan - UNGOMAP – Background", United Nations, <http://www.un.org/en/peacekeeping/missions/past/ungomap/background.html>.

from Afghan citizens in cases where the Soviets violated the terms of the agreement. UNGOMAP did not make proposals for the resolution of these complaints, but acted as a repository of information, maintaining lines of communications between the Soviets, the UN, and the people of Afghanistan.

Good offices and mediation can be closely related. Good offices becomes mediation when the third party, no longer a mere facilitator, actively participates in the discussion among the parties in dispute. This may include making proposals to resolve the dispute. Successful mediation, like negotiation, depends on the parties' willingness to accept the mediator, its role, and the ensuing proposals for settlement. If the parties break-off communication or decide to not respect the mediator, other forms of resolution can be sought or the negotiations may be concluded.

Case Study – Mediation

In February 2010, President Hamid Karzai sent a small delegation of Taliban members to Saudi Arabia to begin what was hoped to be more significant talks between the government of Afghanistan and the Taliban.¹⁵⁵ In October 2010, Ashraf Ghani, a former finance minister of Afghanistan, confirmed that reconciliation talks with the Taliban were underway.¹⁵⁶ Ghani also said that Saudi Arabia had been active in mediation. "There are people [doing] mediation in the kingdom of Saudi Arabia and His Majesty, the King of Saudi Arabia, has been involved and others have been involved."

Ghani said that efforts to draw Taliban elements into the political process would require the assistance of foreign powers. "We are delighted that Saudi Arabia and other Gulf countries and other Islamic countries will be coming increasingly forward to claim an active role," he said.

"We also need the engagement of China to make sure the regional arrangements are put in place to bring about a situation where use of sanctuary in neighboring countries is denied."

1. Why did President Karzai choose the government of Saudi Arabia to act as mediators with the Taliban? Why would the government of Saudi Arabia accept to act as mediators given the Taliban's current standing in international politics?
2. Given that mediation most often does not result in a binding and enforceable outcome, how can mediation play a role in settling disputes between the government of Afghanistan and the Taliban?
3. In his interview, Ghani suggests that he would welcome more countries to join Saudi Arabia in facilitating the mediation process. Why would inviting other countries be beneficial? If so, which countries should be invited and why?

Between mediation and arbitration is yet another form of dispute resolution known as conciliation. Conciliation adds more formality to the negotiation, by mandating recourse to a

¹⁵⁵ "Saudi Arabia halts Afghan mediation," Yahoo!News, 11/06/2010, http://news.yahoo.com/s/ap/20101106/ap_on_re_mi_ea/ml_saudi_arabia_afghanistan.

¹⁵⁶ "Saudis 'mediating' Taliban talks," Al-Jazeera, 01/30/2010, <http://english.aljazeera.net/news/asia/2010/01/2010130114235579766.html>.

Commission agreed upon by the parties, either on an *ad hoc* or permanent basis. The conciliation commission is tasked with developing a proposed solution to the dispute. However, unlike arbitration, the terms and outcomes of conciliation are not binding, thus its proximity to mediation. Conciliation emanates from the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 wherein commissions of inquiry were created to review disputes among countries.¹⁵⁷ These commissions were established to hear the facts, clarify issues, and make proposals for settlements, although their proposals were normally not binding.

The importance of knowing and understanding these different forms of dispute resolution lies not in the particulars of the definitions themselves but in understanding that various degrees of informal dispute resolution are employed in political and diplomatic relations quite often. These tools are a good first step in resolving international disputes because they lower transaction costs and save both money and time,. However, they are not always sufficient, and for some 200 years now quasi-judicial organs, known as courts of arbitration, have developed and flourished. In the next section, we examine the history, development, procedures and usages of arbitration in a global context.

B. Arbitration

In 1873, a British arbitration commission ruled that the Sistan belonged to the Persian Empire and not Afghanistan. Historians cite this decision, arrived at by a panel of British arbitrators, as one of the more important causal events leading to the Second Anglo-Afghan War and eventually the rise to power of Abd Al-Rahman Khan. To Sher Ali, the leader of Afghanistan in 1873, the arbitral award was an unfair betrayal by the British that indicated that they were not to be trusted in future affairs. (This example should not be construed to indicate that arbitration itself is an unfair means of dispute resolution, but rather that in this one case, for any number of reasons, it resulted in an outcome contrary to Afghan interests.)¹⁵⁸ After all, it was the Persians that had started the conflict over the territory, and it was the Afghans that agreed to arbitration by Great Britain. Yet if the conflict over the Sistan was between Afghanistan and Persia, why would Sher Ali agree to arbitration by the British, a third party not directly involved in the conflict, in the first place? For that matter, why do countries, sovereigns over their own borders and affairs, often agree to cede some of their sovereignty to arbitration commissions to resolve international disputes? In this chapter, we will attempt to answer these questions by examining the history of modern arbitration, its procedural and organizational aspects, and the extent of its current usage.

Historical Development of Modern Arbitration

One of the first instances of modern “mixed” arbitration¹⁵⁹ began with the Jay Treaty of 1794 between the United States and Great Britain, “which provided for adjudication of various

¹⁵⁷ Brownlie, Ian. *Principles of Public International Law*, 7th Edition. 2008, Oxford University Press, p.702.

¹⁵⁸ Ewans, Martin. *Afghanistan: a Short History of its People and Politics*. 2002, HarperCollins Publishers, pp. 82-83.

¹⁵⁹ The history of arbitration has been dated to the ancient Greeks and the Romans after them (cf. Robert Morris, *International Arbitration and Procedure*, 1911). However, as used today, arbitration in public international law presupposes the existence of nation-states that recognize a

legal issues by mixed commissions.”¹⁶⁰ The contested issues were mostly over borders (the exact boundary line between the United States and the then British-controlled portion of Canada) and reparations for losses as a result of the American War of Independence. The Jay Treaty called for arbitration by mixed commissions consisting of “one or two commissioners appointed by each party, who were together to choose a third or fifth by agreement or by drawing lots.”¹⁶¹ In submitting certain disputes to resolution by Commission, the Jay Treaty revived arbitration as a tool of settling claims between states, a practice that had fallen out of use over the 18th century. In the years following the Jay Treaty, States often used arbitration, as evidenced by the British requesting Afghanistan and Persia to accept arbitration to settle the Sistan dispute.

The Jay Treaty is also cited for introducing a new type of issue to arbitration. Of the three arbitration commissions created, two decided the more traditional type of inter-state dispute, those relating to boundaries, territorial lines and outstanding debts between countries. The last commission was concerned with questions relating to awards for aliens injured as a consequence of the conflict, applying the doctrine of state responsibility.¹⁶² The Jay Treaty arbitration thus not only revived the use of arbitration as it was then known, but it also added a new reason for its use; arbitration was from then on a tool to resolve issues relating to one state’s nationals being injured by another state during a war or other armed conflict. During the next two centuries, over 65 claims commissions were established to decide these types of cases.¹⁶³

The Jay Treaty revived the use of arbitration in the 19th century, but it was not until the *Alabama Claims* arbitration, commenced in 1871 by the US and Great Britain, that modern arbitration would begin to adopt the procedural reforms that exist to this day. This arbitration is credited with developing a number of new procedural rules as well as introducing the use of predominantly independent third party arbitrators to decide a case.¹⁶⁴ Potentially of greatest import, following the *Alabama Claims* tribunal, States began agreeing *ex ante* to submit future disputes, disputes that had not occurred but may, to arbitration. This is of course common practice today (organizations like the WTO mandate recourse by member states to arbitration to settle inter-state disputes), but at the time was an important innovation.

If the Jay Treaty and the *Alabama Claims* were among the earliest *bilateral* attempts to promote arbitration as an informal dispute mechanism, the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 did much to institutionalize international arbitration by creating the Permanent Court of Arbitration (PCA).¹⁶⁵ The conventions are

uniform body of law as the basis for dispute resolution and a willingness to implement the awards decided by the tribunals (Plank encyclopedia, Arbitration, para. 9).

¹⁶⁰ *Id.*

¹⁶¹ J.L. Simpson & Hazel Fox, *International Arbitration: Law and Practice*, in Carter, Carter; Trimble & Weiner, *International Law* 5th Ed. (2007), p. 359.

¹⁶² Max Planck Encyclopedia of Public International Law, Arbitration, paragraph 17.

¹⁶³ *Id.*

¹⁶⁴ The five-member panel consisted of one arbitrator selected by the US and Great Britain each, and the other three chosen by the King of Italy, the President of the Swiss Confederation and the Emperor of Brazil respectively.

¹⁶⁵ The PCA is not truly speaking a court, but rather a list of names from which arbitrators can be selected, a formal mechanism for the establishment of *ad hoc* arbitration tribunals.

noteworthy as being the third significant development in modern arbitration for not just the creation of the PCA but also recommended arbitral procedures, which provided the set of procedures for all future arbitrations convened under the Permanent Court of Arbitration and all other arbitration tribunals, unless the parties stipulate otherwise. The Code sets the guidelines for the selection and composition of the tribunal, the rules governing the proceedings (from how to state a claim to the use of experts and closure), and the form and effect of awards.¹⁶⁶ Should two states so choose, they may follow the code in its entirety, relieving any need for negotiation or dispute over procedural aspects of the conduct of the arbitration.

The Hague Conventions and the establishment of the PCA were considered by many to be a boon for international law – proof of the acquiescence of nation-states to submit disputes to judicial or quasi-judicial organs. As we will learn in the next chapter, this movement toward the institutionalization of inter-state dispute resolution would be strengthened by the creation of permanent courts of international law, the Permanent Court of International Justice under the League of Nations and later the ICJ as the principal judicial organ of the United Nations. As these new courts gained in importance in international dispute resolution after the World Wars, recourse to the PCA waned. Following World War II, the PCA heard less than one case a decade for the next 50 years.

However, the PCA has once again become a tool used by the international community. In the past decade, more than 20 cases have been submitted to the PCA for resolution, spanning four continents (Asia, Africa, Europe and Latin America) and ranging from territorial disputes, to investment claims, to the settlement of claims arising from armed conflict.¹⁶⁷ In the next two sections, we will discuss in more detail the procedure of the PCA, the nature of awards and their enforceability, as well a few international cases in which arbitration has played an important role.

Procedure, Awards and Enforceability

As you can infer from our previous discussions, three key features distinguish arbitration (and formal judicial settlement) from all of the other informal mechanisms we have discussed: (1) legal principles are applied, (2) decision making power is delegated to independent third parties, and (3) the judgment is binding (sometimes even enforceable through national courts). Arbitration is in fact more similar to formal judicial settlement in these three attributes. However, arbitration differs from judicial settlement as well. In particular, arbitration and judicial settlement differ in “the character of the tribunals to which the parties submit their disputes.”¹⁶⁸ As we have seen in the *Alabama Claims* or at the PCA, an arbitration tribunal is staffed by essentially *ad hoc* arbitrators chosen by the parties in dispute (who may be part time), unlike international judges who are most often chosen via election by the states concerned and serve on a permanent or semi-permanent basis. Arbitrators are, however, non-governmental actors and thus presumptively even more independent and neutral than a judge.

¹⁶⁶ Permanent Court of Arbitration, “Optional Rules for Arbitrating Disputes between Two States,” http://www.pca-cpa.org/showfile.asp?fil_id=195.

¹⁶⁷ Permanent Court of Arbitration, Past Cases, http://www.pca-cpa.org/showpage.asp?pag_id=1146

¹⁶⁸ Max Planck Encyclopedia of Public International Law, Arbitration, paragraph 4.

To go to arbitration, the parties must have given their consent, either before or after the dispute arose. An agreement to submit a dispute to arbitration is known as a *compromis*. This term from French means quite simply an “understanding” or “agreement.” In concluding such an agreement, states choose arbitration over other consent-based dispute resolution forms because they have a much larger role to play in the design and operationalization of the proceedings. The two parties are the only states involved in their proceeding. The “third party” here is only the tribunal itself, not another state, as is the case in mediation. The states in the dispute select arbitrators based on criteria they chose. (Arbitrators may be chosen based on particular subject matter expertise, or perhaps one state believes a particular arbitrator will favor its position over the adversary’s.) Where the states themselves appoint arbitrators, they must also agree on some mechanism for selecting neutral arbitrators. The states will also need to accept a set of procedural and substantive guidelines for the proceedings. They choose which laws will govern the proceedings and what type of awards can be rendered. They may elect to follow rules and procedures that are already established, like the PCA, or they may agree to draft their own set of rules for the dispute in question. Clearly, the flexibility that accompanies arbitration, the ability to decide the composition of the tribunal, the procedures to be followed and the law that will apply, makes it an attractive option to states that do not wish to follow the more rigid rules characteristic of a formal court system.

As concerns the awards or any other outcomes from an arbitration decision, unless otherwise stated, decisions tend to be rendered by a simple majority. The most common form of awards is monetary compensation and declaratory relief. For example, in a territorial dispute, a public declaration by the parties as to where the agreed boundary between the two lies may suffice.

Once decided, the question remains: what can a country do if another country decides not to honor a given decision? The arbitral tribunal certainly has no power of enforcement in the traditional sense, i.e. it has no police force to send after a non-compliant party. Moreover, as arbitration assumes voluntary compliance, the enforceability of an award is to some extent voluntary as well. However, much like other realms of international law, the enforcement of an arbitral award can depend on national courts and the national law in which the award is to be enforced. Since countries agree to arbitration via *compromis*, often in a treaty or other valid international legal agreement, the risk of non-compliance is similar to that in many issues of international law: loss of credibility with the party in dispute, political retaliation via other avenues, and potentially the creation of a sense of general distrust in the international sphere altogether.

We can also imagine a situation in which two disputing parties appear before the same arbitral body but on different issues. If the tribunal issued an award previously, and one party is non-compliant, this tribunal may increase the penalties against the noncompliant party to compensate for unpaid past awards. In fact this was the case in one of the settlements in the Iran-United States Claims Tribunal. The US Second Circuit Court of Appeals refused enforcement of an arbitration award issued by the Tribunal against an American corporation, and in a subsequent hearing, the arbitral tribunal ruled that the U.S. Government was liable for its failure to give effect to the first award and required the United States to itself pay the amount of the original award. If the grounds for the award are “so legally defective as to constitute a nullity,” a state could certainly avoid payment and not fear retaliation by the international

community, but this is generally more of a diplomatic question than a legal one at this point. Arbitration tribunals do not have an appellate function, and their decisions are generally not reconsidered or reviewed.

Having discussed many of the key aspects of international arbitration, from procedure to awards, the following is a summary of a recently decided arbitration brought in front of the PCA relating to the settlement of a series of claims for losses incurred during armed hostilities between Eritrea and Ethiopia.

Case Study on Arbitration – Eritrea - Ethiopia Claims Commission

The Eritrea-Ethiopia Claims Commission was a PCA Commission established in December 2000 at both countries' request to "decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals ... (a) related to the conflict ... and (b) result[ant] from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law." The following is a summary of the major procedural steps involved in establishing the Commission and arriving at final decisions and awards.

1. The Commission consisted of two members appointed by each country and a fifth, the Commission President.
2. The Commission first heard questions related to jurisdiction, procedures and possible remedies.
3. After deciding on these issues, the Commission then met with experts from the International Organization on Migration (IOM) to discuss technical issues relating to the design and implementation of a possible mass claims filing system.
4. In October 2001, having consulted with both parties, the Commission adopted Rules of Procedure based on the PCA's Optional Rules for Arbitrating Disputes Between States.
5. In December 2001, both parties filed claims. Claims related to matters including: the conduct of the military operations in the front zones, the treatment of POWs and civilians and their property, diplomatic immunities and the economic impact of certain government actions during the conflict. There were also sub-elements to each of the claims.
6. Following the filings, the Commission heard views from both parties regarding the claims and their priorities. The parties then filed their defenses to the claims in February 2002.
7. In May 2002, the Commission began to prioritize the ordering of oral arguments. Oral arguments took place from the end of 2002 through 2008, with awards being issued in part throughout.
8. Partial Awards were made public on several occasions beginning in 2004. (There were four separate Partial Award rulings following the prioritization of the issues as agreed by both parties.) Final Awards on damages for each party's claims were rendered in August, 2009.

Advantages and Disadvantages of International Arbitration

To return to a question posed at the beginning of this chapter, why would a state voluntarily cede some of its sovereignty by submitting a dispute for decision under binding arbitration? After all, the state might lose the dispute and be forced to implement a decision that adversely affects its interests. Why would a state run the risk of receiving a judgment against it if there is no principle of law that requires the state to submit to arbitration in the first place? This is less a legal question than a political one. One explanation is that states only consent to the authority of binding arbitration if the issue in dispute is of “secondary importance in which political compromise seems unduly awkward, costly, or time-consuming.”¹⁶⁹ However, given the popularity of international arbitration, we must consider that there are other factors at play. The excerpt below summarizes many of the advantages and disadvantages of arbitration, concepts not lost on nation states when deciding the best form of dispute resolution for a given issue.

Excerpt: “An Overview of the Advantages and Disadvantages of International Arbitration”¹⁷⁰

B. Carter, P. Trimble and A. Weiner, *International Law*, pp. 367-368.

First, international arbitration is often perceived as ensuring a genuinely neutral decision-maker in disputes between parties from different countries. International disputes inevitably involve the risk of litigation before a national court of one of the parties, which may be biased, parochial, or unattractive for some other reason... International arbitration offers a theoretically competent decision-maker satisfactory to the parties, who is, in principle, independent of either party...

Second, a carefully-drafted arbitration clause generally permits the resolution of disputes between the parties in a single forum pursuant to an agreement that most national courts are bound by international treaty to enforce...

On the other hand, incomplete or otherwise defective arbitration clauses can result in judicial and arbitral proceedings where the scope or enforceability of the provision, as well as the merits of the parties' dispute, must be litigated...

Third, arbitration agreements and arbitral awards are generally (but not always) more easily and reliably enforced in foreign states than forum selection clauses or foreign court judgments...

Fourth, arbitration tends to be procedurally less formal and rigid than litigation in national courts. As a result, parties have greater freedom to agree on neutral and appropriate procedural rules, set realistic timetables, select technically expert and neutral decision-makers, involve corporate management in dispute-resolution, and the like. On the other hand, the lack of a detailed procedural code or decision-maker with direct coercive authority may permit party misconduct or create opportunities for an even greater range of procedural disputes between the parties.

¹⁶⁹ Max Planck Encyclopedia of Public International Law, Arbitration, paragraph 3.

¹⁷⁰ Carter; Trimble & Weiner, *International Law* 5th Ed. (2007).

Fifth, international arbitration typically involves less extensive discovery than is common in litigation in some national courts...

Sixth, international arbitration is usually more confidential than judicial proceedings—as to submissions, evidentiary hearings, and final awards... On the other hand, few arbitrations are entirely confidential, with disclosures often occurring by means of judicial enforcement actions, unilateral party action, regulatory inquiries, or otherwise.

Seventh, the existence of an arbitration clause, a workable arbitral procedure, and an experienced arbitral tribunal may create incentives for settlement or amicable conciliation...

Finally, arbitration is often lauded as a prompt, inexpensive means of dispute resolution. That can sometimes be the case, but international arbitration is also frequently criticized as both slow and expensive...

...At bottom, if generalizations must be made, international arbitration is much like democracy; it is nowhere close to ideal, but it is generally better than the existing alternatives. To those who have experienced it, litigation of complex international disputes in national courts is often distinctly unappealing...

Reflection Exercise on the Informal Justice System in Afghanistan

Having read the excerpt, compare the authors' answers to the advantages and disadvantages of going to a *jirga* or *shura* to resolve a dispute. Is arbitration just a Western-version of informal dispute resolution that already exists in Afghanistan? What are the similarities or differences in terms of jurisdiction, competency, cost, speed, and binding nature? Write a short paper comparing these different systems. Does it seem like Afghans would be more willing to use arbitration to settle an international dispute as the system resembles traditional Afghan systems?

C. Dispute Resolution at the WTO: Arbitration and Judicial Decision Making

The World Trade Organization (WTO) brings together 153 countries for the purpose of, in the words of Director General, “negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development.”¹⁷¹ The WTO replaced the GATT (General Agreement on Trade and Tariffs) in 1995. The GATT, along with the IMF and World Bank, was an instrument created to help maintain international peace following World War II. At its base, adherence to the WTO is premised on the notion that economic stability, the ability to peacefully negotiate trade disputes, is a bedrock of peace among nations. To achieve this economic stability, the WTO provides a forum for negotiations and dispute resolution focusing on the reduction of tariffs and other non-tariff barriers to trade and hence opening markets to international transactions in goods. For our purposes, the WTO is of interest because Afghanistan is a prospective member, having applied in 2004, and because the dispute settlement system of the WTO is a unique hybrid form of dispute resolution that contains both elements of arbitration and formal judicial review.

¹⁷¹ “About the WTO — a statement by the Director-General,” http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm.

Case Study: Afghanistan and the WTO

In November of 2004, Afghanistan submitted an official application to the General Council of the WTO declaring the country's interest in joining the organization. The WTO application set off a series of events that will take place over a number of years prior to a final decision on whether or not Afghanistan will be granted accession. Having received the application, the General Council established a Working Party tasked with reviewing the request, ensuring that certain conditions to entry are satisfied, opening up bilateral negotiations regarding concessions and commitments to be made by Afghanistan to the WTO and its members, as well as the creation of the final "accession package." The "accession package" comprises a detailed report and a schedule of timelines summarizing the steps to be taken for Afghanistan to meet WTO requirements and eventually join the organization.

On January 31, 2011, the WTO held the first Working Party session on Afghanistan's application. At this meeting, Dr. Anwar-ul-Haq Ahady, Afghanistan's Minister of Commerce and Industry, noted, "WTO membership was an essential element of Afghanistan's effort to strengthen its trade and investment framework and establish an environment for greater economic opportunities that would alleviate poverty."¹⁷² He acknowledged the many challenges Afghanistan faces as a result of three decades of war, but that membership would help Afghanistan engage in international trade, helping raise the overall economy and wealth of the country. Other WTO members noted that accession would help with domestic reforms, as there would be new benefits available to Afghan farmers and workers if they comply with WTO regulations. To summarize, joining the WTO gives Afghanistan access to trade relations on a global scale, minimizes the burden of continual bilateral negotiations, and opens markets that the country may otherwise not have access to. A last note, accession to the WTO can be a long and timely process. Kazakhstan for example, which applied in 1996, is still in the process, with the hope of acceding in early 2012.

However, some have warned against Afghanistan rushing to join the WTO. In its report "Getting the fundamentals right – the early stages of Afghanistan's WTO accession process," OXFAM, an international aid agency, argued that "joining the WTO too soon may not boost Afghan exports as promised but instead open vulnerable sectors of agriculture and industry to strong foreign competition. In the short-to-medium term, tariffs and other measures are necessary to protect local industries and rural trades, and to foster economic development.

The average cost of implementing each WTO agreement is \$100 million but there is no guarantee that Afghanistan's accession to the WTO would lead to increased trade or investment. Securing favorable terms of membership is essential for promoting sustainable and equitable economic growth...

Liberalizing the Afghan economy too soon could undermine vital efforts to reduce poverty and suffering. Careful preparation and negotiation for accession is the only way for Afghanistan to get the maximum benefit from the WTO and to avoid onerous obligations

¹⁷² "WTO shows strong support for Afghanistan's membership," http://www.wto.org/english/news_e/news11_e/acc_afg_31jan11_e.htm.

imposed on other very poor countries, such as Cambodia or Nepal. The accession process should reflect the development needs of Afghanistan, not the demands of existing members.”¹⁷³

Also note that there are others that argue that Afghanistan should not join at all. Free trade, and globalization more broadly, are sometimes criticized for enabling larger, wealthier countries to take advantage of poorer countries by opening up trade in goods that would otherwise be supplied and developed by the domestic economy. This may undercut efforts to grow and develop local businesses where the wealthier economies have already developed significant knowledge and expertise. (The counter argument would suggest that this benefits countries by enabling specialization in products that they make best and access to goods that would otherwise be unavailable.) As for the criticisms of free trade, they exist in scholarly research but maybe more famously via popular public protest, epitomized by the significant demonstrations during the Seattle Ministerial Conference of the WTO in 1999.¹⁷⁴

The WTO Dispute Settlement Understanding

The Dispute Settlement Understanding (DSU) details the rules and system for dispute resolution within the WTO. One of the primary goals of the WTO is to provide a forum for countries to resolve disputes peacefully but also efficiently. As such, the DSU establishes a four-phased system that begins with consultation and moves toward more formalized resolution, including the appearance in front of a panel of experts, the possibility of appeal, and finally the monitoring and enforcement of final decisions. Notice how this progression resembles the progression from “lowest to highest” among the factors that influence the decision of countries as to which means of dispute resolution they pursue, cited in the beginning of this chapter, (Table 1, p. 3). As noted in the table, recourse to consultation is chosen for its relative speed and lesser cost. As explained in the DSU, article 4, the parties can choose how to conduct the consultations as long as they are in good faith. If the parties fail to settle within 60 days, the parties in dispute may request the establishment of a panel. It is this process that falls into the category of quasi-judicial. Following the panel process, if a country does not agree with the decision, they can then appeal the decision to the Appellate Body (AB) of the WTO, which closely resembles a formal judicial body. Decisions by the AB are final and, as we will discuss later, the DSU contains an “enforcement” mechanism which is potentially as close to real “enforcement” of international law as we see in the international dispute resolution system.

The following passage explains the panel process as defined in the DSU. While reading the passage, note which aspects are more similar to arbitration and those that are more like formal judicial review.

¹⁷³ “Afghanistan: rush to WTO membership could endanger development,” June 27, 2007, <http://www.oxfam.org/en/node/179>.

¹⁷⁴ Brian Knowlton, *In Seattle, WTO Races the Clock*, NY Times, December 3, 1999.

Excerpt: “Section. 7.3 THE WTO Dispute Settlement Understanding”¹⁷⁵

J. Jackson, W. Davey, & A. Sykes, *Legal Problems of International Economic Relations*, (5th ed. 2008).

(2) Panel Process

Under the DSU, the right of party to have a panel established is clearly set out in article 6.1. If consultations fail to resolve a dispute within the 60-day time frame specified in article 4, a complainant may insist on the establishment of a panel and, at the meeting following that at which the request first appears on the DSB's agenda, the DSB is required to establish a panel unless there is a consensus in the DSB not to establish a panel. Since the complaining party may prevent the formation of this "reverse" consensus, there is effectively a right to have a panel established....

(a) Setting Up the Panel

Once a panel is established, it is necessary to select the three individuals who will serve as panelists. DSU article 8 provides for the Secretariat to propose potential panel members to the parties, who are not to object except for compelling reasons. In practice, parties are relatively free to reject proposed panelists...

Article 8.1 of the DSU provides [the criteria for membership on a panel]....These criteria could be roughly summarized as establishing three categories of panelists: government officials (current or former), former Secretariat officials and trade academics or lawyers. It is specifically provided that panelists shall not be nationals of parties or third parties, absent agreement of the parties. It is also specified that in a case involving a developing country, one panelist must be from a developing country (if requested). Of the individuals actually chosen for panel service, it appears that the vast majority (over 80%) are current or former government officials.

The DSU provides that panelists serve in their individual capacities and that Members shall not give them instructions or seek to influence them. In addition, the DSB has adopted rules of conduct applicable to participants in the WTO dispute settlement system. The rules require that panelists “be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings.”...

(b) The Task of Panels

The DSU provides in article 7.1 for standard terms of reference (absent agreement to the contrary). The standard terms direct a panel “To examine, in the light of the relevant provisions in (name of the covered agreement/s cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document DS/...and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement/s.”...

¹⁷⁵J. Jackson, W. Davey, & A. Sykes, *Legal Problems of International Economic Relations*, (5th ed. 2008).

More generally, DSU Article 11 provides that a panel shall make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant WTO agreements....

(c) Panel Procedure

A panel normally meets with the parties shortly after its selection to set its working procedures and time schedule. The DSU's standard proposed timetable for panels makes provision for two meetings between the panel and the parties to discuss the substantive issues in the case. Each meeting is preceded by the filing of written submissions. The DSU permits other WTO members to intervene as third parties and present arguments to the first meeting of the panel. While panel and Appellate Body proceedings have traditionally not been open to the public, since 2005 several panel meetings have been open to the public pursuant to the agreement of the parties. A party is free to choose the members of its delegation to hearings. Thus, parties may be assisted, and often are, by private counsel.

Among the most fundamental issues that arise in assessing a complaint is the assignment of the burden of proof. Generally speaking, the decisions of the Appellate Body have held that the burden of proof rests upon the party who asserts the affirmative of a particular claim or defense. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, then the burden shifts to the other party to rebut the presumption. The Appellate Body has also spoken in terms of the need for a claimant to establish a *prima facie* case...

After hearings and deliberations, the panel prepares a report detailing its conclusions. Traditionally, the panel has submitted its description of the dispute and of the parties' arguments to the parties for comment... Appendix 3 of the DSU specifies time limits for implementations of the various stages in the panel process. Those time limits suggest that the panel report should normally be issued within six to eight months of the establishment of the panel. In practice, cases typically take more time than that.

Either party can appeal if it takes issue with the panel's decision. The AB may review issues of law and legal interpretation, and although it cannot remand a decision for further consideration, it can at times complete analysis where it was found to be otherwise lacking. The AB, like a formal court, is made up of a standing body of judges (as opposed to the arbitrators selected by the parties in the panel process) and has its own set of procedural rules. There are seven judges, each from a different country and, sometimes, each representing a different legal tradition.¹⁷⁶ The AB has compulsory jurisdiction over cases in the WTO (meaning all WTO members have agreed to its jurisdiction) and its judgments are in fact enforced, as we discuss in the next paragraph. Prior to discussing enforcement however, note how the combination of the panel and appeal process brings together elements of both arbitration and more formal judicial decision-making. This hybridization of dispute resolution, along with the enforcement process discussed next, makes the WTO system truly unique in the international system.

Following the panel or appellate review, a report is issued telling the party in derogation to cease its offending practice and set a timetable for coming into conformity. The WTO does

¹⁷⁶ Carter; Trimble & Weiner, *International Law* 5th Ed. (2007), p. 420.

not have a police force. Nations choose to join as sovereigns and must agree to comply with the decisions. Impressively, for an institution that has no real enforcement power, panel/appellate decisions have a successful implementation rate of 83%.¹⁷⁷ This suggests in part that the threat of economic loss, exclusion from the international trading club, or sanctioned retaliation is a strong enough deterrent to guarantee enforcement of decisions. James Bacchus, a former member of the AB, noted in a speech about his role that “the Appellate Body is unique in that we make judgments that are enforced... not by us, but by the members of the WTO themselves through the power of economic suasion.”¹⁷⁸ In fact, it is as though the AB can issue “damages” much like a domestic court. The “damages” are different in that they either grant access to the market of the country ruled against that was otherwise restricted by the WTO, or impose a restraint on that country’s trade with other countries. Regardless of its nature, the WTO’s sanction process is a good example of a functioning enforcement mechanism in international law, if only in a limited context.

But what of disputes that are not related solely to economics, but also politics, territorial boundaries and damages suffered at war? How do these claims get resolved when the issue is between members of the UN? In the next section, we will discuss what many call the World’s Court, the most formal of international peaceful dispute resolution vehicles – a permanent court for the international community.

III. JUDICIAL MECHANISMS OF DISPUTE RESOLUTION

Having discussed and analyzed the numerous advantages to informal and less formal methods of dispute resolution, we now turn to that with which we are most familiar in a legal context – the formal courts of the international system. We will begin by discussing what is known as the World’s Court, or formally, the International Court of Justice (ICJ). We then turn to a quick discussion of some of the world’s regional courts, which provide an important forum for many international claims, but due to their geographical limits do not have jurisdiction to rule on cases involving Afghanistan today.

A. The International Court of Justice

The ICJ, and its predecessor the Permanent Court of International Justice (PCIJ), were both established as responses to the atrocities of great wars. In the wake of World War I and World War II, the international community not only created the league of Nations and the United Nations but also judicial organs to facilitate dispute resolution among the organization’s member states. Although the PCIJ was short lived due to the outbreak of World War II, the ICJ has been actively involved in international dispute resolution for well over sixty-five years now. It has delivered over 100 judgments, most of which have been followed by member states— a demonstration of its staying power and well-earned respect in the international theater.

Composition and Organization

The ICJ is the primary judicicia organ of the United Nations. It is a permanent tribunal, located in The Hague, Netherlands, and is governed by the UN Charter and the ICJ Statute. It is

¹⁷⁷ *Id.* at 419.

¹⁷⁸ *Id.* at 420.

composed of 15 judges, elected to serve 9-year terms with a possibility of being reelected. The judges have most often been either professors of law, appeal judges or foreign ministry legal advisors. Per Article 2 of the ICJ Statute, they must be “independent” and possess “high moral character” with qualifications that would enable them to have the highest judicial offices in their respective countries of origin or to be recognized for their competence in international law. They are elected by both the UN General Assembly and the Security Council. To be elected, a judge must win a majority of votes from both groups.

The composition of the judges is supposed to reflect “the main forms of civilization and of the principal legal systems of the world.” The modern interpretation of these somewhat antiquated expressions is something more akin to an equitable geographic distribution among the judges, which in practice is understood to mirror the composition of the Security Council (which also has 15 members). Today, there are three judges from Africa, three from Asia, two from Latin America, five from a group consisting of Western Europe, the US, Canada and Oceania, and 2 from Eastern Europe. The first Muslim judge, Abdul Badawi of Egypt, was elected to the Court in 1946. Currently two female judges are on the Court, marking the first time two women have sat on the Court simultaneously. (The first female judge was Rosalyn Higgins elected in 1995, subsequently elected President of the Court from 2006-2009.)

The Court may only hear two types of cases: legal disputes brought by countries, known as contentious cases, or requests for advisory opinions. A request for an advisory opinion may be referred to the Court by any of the organs of the United Nations or any one of its specialized agencies that have been authorized by the General Assembly to request advisory opinions. All UN member countries may use the ICJ to help settle international disputes, assuming the controversy is between member states and that the ICJ has jurisdiction over the question at issue. In the following sections, we will discuss the jurisdiction of the court and its procedures, as well as a few cases that the Court has ruled on. While reading and learning about the Court’s past decisions and the type of cases it may hear, think about whether there are issues in modern Afghanistan that you think the Court should help resolve.

Jurisdiction in Contentious Cases

As previously discussed, the ICJ is available to any one of the 192 members of the United Nations, and only states that “may be parties in cases before the Court.”¹⁷⁹ Thus although the country of Afghanistan, as a member of the UN, may be able to bring a case before the court, an Afghan citizen alone cannot; for a citizen to bring a case before the ICJ, their government would have had to agree to take their case and to argue it on their behalf. So, how would the government of Afghanistan bring a case to the ICJ? There are four primary situations under which the ICJ has jurisdiction and all of them require some level of consent by both parties involved. They include jurisdiction by special agreement, jurisdiction by a treaty clause, jurisdiction via the optional clause, and jurisdiction via *forum prerogatum*.

A special agreement to give the ICJ jurisdiction, or a *compromis*, exists when two states choose together to submit a dispute to the Court. This is very much similar to the *compromis*

¹⁷⁹ Statute of the Court, International Court of Justice, Articles 34(1) and Article 35(1), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

that we discussed in the context of arbitrations. However, when two states agree to refer a dispute to the ICJ, unlike in arbitration, no details, procedural or other, need be spelled out as the processes of the ICJ are governed by ICJ Statute and ICJ Rules. Once submitted to the ICJ, Article 38 stipulates that the Court is “to decide [the dispute] in accordance with international law.”¹⁸⁰

Discussion Questions

1. What does it mean that the Court must decide a case “in accordance with international law”? Think back to the chapter on the Sources of International Law. Which sources can the Court draw from in ruling on a given case?
2. Given that the ICJ decides a case in accordance with international law, would the interpretation by the ICJ in theory create new International Law?
3. How does one determine the intent of a party to submit a claim to the ICJ? Can you think of cases where the intent may be difficult to determine? In the dispute between Qatar and Bahrain, the Court was asked to rule precisely on this issue. After reading the following case, discuss what you think the parties intended and whether the Court ruled as you would.

Case Study – Case Concerning Maritime Delimitation And Territorial Questions Between Qatar and Bahrain

Excerpts from the ICJ Judgment of 1 July 1994:

“In its Judgment, the Court recalls that on 8 July 1991 the Minister for Foreign Affairs of the State of Qatar filed in the Registry of the an Application instituting proceedings against the State of Bahrain in respect of disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States ... in its Application Qatar founded the jurisdiction of the Court upon two agreements between the Parties ... Bahrain contested the basis of jurisdiction invoked by Qatar.

Endeavours to find a solution to the dispute took place in the context of a mediation, sometimes referred to as ‘good offices’, beginning in 1976, by the King of Saudi Arabia with the agreement of the Amirs of Bahrain and Qatar, which led, during a tripartite meeting in March 1983, to the approval of a set of ‘Principles for the Framework for Reaching a Settlement’. The first of these principles specified that :

‘All issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together.’

¹⁸⁰ Statute of the Court, International Court of Justice, Article 38(1), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

Then, in 1987, the King of Saudi Arabia sent the Amirs of Qatar and Bahrain letters in identical terms, in which he put forward new proposals. The Saudi proposals, which were adopted by the two Heads of State, included four points, the first of which was that

‘All the disputed matters shall be referred to the International court at The Hague, for a final ruling of justice, binding upon both who shall have to execute its terms.’

The third provided for formation of a Committee, composed of representatives of the States of Bahrain and Qatar and of the Kingdom of Saudi Arabia,

‘for the purpose of the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued’.

Then, in 1988, following an initiative by Saudi Arabia, the Heir of Bahrain, when on a visit to Qatar, transmitted to the Heir Apparent of Qatar a text (subsequently known as the Bahraini formula), which reads as follows:

‘Question

The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters.’

The matter was again the subject of discussion two years later, on the occasion of the annual meeting of the Cooperation Council of Arab States of the Gulf at Doha in December 1990. Qatar then let it be known that it was ready to accept the Bahraini formula. The Minutes of the meeting which then took place stated that the two Parties had reaffirmed what was agreed previously between them; had agreed to continue the good offices of King Fahd of Saudi Arabia until May 1991; that after this period, the matter might be submitted to the International court of Justice in accordance with the Bahraini formula, while Saudi Arabia's good offices would continue during the submission of the matter to arbitration; and that, should a brotherly solution acceptable to the two Parties be reached, the case would be withdrawn from arbitration.

The good offices of King Fahd did not lead to the desired outcome within the time-limit thus fixed, and on 8 July 1991 Qatar instituted proceedings before the Court against Bahrain.

According to Qatar, the two States “have made express commitments in the Agreements of December 1987 ...and December 1990 ...,to refer their disputes to the ...Court”. Qatar therefore considers that the Court has been enabled “to exercise jurisdiction to adjudicate upon those disputes,” and, as a consequence, upon the Application of Qatar.

Bahrain maintains on the contrary that the 1990 Minutes do not constitute a legally binding instrument. It goes on to say that, in any event, the combined provisions of the 1987 exchanges of letters and of the 1990 Minutes were not such as to enable Qatar to seize the Court unilaterally and concludes that the Court lacks jurisdiction to deal with the Application of Qatar.

After examining the 1990 Minutes ... the Court observes that they are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.”

The ICJ may also have jurisdiction over a dispute via a *compromissory* clause, a clause in a treaty specifically stating that disputes regarding the interpretation or application of that particular treaty be referred to the ICJ for resolution. Furthermore, Article 37 gives the ICJ jurisdiction over disputes regarding treaties entered into prior to the creation of the ICJ, those that conferred jurisdiction on the PCIJ or the League of Nations.¹⁸¹ Note however that a country can make reservations to the dispute resolution portion of a treaty and the ICJ has held that if such reservations exist the Court does not have jurisdiction, even if both countries are otherwise parties to the treaty.¹⁸² In 1980, the United States successfully brought its dispute with Iran over American hostages being held in Tehran in front of the Court by invoking the Optional Protocol to the Vienna Convention on Diplomatic Relations 1961, which both countries were members of. Like all cases heard by the ICJ, for jurisdiction to exist, both countries must consent. Thus for jurisdiction via a *compromissory* clause, both parties to the dispute must be signatories of the relevant portion of the treaty, in this case the optional protocol, and not just the treaty itself.

Countries can also agree to obligatory jurisdiction for any international dispute by consenting to the “optional clause,” Article 36(2) of the Statute of the ICJ. Under the “optional clause,” the ICJ has jurisdiction over all disputes between any two states that have both consented to Article 36(2). In essence, the optional clause has created a sort of “club of countries” that have consented to compulsory jurisdiction. Should any two members of the “club” be involved in a dispute, their dispute falls under ICJ jurisdiction. One potential concern related to the optional clause is that states that have not consented will do so only for a particular case. States like Afghanistan or the United States, both states that have not consented to the optional clause, could potentially consent to bring a specific case against another country, assuming the other country has agreed to compulsory jurisdiction. To avoid this type of situation, some states have taken reservations to the optional clause for just this reason. States have also taken reservations to the optional clause to retain control over issues that they deem to be of “national interest.” Upon consenting to the optional clause, France stated that although the country agrees to compulsory jurisdiction, it excludes beforehand disputes “relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.”¹⁸³

¹⁸¹ Statute of the Court, International Court of Justice, Article 37, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

¹⁸² *Armed Activities on the Territory of the Congo (New Applications: 2002) (Democratic Republic of the Congo v. Rwanda)*.

¹⁸³ Carter; Trimble & Weiner, *International Law* 5th Ed. (2007), p. 312.

There is one last basis for jurisdiction with the ICJ, known as *forum prerogatum*. Under this mechanism, a country can invite another country to resolve a dispute in front of the ICJ even though the two parties had not agreed to do so previously. To benefit from *forum prorogatum* jurisdiction, a country must submit an application to the ICJ, which in effect serves as an invitation to the other state in a dispute to agree to confer jurisdiction on the ICJ. This is a useful *ex post* approach to getting the ICJ to help resolve a dispute.

Advisory Opinions

According to Article 65 of the ICJ Statute, the Court is also empowered to give advisory opinions on questions presented by certain authorized bodies, which include the General Assembly, the Security Council and “[o]ther organs of the United Nations and specialized agencies” that have been authorized by the General Assembly to seek an advisory opinion, provided that the questions arise “within the scope of their activities.”¹⁸⁴ These opinions are just that, an opinion, and hence not binding unless the parties decide to treat them as such. Furthermore, the court is not mandated to give an opinion when asked, even if by an authorized body. In some cases, requesting an opinion could be seen as a way of circumventing the consent requirement of the ICJ. Imagine that Afghanistan is engaged in a dispute with a neighboring country, and that country has not agreed to dispute resolution via the ICJ. Afghanistan could, via one of the specialized organs of the UN, request an opinion, and in so doing, could receive a *de facto* ruling. Although non-binding, this opinion could be used as political leverage in the dispute resolution process. For these types of cases, the ICJ has reserved “a discretionary power to decline to give an advisory opinion.”¹⁸⁵

Reflection on the Efficacy of the ICJ

The creation of the ICJ heralded what many proponents of international law and international peace hoped was the beginning of a truly important and transformational moment in the history of international relations. The ICJ has issued some important decisions and UN members have expanded its role by bringing new types of issues to the court (beyond the more traditional border disputes that were common to it in its early years). Some of these new issues include human rights and humanitarian law, universal criminal jurisdiction, and even international environmental law.¹⁸⁶ However, although compliance by states with the Court’s judgment has generally been good, in several cases, countries have refused to comply with the rulings of the court. Furthermore, many countries have begun to use specialized regional courts, which we will discuss next, to settle issues that otherwise could be addressed by the ICJ. Some commentators speculate that this is due to the burdensome formalities and rigidities of the ICJ system. Others look to the issue of enforceability, perhaps better framed as the lack thereof. However, many proponents of international law remain optimistic, pointing to the existence of the ICJ and its alternatives as a sign that countries do believe in and want to follow international law, even if they disagree over how it should be applied. If anything, the proliferation of

¹⁸⁴ Charter of the United Nations, Article 96.

¹⁸⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 156 (July 9).

¹⁸⁶ Carter; Trimble & Weiner, International Law 5th Ed. (2007), p.335.

regional specialized courts is an encouraging sign for supporters of international law, even though they pose a challenge to uniformity and hierarchy in the system.

B. Regional and Specialized Courts

There are a number of regional courts that have sprung up around the world mostly to resolve a limited set of issues among a limited group of nations. We discussed a number of these courts in Chapter 3. The European Union has its own court, the European Court of Justice, dedicated to resolving issues that arise among its member states. Another specialized court, the European Court of Human Rights (ECHR), is charged with providing legal recourse to individuals whose human rights have been violated by a contracting party to the European Convention on Human Rights. This Court is not an EU court, meaning that countries outside of the EU, like Russia, Georgia, Armenia and Azerbaijan, have signed and ratified the treaty and have thus agreed to ECHR jurisdiction.

In Latin America, there is the *Inter-American Court of Human Rights (IACHR)*. The IACHR is a permanent body whose mandate includes the promotion and protection of human rights of the member states of the OAS.¹⁸⁷ Similarly in Africa, there are a number of regional courts like the *African Court on Human and Peoples' Right (ACHPR)* and economically focused courts like the *Court Of Justice Of The Common Market For Eastern And Southern Africa (COMESA)*. Interestingly, there are currently no regional courts exercising these types of functions in Afghanistan. Can you identify areas for which a regional or specialized international court could benefit Afghanistan?

IV. CONCLUSION

In the international system, there exist a variety of *fora* for countries to resolve issues without resorting to war. Granted, much like other aspects of international law, participation in peaceful dispute resolution begins with consent by both parties. However, as we have discussed, there are times where the cost of non-participation is so great, as is the case among UN member states or countries in the WTO, that one could argue that recourse to peaceful dispute resolution is in the state's best interest.

Even with the advent of the ICJ and the growth of international organizations to which most countries in the world belong, there are times where nations cannot find a solution in the courts, arbitral commissions or among each other. In the next chapter, we will discuss international law as it applies to the use of force. While discussing the issues that arise, continue to think about international law in the framework of consent-based versus obligatory and ask why would it be that countries, sovereigns over their own affairs, even during a war, either respect or are subject to certain international codes of conduct, pacts, treaties and laws.

¹⁸⁷ For more information, see <http://www.cidh.oas.org>.

GLOSSARY

- ◆ Arbitration: Arbitration is a form of dispute resolution that is similar to a court, but the tribunal is staffed by essentially *ad hoc* arbitrators chosen by the parties in dispute. Arbitration applies legal principles and the outcome is binding.
- ◆ Compromis: A *compromis* is an agreement to submit a dispute to arbitration.
- ◆ Compromissory Clause: A *compromissory* clause is a treaty clause that specifically states that disputes regarding the interpretation or application of that particular treaty be referred to the ICJ for resolution. For jurisdiction via a *compromissory* clause, both parties to the dispute must be signatories of the relevant portion of the treaty.
- ◆ Consultation: Consultation occurs when a government seeks advice from another state as to whether a particular action may cause harm or be prohibited by that state.
- ◆ Conciliation: Conciliation is a form of dispute resolution that mandates recourse to a Commission agreed upon by the parties, either on an *ad hoc* or permanent basis. The outcomes of conciliation are not binding.
- ◆ Good Offices: A party provides “good offices” when its role in dispute resolution is confined to encouraging parties to open channels of communication, hosting parties in dispute, or encouraging them to resume negotiations in case one or both parties has walked away.
- ◆ Mediation: Mediation can include bringing the parties together for discussion, transmitting messages between parties that otherwise refuse to talk face-to-face, and proposing a solution. Proposed solutions from mediators are non-binding.
- ◆ Negotiation: Negotiation is a discussion between empowered parties with the goal of agreeing to terms or arriving at a common understanding without having to go to a court to resolve the issue.

CHAPTER 6: USE OF FORCE

I. AN INTRODUCTION TO THE USE OF FORCE

“Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.”

-- Abu Bakr, 7th Century

Afghanistan is a nation that is very familiar with how the use of force plays out in the international system. From ancient wars, to the imperial influence of Great Britain, to the Soviet invasion, and to the recent overthrow of the Taliban and invasion by American forces, the people of Afghanistan have experienced the devastation of war and the implications of the use of force firsthand. This chapter will seek to increase your understanding of the legal framework that governs the conduct of warfare between nations. The use of force in international law is a complicated topic, and many scholars spend their careers trying to better understand the intricacies of this topic. This chapter presents the basic principles that govern the use of force and traces the historical evolution of the use of force in international law.

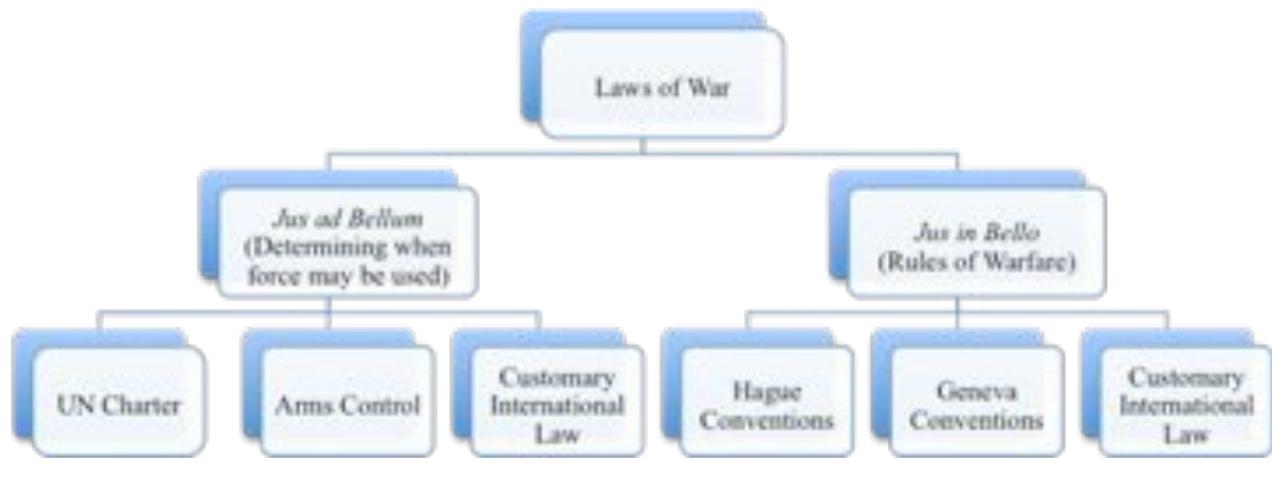
As with other types of law, the laws of war serve to either a) prevent conduct, or b) regulate conduct. Specifically, we will think of the laws of war in terms of either *jus ad bellum* (Latin for law on the use of force or law on the prevention of war) and *jus in bello* (Latin for law in war). This chapter addresses the critically important topics of when (*jus ad bello*) and how (*jus in bellum*) one nation can infringe upon the sovereignty of another through armed conflict. We will spend the first part of the chapter discussing these concepts and their impact on the use of force in the international system. Next, we will discuss the significant impact the United Nations Charter has had on warfare, and the legal regime that governs the 192 states that are members of the United Nations. Finally, we will examine how the use of force in the modern international legal system has impacted Afghanistan, focusing in particular on events of the past decade. The diagram below is a helpful reference for the topics that will be covered in this chapter.

Exercise

Imagine that you are a senior advisor to the current Afghan government. You are faced with the problem of al Qaeda and Taliban operatives who make attacks on Afghan territory, causing great destruction and killing Afghan civilians. Yet the Afghan police and military are unable to destroy these organizations because the operatives withdraw to bases in neighboring Pakistan. What are your recommendations for securing Afghan territory and eliminating this threat? Would you advocate invading the sovereignty of Pakistan because the operatives seek refuge there? Why or why not? What factors would you weigh in making this decision? Would you request support from International Security Assistance Force-Afghanistan or American forces? What are your concerns in deciding upon and implementing a strategy to secure the sovereign territory of Afghanistan? Would your answer be different if Pakistan army troops, instead of non-uniformed, non-state terrorist organizations, invaded?

After you have read this chapter, you may find it helpful to review this exercise again. Does your response change? Why or why not?

A Snapshot of The Use of Force in the Modern International System:



A. Why is the Use of Force Important in International Law?

Before we begin our discussion on the use of force in the international system, it is helpful to explore why the use of force is such a critical topic in international law. Think back to the beginning of the book and the discussion of the state as the primary actor on the global stage—the concept of the Westphalian state. As we discussed, there are three over-arching concepts that dominate how we think about states. The first is the principle of state sovereignty and the fundamental right of political self-determination. This means that there can be no higher entity than a state without the state's acquiescence to that entity; states voluntarily give up bits of their sovereignty to join the United Nations and other international organizations or make

bilateral treaties because they believe that ultimately these decisions serve the best interests of the state. Second, the international community recognizes the principle of legal equality between states. Regardless of whether or not a nation is a super-power or struggling to meet the basic needs of its citizens, the international system treats all states equal (as a legal matter). Finally, there is a long-recognized principle of non-intervention of one state in the internal affairs of another state. That is, there is no legal right for another state, or an international organization, to infringe upon the sovereignty of a state.¹⁸⁸

Few issues in international affairs are more disruptive to a state or pose more of a threat to a state's sovereignty—or even existence—than war and armed conflict. It is because of the severe and powerful impact that war has on the viability of the state itself that it is such an important area of international law. As modern technologies and weaponry have made the world both more interconnected and more accessible, the topic of what is appropriate concerning the use of force deserves much scrutiny.

Discussion Questions

1. Why is it important for international law to regulate when states go to war and how they conduct hostilities? Can you think of any alternatives?
2. Should war even be permitted in the modern international system? Do you think there is a way to deter hostilities among states? Why or why not?

B. Historical Background

Codes of military conduct and efforts to control and limit warfare may be traced almost as far back as warfare itself. Ancient societies, from the Egyptians and Sumerians in the second millennium B.C.E. to the Greeks in the Peloponnesian War of 431 to 404 B.C.E.¹⁸⁹, made some of the first efforts to determine when warfare is legitimate, and once hostilities began, to control warfare – including the use of coalitions to fight wars and the signing of treaties to end hostilities. Ancient Chinese military theorists, most notably Sun Tzu in the 4th century B.C.E., laid out rules regulating conduct during warfare.¹⁹⁰ Throughout the centuries, these concepts continued to evolve.

As the opening quote indicates, the first Caliph, Abu Bakr, outlined to his Muslim Army ten rules governing the conduct of warfare in the 7th century C.E. He undoubtedly was influenced by the Islamic rules of war that evolved from the twenty-seven battles in which Prophet Muhammad played a direct or indirect role. More specific Islamic military jurisprudence was applied to international law from the 9th century onwards. Islamic texts on the laws of war include the concept of “just war.” These laws also included the treatment of

¹⁸⁸ Chapter VII of the United Nations Charter creates an exception to this rule. We will discuss Chapter VII later in the chapter.

¹⁸⁹ For more information on the Peloponnesian War, see *History of the Peloponnesian War* by the ancient Greek historian, Thucydides.

¹⁹⁰ For more information, see *The Art of War*, by Sun Tzu. The author discusses a number of aspects of warfare, including the treatment of prisoners and civilians.

diplomats, hostages, refugees; the law of treaties; battlefield conduct; the right of asylum; and destruction of enemy territory.¹⁹¹ The breadth of these laws indicates that the conduct of hostilities was a topic of much thought and importance many centuries ago. Over forty classical Arabic texts on warfare were written between the 8th and 15th century.¹⁹²

Focus on Islamic Military Jurisprudence¹⁹³

Before turning to the modern international legal framework we will discuss the evolution of Islamic just war theory, which in many ways closely parallels that developed in medieval Europe. As Islamic law evolved, a continuous theme was that war had to be waged in accordance with religious principles (*bellum pium*). Literally translated, *bellum pium* means “pious war,” or “war in accordance with God’s will.” Islamic military jurisprudence also called for *bellum justum*, or just war.

In addition to the debates and evolution surrounding the concepts of *bellum pium* and *bellum justum*, a second debate emerged over the nature of the injunction to *jihad*. There are two sets of requirements in Islamic law: binding or collective duties and individual duties.

Jihad has been defined as being a collective and an individual duty. Therefore, some argue that if Islam, or the Muslim community, is attacked, *jihad* is a duty of all Muslims, and is required even of those who are normally noncombatants. Further, the nature of an attack can also alter the understanding of the *jihad* duty. For instance, if an attack is imminent and literal, it may require a different reaction than a cultural or political influence that takes years to influence society.

However, the requirement to participate in a *jihad* could be met in several ways: by waging war with (a) the heart, (b) the tongue, (c) the hands, and (d) the sword. *Jihad* also means a personal struggle to live as a true Muslim. When *jihad* is considered a collective duty, there is no need to have a religious or political official proclaim it. However, from the standpoint of an individual duty and the just pursuit of war, this official proclamation should occur.

Concern over the conduct of hostilities transcended geographic location and time. In medieval Europe—which was isolated from the developments that had transpired under the first Caliph—scholars struggled to resolve the moral dilemma posed by warfare. Namely, is it ever possible that war, with its inherent destruction, devastation, and loss of life, can ever be just despite its moral repugnance? The concept of “just war” evolved to answer that question. Just war restricted the extent of warfare and required that non-combatants be protected from hostilities. There are many similarities to the laws created under Islamic military jurisprudence and those derived from just war theory. In subsequent centuries, international legal principles evolved to meet the changing circumstances brought on by technological advancement, the

¹⁹¹ Kelsay, J., *Al-Shaybani and the Islamic Law of War*, Journal of Military Ethics, Mar. 2003, 63-75; Judge Weeramantry, Christopher G., Justice Without Frontiers, 136 (1997).

¹⁹² Umar Ibn Ibrahim Al-Awasi al-Ansari, *Tafrij al-qurub fi tadbir al-hurub*, A Muslim Manual of War, George T. Scanlon, ed. and trans., Cairo: American University at Cairo Press, 1961, 7-19.

¹⁹³ Adapted from Aboul-Enein, H. Yousuf and Zuhur, Sherifa, *Islamic Rulings on Warfare*, Strategic Studies Institute, US Army War College, 3.

influence of religion, secular governance, and the increasing use of sea-faring vessels for commerce and war.

Focus on Islam: Types of Jihad¹⁹⁴

The development of Islamic military jurisprudence in many ways parallels the law governing the conduct of warfare in the West and resonates throughout international law on the use of force today. However, there are certain unique features of the Islamic system, and it is important to briefly highlight the concept of *jihad*. Islamic jurists considered different types of *jihad*; some of these categories might be waged against Muslims as well as non-Muslims.

- *Jihad* against unbelievers or polytheists. This was the most permissible form of *jihad*.
- *Jihad* against apostasy. Apostasy is a capital crime in Islam; here it could mean that an individual renounced his belief in Islam or, as with the tribes who seceded from their alliance with the Muslims after the Prophet's death, it could refer to a group of Muslims who denied their faith.
- *Jihad* against dissension or sedition. Since Muslims gave an oath of allegiance to their leader, none should revolt against him.
- *Jihad* against brigands and deserters.
- *Jihad* against the Peoples of the Book (*ahl al-kitab*). The Peoples of the Book include Jews, Christians, and by some definitions, Magians and Sabeans.
- Some jurists considered defense of the frontiers (*ribat*) to be a requirement of Muslims comparable to *jihad*.

In addition to the types of *jihad*, early Islamic warfare had distinct terms of reference that differ from Western tradition. The following list includes some of the terms derived from the early Islamic texts of warfare.

1. *Qital* (fighting) is also used in the Quran. But unlike *jihad*, it is not followed by the phrase, "fi sabil Allah" (in the path of God). Three types of military action were introduced during Prophet Muhammad's time (590-632 A.D.). The terms carry a particular legitimacy due to their derivation in this early period, and their relationship to the Prophet's practice.

2. *Ghazw* is a raid that has evolved into the term for battle, *ghazah*, or *ghazwa*. These were battles in which the Prophet Muhammad personally participated. The term *ghazi* came to mean "warrior for the faith," as these battles came to be associated with the expansion of Muslim territory.

3. *Siriya* (s.) *Saraya* (pl.) were battles Prophet Muhammad commissioned but did not lead. This is also the name for raiding parties and reconnaissance groups, usually on horseback, which the Prophet authorized.

4. *Ba`atha* (s.) *Ba`athat* (pl.) were expeditions or missions primarily diplomatic in nature

¹⁹⁴ Aboul-Enein, H. Yousuf and Zuhur, Sherifa, *Islamic Rulings on Warfare*, p. 5-6, Strategic Studies Institute, US Army War College, Diane Publishing Co., Darby PA.

(e.g., a courier or political exchange), but which some consider combative. It differed from *saraya* in size.

The modern law of war stems from 19th century efforts by European and later American states to formally codify the rules of warfare. Modern law of war is derived from two main sources: (1) treaties and conventions; and (2) customary international law. We discussed the distinctions between these sources in Chapter 2. If you are not already familiar with the sources of international law, you may find it helpful to refer to that chapter.

As you learn about the concepts of *jus ad bellum* and *jus in bello* below, think about the unique historical evolution of Islamic military jurisprudence. Does modern international law incorporate the general teachings of this jurisprudence? Are there certain foundational concepts in Islamic and Western just war theories that transcend the differences in their historical evolution?

II. *Jus ad Bellum*: Law on the Use of Force



There are two primary components of international law that pertain to the laws of war: (1) those governing the conditions under which a state may declare war; and (2) those governing conduct during the war itself. While *jus ad bellum* (law on the use of force, or the grounds for war) and *jus in bello* (law in war) are interrelated, the distinction between the two concepts is important. No matter why a state goes to war, it is still obligated to follow the international legal regime governing war itself. This section and the following section will focus primarily on these distinctions, and how the international community has addressed each.

A state must have legitimate reasons to resort to the use of force. *Jus ad bellum*, which is roughly translated as “the justice of war,” may be thought of as the law on the use of force or the law on the recourse to war. The primary sources of *jus ad bellum* as it is interpreted today include the United Nations Charter — namely Article 2(4) and Article 51 — as well as customary international law, and arms control initiatives. We will discuss arms control in a separate section.

A. *Jus ad Bellum* and the Charter of the United Nations

As discussed elsewhere in the book, the United Nations is an international organization founded in 1945, after World War II, by 51 countries committed to international peace and security, friendly relations among nations, social progress, promoting better living standards, and human rights.¹⁹⁵ The UN Charter follows a series of efforts by the international community to create an international legal framework for the peaceful settlement of crises, preventing wars, and codifying the rules of warfare. In 1899, the first International Peace Conference was held in The Hague, The Netherlands, adopting the Convention for the Peaceful Settlement of International Disputes and establishing the Permanent Court of Arbitration. These efforts to codify *jus ad bellum* were followed by the 1919 creation of the League of Nations to “promote international cooperation and to achieve peace and security.”¹⁹⁶ After the ineffectiveness of the League of Nations in preventing the horrors of World War II, representatives of 50 countries met in San Francisco in 1945 to draft the United Nations Charter, which came into existence on 24 October 1945. When the Charter was adopted, it was generally considered to have banned war, with two exceptions: force used in self-defense and armed action authorized by the UN Security Council as an enforcement measure.¹⁹⁷

Today, there are 192 Member States who have signed the Charter of the United Nations. We will discuss the international framework created by the United Nations Charter throughout this chapter—and indeed, throughout the entirety of this book—but we will focus in this section specifically on two articles that have contributed heavily to the modern interpretation of *jus ad bellum*. They are Article 2(4) and Article 51 of the United Nations Charter.

UN Charter - Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹⁹⁸

In 1945, a radical notion was formally accepted by the international community: the general prohibition on the unilateral use of force by states. Until the signing of the United Nations Charter, the international community lacked the legal framework by which to enforce international rights; “self-help” was the only recourse for states.¹⁹⁹ The UN Charter created a new legal framework, composed of both institutions and procedures that created a collective security system. Article 2(4) was “embedded in and made initially plausible by [this] complex security scheme.”²⁰⁰ Other key aspects include Chapter VI, procedures for the peaceful

¹⁹⁵ Overview, United Nations. Available at <http://www.un.org/en/aboutun/index.shtml>.

¹⁹⁶ The Versailles Treaty, June 28, 1919. Available at <http://avalon.law.yale.edu/imt/parti.asp>.

¹⁹⁷ Schachter, Oscar, *The Right of States to Use Armed Force*, Mich. L. Review, Vol 82, No. 5/6, April-May 1984, p 1620. Available at <http://www.jstor.org/stable/1288499>.

¹⁹⁸ Charter of the United Nations, Article 2(4). Available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

¹⁹⁹ W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 Amer. J. of Int'l L. 3 (Jul 1984), 642. Available at <http://www.jstor.org/stable/2202601?seq=3>.

²⁰⁰ W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 Yale J. of Int'l L. (1984-85), 279. Available at

settlement of disputes, and Chapter VII, which grants authority to the UN Security Council to act on behalf of the international community in response to breaches of the peace and acts of aggression. Both of the Chapters will be explored in more depth later in the chapter.

Article 2(4) was intended to obviate the need for the unilateral use of force.²⁰¹ Indeed, Article 2(4) is generally viewed as prohibiting any trans-boundary use of military force, which includes force justified by reference to the various doctrines that were developed in the era before the UN Charter, including forcible self-help, reprisal, protection of nations, and humanitarian intervention.²⁰² The idea behind the collective security system was to create a system where states with grievances could bring those concerns to the UN Security Council. In turn, the Security Council could then investigate and determine the appropriate response to resolve the situation. That response could include force, if necessary, under the new framework. And, as we will discuss below, it did not prohibit the inherent right of a state to resort to self-defense, addressed in Article 51 of the UN Charter.

Focus on the Text of 2(4):

As Professor Oscar Schachter points out in his article, “The Right of States to Use Armed Force,” Article 2(4) does not use the term “war.” The term “force” was used instead, despite the precedent of using “war” in the League of Nations Covenant and the Kellogg-Briand Pact of 1928. The reason for the change was largely a result of events that ensued in the 1930s, where states engaged in hostile actions without declaring war or calling the hostile acts “war.” As the author writes, the “term ‘force’ was thus a more factual and wider word to embrace military action.” But, as the author continues, the choice of the term “force” to replace “war” creates other challenges:

“Force” has its own ambiguities. It can be used in a wide sense to embrace all types of coercion: economic, political, and psychological as well as physical. Governments represented in the United Nations have from time to time sought to give the prohibition in article 2(4) this wider meaning, particularly to include economic measures that were said to be coercive. Although support has been expressed by a great many states in the Third World for this wider notion, it has been strongly resisted by the Western states. Other instruments (such as the Charter of Economic Rights and Duties of States) have been used to express opposition to economic coercion directed against sovereign rights, with less emphasis placed on article 2(4).

http://heinonline.org/HOL/Page?handle=hein.journals/yjil10&div=22&g_sent=1&collection=journals.

²⁰¹ *Id.*

²⁰² Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 *Harv. Int’l L. J.* 41 (2002), 42. Available at:

http://heinonline.org/HOL/Page?handle=hein.journals/hilj43&div=8&g_sent=1&collection=journals.

Professor Schacter concludes that the issue of how broadly to define the term “force” remains, but it is “marginal to the central problem with which article 2(4) is concerned: the use and threat of armed force.”

Discussion Questions:

1. Given the excerpt above, and combined with your knowledge of international affairs in recent decades, do you think the drafters of the UN made the right choice in using the term “force” instead of “war?” Why or why not?
2. Today, most scholars agree that Article 2(4) of the UN Charter applies only to the use of armed force. However, some argue that Article 2(4) should be interpreted more broadly, to include political and economic coercion. Which do you think is the correct interpretation? Why? Do you foresee any challenges with trying to enforce a broader interpretation that includes political and economic coercion, in addition to armed force?
3. Review the language of Article 2(4), printed above. Note that it includes the qualifying language of “against territorial integrity or political independence of any state” and “inconsistent with the purposes of the United Nations.” How would you apply this language to determine the legality of state action in the following two examples, neither of which present a situation where force is directed against the territorial integrity or political independence of the target state?
 - a) State A claims that it is allowed to use force to secure compliance with an arbitral or judicial award.
 - b) State B claims that it is allowed to use force to secure safe, lawful passage through waters of an international strait.
 - c) State C claims that it is allowed to use force to rescue its own nationals in imminent peril of injury in a foreign country.

Note: If you are interested in learning more about the treatment of the “benign end” argument on the use of force, you may find it helpful to review the *Corfu Channel* Case of the International Court of Justice, which concerned a claim of self-help or self-protection rather than self-defense. (United Kingdom v. Albania, 1949 I.C.J. 4, Judgment of April 4).

We now turn to an important exception to the prohibition on the use of force detailed in Article 2(4): the exception for self-defense found in Article 51 of the UN Charter.

UN Charter - Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.²⁰³

Article 51 provides an important clarification to the general prohibition on the use of force detailed in Article 2(4); it permits force to be used unilaterally in self-defense against an armed attack. The right of self-defense, as an “inherent right” of a state, preexisted the UN Charter. However, Article 51 limited this inherent right because it now required an armed attack to take place before the right of self-defense could be animated.²⁰⁴

While most governments, scholars, and the International Court of Justice agree that an armed attack is required before a state may invoke Article 51, it is less clear as to what constitutes an “armed attack” for the purposes of this Article. In 1974, the UN General Assembly passed Resolution 3314, which defined the term “aggression” as the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”²⁰⁵ Article 3 of the Resolution specifically provides a non-exhaustive list of the acts that, regardless of a declaration of war, qualify as an act of aggression:

²⁰³ Charter of the United Nations, Article 51. *Available at:*
<http://www.un.org/en/documents/charter/chapter7.shtml>.

²⁰⁴ *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103, 110 (June 27).

²⁰⁵ UN General Assembly, Resolution 3314 (1974). *Available at:*
[http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314\(XIX\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314(XIX)).

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The International Court of Justice, interpreting the Resolution for the Military and Paramilitary Activities case (*Nicaragua v. U.S.*), regarded an “armed attack” as occurring when regular armed forces cross an international border, or when a state sends “armed bands, groups, irregulars or mercenaries which carry out armed force against another State of such gravity as to amount to” an actual armed attack by regular forces.²⁰⁶ But, the International Court of Justice in the *Nicaragua v. US* case did not find that “assistance to rebels in the form of the provision of weapons or logistical or other support” constituted an armed attack.²⁰⁷ Professor Murphy and other scholars have used this information to establish a continuum of actions that might constitute an armed attack. The low end of the continuum includes those uses of force not severe enough to meet the threshold of armed attack.²⁰⁸ They include such actions as the provision of

²⁰⁶ *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) (quoting from the UN Definition of Aggression).

²⁰⁷ *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 103, 110 (June 27).

²⁰⁸ But note, under General Assembly Resolution 2625 (1970), the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation, no state has the right to

arms to nationals of a state who seek to overthrow their government. Such actions do not meet the threshold for invoking Article 51 self-defense rights. At the high end of the spectrum are armies crossing national borders, which are clearly above the threshold for armed attack. Also above the threshold for armed attack are instances where a State sends irregular forces (not their uniformed military) into another country to carry out acts of armed force; these acts are at the high end of the spectrum if they are of such gravity as to amount to an actual armed attack by regular uniformed military. Such actions may result in the invocation of Article 51 in response.²⁰⁹

But must a state wait until after it has suffered an attack to invoke its Article 51 right to self-defense? Most governments and scholars agree that if an attack is imminent, a state may respond. However, there is considerable disagreement within the international community about what constitutes an imminent attack. Theories of preemptive and preventive war have been cause for considerable discord within the international community in recent decades, and there are strong arguments on all sides. The most notable example of action taken prior to an actual attack is the US invasion of Iraq in 2003, under claims of self-defense from a potential Iraqi attack using weapons of mass destruction (WMD). The nuances of these arguments are beyond the scope of this introductory chapter, yet if you are interested in the topic there is much literature available on the topic.

Discussion Questions:

1. Article 2(4) prohibits the use of force, except as permitted in accordance with the Purposes of the UN. Article 51 permits the use of force in cases of self-defense. But the Charter does not provide guidance on how to establish whether or not an armed attack has taken place. Because of this procedural gap, do you think that Article 2(4) can be nullified by self-serving allegations of self-defense?

Exercise:

As discussed above, Article 51 permits the use of armed force by a state in self-defense of an armed attack. However, there is no conclusive way for the international system to establish which state (or non-state actor) is the aggressor and which state is the aggrieved.²¹⁰ Some actions, such as not notifying the UN in advance of taking action in self-defense, may be probative evidence of unlawful use of force. However, it is not conclusive. Without an objective framework for fact-finding, it is argued that “the concept of self-defense remains a

intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. This resolution is not binding, but may reflect customary international law.

²⁰⁹ Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 Harv. Int’l L. J. 41 (2002), 42. Available at http://heinonline.org/HOL/Page?handle=hein.journals/hilj43&div=8&g_sent=1&collection=journals.

²¹⁰ Tom Franck, *Who Killed Article 2(4)?*, 64 Am. J. Int’l L. 809 (1970), at 811.

convenient shield for self-serving and aggressive conduct... The temptation remains ... to attack first and lie about it afterwards.”²¹¹

Together with your classmates, develop a list of criteria that the UN Security Council (or another international organization, which you can create) could use to provide an objective framework to determine which state is the aggressor and which state is the aggrieved.

B. Customary International Law

In addition to the legal framework on the use of force established by the United Nations, specifically through Articles 2(4) and 51, customary international law plays an important role in determining when the use of force is authorized. Necessity and proportionality are important limits to the use of force in customary international law. A state may act in self-defense only with such force as is necessary and proportionate to the act of aggression.

Necessity

Specifically, “necessity” requires an examination of the alternatives to the use of armed force, even as a defensive measure. If viable, peaceful solutions are available, these should be pursued before resorting to armed force. However, if it is determined that force is necessary to resolve the situation, the second prong, proportionality, will apply. The role of the necessity prong varies depending on the circumstances. If a state has already been attacked, then it is most likely that all other means to peacefully resolve the situation have been exhausted. Establishing that the use of force in self-defense is necessary is easier to do after the state has already been attacked. However, the necessity prong is more of a concern with regards to preemptive or preventive force, where it may not be as clear that all other means to peacefully resolve the situation have been exhausted.

Proportionality

Proportionality refers to the scope of force used. A state may not use excessive force, even in self-defense, under customary international law. It is important to note that necessity and proportionality are not intended to prevent a state from defending itself, but merely to ensure that a state uses measures that are appropriate under the circumstances.

Discussion Questions

1. Although an “armed attack” triggers the right of self-defense, “armed attack” is not explicitly defined in the U.N. charter. How would you define it? Does your definition change at all if you focus solely on conventional attacks of one state against another, or if you focus on terrorist attacks by non-state actors? Can a definition effectively incorporate attacks by states and non-state actors? How?

²¹¹ John Becker, *The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter’s Limitations on the Use of Force*, 32 *Denv. J. Int’l L. & Pol’y* 583 (2003-2004), at 587.

Note: As discussed above, the International Court of Justice has ruled that force or intervention below the level of an “armed attack” does not trigger the right of self-defense. Thus, a murky area exists as to what level of force and/or intervention meets the threshold for “armed attack,” and what level of force and/or intervention is sufficient to invoke self-defense principles. See *Military and Paramilitary Activities in and against Nicaragua*. (Nicar. v. U.S.), 1986 I.C.J. 14, para. 249 (June 27).

2. Now consider the timing of an armed attack. Can a state only respond to an armed attack that has already occurred? Or can it respond to an imminent armed attack that has not yet occurred (this is called “anticipatory self-defense”)? Do you think Article 51 of the United Nations Charter allows a state to respond to an armed attack that is not imminent but may occur at some point in the future (preemptive self-defense)? Again, does your answer change for a terrorist attack?

Exercise

States have the right to defend themselves in response to an armed attack. Historically, an armed attack had to be launched by one state against another state. In the aftermath of the September 11, 2001 attacks, the American and coalition response was to overthrow the Taliban regime. The 2001 invasion of Afghanistan by American and coalition forces has been generally accepted by the international community as in accordance with the norms of *jus ad bellum* because of the Taliban regime’s support for al Qaeda. But what if the facts were changed? What if the Taliban had not hosted al Qaeda operatives, and had actively tried to rid the country of these individuals, and made it clear to the international community that the regime did not support al Qaeda activities? If the regime was unable to control terrorist organizations within its territory, and if those terrorists carried out an armed attack on another state, would retaliation against al Qaeda terrorists operating in Afghanistan be permissible under international law?

Once you have completed this part of the exercise, focus on the applicability of this answer across the international community. Have the rules of *jus ad bellum* changed because of the inability of states to control terrorist operatives that plan and carry out attacks against another state? Should a state be subjected to the use of force against non-state actors that take up residence in its territory? How much effort should a state be required to make to rid its territory of terrorists before the international system determines it is not appropriate for an attacked state to retaliate?

III. *JUS IN BELLO* – THE CONDUCT OF WARFARE



What means justify the ends? What are the rules of war? In simplified form, those are precisely the questions that this section sets out to answer. Even if force is justified under *jus ad bellum*, that force still must be used in a manner that conforms to another, interrelated set of principles called *jus in bello*. *Jus in bello*, which means “justice *in* war,” is also referred to as “international humanitarian law.” It is also referred to as the “laws of war,” the “laws and customs of war,” or the “law of armed conflict.” *Jus in bello* governs the actual conduct of war. Under *jus in bello*, two main principles govern the actual conduct of war.²¹²

- *Discrimination*. Military force is justified only if it is directed at the enemy’s military forces. In war, every effort must be made to distinguish between enemy combatants and civilians. Even during times of war, innocents (also called non-combatants) must be protected. While it may be difficult to distinguish combatants from civilians, international norms require that noncombatants and civilian infrastructure not be targeted. Indiscriminate mass destruction of populations or violence against civilian targets is not permitted. It is important to note that this norm has evolved significantly over time and remains nuanced. The numbers of noncombatant civilians killed during World War II was extremely high. Minimal effort was made to protect innocents. For instance, the United States and the Allies conducted bombing campaigns in Germany and Japan that specifically targeted hundreds of thousands of civilians. However, the Allies justified these casualties because these civilians were part of the military-industrial complex—they were often employed in factories that produced materials such as ammunition, military vehicles, and soldiers’ gear that were critical to the ability of the enemy to wage war. Since—and in response to—World War II, *jus in bello* rules have evolved to be considerably more restrictive, and it is most likely that World War II-type terror bombings would not be justified today under the principle of distinction.
- *Proportionality*. The principle of proportionality is closely related to the concept of proportionality under *jus ad bellum*. But instead of determining whether or not war is a proportionate response, *jus in bello* asks whether the incidental damage to civilian lives and civilian objects that is caused by an attack against a military objective is out of

²¹² Adapted from Force and Statecraft, 264.

proportion to the military advantage to be gained by the attack. If it is, the attack is not proportionate. Leaders have an ethical obligation not to use excessive force that will result in unnecessary death and destruction. For example, the use of a nuclear bomb to destroy a munitions plant would be unacceptable because a smaller, conventional bomb could achieve the same result without killing as many civilians or causing collateral damage.

We now turn to the two general areas of international humanitarian law: restrictions on the methods of warfare and protections for noncombatants. Many states have adopted these laws through treaties, as well as the incorporation of international norms into manuals developed by militaries to govern conduct on the battlefield. “Hague law” generally refers to restrictions on the methods of warfare while “Geneva law” generally refers to protections for noncombatants. We will discuss each in turn.

A. Hague Law: Restrictions on Methods of Warfare

By the end of the 1800s, the advent of modern weapons technology capable of causing mass casualties made it critically important to limit the methods of warfare. In 1899, twenty-six states convened a peace conference in The Hague, The Netherlands. Less than a decade later, these states and eighteen others met again to establish rules on the conduct of warfare. The conventions agreed to by these states marked a significant development in international law. The conventions codified core principles that animate *jus in bello*. In particular, the states agreed to the imperative of protecting persons and property unless military necessity requires otherwise; the need to differentiate between legitimate and illegitimate (civilian) targets; the significance of collateral damage (damage that results to civilians from striking a legitimate target); and, more broadly, the consensus that warfare must be conducted in accordance with general principals of humanity.²¹³ Some of the provisions they agreed upon include:²¹⁴

- A prohibition on the launching of projectiles and explosives from balloons or by other similar methods;²¹⁵
- A declaration on the use of projectiles whose only object is the diffusion of asphyxiating or deleterious gases;²¹⁶
- A declaration on the use of bullets which expand or flatten easily in the human body;²¹⁷
- A convention on the laws and customs of war on land, including the treatment of prisoners of war, conduct of hostilities, and armistices, as well as clarification that the

²¹³ Murphy, 456.

²¹⁴ See generally http://avalon.law.yale.edu/subject_menus/lawwar.asp.

²¹⁵ Prohibiting Launching of Projectiles and Explosives from Balloons (Hague, IV); July 29, 1899. Available at http://avalon.law.yale.edu/19th_century/hague994.asp.

²¹⁶ Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases; July 29, 1899. Available at http://avalon.law.yale.edu/19th_century/dec99-02.asp.

²¹⁷ Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body; July 29, 1899. Available at http://avalon.law.yale.edu/19th_century/dec99-03.asp.

“laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps” that meet specified conditions.²¹⁸

The Hague Conference of 1907 further developed the rules governing the use of force. The Hague rules provide a detailed code of conduct for states engaged in warfare, one aspect of which we will discuss in the “Arms Control” section to follow. Despite the thoroughness of the regulations, the drafters recognized that they would not be able to anticipate all conceivable actions that might occur during the conduct of hostilities—particularly those that might arise from technological advances. So they inserted a clause in the *Laws and Customs of War on Land* that binds all states to the confines of the “laws of humanity and the dictates of the public conscience.”²¹⁹ This clause is a critical component of the convention, as it allows the principles to adapt to meet the evolving nature of warfare, even in the absence of specific treaties and conventions.²²⁰

Discussion Questions

1. Do you think the above clause in the *Laws and Customs of War on Land*, which provides for elasticity where there is a gap in international treaty law, is a good thing? Can you think of any downsides to having such a clause?
2. What would you recommend if there is no international consensus on a particular aspect of warfare?
3. Recall Chapter II and the sources of international law. Do you think that the Hague rules, as developed by a few dozen states, should be binding for the entire international system? The Hague Conventions are binding international law between the parties. But how else could it become binding for those states in the international community that have not affirmatively accepted its provisions? What factors would a court consider to decide whether it is binding on non-parties?

Targeted Killings: Noncombatants as acceptable collateral damage?

You may be familiar with America’s use of targeted killings to destroy terrorist operatives hiding in remote outposts, particularly in the Waziristan region of Pakistan. Under the Obama Administration, the number of unmanned, armed drone attacks has increased significantly. Although the Administration has claimed the practice of targeted killings is justified under international law, consider the issue of collateral damage. Collateral damage is the term used for destruction of property and any loss of life that results from the targeting of a legitimate military target. In the case of drone strikes, where an unmanned aerial vehicle fires a missile to kill a terrorist operative, collateral damage happens frequently. Villages are often

²¹⁸ *Laws and Customs of War on Land (Hague IV)*; October 18, 1907. Available at http://avalon.law.yale.edu/20th_century/hague04.asp.

²¹⁹ Preamble, *Convention Respecting the Laws and Customs of War on Land*, accessible at http://avalon.law.yale.edu/20th_century/hague04.asp#art53.

²²⁰ For a comprehensive database of treaties, conventions, and protocols over the past century, see http://avalon.law.yale.edu/subject_menus/20th.asp.

destroyed, and innocents are frequently reported as killed. Many times, these noncombatants are family members of the terrorist.

Do you believe this practice—in terms of the noncombatant deaths—is justified under the *jus in bello* principles of proportionality and protection of innocents? Should noncombatants be considered a legitimate target because they associate with terrorists? Are family members “guilty” by association? If you were in charge of drafting policy for when targeted killings could be authorized, what factors and information would you consider? Why?

B. Geneva Law: Protections for Victims of Warfare

The Hague Conventions focused on the actual conduct of warfare, of which the protections of prisoners of war are just one component. In contrast, the 1949 Geneva Conventions focused entirely on the treatment of combatants and non-combatants. By 2005, every state in the international community had ratified or acceded to the 1949 Geneva Conventions.²²¹ It is exceedingly rare to have unanimity across the entire international community regarding a set of principles or conditions. That a true international consensus was reached on the Geneva Conventions demonstrates the importance of these principles. There are four Geneva Conventions and three additional protocols.²²²

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Convention (III) Relative to the Treatment of Prisoners of War
- Convention (IV) Relative to the Protection of Civilian Persons in Time of War
- Additional Protocol I (1977) on International Conflicts
- Additional Protocol II (1977) on Non-International Conflicts
- Additional Protocol III (2005) on Additional Distinctive Emblem

The protections and provisions contained in the Geneva Conventions are of great importance. They establish that prisoners of war must be treated humanely at all times and must not be harmed or killed after they surrender. The Conventions also govern the treatment of civilians during conflict. But who counts as a civilian?

Article 50(1) of Protocol I addresses the topic of civilians versus combatants. It defines a civilian as anybody who is not a member of an organized armed group fighting under the command of a party to an international armed conflict, and therefore who does not qualify for Prisoner of War status under the Geneva Prisoner of War Convention and Article 43 of Protocol I. This definition is still quite loose. But it does clarify that the status of “civilian,” and the

²²¹ Murphy, 459; for more information on the conventions see International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949: Commentary by Jean S. Pictet ed.*, 1952-1960 (4 vols.).

²²² These conventions are listed because of their criticality in the international system. The text of the conventions may be accessed at: http://avalon.law.yale.edu/subject_menus/lawwar.asp.

immunity that status confers, is not absolute—if a civilian takes a “direct” part in hostile acts, he or she loses immunity and may be targeted as a combatant under Article 51(3).²²³

Select Articles of Protocol I

Article 43: Armed Force

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 50(1):

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Article 51(3):

Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

²²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Available at: <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>.

Exercise

You are the Afghan delegate to a convention tasked with updating the Geneva Conventions. You are assigned to the committee responsible for updating Article 50(1). The question arises whether or not an affirmative definition of a civilian should be included in the Geneva Convention. What are your recommendations? If you determine that a definition should be included, or that Article 50(1) should be modified in some other way, draft the text as you see fit.

As you prepare the draft, think carefully about why the original drafters did not include a clear definition. Are there negatives that surface from too precisely defining a “civilian?” Think back to the example earlier in the chapter about noncombatants who were integral to the war production effort—do they lose their status as civilians by virtue of their involvement in the war production effort? Why or why not? What if their government forces them to work in factories or farms in order to produce necessary war supplies? Also consider whether or not the status of a civilian should be a permanent label or whether it may be lost if that person engages in hostilities. Can a combatant ever return to the status of a civilian?

Common Article 3 of the Geneva Conventions provides that certain minimum protections must be afforded to “persons taking no active part in hostilities:”²²⁴

- Humane treatment without any adverse distinction based upon race, color, religion, sex, etc.;
- Violence, cruel treatment, and torture are forbidden;
- The taking of hostages is forbidden;
- Humiliating and degrading treatment is forbidden;
- Must afford all the judicial guarantees (i.e., fair trial); and,
- The wounded and sick shall be collected and cared for.

The Power to Appoint Protecting Powers and Services of an Impartial Humanitarian Body

An additional contribution of the Conventions is the call for belligerents to appoint “protecting powers” (third parties) to monitor the treatment of interned persons, assist in communications between interned persons and their families, and assist in the repatriation process. Also under Common Article 3, an impartial humanitarian body, such as the International Committee of the Red Cross/Red Crescent, is permitted to offer its services to the Parties to the conflict.²²⁵ Today, it is common for the International Committee of the Red Cross/Red Crescent to serve in both capacities during armed conflict.

²²⁴ Common Article 3, Geneva Conventions. Available at http://avalon.law.yale.edu/20th_century/geneva07.asp.

²²⁵ Common Article 3, Geneva Conventions. Available at http://avalon.law.yale.edu/20th_century/geneva07.asp.

Applicability: International versus Non-International Armed Conflict:

Throughout history, international law of war has focused on traditional declarations of war between nation-states. This historical precedent was reinforced in Article 2 of the Geneva Convention, which states that the laws of war apply in any instance of international armed conflict.²²⁶ Yet, the delegates to the Geneva Convention sought more broadly to establish certain minimum humanitarian standards that would apply to all situations of armed conflict. Therefore, the Convention not only addresses international conflict but also “armed conflict not of an international character.” In other words, it addresses internal conflicts that reach a certain threshold. While the requirements for non-international armed conflict are not as specific as those regarding war between states, it does provide a useful minimum standard of treatment: “elementary considerations of humanity.”²²⁷

Protocol II sought to further clarify the language of Common Article 3, and to extend the scope of the law to cover additional humanitarian rights in the context of non-international armed conflicts.²²⁸ The vast majority of the international community is a party to Protocol II, although there are notable exceptions such as the United States. Afghanistan became a party to Protocol II in 2009 through accession.²²⁹

²²⁶ See http://avalon.law.yale.edu/subject_menus/lawwar.asp.

²²⁷ Murphy, 461, citing *Military and Paramilitary Activities in and against Nicaragua*, at para. 218.

²²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Available at

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545>.

²²⁹ State Parties, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II), 8 June 1977.

Available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P>.

*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*²³⁰

- Scope -

Article 1. Material field of application:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Significantly, Protocol II adds to international humanitarian law by stating that “dissident armed forces or other organized armed groups” which control territory fall under the mandate of Protocol II. The rationale for applying international humanitarian law to non-international armed conflict centers around the notion that any distinction between the two is artificial from the perspective of the victim: the laws of war should apply regardless of the identity of the combatants. This notion is in conflict with the broader principle of state sovereignty, the idea that a state is the primary authority within its borders. It also demonstrates how legal norms adapt and evolve as evidence suggests that more civilians have been killed in *internal* conflicts than international conflicts since World War II.

In recognition of sovereign rights, Protocol II is much more limited in scope than the rest of the Geneva Conventions. Therefore, the distinction between international and non-international armed conflicts is critical when trying to determine which laws to apply during armed conflict. Non-international armed conflicts have more limited rules, and in some cases, rules that apply to international armed conflicts do not apply to non-international armed conflicts. For instance, the Protocol does not include the “grave breaches” clause found in the four conventions. The grave breaches clause requires national prosecution of individuals for grave breaches of international humanitarian law during international conflicts (willful killing, torture, and inhuman treatment).

²³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Available at

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545>.

Additional guidance regarding the differences between international and non-international armed conflict under international law was provided by the International Court of Justice. In 1986, the Court held that Common Article 3 serves as a “minimum yardstick of protection” in *all* conflicts—not just international conflicts. The International Criminal Tribunal for the Former Yugoslavia reaffirmed the International Court of Justice’s holding in the *Tadic* case when it found that Common Article 3 “reflect[s] ‘elementary considerations of humanity’ applicable under customary international law to any armed conflict whether it is of an internal or international character.”²³¹

*Summary: Basic Rules of International Humanitarian Law in Armed Conflict: An Excerpt from “Basic Rules of the Geneva Conventions and the Additional Protocols”*²³²

1. Persons *hors de combat*²³³ and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.
3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and equipment. The emblem of the red cross or the red crescent is the sign of such protection and must be respected.
4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.

²³¹ *Prosecutor v. Dusko Tadic*, International tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-AR72, (2 October 1995) (quoting *Nicaragua v. United States* at para. 218).

²³² *Basic Rules of the Geneva Conventions and Their Additional Protocols*, International Committee of the Red Cross, ICRC Publication 1988 ref. 0365. Available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0365.pdf.

²³³ *Hors de combat* literally means “outside the fight” in French. Under Protocol I to the Geneva Convention, it means a combatant who is a) in the power of an adverse Party, b) clearly expresses an intention to surrender, or c) has been rendered unconscious or is otherwise incapacitated by wounds r sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Part III: Methods and means of warfare -- Combatant and prisoner-of-war status #Section I -- Methods and means of warfare, Article 41 -- Safeguard of an enemy hors de combat, Paragraph 2."

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of the attack. Attacks shall be directed solely against military objectives.

Discussion Questions

1. What are some examples of “armed conflicts not of an international character?” Do you think there is always a clear distinction between non-international and international armed conflict? If not, what problems might this raise?
2. How do you think the distinction between non-international and international armed conflict should apply to terrorism? If a terrorist organization has a transnational network—operatives, fund-raising, etc.—across the region or globe, should that impact whether or not its activities within one state should be deemed internal or international? For instance, how would you characterize the bombings and other terrorist activities carried out by al Qaeda in Afghanistan?
3. Are you surprised that every state in the international community has agreed to the 1949 Geneva Conventions? Why or why not?

C. Arms Control

The 1907 Hague Regulations provide that the “right of belligerents to adopt means of injuring the enemy is not unlimited.”²³⁴ In other words, certain tactics and weapons are off limits, even if they would otherwise be permissible (think back to our discussion of necessity and proportionality). These Regulations therefore help to provide a foundation in international law for the principle of arms control.

Arms control is a general term used to refer to restrictions upon the development, production, acquisition, stockpiling, proliferation, and use of weapons. Typically the term refers to the effort to prohibit the use of chemical weapons, biological weapons, nuclear weapons, and conventional weapons that are deemed to be excessively injurious or to have indiscriminate effects.²³⁵ The numerous treaties and conventions that ban or restrict the use of these weapons

²³⁴ Hague Regulations, Article 22.

²³⁵ The latter category is specifically described in the “Convention on Certain Conventional Weapons” of 1980.

demonstrate a broad global consensus that the use of these weapons is not in accordance with international norms. Afghanistan is a party to many of these conventions.²³⁶

*The Impact of Non-Governmental Organizations:
The International Campaigns to Ban Landmines*²³⁷

The problem of land mines is well known to Afghans. These instruments are designed to maximize destruction, and sadly, they continue to maim and kill years and even decades after combat forces withdraw. Recognizing the urgent need to stop the use of mines in combat operations, the International Campaigns to Ban Landmines (ICBL) was launched in October 1992 by a group of six non-governmental organizations: Handicap International, Human Rights Watch, medico international, Mines Advisory Group, Physicians for Human Rights and Vietnam Veterans of America Foundation.

These founding organizations witnessed the horrendous effect of mines on the communities they were working with in Africa, Asia, the Middle East and Latin America and saw how mines hampered and even prevented development efforts in these countries. They realized that a comprehensive and coordinated solution was needed to address the crisis caused by landmines and they therefore pursued a complete ban on these instruments.

The ICBL is a story of tremendous success due in part to the role played by a proactive NGO community. "They did not wait for anyone to appoint them leaders on the issue – they saw that a critical problem had to be addressed and they took it up," according to ICBL Ambassador Jody Williams. The founding organizations brought to the international campaign a practical experience of the impact of landmines. They also brought the perspective of the different sectors they represented: human rights, children's rights, development issues, refugee issues and medical and humanitarian relief. They also brought to the campaign their contacts with civil society groups in diverse parts of the world. The ICBL went on to organize conferences and campaigning events in different regions so the word spread and many new initiatives were born. From the beginning, the ICBL defined itself as a flexible network of organizations that share common objectives.

The hard work and dedication of the ICBL paid off with the adoption of the Mine Ban Treaty in Oslo, Norway, in September 1997. It was signed by 122 states in Ottawa, Canada on 3 December 1997. It entered into force less than two years later, more quickly than any treaty of its kind in history. Afghanistan ratified the Treaty in September of 2002, and it entered into force in March 2003. The Afghan mine clearance deadline is March 2013.

In recognition of its achievements the campaign was awarded the Nobel Peace Prize in 1997, together with its then coordinator, Jody Williams. The Norwegian Nobel Committee applauded the campaign for changing a ban from "a vision to a feasible reality" and recognized that it offers a model for disarmament and peace.

²³⁶ As of January 2010, Afghanistan was a party to: Geneva Gas Protocol of 1925, Biological Weapons Convention of 1972, Chemical Weapons Convention of 1993, and the Ottawa Treaty of 1997. Afghanistan is a signatory only of the Convention on Certain Conventional Weapons of 1980 and the Convention of Cluster Munitions of 2008. See http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=1.

²³⁷ Derived from the ICBL website, <http://www.icbl.org>.

III. THE USE OF FORCE AND THE LEGAL REGIME OF THE UNITED NATIONS

The first section of this chapter has focused on the use of force in the context of customary international law—international norms and values that have been consistently practiced by states—and the impact of specific treaties, particularly what have come to be known as *Hague law* and *Geneva law*. Much of our earlier discussion has been concerned with the international legal framework that governs the use of force. In this section, we will focus on the use of force as it relates to the legal regime of the United Nations. We will first examine the role of the UN Security Council, then focus on the different authorizations for force provided in the UN Charter. This section will introduce the use of force across the spectrum of conflict—from humanitarian interventions to full-scale combat operations.

A. The UN Security Council

The UN Security Council is tasked with “primary responsibility for the maintenance of international peace and security” under article 24(1). Further, under Article 25, member states “agree to accept and carry out the decisions of the Security Council in accordance” with the Charter. The Security Council is composed of 15 Member States. Five of these members are permanent—China, France, the Russian Federation, the United Kingdom, and the United States. The other ten members are elected for two-year terms based on a formula that results in an equitable geographic distribution. The specific responsibilities and powers of the Security Council are contained in the UN Charter, and are outlined below.

The Functions and Powers of the UN Security Council.²³⁸

- To maintain international peace and security in accordance with the principles and purposes of the United Nations;
- To investigate any dispute or situation which might lead to international friction;
- To recommend methods of adjusting such disputes or the terms of settlement;
- To formulate plan for the establishment of a system to regulate armaments;
- To determine the existence of a threat to the peace or an act of aggression and to recommend what action should be taken;
- To call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression;
- To take military action against an aggressor;
- To recommend the admission of new Members;
- To recommend to the General Assembly the appointment of the Secretary General and, together with the Assembly, to elect the Judges of the International Court of Justice.

Chapters VI and VII of the UN Charter are particularly important to understand in the context of the Security Council’s power. These Chapters address peaceful—or peaceful—settlement of dispute and actions regarding threats of peace, breaches of peace, and acts of aggression. Under Article 42, the Security Council is authorized to investigate and make

²³⁸ United Nations Charter, chapter V.

recommendations regarding the settlement of disputes, including authorizing “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

Spotlight on the U.N. Security Council:²³⁹

The Security Council is organized to function continuously, and a representative of each of its 15 members must be present at all times at United Nations Headquarters in New York. The Council may meet elsewhere than at Headquarters; in 1972, it held a session in Addis Ababa, Ethiopia, and the following year in Panama City, Panama.

When a complaint concerning a threat to peace is brought before it, the Council's first action is usually to recommend to the parties to try to reach an agreement by peaceful means. In some cases, the Council itself undertakes investigation and mediation. It may appoint special representatives or request the UN Secretary-General to do so or to use his good offices. It may set forth principles for a peaceful settlement.

When a dispute leads to fighting, the Council's first concern is to bring the conflict to an end as soon as possible. On many occasions, the Council has issued cease-fire directives that have been instrumental in preventing wider hostilities. It also sends United Nations peace-keeping forces to help reduce tensions in troubled areas, keep opposing forces apart, and create conditions of calm in which peaceful settlements may be sought. The Council may decide on enforcement measures, economic sanctions (such as trade embargoes) or collective military action.

A Member State against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly on the recommendation of the Security Council. A Member State which has persistently violated the principles of the Charter may be expelled from the United Nations by the General Assembly on the Council's recommendation.

A State which is a Member of the United Nations but not of the Security Council may participate, without a vote, in its discussions when the Council considers that that country's interests are affected. Both Members of the United Nations and non-members, if they are parties to a dispute being considered by the Council, are invited to take part, without a vote, in the Council's discussions. The Council sets the conditions for participation by a non-member State.

The Presidency of the Council rotates monthly, according to the English alphabetical listing of its Member States.

Since joining the United Nations in 1946, Afghanistan has never been a member of the U.N. Security Council.

²³⁹ Adapted from UN Security Council: Background, available at http://www.un.org/Docs/sc/unsc_background.html.

As you have learned, the UN Security Council is a very powerful entity in the international community. But beyond having 15 voting members, how is it organized? The next box examines the structure of the UN Security Council. It is reprinted here to give you a better idea of the complexity of the UN Security Council and the range of committees that exist to serve the mission of the Security Council.

STRUCTURE OF THE U.N. SECURITY COUNCIL²⁴⁰	
COMMITTEES	
<i>Standing Committees</i>	Committee of Experts
	Committee on Admission of New Members
	Committee on Council meetings away from Headquarters
<i>Ad Hoc Committees</i>	Governing Council of the United Nations Compensation Committee established by Security Council Resolution 692 (1991)
	Committee established pursuant to Resolution 1373 (2001) concerning Counter-Terrorism
	Committee established pursuant to Resolution 1540 (2004)
<i>Sanctions Committees</i>	(None as of 2010)
<i>Subsidiary Bodies Bureaux 2010</i>	Committee established pursuant to Resolution 751 (1992) concerning Somalia
	Committee established pursuant to Resolution 918 (1994) concerning Rwanda
	Committee established pursuant to Resolution 1132 (1997) concerning Sierra Leone
	Committee established pursuant to Resolution 1267 (1999) concerning Al Qaeda and the Taliban and associated individuals and entities
	Committee established pursuant to Resolution 1518 (2003)
	Committee established pursuant to Resolution 1521 (2003) concerning Liberia
	Committee established pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo
	Committee established pursuant to Resolution 1572 (2004) concerning The Democratic Republic of Congo

²⁴⁰ Adapted from U.N. Security Council Structure, available at: http://www.un.org/Docs/sc/unsc_structure.html.

	Committee established pursuant to Resolution 1591 (2005) concerning Cote d'Ivoire
	Committee established pursuant to Resolution 1636 (2005)
	Committee established pursuant to Resolution 1718 (2006)
	Committee established pursuant to Resolution 1737 (2006)
WORKING GROUPS	
	Working Group on Peacekeeping Operations
	Ad Hoc Working Group on Conflict Prevention and Resolution in Africa
	Working group established pursuant to Resolution 1566 (2004)
	Working group on Children and Armed Conflict
	Informal Working Group on Documentation and Other Procedural Questions
PEACEKEEPING OPERATIONS	
	Since 1948, there have been 63 U.N. peacekeeping operations
INTERNATIONAL TRIBUNALS	
	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 - established by S/RES/808 (1993)
	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994 - established by S/RES/955 (1994)

Discussion Questions

1. Why do you think the U.N. Security Council, as opposed to the General Assembly or another component of the U.N., has the primary responsibility for the maintenance of international peace and security?
2. The U.N. Security Council has 15 members, five permanent and ten rotating. Do you think it is a positive or a negative that so much authority is given to such a small body? Why or why not?

3. As an Afghan, how do you feel about the fact that Afghanistan has never been a member of the U.N. Security Council, yet has been the subject of multiple resolutions and sanctions? Would you recommend a change to the U.N. system? Remember that member states who have an interest in any resolutions being considered by the U.N. Security Council may attend discussions on that matter, but they cannot vote.

Afghanistan and the UN Security Council from 1999 - 2010

The ongoing situation in Afghanistan demonstrates how the UN Security Council continuously monitors the implementation of a resolution. While we will specifically focus on events in Afghanistan in Section V of this chapter, this box provides an overview of the UN Security Council Resolutions (UNSCR) concerning Afghanistan from 1999-2010. It is intended to provide a background understanding of the number and scope of resolutions that have been issued by the UNSC.

UNSCR 1267 was followed a year later by UNSCR 1333. That resolution recognized the failure of the Taliban to cooperate with Resolution 1267, and acted under Chapter VII to demand Taliban compliance with UNSCR 1267 and “cease the provision of sanctuary and training for international terrorists and their organizations ... turn over Usama bin Laden ... and close all camps where terrorists are trained...”²⁴¹ In increasing the pressure on the Taliban, the Security Council made very specific requests of Member States, including freezing the financial assets of Usama bin Laden and closing all offices of Ariana Afghan Airlines in their territories.²⁴² In July 2001, the Security Council passed a third Chapter VII resolution on Afghanistan, reaffirming the previous two resolutions and requesting that the Secretary-General establish, in consultation with the Security Council’s Committee of Experts, a mechanism to monitor the implementation of the measures imposed by UNSCRs 1267 and 1333, as well as offer assistance to states bordering Afghanistan to increase their capacity to implement the measures imposed by the earlier resolutions.²⁴³

In November 2001, the Security Council passed resolution 1378. UNSCR reaffirmed resolutions 1368 and 1373. While not an authorization to use force, it was a basis for subsequent UNSC-authorized peacekeeping activities in Afghanistan, including UNSCR 1386 (2001), which authorized the International Security Assistance Force (ISAF). We will discuss peacekeeping activities more in the next section, but we have reprinted UNSCR 1378 below for discussion purposes.

In 2002, the Security Council devoted a considerable amount of time to the situation in Afghanistan. A total of seven resolutions were passed: 1388, 1390, 1401, 1413, 1419, 1444, and

²⁴¹ UNSCR 1333, 2000. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement>.

²⁴² UNSCR 1333, 2000. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement>.

²⁴³ UNSCR 1363, 2001. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/473/97/PDF/N0147397.pdf?OpenElement>.

1453.²⁴⁴ The content of these resolutions ranged considerably. For instance, UNSCR 1401 established the United Nations Assistance Mission-Afghanistan (UNAMA) for an initial period of twelve-months. While UNSCR 1388, “decide[d] that the provisions of ... resolution 1267 (1999) do not apply to Ariana Afghan Airlines” because the airline was no longer owned, leased or operated by the Taliban.²⁴⁵ UNSCR 1444 extends the mandate of the International Security Assistance Force by one year.

Since then, many of the UNSCRs regarding Afghanistan have centered on the continuing mandate of ISAF (specifically, UNSCRs 1563, 1623, 1707, 1776, 1833, 1890, and 1943) and UNAMA (UNSCRs 1471, 1536, 1589, 1662, 1746, 1806, 1868, and 1917).²⁴⁶ Acting under Chapter VII, ISAF’s mandate has been extended in twelve-month increments through the present date. Also, the UNSC has approved a continuation of the United Nations Assistance Mission-Afghanistan (UNAMA) in twelve-month mandates; we will discuss UNAMA more in section C.

We have discussed the role of the United Nations Security Council in this section, and the box above traces the resolutions passed by the UNSC pertaining specifically to Afghanistan over the past decade. But what does an actual UN Security Council Resolution look like? We have reprinted UNSCR 1378 in its entirety below.

²⁴⁴ You may access these UNSCRs at <http://www.un.org/Docs/scres/2002/sc2002.htm>.

²⁴⁵ UNSCR 1388, 2002. *Available at:* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/212/87/PDF/N0221287.pdf?OpenElement>.

²⁴⁶ For the complete text of these resolutions, see <http://www.un.org/Docs/sc/>.



Resolution 1378 (2001)

Adopted by the Security Council at its 5075th meeting, on 14 November 2001

The Security Council

Reaffirming its previous resolutions on Afghanistan, in particular resolutions 1028 (1995) of 15 October 1995, 1151 (1998) of 15 November 1998 and 1182 (1998) of 16 July 1999,

Supporting international efforts to end war terrorism, in keeping with the Charter of the United Nations, and reaffirming also its resolutions 1182 (1998) of 15 November 1998 and 1191 (1998) of 19 September 1998,

Recognizing the impact of the security and political situation in Afghanistan in light of the new world developments, particularly in India,

Encouraging the Taliban by offering Afghanistan to be used as a base for the export of terrorism to the United Kingdom and other member States and for providing safe haven to funds, the Taliban, mujahideen and others associated with them, and to the extent supporting the efforts of the United people to restore the Taliban regime,

Welcoming the invitation of the Special Representative to convene an expert meeting of the United Nations process at an appropriate venue and calling on the United States and all States represented in that process to accept the invitation to that meeting without delay, in good faith and without preconditions,

Welcoming the Declaration on the Situation in Afghanistan by the Foreign Ministers and other Senior Representatives of the 141 States from 13 November 2001, as well as the supporting initiatives of other international groups,

Taking note of the media report of the meeting of the Security Council on the situation in Afghanistan on 13 November 2001,

Endorsing the approach outlined by the Special Representative of the Secretary-General in the meeting of the Security Council on 13 November 2001,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity, international unity of Afghanistan,

Should be covered by the same fundamental standard and the common law, subject to the fact that it is not a right and fundamental standard.

1. Support is being given for the effect of the higher people in creating a new and traditional administrative body in the form of a government body of state.

- should be based on, and subject to, the requirements of all the higher people and fundamental law and fundamental rights.
- should respect the basic rights of all higher people, regardless of gender, ethnicity or religion.
- should respect fundamental administrative obligations, including the requirement to be transparent, open to public scrutiny and that they be subject to review and to be subject to the rule of law.
- should be based on the same principle of fundamental standard and the same level of respect and fundamental rights, when the situation permits.

2. Call on all higher people to ensure that any of support is given to the higher people under fundamental law and fundamental standard, and to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights.

3. Call on the higher people to ensure that any of support is given to the higher people in creating a new and traditional administrative body in the form of a government body of state, and to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights, and to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights.

4. Call on higher people to provide:

- support for such an administrative and government, including through the implementation of a good report process.
- support for the higher people to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights, and to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights.
- support for the higher people to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights, and to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights.

5. Encourage higher people to support efforts to ensure the safety and security of fundamental law and fundamental standard, and to ensure the safety and security of fundamental law and fundamental standard, as well as protection of fundamental rights, and to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights.

6. Encourage higher people to support efforts to ensure the safety and security of fundamental law and fundamental standard, and to ensure the safety and security of fundamental law and fundamental standard, as well as protection of fundamental rights, and to ensure the safety and security and freedom of movement of fundamental law and fundamental standard, as well as protection of fundamental rights.

Discussion Questions

1. After carefully reviewing the text of UN Security Council resolution 1378, are you surprised the authority the United Nations Security Council has over sovereign states, such as Afghanistan? Do you think it is beneficial for the international system as a global community, or do you think it allows certain states to unfairly influence less powerful states?
2. Recall that Afghanistan has *never* been elected to one of the ten rotating seats on the Security Council. While it may have a representative present for matters that pertain to Afghanistan, no voting representative approved UNSCR 1378. Do you think this should be the way the Security Council handles situations of international concern? If you could change the process, how would you do so?

B. Chapter VII of the UN Charter

The articles of Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, provide the basis for collective security efforts initiated by the United Nations itself. These efforts may vary across the spectrum from peacekeeping to use of force. Of particular importance is Article 43 of the U.N. Charter, which is reprinted below.

UN Charter - Article 43

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.²⁴⁷

When the Charter was created, it was envisioned that the U.N. would have a standing military force to enforce U.N. Security Council decisions.²⁴⁸ However, this did not materialize, and instead this provision has been used to justify the creation of *ad hoc* forces to implement Security Council resolutions when necessary. These forces are “coalitions of the willing” as participation by member states in peacekeeping and use of force missions is voluntary.

The first such example of an *ad hoc* U.N. force is the case of Korea. Following the 1950 attack by North Korean forces on the Republic of Korea, the U.N. Security Council passed resolutions 82 and 83. Resolution 82 called for an immediate cessation of hostilities, while Resolution 83, recognizing that no action had been taken by the North Korean force to withdraw or cease hostilities, recommended that U.N. states assist the Republic of Korea to “repel the

²⁴⁷ Article 43, UN Charter. Available at <http://www.un.org/en/documents/charter/chapter7.shtml>.

²⁴⁸ Carter, Trimble, Weiner, International Law, p. 1039.

armed attack and to restore international peace and security in the area.”²⁴⁹ Ten states contributed forces to the U.N. effort during the Korean War, which ultimately forced the North Koreans to withdraw to the 38th parallel (the present border between North Korea [Democratic Peoples Republic of Korea] and South Korea [Republic of Korea]).

Other examples of Chapter VII authorizations to use force include:

- *Response to Iraq invasion of Kuwait (1990)*: UNSCR 660 and UNSCR 678, of which the latter authorized member states to “use all necessary means . . . to restore international peace and security in the area.” Armed conflict ensued on the night of 16 January 1991, and Saddam Hussein’s forces were repelled from Kuwait.
- *Somalia (1993)*: UNSCR 814 established the United Nations Operation in Somalia, which was the second phase of the United Nations intervention in Somalia. UN operations in Somalia were originally structured to give humanitarian relief, but expanded to create a secure environment for humanitarian operations to provide meaningful relief in an increasingly violent, lawless, and famine-stricken country.
- *Haiti (1994)*: UNSCR 940 authorized members to use all necessary means to affect the prompt return of the legitimately elected President, and to facilitate the departure from Haiti of the military leadership.
- *Iraq (2003)*: UNSCR 678 authorized the “use [of] all necessary means” to uphold UNSCR 660 (from 1990, which was still in effect) and all subsequent resolutions and to “restore international peace and security in that area.” UNSCR 687 established ceasefire conditions and identified an obligation to eliminate and account for their Weapons of Mass Destruction program. UNSCR 1441 affirmed that Iraq remained in material breach of 687. It should be noted that there was considerable controversy throughout the international community about whether UNSCRs 678, 687, and 1441 did, in fact, authorize the use of force against Iraq in 2003.
- *Libya (2011)*: UNSCR 1973 authorized member states to take all necessary measures to protect civilians, and took the bold step of declaring a “no fly” zone across Libyan airspace, in addition to updating the arms embargo, freezing of Libyan assets, and travel ban for certain Libyan leaders, as announced in UNSCR 1970 (2011).

In addition to authorizations to use force under Chapter VII, the UN Security Council also has the authority to make determinations of threats to international peace and security under Chapter VII. The following are examples of Security Council enforcement through the use of sanctions, instead of authorizations to use force.

- *Kosovo (1998)*: UNSCR 852 is an example of an Article 39 trigger. Note that it does not authorize “all means necessary,” even though it demands Serbian compliance with the October 1998 peace treaty.
- *Afghanistan (1999)*: UNSCR 1267 established a sanctions regime to cover individuals and entities associated with al-Qaeda, Osama bin Laden, and/or the Taliban. The resolution was followed by UNSCR 1333 (2000).

²⁴⁹ UN Security Council Resolutions 82 and 83. Available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/064/95/IMG/NR006495.pdf?OpenElement>.

C. Humanitarian Interventions and Peacekeeping Operations

Earlier in the chapter we discussed how the UN Charter provides for sovereign states to take action on their own, as members of regional security organizations, or as members of *ad hoc* UN forces. We know that Chapter VII—which pertains to Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression—provides the authorization for the use of force to enforce UN Security Council Resolutions, and that Chapter VI provides for the Pacific Settlement of Disputes. But what about the situations that lie in between peace and armed conflict, those missions commonly referred to as “peacekeeping operations”? Former UN Secretary-General Dag Hammarskjöld referred to these missions as belonging to “Chapter 6 ½” of the Charter; this characterization has stuck and UN peacekeeping missions have deployed around the globe under the authorization interpreted by reading Chapters VI and VII together.

The first UN peacekeeping mission occurred in 1948, with the deployment of UN Military Observers to monitor the Arab-Israeli Armistice Agreement. Since that date, there have been over 60 UN peacekeeping operations throughout the world. As of March 2010, there are 16 peacekeeping operations directed and supported by the UN Department of Peacekeeping Operation (DPKO) on four continents, directly impacting the lives of hundreds of millions of people. The number of peacekeepers today represents an eight-fold increase since 1999.^{250 251}

The chart below shows the names and locations of the current peacekeeping operations. There are approximately 125,000 total uniformed and civilian personnel supporting these missions; these personnel hail from 115 countries.²⁵² The annual expenditure for these peacekeeping operations for 2009-2010 is approximately \$7.87 billion.²⁵³ The cost of UN peacekeeping operations from 1948 to 2009 was over \$60 billion.²⁵⁴

²⁵⁰ Factsheet: U.N. Peacekeeping, March 2010, *available at* <http://www.un.org/en/peacekeeping/documents/factsheet.pdf>.

²⁵¹ For more information on U.N. peacekeeping efforts, *see* <http://www.un.org/en/peacekeeping/index.shtml>.

²⁵² Background Note – U.N. Peacekeeping Operations, *available at* <http://www.un.org/en/peacekeeping/bnote.htm>.

²⁵³ Background Note – U.N. Peacekeeping Operations, *available at* <http://www.un.org/en/peacekeeping/bnote.htm>.

²⁵⁴ Background Note – U.N. Peacekeeping Operations, *available at* <http://www.un.org/en/peacekeeping/bnote.htm>.

current UN Political and/or Peacebuilding missions below in order for you to better understand where these 12 missions are currently operating:

- U.N. Political Office for Somalia (1995)
- Office of the United Nations Special Coordinator for the Middle East (1999)
- Office of the Special Representative of the Secretary-General for West Africa (2001)
- U.N. Assistance Mission in Afghanistan (2002)
- U.N. Assistance Mission for Iraq (2003)
- U.N. Integrated Office in Burundi (2007)
- U.N. Mission in Nepal (2007)
- Office of the U.N. Special Coordinator for Lebanon (2007)
- U.N. Regional Centre for Preventive Diplomacy for Central Asia (2007)
- U.N. Integrated Peacebuilding Office in Sierra Leone (2008)
- U.N. Integrated Peacebuilding Office in Guinea-Bissau (2010)
- U.N. Integrated Peacebuilding Office in the Central African Republic (2010)

D. Provision for Regional Security Arrangements

The UN Charter has a specific chapter that addresses regional organizations: Chapter VIII. Not only does the Charter recognize the existence of organizations such as the Arab League, the Organization of American States, and the Organization of African Unity (which was disbanded and is now known as the African Union), it encourages local dispute resolution through these organizations.²⁵⁸ The Charter also provides for the Security Council to utilize regional arrangements for enforcement actions. However, there is an important caveat that regional organizations may not undertake enforcement actions without authorization from the Security Council. (Article 53)

In order to better understand the role of regional organizations and their relationship with the United Nations, we will examine the North Atlantic Treaty Organization (NATO). NATO was created with the signing of the Washington Treaty in 1949, which reaffirmed the purposes and principles of the UN Charter. NATO differs from most other regional organizations because it is a collective defense organization—meaning that member states are bound to take action to protect each other in the case of an attack. Article V of the NATO Treaty provides:²⁵⁹

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

The original treaty was designed to overcome the challenges of the Cold War, where it was commonly thought that if the treaty were ever invoked it would be the result of a Soviet

²⁵⁸ Chapter VII, Article 52 of the UN Charter.

²⁵⁹ http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

invasion of Europe. The treaty was not invoked throughout the duration of the Cold War.²⁶⁰ The Article V provision of the treaty was first invoked in response to the terrorist attacks against the United States on September 11, 2001. We will discuss this invocation and its consequences for Afghanistan more in depth in Section IV of this chapter.

IV. TERRORISM AND THE USE OF FORCE

Thus far, we have focused on the use of force during situations of armed conflict. We have learned that both specific treaties and customary international law—international norms and values, guide the concept of using force in the international system. Sometimes the international system is very clear on when force may be used (*jus ad bellum*) and how it may be used (*jus in bello*). However, we have learned that many times the situation is not entirely clear and we must weigh different criteria to determine whether or not force may be used at all, and if so, how the conflict may be carried out. The challenges of adhering to international law in traditional wars—two or more states fighting each other—is made significantly more complicated when we enter the murkier world of terrorism and humanitarian intervention. Both have become more frequent on the international stage in recent decades, yet international law has not clearly espoused how the use of force may be applied in these situations. One of the reasons the international legal framework remains incomplete is the significant discord between members of the international community on the role of states intervening in the affairs of other states. We will explore the unique characteristics and challenges of terrorism below.

A. What is Terrorism?

“... States must ensure that any measures [sic] taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law...”

-- UN Security Council Resolution 1456 (2003)

Although terrorism has taken on a prominent role in the international community in recent years, there is no distinct “law of terrorism.” Indeed, the United Nations Member States cannot reach a consensus on the definition of “terrorism.” The challenge in defining “terrorism” stems from the numerous contentious issues that surround identifying what is an act of terrorism and who may be considered a terrorist. Some of the key issues include how to categorize self-determination struggles that result in violence, asymmetric responses to power (such as guerilla or insurgent attacks against a standing government with a conventional military force), and state-sponsored terrorism. Each of these issues—and the numerous other issues that also complicate the subject—makes it very difficult for the international community to come to a consensus about what constitutes terrorism.

²⁶⁰ As many of you know, NATO did contribute forces to the Balkans (and continues to do so) as part of a peacekeeping effort. However, this effort was not in response to an Article V violation, but rather an effort to maintain peace and stability along the periphery of Europe in accordance with NATO’s strategic concept. *See* http://www.nato.int/cps/en/natolive/official_texts_23847.htm.

Without even this basic foundation, we are left to deal with this issue in terms of applicable sectors of international law, including international criminal law, state responsibility, and jurisdiction. Use of force is also relevant in terms of the actions that a state can take to eliminate sources of terrorism that lie outside that state's borders. The principles of the use of force that we have discussed thus far in the chapter continue to apply to cases of terrorism. For instance, "if a terrorist attack involves the responsibility of a State, it may, depending on the circumstances, constitute an armed attack and therefore justify action by way of self-defence"²⁶¹ (under Article 51 of the UN Charter and customary international law).

Exercise

Are you surprised that there is no uniformly accepted definition of "terrorism?" Why do you think it is so hard for the international community to draft a definition? Do you think that a definition would help create a foundation for more substantive progress to be made on the creation of legal instruments to fight terrorism?

As a group or on your own, spend some time drafting a definition of terrorism that could be used by the United Nations. Share the draft with your other classmates. Do you all have similar definitions or did you come up with very different versions? What are the factors that you think are important to consider when drafting a basic definition for terrorism?

B. International Efforts to Develop a More Robust International Legal Framework

The international community has been making some progress at establishing a more robust framework of international law regarding terrorism. The United Nations Global Counter-Terrorism Strategy, which was adopted in a General Assembly resolution, aims to enhance national, regional, and international efforts to counter terror. Member States have resolved to take practical steps individually and as a global community to prevent and combat terror through four specific pillars:²⁶²

- Measures to address the conditions conducive to the spread of terrorism
- Measures to prevent and combat terrorism
- Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard
- Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

The UN Security Council has set up three Committees to monitor the implementation of resolutions that specifically relate to terrorism. These three bodies (which are also detailed in the Structure of the Security Council chart earlier in this chapter) are the Al-Qaeda and Taliban Sanctions Committee (UNSCR 1267), the 1540 Committee (UNSCR 1540), and the Counter-Terrorism Committee (UNSCR 1373). The al-Qaeda and Taliban Sanctions Committee was

²⁶¹ Brownlie, *Principles of Public International Law*, 745.

²⁶² UN Global Counter-Terrorism Strategy, *available at* www.un.org/terrorism/strategy-counter-terrorism.shtml.

established in 1999 to oversee the implementation of sanctions on Taliban-controlled Afghanistan. The sanctions were a punishment for support of Osama bin Laden, and the sanctions regime has been modified and strengthened by later Security Council resolutions, including 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2007), and 1822 (2008). The sanctions, which include an assets freeze, travel ban, and arms embargo, have been updated to cover individuals and entities associated with al-Qaeda, Osama bin Laden, and/or the Taliban wherever they might be located.²⁶³

In 2004, the Security Council passed Resolution 1540. The Resolution established certain obligations intended to prevent weapons of mass destruction getting into the hands of non-state actors, including terrorist groups. Pursuant to this resolution, a committee was established with the task of monitoring Member States' compliance with these obligations.²⁶⁴ This committee is known as the "1540 Committee."

The third committee, the UN Security Council Counter-Terrorism Committee, has taken an active role in the development of international counter-terrorism legal instruments. It promulgated 12 of the current 16 international counter-terrorism legal instruments prior to September 11, 2001.²⁶⁵ However, there was little adherence to these conventions by member states until the events of September 11, 2001 focused the attention of the international community on the rising threat of terrorism. U.N. Security Council Resolution 1373 was passed in 2001, which established the Counter-Terror Committee and called on states to become parties to the international counter-terrorism legal instruments. Today, approximately two-thirds of the U.N. members have either ratified or acceded to at least 10 of the 16 instruments. The 16 instruments, the date the instruments entered into force, and the number of parties (states) to the counter-terror instruments are depicted in the below chart.²⁶⁶

²⁶³ www.un.org/sc/committees/1267/index.shtml.

²⁶⁴ www.disarmament2.un.org/Committee1540/index.html.

²⁶⁵ Security Council Counter-Terrorism Committee homepage, <http://www.un.org/sc/ctc/laws.html>.

²⁶⁶ Derived from the U.N. Security Council Counter-Terrorism Committee site, available at <http://www.un.org/sc/ctc/laws.html#t16>.

COUNTER-TERROR INSTRUMENT	ENTERED INTO FORCE	STATUS	AFGHANISTAN DATE OF ACCESSION/RATIFICATION²⁶⁷
Convention on Offences and Certain Other Acts Committed On Board Aircraft	1969	185 Parties	15 April 1977
Convention for the Suppression of Unlawful Seizure of Aircraft	1971	185 Parties	29 Aug 1979
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation	1973	188 Parties	26 Sep 1984
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents	1977	172 Parties	24 Sep 2003
International Convention Against the Taking of Hostages	1983	167 Parties	24 Sep 2003
Convention on the Physical Protection of Nuclear Material	1987	141 Parties	12 Oct 2003
Amendments to the Convention on the Physical Protection of Nuclear Material	2005	33 Parties	
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971	1989	171 Parties	
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation	1992	156 Parties	23 Sep 2003
Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation	2005	11 Parties	
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf	1992	144 Parties	23 Sep 2003
Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf	2005	9 Parties	

²⁶⁷ See “Current Status.” Available at http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG.

Convention on the Marking of Plastic Explosives for the Purpose of Detection	1998	143 Parties	10 Jan 2003
International Convention for the Suppression of Terrorist Bombings	2001	164 Parties	24 Sep 2003
International Convention for the Suppression of the Financing of Terrorism	2002	173 Parties	24 Sep 2003
International Convention for the Suppression of Acts of Nuclear Terrorism	2007	61 Parties	29 Dec 2005 (signed)

Spotlight on the Counter-Terrorism Implementation Task Force:²⁶⁸

In 2005, former Secretary-General Kofi Annan created the Counter-Terrorism Implementation Task Force (CTITF) to coordinate and share information across different U.N. organizations and entities focused on countering terrorism. The CTITF “serves as a forum to identify and pursue strategic issues and approaches and to foster coherent action across the United Nations system.” The task force is chaired by the Office of the Secretary-General, and includes 24 representatives from various United Nations departments, Specialized Agencies, Funds and Programmes, as well as other entities, such as the International Criminal Police Organization (Interpol).

Since the adoption of the United Nations Global Counter-Terrorism Strategy, the Task Force focused not only on policy, but has increasingly incorporated operational work in specialized substantive fields. To facilitate these processes, the Task Force has established several working groups. These groups address issues that include:

- Financing of terrorism;
- Human rights;
- Integrated implementation;
- Radicalization and extremism that lead to terrorism;
- Victims of terrorism; and,
- Vulnerable targets.

During the November 2007 International Conference on Terrorism: Dimensions, Threats and Countermeasures, in Tunisia, Secretary-General Ban Ki-Moon had the following to say about the CTITF:

“The United Nations Counter-Terrorism Implementation Task Force illustrates how the United Nations family can work as one. We are working with Member States in mapping and analyzing national and international initiatives for addressing radicalization and recruitment; in advancing the protection of human rights; in helping to protect vulnerable targets; and in addressing the needs of victims of terrorism.”

²⁶⁸ Counter-Terrorism Implementation Task Force, www.un.org/terrorism/cttaskforce.html.

V. AFGHANISTAN AND THE USE OF FORCE SINCE 2001

This section is intended to provide you with general information about the forces currently operating in Afghanistan. Think critically about the mission of these forces, their mandates, and how they fit in with what you have learned about the use of force and humanitarian interventions. Do you think the international community has effectively utilized international legal instruments to improve conditions in Afghanistan? Are there limits to what authorizations for the use of force can achieve? How should such authorizations be paired with stabilization and reconstruction efforts?

A. Overview of the Use of Force in Afghanistan after 9/11

The attacks orchestrated by al Qaeda in the United States on September 11, 2001 (commonly called “9/11”), resulted in extensive damage and the death of approximately 3,000 people. The United States invoked its right of self-defense under Article 51, asserting in its report to the U.N. Security Council that the Taliban regime was unwilling to prevent al Qaeda attacks, and specifically allowed parts of Afghanistan to be used by al Qaeda as a base of operation.²⁶⁹ The international community was receptive to the American report. Shortly after the attacks the Security Council passed two resolutions, Security Council Resolution 1368 and 1373, which recognized and reaffirmed the “inherent right of individual or collective self-defence.”²⁷⁰ Neither of these resolutions mentioned Afghanistan or al Qaeda specifically, but they laid a foundation for future resolutions, which would directly target the Taliban regime and Afghanistan.

U.S. and coalition attacks against al Qaeda and the Taliban regime commenced in October. On November 14, 2001, the Security Council adopted by a vote of 15-0 Resolution 1378, in which it “support[ed] international efforts to root out terrorism,” and in the context of “condemning the Taliban for allowing Afghanistan to be used as a base for the export of terrorism,” “support[ed] the efforts of the Afghan people to replace the Taliban regime.”²⁷¹

Since 2001, the U.S. has maintained a presence in Afghanistan supported by the Government of the Islamic Republic of Afghanistan, the United Nations, and domestic authorization²⁷² under Operation Enduring Freedom. This effort was distinct, but collaborated with other multinational efforts such as that of the International Security Assistance Force (ISAF), which we will address in the next section. In October 2008, the U.S. Defense Department activated U.S. Forces-Afghanistan (USFOR-A) as the command and control headquarters for U.S. forces operating in Afghanistan.²⁷³ This activation was intended to increase efficient command and control of forces, and enhance integration and coordination between American contingents and ISAF forces. This command includes the Combined Security Transition Command-Afghanistan, which is tasked with training the Afghanistan National Security forces. As you read the next section, remember that the ISAF and USFOR-A chains of

²⁶⁹ Murphy, 445. U.N. Doc S/2001/946 (Oct. 7, 2001).

²⁷⁰ See S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001).

²⁷¹ See S.C. Res. 1378 (November 14, 2001).

²⁷² Most notably the U.S. Authorization for the Use of Military Force.

²⁷³ <http://www.defense.gov/Releases/Release.aspx?ReleaseID=12267>.

command—military hierarchy—are separate and distinct, although presently the Commander, USFOR-A is also the Commander, ISAF.

The chart below provides a generic, and intentionally over-simplified view of the structure of foreign forces in Afghanistan. We will discuss these different entities in more depth later, but for now it is helpful to know what the acronyms stand for. Recall the different mandates that we discussed earlier in this chapter, there are different mandates from the United Nations, NATO, and the U.S. in response to the 9/11 attacks. Because of this complicated intersection of mandates, there are different command structures. Under the U.S. side, the U.S. Forces-Afghanistan (USFOR-A) are divided into two primary commands: the Combined Joint Task Force (CJTF), which is responsible for the operational mission (including combat operations), and the Combined Security Transition Command-Afghanistan (CSTC-A), which is responsible for facilitating the training and equipping of the Afghan security forces to enable them to take over responsibility for maintaining stability and security across Afghanistan. Provincial Reconstruction Teams (PRTs) are also annotated on the slide. They do not clearly fit in a military command relationship, as they are primarily civilian-led and are focused on institution building. These teams work at the province level and help local Afghan leaders to develop local governance, rule of law, and provide technical expertise on a range of issues including agriculture and industry. There are both American-led and ISAF-led PRTs.

On the International Security Assistance Force side, NATO is placed at the top as it has taken the responsibility for leading and coordinating the international effort to develop a strong and secure Afghan state. The NATO Training Mission-Afghanistan (NTM-A) has a complementary role with CSTC-A, as both focus on different aspects of the train and equip mission—providing training support, technical expertise in force development, and coordinating the donation and purchase of equipment for use by the Afghan security forces.



B. ISAF and the Role of NATO in Afghanistan

As discussed earlier, the North Atlantic Treaty Organization (NATO) is a collective defense organization formed in accordance with the U.N. Charter. How has NATO, whose 28 members hail from Europe and North America, come to be so involved in Afghanistan? The story is an interesting study in international law and the use of force. In this section, we will examine the role of NATO in Afghanistan, and the legal authority upon which it is based.

During the Bonn Conference of December 2001, the concept of a U.N.-mandated international force to assist the newly established Afghan Transitional Authority was launched. The mission of this force was to support the reconstruction of Afghanistan, particularly through establishing security. This force was called the International Security Assistance Force (ISAF), and it was officially created through U.N. Security Council Resolutions. A total of eleven UNSCRs relate to ISAF: 1386, 1413, 1444, 1510, 1563, 1623, 1707, 1776, 1833, 1943, 1974.²⁷⁴ The number of resolutions pertaining to this force demonstrates the international commitment to the force as well as the broad consensus that has existed for nearly a decade regarding the existence of an international force to establish peace and security in Afghanistan. Further, they demonstrate the interest of the international community in the evolution of ISAF to meet the changing security needs of Afghanistan. ISAF is a coalition of the willing—not a designated UN force—and it operates under the Chapter VII peace-enforcement provisions of the U.N. Charter.

In August 2003, NATO assumed leadership of the ISAF operation, which had previously been rotating between different countries. Since then, NATO has been responsible for the command, coordination, and planning of the force. By designating NATO as the lead organization for ISAF, it alleviated the initial challenge of rotating leadership among different nations.

The original U.N. Security Council mandate limited ISAF to the area surrounding Kabul. However, in December 2003, UNSCR 1510 extended ISAF's authority to cover the whole of Afghanistan.²⁷⁵ The evolution of ISAF has occurred as a result of U.N. Security Council resolutions, NATO internal decision-making (particularly through its North Atlantic Council), agreements with the Afghan Transitional Authority and elected government, and involvement from members of the international community. The number of ISAF troops has grown from an initial 5,000 to approximately 130,000 troops coming from 42 nations, including all 28 NATO members.²⁷⁶

ISAF's mandate demonstrates the multi-faceted nature of international intervention today. The force is tasked specifically with security, reconstruction and development, and

²⁷⁴ For more detailed research, reference the UN Security Council Resolutions website, *available at* http://www.un.org/Docs/sc/unsc_resolutions.html.

²⁷⁵ UNSCR 1510, *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/555/55/PDF/N0355555.pdf?OpenElement>.

²⁷⁶ Headquarters, Allied Joint Force Command Brunssum, NATO, <http://www.jfcbs.nato.int/jfcbrunssum/isaf.aspx>. As of April 2011.

governance. In addition to assisting the Afghan government by conducting security and stability operations, ISAF is involved with mentoring, training, and equipping the Afghan National Army. The ISAF Post-Operations Humanitarian Relief Fund provides short-term humanitarian relief, while ISAF works with Afghan government and U.N. Assistance Mission-Afghanistan (UNAMA) representatives on reconstruction and development issues. Further, ISAF Provincial Reconstruction Teams (26 teams located at the provincial level, as of 2010) are helping Afghan authorities to strengthen governance institutions.

Exercise:

In groups or as a class, discuss your personal interaction with coalition forces in Afghanistan. Have you been subject to a checkpoint operated by United States forces or NATO troops under ISAF? Have you experienced first-hand the contributions of a Provincial Reconstruction Team working with local governments to build institutions and governance capacity? Did you see U.N. representatives monitoring the presidential elections in 2009?

Has your experience with these organizations been positive or negative? Why? How do you feel about their contributions to security, stability, and development in Afghanistan? Do you believe that their actions are in accordance with the mandate provided by the U.N. Security Council? Do they comply with what you have learned about the use of force in international law? What changes or recommendations would you have for the United Nations Security Council regarding their mandate?

The interrelationships between the sovereign government of Afghanistan, ISAF/NATO, the United Nations, the United States, and other states in the international community are exceedingly complex. Take, for instance, the mission statement of the NATO Training Mission-Afghanistan, which operates under the ISAF headquarters, but whose commander is dual-appointed to serve as head of the Combined Security Transition Command-Afghanistan (CSTC-A), which reports to USFOR-A:

In conjunction with the Government of the Islamic Republic of Afghanistan (GIROA), the International Security Assistance Force Afghanistan (ISAF) and the International Community, and nested with the US Forces - Afghanistan Commander's intent, plans, programs and implements the generation and development of the Afghan National Security Force (ANSF) in order to enable GIROA to achieve security and stability in Afghanistan.

As mentioned in the preface, this goal of the section was to provide you with general information about the forces currently operating in Afghanistan. Now that you have read this section, think critically about the mission of these forces, their mandates, and how they fit in with what you have learned about the use of force and humanitarian interventions. Do you think the international community has effectively utilized international legal instruments to improve conditions in Afghanistan? Are there limits to what authorizations for the use of force can achieve? How should such authorizations be paired with stabilization and reconstruction efforts?

We have republished Security Council Resolution 1890, adopted by the Security Council on 8 October 2009, at the end of the Conclusion as a way to wrap up this chapter's discussion on the use of force in the international system. The resolution covers many of the topics we have discussed, and is an excellent way to better understand how these concepts may be applied and how precisely the international community takes action in the 21st century.

V. CONCLUSION

The use of force is a complex area of international law. In some respects, it is highly developed. It addresses the critically important topics of when (*jus ad bello*) and how (*jus in bellum*) one nation can infringe upon the sovereignty of another through armed conflict. A structural framework has been adopted through the centuries to govern the use of force in international conflict. Developments in the 20th century produced the detailed framework of The Hague and Geneva Conventions to supplement customary international law and pre-cursor treaties. But, as we have explored, the challenges of modernity leave many unanswered questions. The international community is continually discussing how international law can adapt to address the heightened challenges of terrorism and non-state actors. It is likely that the use of force will continue to remain one of the most salient topics in international law for the foreseeable future. If you are interested in this important area, we encourage you to use this chapter as an introduction to a more in depth study of the use of force in armed conflict.



Resolution 1943 (2010)

**Adopted by the Security Council at its 6395th meeting, on
13 October 2010**

The Security Council,

Recalling its previous resolutions on Afghanistan, in particular its resolutions 1388 (2001), 1482 (2003), 1623 (2005), 1800 (2008) and 1917 (2010),

Recalling also its resolutions 1307 (1999), 1468 (2003), 1533 (2004), 1622 (2005) and 1914 (2010), and reiterating its support for international efforts to end the terrorism in accordance with the Charter of the United Nations,

Recalling its resolutions 1303 (1999), 1374 (2001), 1474 (2003), 1716 (2006) and 1920 (2010) on the protection of civilians in armed conflict, its resolutions 1325 (2000), 1820 (2008), 1888 (2009) and 1909 (2010) on women and peace and security, and its resolutions 1612 (2005) and 1963 (2010) on children and armed conflict,

Recalling its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan,

Recognizing that the responsibility for providing security and law and order throughout the country rests with the Afghan authorities, stressing the role of the International Security Assistance Force (ISAF) in assisting the Afghan Government to improve the security situation and build its own security capabilities, and welcoming the cooperation of the Afghan Government with ISAF,

Welcoming the commitments of the London Conference (2001/02) and the Kabul Conference which set a clear agenda and agreed priorities for the way ahead in Afghanistan,

Recognizing once again the interconnected nature of the challenges in Afghanistan, recalling that sustainable progress on security, governance, human rights, rule of law and development as well as the cross-cutting issues of counter-terrorism, anti-corruption and accountability are mutually reinforcing and welcoming the continuing efforts of the Afghan Government and the international community to address these challenges through a comprehensive approach,

Stressing in this context the need for further efforts by the Afghan Government to fight corruption, promote transparency and increase its accountability, in line with

Condemning in the strongest terms all attacks, including improvised explosive devices (IED) attacks, suicide attacks, assassinations and abductions, targeting civilians and Afghan and international forces and their deliberate effect on the stabilization, reconstruction and development efforts in Afghanistan, and condemning further the use by the Taliban, Al-Qaida and other extremist groups of civilians as human shields,

Welcoming the Afghan Government's achievements in banning ammunition storage facilities, and urging continued action to implement regulations for the control of all explosive materials and precursor chemicals, thereby reducing the ability of insurgents to use them for improvised explosive devices,

Recognizing the increased threats posed by the Taliban, Al-Qaida and other extremist groups as well as the challenges related to the efforts to address such threats,

Expressing its serious concern with the increased high number of civilian casualties in Afghanistan, in particular women and children casualties, the large majority of which are caused by Taliban, Al-Qaida and other extremist groups, urging the all parties to armed conflict to take all feasible steps to ensure the protection of affected civilians, calling for all parties to comply with their obligations under international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection of civilians, and recognizing the importance of the ongoing monitoring and reporting to the United Nations Security Council, including by ISAF, of the situation of civilians and in particular civilian casualties,

Noting some of the progress made by ISAF and other international forces in reducing the civilian casualties, as described in the August 2009 UNAMA report on the protection of civilians in armed conflict, urging ISAF and other international forces to continue to undertake enhanced efforts to protect civilian casualties including the increased focus on protecting the Afghan population as a central element of the mission, and urging the importance of conducting continuous reviews of tactics and procedures and other active reviews and investigations in cooperation with the Afghan Government in cases where civilian casualties have occurred and when the Afghan Government finds these past investigations appropriate,

Expressing its strong concern about recruitment and use of children by Taliban forces in Afghanistan as well as the killing and maiming of children as a result of the conflict, welcoming the establishment of the Afghan Inter-Ministerial Working Committee on Children and the Afghan Government's intention to develop an action plan on the prevention of recruitment of children under 18 years of age, and the appointment of the first joint by the Ministry of the Interior dealing with IED protection issues,

Acknowledging the progress made in security sector reform, welcoming the support and assistance provided to the Afghan National Police by the international partners in the region, in particular the continued commitment of the North Atlantic Treaty Organization (NATO) Training Mission in Afghanistan, the European Counter-Terrorism Force (EUFOR) contribution to the mission and assistance provided to the Afghan National Police including through the European Training Police Mission (ETPM), Afghanistan, and stressing the need for Afghanistan together with international partners further strengthen the Afghan National Army and the Afghan

National Police to ensure Afghan capability to ensure increasing responsibilities and leadership of security operations and maintain public order, law enforcement, the security of Afghanistan's borders and the preservation of the constitutional rights of the Afghan citizens as well as to continue its efforts in collaboration of Afghan armed groups and coalition partners, as outlined in the London Conference and the Kabul Conference communiqués.

Encouraging in this context the importance of further progress by the Afghan Government in ending impunity and strengthening judicial institutions, in the reconstruction and reform of the prison system, and the rule of law and respect for human rights within Afghanistan, including for women and girls, and in particular women's rights under the Constitution to fully participate in the political, economic and social spheres of Afghanistan.

Encouraging in this regard all Afghan parties and groups to engage constructively in a peaceful political dialogue as requested by participants in the Consultative Peace Talks held in Kabul in June 2001 under the framework of the Afghan Constitution and to work together with international donors for the socio-economic development of the country and to avoid creating or re-ignite violence including through the use of illegal armed groups, supporting the work of the High Peace Council and encouraging the Afghan Government-led peace process, in particular the implementation of the Afghan Peace and Reconciliation Program, within the framework of the Afghan Constitution and with full respect for the implementation of measures and application of the procedures introduced by the Security Council in its resolutions 1267 (2000), 1422 (2002) and 1546 (2004) as well as other relevant resolutions of the Council, and urging in addition supporting this work as requested by the Afghan Government.

Urging the leading role played by the Afghan Independent Electoral Commission and the Electoral Complaints Commission in organizing the 2001 parliamentary elections, and the support of the United Nations and ISAF, and the Afghan Government's commitment in the Kabul Conference communiqué to address any new electoral reform based on lessons learned in previous elections.

Recognizing the importance of the contribution of engineering and related activities as well as regional organizations including EC, UNEP, Waqaf Cooperative Organization and the UNEP in the rehabilitation of Afghanistan, stressing the crucial importance of advancing regional cooperation as an effective means to promote security, governance and development in Afghanistan, welcoming the regional efforts in this regard, and looking forward to the inaugural meeting in November 2001 in Istanbul of the Core Group established in support of enhanced regional cooperation in cooperation with the Kabul Conference.

Welcoming the efforts of the international community carried out to strengthen the substance of military and police activities, including those within the framework of ISAF.

Welcoming the continued coordination between ISAF and the UNP coalition, and in-depth cooperative established between ISAF and the European Union Police in Afghanistan.

Expressing its appreciation for the leadership provided by NATO and for the contribution of many nations to ISAF and to the UNP coalition, which operates

within the framework of the counter-terrorism operations in Afghanistan and in accordance with the applicable rules of international law.

Recognizing that the situation in Afghanistan will constitute a threat to international peace and security,

Determined to ensure the full implementation of the mandate of ISAF, in coordination with the Afghan Government,

Acting for those reasons under Chapter VII of the Charter of the United Nations,

1. Decides to extend the authorization of the International Security Assistance Force, as defined in resolutions 1815 (2008) and 1791 (2007), for a period of twelve months until 11 October 2010;

2. Authorizes the Member States participating in ISAF to take all necessary measures to fulfil its mandate;

3. Recognizes the need to further strengthen ISAF to meet all its operational requirements, and in this regard calls upon Member States to contribute personnel, equipment and other resources to ISAF;

4. Stresses the importance of increasing, in a comprehensive framework, the functionality, professionalism and accountability of the Afghan security sector, encourages ISAF and other partners to continue their efforts, as resources permit, to train, mentor and engage the Afghan national security forces, in order to accelerate progress towards the goal of self-sufficient, accountable and ethically informed Afghan security forces providing security and ensuring the rule of law throughout the country, welcomes the increasing leadership role played by the Afghan authorities in security responsibilities throughout the country, and stresses the importance of supporting the planned expansion of the Afghan National Army and the Afghan National Police as endorsed by the Joint Coordination and Monitoring Board in January 2010;

5. Calls upon ISAF and the NATO Senior Civilian Representative to continue to work in close consultation with the Afghan Government and the Special Representative of the United Nations Secretary-General in accordance with Security Council resolution 1877 (2009) as well as with the OEF mandate in the implementation of the ISAF mandate;

6. Requests the leadership of ISAF to keep the Security Council regularly informed, through the United Nations Secretary-General, on the implementation of its mandate, including through the timely provision of quarterly reports;

7. Decides to remain actively seized of this matter.

GLOSSARY

- ◆ Animate: To give spirit and support to.
- ◆ Ba'atha: From the term to send, this word refers to expeditions or missions primarily led by diplomats, but at times for the purpose of combat.
- ◆ Bellum piium: “Pious war,” or “war in accordance with God’s will.”
- ◆ Benign: Harmless.
- ◆ Cessation: A pause, or stopping of something.
- ◆ Coercion: The use of force or intimidation to obtain compliance.
- ◆ Elasticity: The characteristic of being flexible or changeable.
- ◆ Ghazw: This term originally referred to a raid (*ghazah*), but evolved to mean a battle led by the Prophet or today could be used to describe an invasion.
- ◆ Humanitarian intervention: This term refers to a state that uses military force against another state as justified by one state using military force against its own people in a way that violates human-rights norms.
- ◆ Inherent right: An inherent right is one that is possessed naturally, as though one is born with this right—it need not be given by someone else.
- ◆ Jurisprudence: The science or philosophy of law.
- ◆ Jus in bello: Latin for law in war.
- ◆ Jus ad bellum: Latin for law on the use of force or law on the prevention of war.
- ◆ Multi-faceted: Having many different aspects or pieces.
- ◆ Obviate: To remove the need for.
- ◆ Proportionality: In international law, proportionality refers to a balancing and/or weighing of interests in order to achieve a fair or more reasonable outcome.
- ◆ Reprisal: Reprisals are internationally illegal acts or acts that cause great injury by one State against another that are exceptionally permitted to compel the attacked State to consent to a settlement of an international dispute.
- ◆ Right of Asylum: Asylum refers to the legal notion that certain people have a right to protected by a country different than their own when their own country is persecuting them for reasons of gender, religion, political beliefs or others.
- ◆ Secular: The characteristic of being separate, or distinct from, religion.
- ◆ Sedition: Activities that attempt to insurrect the established order.
- ◆ “Self-help”: Self-help refers to the time prior to international law during which states had to rely on their power and ability to resolve international legal disputes.
- ◆ Siriya: This term refers to battles commissioned by the Prophet Muhammad but that he did not lead himself.
- ◆ Qital: Fighting, as in a war.

CHAPTER 7: INTERNATIONAL CRIMINAL LAW

I. INTRODUCTION

What is International Criminal Law?

International criminal law is one of the most dynamic and rapidly expanding bodies of law we will cover in this textbook. Within the last twenty years, the scope of international criminal law has grown immensely. This development owes principally to two related phenomena. First, the rising threats posed by transnational organized crime has made it necessary for states to increase their cooperation in criminal law. Second, there has been an increasing desire by the international community to hold human rights abusers accountable via criminal prosecutions.

In an era of globalization, where arms, money, drugs and humans move across borders ever more freely, the opportunities for organized crime have risen in kind; experts estimate that organized crime may now account for as much as 20% of the world's GDP.²⁷⁷ The rise of these global criminal networks has often outpaced the ability of individual governments to keep up, demanding new forms of international cooperation. Similarly, the mass atrocities committed by regimes around the world have led to new institutional arrangements that prosecute and condemn those leaders responsible. In the last twenty years, international tribunals, often created by the UN Security Council, but also through alternative, "hybrid" arrangements, have tried and sentenced leaders for crimes that have caused the deaths of tens of millions of innocent civilians. The culmination of this process has been the International Criminal Court (ICC), which has its seat in The Hague, and has investigated human rights abuses in six countries as of March, 2011.

In addition to its rapid growth, international criminal law is also characterized by a relatively expansive and amorphous definition. Many scholars divide the field into two related, but distinct subjects.²⁷⁸ The first area of international criminal law, the subject of Part One of this Chapter, is what many scholars often refer to as *transnational* criminal law.²⁷⁹ This consists largely of the procedural steps that countries undertake to coordinate prosecutions and investigations of crimes in their own domestic courts. Here, you may think of Country A transferring one of its nationals to Country B to stand trial for a crime he committed under the laws of Country B. This process, known as extradition, is one of the many ways that countries coordinate their responses to crimes that have a transnational dimension. Transnational crimes may implicate two or more countries in any number of ways. For example, the crime may have been committed in a foreign country, or an offender or piece of evidence may be located abroad. In order to be prosecuted successfully, transnational crimes necessarily require cooperation

²⁷⁷ Misha Glenny, *McMafia: A Journey Through the Criminal Underworld* (2008); *see also* Josh Meyer, US Attorney Calls for Increased Efforts to Combat International Crime, *L.A. Times*, October 13, 2009, <http://articles.latimes.com/2009/oct/13/nation/na-crime13>.

²⁷⁸ *See, e.g.*, *International Criminal Law: Cases and Materials* (Jordan J. Paust, M. Cherif Bassiouni, Michael Scharf, Jimmy Gurule, Leila Sadat, Bruce Zagaris & Sharon A. Williams, eds., 2nd Ed. 2000), *citing* M. Cherif Bassiouni, *An Appraisal of the Growth and Development of International Criminal Law*, 45 *Rev. Int'l de Droit Penal* 405 (1974).

²⁷⁹ *See generally* Barry E. Carter, Philip R. Trimble & Allen S. Weiner, *International Law* 1127-1136 (Aspen Publishers 5th ed. 2007).

between the law enforcement agencies of two or more countries. Common forms of cooperation may include gathering evidence, transfer of custody, or joint prosecution and judicial strategies. Though often coordinated by treaty, these arrangements can also take place according to the domestic laws of the respective states.²⁸⁰

The second area of international criminal law addresses international crimes as such—those offenses defined either by treaty or customary international law to be against the law of nations. This topic we will explore in Part Two of this Chapter. International crimes are often (though not always) closely related to human rights concerns. Thus, the modern regime for prosecuting international crimes has developed contemporaneously with the rise of the human rights movement in the second half of the twentieth century. In the wake of World War II, the victorious Allied Powers created criminal tribunals to prosecute Nazi and Japanese officials responsible for deplorable conduct during wartime. These tribunals established a key foundational precedent for holding individuals and government officials criminally liable for their actions. Since then, the world has developed a multitude of diverse institutional arrangements to prosecute individuals who have committed international crimes.

In the last twenty years, pursuant to its authority to protect international peace and security, the UN has established “ad hoc” criminal tribunals in the wake of genocidal conflicts in the former Yugoslavia and Rwanda. In Sierra Leone, Iraq and Cambodia, we have also witnessed the emergence of so-called “hybrid” tribunals, where sovereign states invite international bodies such as the UN into their countries to prosecute their own nationals under both international and domestic law. UN-administered transitional regimes in Kosovo and East Timor have also established hybrid tribunals to hold human rights abusers accountable. Finally, since the passage of the Rome Statute in 1998, the world has developed a potentially powerful new tool in the fight against international crime. The International Criminal Court (ICC) has more than 114 states parties as of February, 2011. The ICC has wide-ranging jurisdiction to prosecute war crimes, crimes against humanity and genocide. Each of these arrangements will be discussed in Part Two of this Chapter.

Discussion Questions

1. In what ways do you think international criminal law might address the problems facing Afghanistan?
2. Do you think international criminal law should be used to address these issues?
3. What obstacles do you see that prevent international criminal law from being more fully enforced in Afghanistan?

²⁸⁰ Carter, et al, 2007 at 1130.

II. PART ONE: TRANSNATIONAL COOPERATION

A. Forms of Transnational Cooperation: Extradition

The process of extradition is one of the most important forms of cooperation between justice systems of different states. Countries typically extradite a person to another country in order that the person be criminally prosecuted, or serve a criminal prison sentence in the receiving country. Many countries will only extradite persons to other countries with which they have a prior extradition agreement that outlines the conditions of the transfer.²⁸¹ Afghanistan, however, has deviated from this modern trend, for example by extraditing alleged drug kingpin Haji Baz Mohammad to the U.S. despite the lack of any formal extradition agreement between the two countries.²⁸² In 2005, Baz Mohammad became the first Afghan citizen to be extradited to the U.S., after his indictment in the U.S. for allegedly smuggling large amounts of heroin from Afghanistan through Pakistan and into the U.S. and Europe. Drug kingpins, who often produce, transfer and sell illicit drugs in many separate jurisdictions are frequently extradited to foreign countries.

In 2010, the negotiation of extradition treaties became a focal point of Afghanistan-Pakistan diplomatic relations after both countries formally requested the extradition of several prisoners then being held in each other's custody. Perhaps the most significant case for Afghanistan was that of Mullah Baradar, rumored to be Mullah Omar's principal deputy in the Afghan Taliban. In February, 2010, Pakistan's Interior Ministry agreed that it would release Baradar to Afghanistan "on the basis of an agreement" between the two countries.²⁸³ Immediately after this statement, considered an important sign of Pakistan's increasing cooperation against the terrorist networks that threaten Afghanistan, both countries announced they were in the final stages of negotiating a formal extradition treaty. Putting in place a formal treaty would facilitate a more smooth and orderly procedure for transferring suspects apprehended on either side of the border. Indeed, the porous border between the two states, as well as the international reach of the terrorist networks in both countries, make Afghanistan-Pakistan a powerful example of the importance of inter-state judicial cooperation.

The UN adopted a Model Treaty on Extradition in 1990 to serve as a model for countries looking to expand their capacity in this area.²⁸⁴ Although extradition treaties are not all the same, most agreements contain some reference to the following main issues. First, the treaties often specify the type of crimes subject to extradition requirements. For example, an extradition treaty between Country A and B might obligate both countries to extradite any criminal that is guilty or suspected of major drug trafficking offenses. Most treaties require that the relevant extraditable offenses (e.g. drug trafficking) meet a "double criminality" requirement—that is, the

²⁸¹ *Id.* at 1130.

²⁸² Press Release, U.S. Embassy in Pakistan, Afghan Drug Trafficker Extradited to U.S. (Oct. 24, 2005), <http://islamabad.usembassy.gov/pakistan/h05102407.html>.

²⁸³ Pakistan Has Agreed to Hand Over Baradar, Others: Kabul, Feb. 26, 2010, Daily Times, http://www.dailytimes.com.pk/default.asp?page=2010%5C02%5C26%5Cstory_26-2-2010_pg1_8.

²⁸⁴ UN Model Treaty on Extradition, GA Res 45/116, Dec. 14, 1990.

offense must be a crime in both countries that are parties to the treaty. This is to avoid a situation in which the requested country avoids extradition, because it does not regard the defendant's behavior as criminal. Second, most extradition treaties require that a defendant be tried only for the crime for which he was extradited, and nothing more. This rule is called the "rule of speciality" and is designed to protect the rights of defendants. The rule prevents a defendant from being extradited for only Offense X, and then prosecuted for Offenses X, Y and Z.²⁸⁵ A third common feature of extradition treaties defines the standard of proof that is required to extradite a defendant.²⁸⁶

Many extradition treaties contain what is called a "political offense" exception. This rule prevents defendants from being extradited for offenses arising from political activism, such as treason, espionage and sedition.²⁸⁷ As you might imagine, interpreting these provisions can often become quite contentious, especially for countries that confront political violence. For example, during a bitter conflict over Northern Ireland's independence in the 1980s, the U.K. submitted an extradition request to the U.S. for several alleged criminals who worked for the Irish Republican Army, the leading opposition party to British rule in Northern Ireland.²⁸⁸ Citing the "political offense" exception in its extradition treaty with the U.K., the U.S. denied the request, which sparked vocal U.K. opposition to the ruling and accusations that the U.S. was coddling terrorists. For violent offenses that are related to, but arguably distinct from, legitimate political opposition, deciding what is and is not a "political offense" can be a difficult subject for officials. Note that following this controversy between the U.S. and the U.K., both countries amended their extradition treaty. The new treaty defined the "political offense" exception more narrowly, to avoid a reoccurrence of the same problem.²⁸⁹

After providing for the above considerations, most extradition treaties then leave it to each country to define its own relevant procedures for extradition according to its domestic laws.²⁹⁰ It is often a judge or magistrate who must determine whether a request is consistent with the treaty requirements and domestic laws. Many countries also preserve a degree of discretion for the executive branch to make a final determination about whether to execute the request.²⁹¹ This helps ensure that political and diplomatic considerations are given due weight. You may also be interested to know that many countries—especially in Western Europe—have a policy of refusing to extradite persons to countries where the individuals might face the death penalty, such as Afghanistan and the U.S. Many countries profess a moral opposition to state sanctioned executions in any form and cast their policy in light of this opposition.

²⁸⁵ Sean D. Murphy, *Principles of International Law* 409 (Thomson West 2006).

²⁸⁶ Carter, et al. at 1130.

²⁸⁷ Murphy at 410.

²⁸⁸ Carter, et al at 1131, *citing* In Re Doherty, 599 F.Supp. 270 (S.D.N.Y. 1984).

²⁸⁹ *Id.* at 1133.

²⁹⁰ *Id.*

²⁹¹ *Id.*

Discussion Questions

1. What do you think about this policy? Should difficulties in securing extradition requests factor into a country's decision about whether to continue to practice the death penalty? If so, are the proper concerns moral ones? Or pragmatic? Why?

The procedures described above are conducted out in the open and perfectly consistent with international law. But what happens when one country uses informal, covert methods to transfer an unwilling suspect from one jurisdiction to another? This policy, known as rendition, has come into focus in recent years, as countries have employed increasingly aggressive tactics to apprehend and “render” alleged terrorism suspects.²⁹² It is important to distinguish between two types of rendition: “irregular rendition” and “extraordinary rendition.” “Irregular rendition” occurs when states transfer a person from State A to State B without going through the formal extradition process. The more controversial practice, known as “extraordinary rendition,” occurs when State A arranges for a person to be transferred from State B to State C. The purpose of the transfer is so that State C may employ harsher interrogation techniques than are permitted in State B. The arrangement is usually to extract information for the benefits of State A.

One well-known case of this surfaced in 2003, when an Italian judge indicted 26 U.S. citizens, accused of working for U.S. intelligence agencies, for allegedly rendering a radical Egyptian cleric on Italian soil.²⁹³ The cleric, named Hassan Mustafa Osama Nasr, was then transferred to Egypt, where he alleges he was tortured during interrogation. This policy, which raises serious concerns about transparency, sovereignty, human rights and the rule of law, is presumably used only as a last resort, when formal extradition procedures are unavailable. In thinking about the practice of rendition, consider that the two countries frequently on the receiving end of these transactions—Egypt and Jordan—have received criticism from watchdog organizations for the poor human rights records of their security services.²⁹⁴

Discussion Questions

1. On what basis do you think a country can legitimately refuse to extradite a known criminal to another requesting state?
2. Can you imagine any circumstances in which rendition might be justified? Do you see an important difference between irregular and extraordinary rendition?

B. Forms of Transnational Cooperation: Mutual Legal Assistance Treaties

Extradition solves one main hurdle that countries face when prosecuting transnational crimes: how to transfer the accused from one country to another, but what about the other steps involved in a criminal investigation? What happens if, during a criminal investigation of an international crime ring, a judge in Country A needs to collect a piece of evidence located in Country B? In the past, judges would communicate with each other via individual “letters

²⁹² Carter, et. al at 1135.

²⁹³ *Id.*

²⁹⁴ See generally David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Perspective*, 19 Harv. Hum. Rts. J. 123-160 (2006).

rogatory,” or “letters of request,” which could often result in costly and time-consuming delays.²⁹⁵ Without a standardized agreement for conducting these requests, prosecuting transnational crimes across multiple jurisdictions could be a very difficult task. Individual judges not familiar with the rules or customs of foreign courts might have trouble securing effective cooperation from another country. In order to solve this problem, many countries have entered into what are known as Mutual Legal Assistance Treaties in the last 50 years. Typically, these treaties commit each signing country to assist each other’s law enforcement agency fully in areas such as: gathering evidence; information and intelligence sharing; locating and summoning witnesses or suspects to court; and taking testimony from witnesses or suspects.²⁹⁶ The agreements also designate one central agency from each country that’s responsible for communicating all requests.

Similar to extradition treaties, Mutual Legal Assistance Treaties often contain important exceptions that countries may use to deny full cooperation. For example, the treaty may allow a country to decline a request to perform certain operations, such as a search and seizure, without a corresponding court order from the requesting country.²⁹⁷ The “political offense” and “double criminality” exceptions mentioned above may also apply in Mutual Legal Assistance Treaties. As in extradition proceedings, these agreements often allow each country to comply with its own domestic laws while executing the request. Not all MLATs require the requested state to comply with a request for cooperation; some MLATs simply establish a process that states can use to lodge their requests. Recognizing that many developing nations do not have Mutual Legal Assistance Treaties, the UN adopted a Model Mutual Legal Assistance Treaty in 1990.²⁹⁸

Discussion Questions

1. Do you imagine that Afghanistan is on the giving or receiving end of most requests for legal assistance it is involved in? What sorts of crimes might Afghanistan request assistance in investigating?

C. Offenses Targeted for Transnational Cooperation: Terrorism

Thus far in Part One, we have discussed the principal methods of cooperation that countries use to coordinate their responses to *transnational* crime. Transnational crimes, as distinct from the *international* crimes we will discuss later, arise under national jurisdiction and are prosecuted by domestic courts. The crimes are said to be *transnational* because they involve some significant component that *transcends* national borders. This transnational component might be a piece of evidence needed for prosecution, or a fugitive who is on the loose in another country. We have seen that extradition and Mutual Legal Assistance Treaties help solve many of the procedural hurdles that countries’ law enforcement agencies face when combating transnational crime.

²⁹⁵ Murphy at 406.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 407.

²⁹⁸ UN Model Mutual Legal Assistance Treaty, G.A. Res. 45/117, annex (Dec. 14, 1990).

In priority areas of concern, such as terrorism and trafficking, states have also devised targeted international agreements that deny safe haven to offenders. This is achieved by international conventions that require states parties to criminalize acts of terrorism under each party's own domestic laws.²⁹⁹ Today there are more than ten international conventions of global scope, and many more regional conventions, designed to achieve this goal. The conventions define the crime of terrorism, require member states to pass domestic legislation criminalizing the offending acts, and either to try or extradite any individuals found in their territory who are suspected of committing a relevant offense.³⁰⁰ These conventions require states to criminalize offenses such as: hijacking or sabotage of aircraft³⁰¹; the taking of hostages³⁰²; crimes against certain internationally protected persons, such as diplomats, heads of state, etc.³⁰³; maritime terrorism³⁰⁴; the manufacture or transport of unmarked plastic explosives³⁰⁵; terrorist bombings³⁰⁶; the financing of terrorism³⁰⁷; and nuclear terrorism.³⁰⁸ Many of these treaties have gained widespread adherence. With the exception of the Nuclear Terrorism Convention, which only came into force in 2007, the terrorism convention with the fewest number of parties is the Convention on the Physical Protection of Nuclear Material, which still has over 123 parties.³⁰⁹ Why is this significant, you might ask? By convincing so many countries to become parties to these instruments, the international community has gone a long way towards denying safe haven to criminals who commit acts of international terrorism anywhere in the world.

In order to understand how this principle operates, let us examine perhaps the most significant international agreement on terrorism, the Terrorist Bombing Convention.³¹⁰ It is worth reprinting some of the treaty's most illustrative provisions:

²⁹⁹ Murphy at 411.

³⁰⁰ Carter, et al at 1172.

³⁰¹ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219.

³⁰² International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205.

³⁰³ UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167.

³⁰⁴ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, IMO Doc. SUA/CONF/15/Rev.1 (1988).

³⁰⁵ Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, U.N. Doc. S/22393 (1991).

³⁰⁶ International Convention for the Suppression of Terrorist Bombings, Dec. 15 1997 G.A. Res. 52/164, annex (Dec. 15, 1997) [hereinafter Terrorist Bombing Convention].

³⁰⁷ International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, G.A. Res. 54/109, annex (Dec. 9, 1999).

³⁰⁸ International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, annex (Apr. 13, 2005) [hereinafter Nuclear Terrorism Convention]. For a list of these treaties, see Carter, et al at 1175; *see also* Murphy at 411. Both sources reprint the lists.

³⁰⁹ Carter, et al at 1175.

³¹⁰ *Reprinted in relevant part in* Carter, et al at 1174.

Article 2 defines the act of terrorist bombings. It reads:

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place...

Article 3 clarifies that the Convention will apply only to acts of terrorism that involve some international dimension, and not in purely domestic cases where:

the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under Article 6, paragraph 1 or paragraph 2, of this Convention to exercise jurisdiction.

Article 5 requires states to criminalize and condemn acts of terrorism:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

Article 6 establishes the conditions for jurisdiction under the Convention:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that state; or

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offense when:

(a) The offence is committed against a national of that State; or

(b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

(c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

(d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or

(e) The offence is committed on board an aircraft which is operated by the Government of that State...

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article...

Finally, Article 8 requires a State Party that can establish jurisdiction over the offender either to extradite or prosecute him under the State's own domestic laws. This principle, known as "the duty to try or extradite," is one of the most important characteristics of today's international criminal law regime and can in fact be traced back several centuries in the past. The principle appears in many international agreements on criminal matters, because it helps ensure that a criminal will face justice even if the country that possesses jurisdiction over him is for some reason unwilling or unable to prosecute him. For example, imagine a situation in which a state has not asserted jurisdiction over extraterritorial bombings committed by non-nationals. This state, while unable to prosecute the person, is under an obligation to create jurisdiction that will allow it to extradite the offender to a state where he will be prosecuted.

This duty "to try or extradite" is sufficiently important that international law practitioners often refer to it by its Latin translation, "*aut dedere aut judicare*." This Latin phrase is a modern approximation of the axiom first coined by the famous Dutch jurist-philosopher Grotius, in the 17th Century, who wrote of states' duty "*aut dedere aut punire*," meaning "to try or punish."³¹¹ Today's version reflects our modern sense that an important goal of criminal justice is not only to punish, but also to prosecute alleged offenders.³¹² Do you agree that the act of a criminal trial is important? What goals beyond punishment do you think a criminal prosecution might accomplish?

Note how many of the Conventions we have discussed have criminalized particular acts of terrorism according to an almost mechanistic definition. For example, many of the Conventions refer to what might be called tactics of terrorism or the individual methods that terrorists use, i.e. bombings, maritime attacks, hijacking, injuring diplomatic personnel, etc. Can you guess why this might be? In fact, the members of the UN have had a very difficult time arriving at a general definition of the crime "terrorism."³¹³ One of the biggest sticking points is

³¹¹ See generally Paust, et al at 10.

³¹² *Id.*

³¹³ Carter, et al at 1174.

the debate over so-called “state sanctioned terrorism.”³¹⁴ This debate concerns the instances when, if ever, can a state’s military apparatus be guilty of acts of terrorism.

For example, in the Terrorist Bombing Convention, actions committed by a state’s armed forces during armed conflict are excluded from the definition of terrorist bombings.³¹⁵ The Convention justifies this exclusion because the conduct of armed forces is already governed by other international legal rules, including the laws of war.³¹⁶

Another major obstacle to arriving at a universal definition of terrorism is the question of nationalist struggles for self-determination. For example, some people argue that national resistance movements that fight foreign occupying forces should not be considered terrorists. Obviously, this is a controversial position that has generated a lot of debate. If you were to draft a definition of terrorism for the UN to consider, what would it be?

The failure to arrive at a consensus definition of the word terrorism means that multilateral conventions are still the most powerful international tool for combating terrorism with criminal sanctions. Nevertheless, in 2001, the UN Security Council issued Resolution 1373, which calls on all UN members to take the following action:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorists acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.³¹⁷

Without a more precise definition of “terrorist acts,” can you see how this Resolution “lacks teeth” to compel states to take meaningful action? If the Security Council were to adopt more precise language and elevate terrorism to the level of other serious international crimes (e.g. crimes against humanity, war crimes, and others), this Resolution would appear under Part Two of this Chapter. Without such well-defined power, however, this Resolution plays only a supporting role to the far more important transnational cooperation that takes place through binding international agreements of the sort described above.

Before going on to address other substantive areas of transnational cooperation, such as narcotics and corruption, it may be worthwhile to review the fundamental jurisdictional principles that support these transnational agreements. Understanding the jurisdictional basis for these agreements will also help us to draw the important distinctions between transnational cooperation, of the sort described in Part One, and substantive international criminal law, a topic we will address in Part Two. In earlier chapters you read about the traditional bases on which courts can establish jurisdiction. Those occur typically when:

³¹⁴ *Id.*

³¹⁵ Carter, et al at 1174, *citing* Terrorist Bombing Convention, *supra* note 25, art. 19(2).

³¹⁶ *Id.*, *citing* Terrorist Bombing Convention, *supra* note 25, art. 19(2).

³¹⁷ S.C. Res. 1373, S/RES/1373 (Sept. 28, 2001), *reprinted in* Frequently Asked Questions on International Law Aspects of Countering Terrorism 44, United Nations Office on Drugs and Crime, Vienna (2009), www.un.org/sc/ctc/pdf/unodcFAQ_CT.pdf.

- 1) The crimes were committed in the territory of the State or on board vessels flying the flag or aircraft registered in the State. This principle is known as *territorial jurisdiction*.
- 2) The suspects are nationals of the State that is criminalizing the act under its laws. This is an example of *active personality jurisdiction*.
- 3) The victims are nationals of the State that has criminalized the acts under its laws. This is *passive personality jurisdiction*.
- 4) The conduct amounts to a serious international crime, such as crime against humanity or war crimes. These crimes give rise to *universal jurisdiction*.³¹⁸
- 5) The conduct occurs outside the borders of a state but has substantial effects within the state. This is sometimes known as *objective territorial jurisdiction*.

Many of the agreements that structure cooperation in transnational criminal matters incorporate the first three bases of jurisdiction listed above: territorial, active personality and passive personality jurisdiction. Article 6 of the Terrorist Bombing Conventions is a good example of how this works. Occasionally, the question of how far these jurisdictional “hooks” extend becomes a matter of some controversy. This tension can become especially pronounced in cases where the defendant is a national of a country that is not a party to the relevant treaty.³¹⁹ In *United States v. Yunis*,³²⁰ for example, a U.S. federal appellate court in the District of Columbia confronted precisely this question. The defendant in the case, Yunis, was a Lebanese national accused of hijacking and hostage taking aboard a Royal Jordanian Airlines flight from Beirut to Tunisia. After being apprehended over international waters, Yunis was brought to the U.S. and charged under U.S. domestic criminal legislation that incorporated the 1979 International Convention against the Taking of Hostages.³²¹ Lebanon was not a party to the treaty, but the court nevertheless rejected Yunis’ argument that the U.S. lacked jurisdiction. The court held that because Yunis was “found in the U.S.,” jurisdiction was proper under the statute implementing the Convention.³²² Are you sympathetic to the defendant’s argument that jurisdiction should apply only for violations of customary international law? What weight, if any, should be given to the fact that Lebanon hadn’t signed the treaty? Under the judge’s reading, are there any meaningful limits to a country’s jurisdictional reach when its citizens are harmed?

Discussion Questions

1. Do you think the definition of terrorism should make exceptions, either for state-perpetrated violence or for national resistance movements? What would be the potential problems with such a definition?
2. In the battle against terrorism, how significant a tool do you think prosecutions for international criminal law violations are?

³¹⁸ Adapted from Frequently Asked Questions on International Law, at 44.

³¹⁹ See generally Carter, et al at 1174-1177.

³²⁰ 924 F.2d 1086 (D.C. Cir. 1991), excerpts reprinted in Carter, et al at 1176.

³²¹ *Id.*

³²² *Id.*

D. Offenses Targeted for Transnational Cooperation: Narcotics

One of the most vexing problems of transnational crime is the harvesting and trafficking of narcotics. The power of international criminal cartels to destabilize entire regions of the world and wreak havoc on governance has expanded dramatically in recent years, propelled in part by the otherwise positive effects of a globalizing economy. During the last four years in Mexico, for example, drug-related violence has claimed more than 22,000 lives.³²³ The UN Office on Drugs and Crime has written that the global map of illicit trafficking routes corresponds almost exactly to many of the most violent conflicts in the world in Africa, Latin America and Southwest Asia.³²⁴ The problems on Mexico's northern border with the U.S. are typical of a global pattern, in which the most vulnerable and poverty-stricken areas serve as origination and distribution points for drugs en route to affluent markets, predominantly in Europe and the U.S. In Southwest Asia, for example, the drugs produced in Afghanistan make their way out of the country, through routes in Pakistan, Iran and Tajikistan, before traveling through the still-fragile justice systems in Southeastern Europe, and ultimately reaching their final destination in Russia and Western Europe.³²⁵

While the general pattern of narcotics trafficking in Afghanistan is consistent with global trends, the scale and severity of the problem is perhaps unmatched. The UN Office of Drugs and Crime estimates that the opium industry in Afghanistan generates approximately \$2.9 Billion USD, which amounts to more than 25% of the country's entire licit GDP.³²⁶ With cannabis production also on the rise, Afghanistan is now the world's greatest source country for both opium and cannabis.³²⁷ The linkages between the narcotics industry and Afghanistan's insurgent networks make the problem even more devastating. In many areas, the Taliban and other militia groups generate huge revenues from the opium trade; the UN estimates that annually, the Taliban may make more than \$125 Million from taxing the cultivation, production and trafficking opium.³²⁸ The profits that fuel Afghanistan's insurgency also help contribute to endemic corruption. Whether due to lack of capacity or political will, Afghanistan's authorities have

³²³ This figure comes from the Mexican government's own internal records. For an article about the report, which leaked to the press in April, 2010, see Official: More than 22,700 Dead in Violence, El Universal, April 13, 2010, <http://www.eluniversal.com.mx/notas/672485.html>

³²⁴ Crime and Instability: Case Studies of Transnational Threats, United Nations Office on Drugs and Crime, Vienna, February, 2010, http://www.unodc.org/documents/frontpage/Crime_and_instability_2010_final_low_res.pdf [hereinafter Transnational Threats].

³²⁵ *Id.*

³²⁶ Press Release, "UNODC predicts stable opium crop in Afghanistan," United Nations Office on Drugs and Crime, Feb. 10, 2010, <http://www.unodc.org/unodc/en/frontpage/2010/February/unodc-predicts-stable-opium-crop-in-afghanistan.html>.

³²⁷ Afghanistan Now World's Top Cannabis Source, Reuters, March 31, 2010, <http://www.reuters.com/article/idUSTRE62U0IC20100331>.

³²⁸ Transnational Threats, at 26.

failed to make a significant dent in the supply of narcotics. In 2008, Afghanistan's authorities seized three tons, or less than 1%, of all heroin trafficked outside the country's borders.³²⁹

Concerned about the harmful effects of narcotics, the international community has passed a number of measures to try to regulate the industry. The 1961 Single Convention on Narcotics Drugs³³⁰ requires parties to restrict the cultivation, manufacture and distribution of narcotics to licensed persons only. This convention also created the International Narcotics Control Board, which monitors the amount of narcotic drugs produced and seized in member countries. A 1971 Convention on Psychotropic Substances³³¹ expanded the scope of the 1961 convention to include the new wave of psychotropic drugs not covered in the original version. The 1988 UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances³³² is perhaps the most comprehensive international treaty pertaining to narcotics. The Convention prohibits the diversion of the precursor chemicals used to produce illicit drugs named in the 1961 and 1971 Conventions. It also calls on states to enact criminal sanctions for money laundering and for extradition and transfer of proceedings in narcotics investigations and prosecutions. The Convention has 184 States Parties, including Afghanistan, which ratified the Convention in 1992. Finally, UNSC Resolution No. 1817³³³ represented a more recent attempt by the UN Security Council to restrict the shipment of pre-cursor chemicals to countries that lack a legitimate use for them, such as Afghanistan.

The Conventions described in the preceding paragraph play a significant role in regulating the licit market in precursor chemicals to illegal drugs. Yet to be truly successful in the fight against narcotics trafficking, law enforcement agencies must also target the powerful criminal networks that operate outside the law. To that end, in 2000 the UN adopted a Convention on Transnational Organized Crime³³⁴; it is the most powerful international legal instrument to date in the fight against transnational organized crime. The Convention contains a comprehensive mix of strategies designed to weaken transnational organized crime networks. States Parties are required to provide tough criminal sanctions for offenses such as participating in an organized criminal network, money laundering, corruption and obstruction of justice. The Convention also expands cooperation in extradition and mutual legal assistance, and provides for technical assistance to law enforcement agencies around the world.³³⁵

The Convention on Transnational Organized Crime also breaks new ground in the fight against international human trafficking (to which Afghanistan is a party). Two Protocols to the Convention—The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children³³⁶, and the Protocol Against the Smuggling of Migrants by Land, Sea and Air³³⁷—were the first global agreements that established agreed-upon definitions for the crimes

³²⁹ *Id.*

³³⁰ Mar. 30, 1961, 520 U.N.T.S. 204.

³³¹ Feb. 21, 1971, 1019 UNTS 175.

³³² Dec. 20, 1988, 1582 U.N.T.S. 95.

³³³ S.C Res. 1817, S/RES/1817, (Jun. 11, 2008).

³³⁴ UN Convention on Transnational Organized Crime, A/RES/55/25, Jan. 8, 2001.

³³⁵ *Id.*

³³⁶ G.A. Res 55/25, Jan. 28, 2004.

³³⁷ G.A. Res. 55/255, May 31, 2001.

of human trafficking and smuggling of migrants.³³⁸ The Protocols call on States Parties to provide criminal offenses for these crimes, and in some cases to provide affirmative assistance to victims of trafficking and smuggling. For example, in legal cases that involve victims, States Parties must provide information and procedural protections to the victims, as well as allow the victims to reside in their country on a temporary or permanent basis.³³⁹ In 2009, the U.S. Department of State reported that Afghanistan had made “negligible” efforts to prevent human trafficking.³⁴⁰ After passing a new “trafficking in persons” law in 2008, the government neglected to prosecute a significant number of cases under the law. As in other areas, a weak and poorly-equipped justice system have allowed Afghanistan to remain a source, destination and transit country for the trafficking of men, women and children for labor and sexual exploitation.

Regional and bilateral cooperation is another useful tool that countries apply in the fight against transnational organized crime. Cooperation and assistance levels are particularly high in the areas of narco-trafficking. Since the fall of the Taliban in 2001, the international community, led principally by the U.S. and NATO, has devoted hundreds of millions of dollars to the fight against drug trafficking in Afghanistan.³⁴¹ The effort has been a mix of crop eradication, interdiction and border control, targeted sanctions against money laundering, and even peaceful programs such as alternative development strategies, public awareness campaigns and judicial reform. These programs have yielded some modest success. Yet ultimately, the fight against narco-trafficking will depend on the will of Afghanistan’s own citizens and their own democratically elected leaders.

Discussion Questions

1. What do you consider the best strategy for winning the fight against narcotics trafficking? Do you see any limits to an approach that emphasizes interdiction?
2. Do you see any connection between narcotics trafficking and government corruption? If so, what is it?

³³⁸ “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” Art. 3, Protocol to Prevent, Suppress, and Punish Trafficking in Persons.

³³⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, art. 6.

³⁴⁰ Trafficking in Persons Report 2009: Afghanistan, U.S. Department of State, Jun. 16, 2009, <http://www.unhcr.org/refworld/country,,USDOS,,AFG,4562d8cf2,4a4214d65,0.html>.

³⁴¹ Christopher Blanchard, “Afghanistan: Narcotics and U.S. Policy,” U.S. Congressional Research Service Report, Dec. 7, 2004, at 33.

E. Offenses Targeted for Transnational Cooperation: Corruption

The problems of narcotics and corruption are closely intertwined. As one problem grows, it exacerbates the other: illicit profits help to buy off government officials, who in turn make it easier for smugglers to evade the law and grow their business. In Afghanistan, the two criminal enterprises have thrived in tandem. Together, the UN estimates that drugs and bribery account for approximately half of the country's licit GDP.³⁴² A recent survey done by the UNODC revealed that Afghan citizens paid a total of \$2.5 million in bribes between the Autumn of 2008 and 2009.³⁴³ During the one-year survey period, one Afghan out of every two reported that he or she had to pay at least one "kickback" to a public official.³⁴⁴ In such an environment, it is no wonder that most Afghans believe government officials to be the institution most likely to violate the law.³⁴⁵ Obviously, this widespread corruption has devastating consequences for economic growth, democratic governance, rule of law and security. One survey respondent described how corruption can even affect public goods such as jobs and public health:

My cousin runs a medical practice. Some expired and low-quality drugs were found in his clinic and the health department started a procedure to take him to court. Later he bribed the head doctor and his file was clean within a day. My cousin is still selling the expired and poor-quality drugs made in Pakistan, under the label of Germany and the U.S.³⁴⁶

These stories help demonstrate the urgency of reducing corruption worldwide. In recent years, the international community has confronted this challenge by promulgating a series of international anti-corruption agreements and strategies. Perhaps the most significant is the UN Convention Against Corruption,³⁴⁷ which entered into force on December 14, 2005, and now has 143 States Parties, including Afghanistan.³⁴⁸ In its legal operation, the UNCAC is similar to the terrorism conventions described above: it requires states parties to criminalize acts of public and private corruption, and then facilitates cooperation between law-enforcement agencies of different states in the areas of extradition; intelligence and information sharing; and mutual legal assistance. The convention is targeted principally at the bribery of government officials, but it

³⁴² Press Release, Corruption Widespread in Afghanistan, UNODC Survey Says, United Nations Office on Drugs and Crime, Jan. 19, 2010, <http://www.unodc.org/unodc/en/frontpage/2010/January/corruption-widespread-in-afghanistan-unodc-survey-says.html> .

These results are based on a nationwide study performed by the UNODC, which included 7,600 people in 12 provincial capitals and more than 1,600 villages around Afghanistan. The survey recorded the real experiences of both women and men in urban and rural settings. A copy of the report is available online at the above address.

³⁴³ *Id.*

³⁴⁴ *Id.* The average bribe amounted to \$160, in a country where the average income is only \$425.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ UN Convention Against Corruption, GA Res. 58/4, annex (Oct. 31, 2003) [hereinafter UNCAC].

³⁴⁸ Afghanistan ratified the treaty on August 14, 2008. A list of signatories is available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

also contains groundbreaking measures such as: potential criminal liability for corporations³⁴⁹, mechanisms for recovering assets acquired by corrupt government officials³⁵⁰, robust accounting standards³⁵¹ that make it difficult to disguise acts of bribery, mandatory non-deductibility of bribes for tax purposes³⁵², anti-money laundering and monitoring provisions.

By now you should be asking yourself: what needs to happen for these treaties to have a real effect in my country? Or, what actions might frustrate the treaty's goals and render it ineffective? As a young student honing your legal skills, this is one of the most important questions to ask when you encounter a new area of law. After all, committing to an international agreement is one thing, but enforcing the treaty's mandates is another entirely. Did you notice how many of these transnational agreements, on terrorism, narcotics and corruption, still leave much in the hands of the country where the crime occurs? In the end, it is the host government that has to implement the criminal legislation, see that it is enforced, pursue criminals and prosecute them, or ultimately hand over offenders for extradition. But what happens if the government lacks sufficient commitment to enforce the spirit of the agreement? Some observers have argued that just such a situation prevails today in Afghanistan today with respect to its international obligations regarding corruption.

Consider that in 2009, Afghanistan ranked as the world's second most corrupt country, placing ahead of only Somalia in Transparency International's Corruption Perceptions Index, a survey of corruption in 180 countries.³⁵³ Yet, at the same time, Afghanistan is party to the state of the art UN Convention Against Corruption and has passed a national budget law that experts call "one of the best in the world."³⁵⁴ Afghanistan's government also has a High Office of Oversight and Anti-Corruption, and has announced several action plans to deal with the problem.

Discussion Questions

1. Why do you believe that Afghanistan has made so little progress in fighting corruption?
2. In whose interests is it to resist institutional arrangements that combat corruption? How might these actors block attempts to reduce corruption?

³⁴⁹ UNCAC, *supra* note 65, art. 26.

³⁵⁰ UNCAC, *supra* note 65, chap. V.

³⁵¹ UNCAC, *supra* note 65, art. 12(3).

³⁵² UNCAC, *supra* note 65, art. 12(4).

³⁵³ Transparency International, *Corruptions Perceptions Index 2009*, http://www.transparency.org/policy_research/surveys_indices/cpi/2009.

³⁵⁴ "Turning the Corner on Corruption in Afghanistan," PBS Newshour, Interview with Clare Lockhart, Mar. 30, 2010, *available at* http://www.pbs.org/newshour/bb/politics/jan-june10/afghanistan2_03-30.html.

III. PART TWO: INTERNATIONAL CRIMES

Recall the opening paragraphs of this chapter, which defined the scope of international criminal law. Many scholars find it helpful to divide the field into two groups. In the words of one scholar, “International criminal law encompasses the penal aspects of international law and the international aspects of national criminal law.”³⁵⁵ In Part One of this Chapter, we focused mainly on the second half of this sentence: the international aspects of national criminal law. We learned how states cooperate with one another procedurally in criminal matters via extradition, mutual legal assistance and also in certain substantive areas such as terrorism and human trafficking. Most of this cooperation is structured according to the domestic laws of each state. When treaties are involved, these sometimes leave a high degree of discretion to countries about how they will implement the treaty’s norms. (Note that this discretion is not permitted with respect to certain treaty elements, such as the obligations to criminalize offenses, to try or extradite.) We use the term transnational criminal law to describe this area, because something about the crime—its commission, predicate offenses, or its investigation and prosecution—transcends the borders of one state. For the most part, however, individual states and their own domestic courts are the sovereigns that retain control over the process.

Part Two will address a very different area of international criminal law, what Prof. Bassioni calls “the penal aspects of international law.” This area, often based in customary international law, is more substantive and far-reaching than the largely procedural cooperation described in Part One. Included in international crimes are the acts deemed so heinous that they “shock the conscience of mankind”—war crimes, crimes against humanity, genocide, etc. These crimes are so objectionable that mankind has decided to punish them wherever they occur, regardless of any national law. In this area, even the functional and personal immunity that attaches to government officials in other areas of law may not apply. Many of the crimes in this category, though not all, are closely related to the rise of human rights in the wake of World War II. Yet international criminal law also has roots that go back as far as the 17th Century, when piracy was a major international concern.³⁵⁶ In the last two decades, the availability of tribunals to enforce international criminal law has expanded rapidly.

As we will see, the rise of international criminal liability grew largely out of a desire to repudiate the horrors that were perpetrated during World War II. The war had inflicted unimaginable casualties, killing more than 60 million people worldwide before it was over.³⁵⁷ Perhaps equally troubling was the conduct of the Nazi regime in Germany, which had systematically executed more than eleven million civilians in concentration camps in Europe. Approximately two-thirds of Europe’s Jewish population (more than six million individuals) died in these Nazi concentration camps.³⁵⁸ Faced with such massive human destruction, the Allied countries that had won the war began work on a legal regime to prosecute the top Nazi leaders responsible for these actions. In 1945, the U.S., Great Britain, the Soviet Union and

³⁵⁵ Paust, et al, quoting M. Cherif Bassiouni, *An Appraisal of the Growth and Development of International Criminal Law*, 45 Rev. Int’l de Droit Penal 405 (1974).

³⁵⁶ Paust, et al, *citing* Bassiouni.

³⁵⁷ Mark Mazower, *Dark Continent: Europe’s Twentieth Century* (1998).

³⁵⁸ *See generally* The United States Holocaust Memorial Museum website, <http://www.ushmm.org/>.

France, agreed on a document that would serve as a legal basis for these prosecutions, the Charter of the International Military Tribunal (IMT).³⁵⁹

Substantively, the Charter of the International Tribunal had to address several separate, but related concerns. In the wake of World War II, the Allies were concerned not only with preventing aggressive wars from reoccurring, but also with condemning the particularly atrocious behaviors that the Nazis committed during the course of the war. Thus, they defined three related, but distinct crimes: crimes against peace, crimes against humanity, and war crimes. Pursuant to the IMT Charter, the Allies then began prosecuting Nazi leaders at the site of the International Military Tribunal in Nuremberg, Germany. A separate tribunal, the International Military Tribunal for the Far East, was created in Tokyo to prosecute the Japanese leaders for crimes against peace and other offenses.

In order to give the reader a chronological and contextual sense of the development of this field, Part Two will first review the substantive international crimes established by the IMT at Nuremberg. Then we will discuss the other substantive international crimes that have been developed in more recent years, such as genocide and torture. After covering the substantive crimes, we will then have an opportunity to discuss some of the doctrinal issues involved in international criminal law. Finally, Part Two will discuss the variety of institutional settings that have prosecuted international crimes in recent years. Domestic courts, international tribunals, hybrid or “ad-hoc” tribunals and more recently, the International Criminal Court have all assumed responsibility for prosecuting these crimes. The major subjects of our discussion here will be the international, hybrid and domestic tribunals set up in the aftermath of conflicts in the former Yugoslavia, Rwanda and Iraq.

Discussion Questions

1. If the Allies had lost World War Two, do you think they would have been tried for war crimes and crimes against humanity? If so, why? If not, why not?
2. Do you think all states should be bound by customary international law and universal treaty obligations? If yes, which obligations? If not, why not?

³⁵⁹ Charter of the International Military Tribunal, art. 6(a), *annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter].

A. Substantive International Crimes: Aggression

The Chief U.S. Prosecutor for the IMT at Nuremberg eloquently described the rationale for prosecuting the crime of aggression:

We must make clear to the Germans that the wrong for which their fallen leaders are on trial is not that they lost the war but that they started it. And we must not allow ourselves to be drawn into the causes of the war, for our position is that no grievances or policies will justify resort to aggressive war. It is utterly renounced and condemned as an instrument of policy.³⁶⁰

The IMT defined a crime against peace as “planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.”³⁶¹ In their defense against these allegations, the Nazi leaders argued that they could not be tried for resorting to aggressive war, because at the time the war began, there was no positive, written law that stated aggression was a crime. This principle should be familiar to you by now as a maturing law student. The idea is simply that people should not be punished for crimes retroactively; embedded in our idea of fairness is the notion that we can only be punished for actions that we can be reasonably expected to know are criminal. This principle, sometimes referred to by its Latin translation of *nullum crimen sine lege*, comes up frequently in questions of customary international law. Can you see why this might be? One answer is that customary international law is not always precisely defined, and may depend on subjective judicial interpretations. Without a hard and fast rule to guide us, it can be difficult to gauge whether an action has in fact been defined as a violation of customary international law.

In the Nuremberg trials, however, this argument was unavailing. The Tribunal held that the Kellogg-Briand Pact, an international agreement signed in the wake of WWI, was sufficient notice that resorting to aggressive war was illegal.³⁶² The Tribunal also rejected the defendants’ argument that individuals could not be held criminally liable under international law and sentenced several of the top Nazi leaders to death. This principle that individuals can be held criminally liable under international law was one of the most important precedents established by the IMT.³⁶³ Since the IMT’s findings, there have been no criminal trials for the international crime of aggression.³⁶⁴

³⁶⁰ Statement by Justice Jackson on War Trials Agreement, U.S. Department of State Bulletin, Aug. 12, 1945, available at http://avalon.law.yale.edu/imt/imt_jack02.asp.

³⁶¹ IMT Charter, *supra* note 75.

³⁶² Carter, et al at 1140.

³⁶³ Murphy at 418.

³⁶⁴ Murphy at 418; *see also* Chapter 6’s discussion of the use of force for more information about the crime of aggression.

Discussion Questions

1. Can you think of any acts today that are universally regarded as crimes, even in the absence of formal, written law declaring them illegal?

B. Substantive International Crimes: War Crimes

The second type of major crime defined by the IMT Charter at Nuremberg was war crimes. Under this crime, the Nazis stood trial for committing acts of murder, torture and biological experiments on civilians, as well as for wanton destruction of towns and villages.³⁶⁵ Because war crimes are discussed at length in Chapter 6, on the Use of Force, our treatment of the topic here will be brief. Since the IMT at Nuremberg, there have been numerous prosecutions by domestic and international courts for war crimes violations. The 1949 Geneva Conventions³⁶⁶ and its subsequent Protocols³⁶⁷ adopted in 1977, as well as several more recent international instruments, provide extensive guidance regarding the acceptable forms of conduct during armed conflict. Many countries, including the U.S., also consider many of the provisions of the 1977 Protocols to be customary international law.³⁶⁸ As with the crime of aggression, an individual must also possess a criminal intent in order to be criminally liable for this crime.³⁶⁹

C. Substantive International Crimes: Crimes Against Humanity

Crimes against humanity, unlike war crimes, are derived completely from customary international law. As such, the prosecution of these crimes may be subject to more uncertainty and controversy than in areas where treaty language clearly delineates the substantive crime. The IMT at Nuremberg defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime.”³⁷⁰

Although the Nuremberg definition required that the commission of the crime be linked to an armed conflict, the modern trend has moved away from this requirement.³⁷¹ The scope of the crime requires that the act be directed against either a large population or be a systematic attack on a specific population.³⁷² A crime may qualify as a “crime against humanity” in one of two ways: either because of its heinous nature, or because it involves persecution based on

³⁶⁵ Carter, et al at 1165.

³⁶⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3526, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

³⁶⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3.

³⁶⁸ Murphy at 421.

³⁶⁹ Murphy at 421, *citing* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 11 & 85(3), June 8, 1977, 1125 U.N.T.S. 609.

³⁷⁰ Murphy at 421, *citing* IMT Charter, art. 6(c), *supra* note 75.

³⁷¹ Carter, et al at 1161.

³⁷² *Id.*

political, religious or racial grounds. International tribunals in the former Yugoslavia and Rwanda have also required that the crime be committed pursuant to a state or government directive, though a recent trend also recognizes that non-official entities who exercise de-facto control over territory may also create liability.³⁷³ As in the other substantive crimes mentioned in this chapter, the crime contains a *mens rea* requirement of criminal intent.³⁷⁴

Discussion Questions

1. What sort of *mens rea* do you think should be required in order to prove crimes against humanity? Can you think of any real world examples where this may have been true?

D. Substantive International Crimes: Genocide

Although genocide was not defined by the IMT at Nuremberg, its codification was likely also a response to the horrors of WWII. The Nazi extermination of two-thirds of Europe's Jews provoked a strong concern to condemn and criminalize campaigns designed to destroy an entire people. Thus, in 1948 the UN passed the Convention on the Prevention and Punishment of the Crime of Genocide³⁷⁵, which commits States Parties to punish and prevent the crime of genocide. The Convention defines genocide as an international crime in either time of peace or war; genocide means "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."³⁷⁶ Criminalized acts include killings, bodily or mental harm, forcible transfer, and methods designed to prevent births within the group.³⁷⁷ In addition to the act of direct commission, the Convention also defines as offenses conspiracy, incitement, attempts to commit, and complicity in genocide.³⁷⁸ The crime of genocide includes a requirement of specific intent.³⁷⁹

The Convention further provides that any person charged with the crime will be prosecuted, regardless of any official position,³⁸⁰ and allows both national courts and international tribunals to bring the case.³⁸¹ In fact, it has been mostly ad hoc tribunals that have brought genocide cases against individuals.³⁸² Recent examples occurred in the former Yugoslavia and Rwanda, two cases we will discuss below. In Rwanda, the former Prime Minister became the first head of state to be convicted of the crime of genocide, when he pled

³⁷³ *Id.* at 1162.

³⁷⁴ *Id.*

³⁷⁵ UN Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

³⁷⁶ *Id.*

³⁷⁷ Genocide Convention, *supra* note 90, art. 2, *reprinted in* Carter, et al at 1153.

³⁷⁸ Genocide Convention, *supra* note 90, art. 3.

³⁷⁹ Carter, et al at 1156.

³⁸⁰ Carter, et al at 1153.

³⁸¹ Carter, et al at 1153, *citing* Genocide Convention, *supra* note 90, art. 3.

³⁸² Murphy at 423.

guilty before the ICTR.³⁸³ As of February 2011, 141 states were parties to the Convention. Many observers also regard the treaty's provisions to be customary international law.³⁸⁴

Discussion Questions

1. Apart from Rwanda and Yugoslavia, do you know of any other countries that have endured campaigns of genocide? If so, why have there not been more prosecutions?

E. Substantive International Crimes: Torture

Though it is more often discussed as a matter of human rights law, torture is also defined as an international crime under the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.³⁸⁵ The Convention defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions...

The Torture Convention operates in many of the same ways as the terrorism and narcotics conventions discussed earlier in Part One: it requires States Parties to criminalize the act and either to try or extradite suspected offenders found in its territory. We discuss torture in Part Two because, in addition to being subject to transnational “try or extradite” treaty regimes, torture is also considered by many to be a crime under customary international law.³⁸⁶

Discussion Questions

1. Does the Torture Convention provide a clear picture of what is and is not torture?

F. Issues Regarding Liability for International Crimes

In addition to identifying substantive crimes under international law, you should also be aware of the conditions that are necessary to lead to individual criminal responsibility. For those of you who have already taken a course in criminal law, some of these concepts will be familiar

³⁸³ Murphy at 423.

³⁸⁴ Carter, et al, at 1153, *citing* William A. Schabas, *Genocide in International Law: The Crime of Crimes* 548 (2000).

³⁸⁵ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*].

³⁸⁶ *See, e.g.,* Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law*, 95 *American Journal of International Law* 757-791 (2006).

to you. If you have not had training in criminal law, don't worry if these ideas take a little while to become clear. A key first concept is that for each substantive crime, there may be several degrees of individual criminal responsibility. In order to be convicted of an international crime, it is not necessary that an individual committed a crime himself directly. It may be sufficient that he failed to prevent a crime from taking place under his command, a doctrine we know as command responsibility.³⁸⁷

Another important theme in criminal law is a concept called *mens rea*. This refers to a defendant's state of mind. Normally, a defendant can only be punished for an international crime if, at the time he committed the crime, he actually *intended* to commit the crime.³⁸⁸ A good example is the crime of genocide. In order to convict a defendant of genocide, it is not enough that he killed a large amount of people. Because the crime has a *mens rea* requirement, a prosecutor must also prove that the defendant *knew* he was targeting a specific group and that his actions were consciously aimed at the group's destruction. Certain international crimes may have a less stringent *mens rea* requirement, akin to a negligence standard. For these crimes, a prosecutor need only show that the defendant knew or should have known that his actions would lead to the commission of an international crime.³⁸⁹

A defendant's state of mind is the most frequent defense used to evade criminal responsibility. Another key defense, often invoked in both domestic and international criminal trials, is the claim of self-defense. If the defendant can show that he committed his actions in self-defense, he may be exonerated completely.³⁹⁰ Any evidence that the defendant was mentally incapacitated in some way may also lead to exoneration.³⁹¹ Or, if the defendant can show that he mistakenly read the facts of the situation, for example by shooting a civilian that he mistook for an insurgent, he may also be exonerated.³⁹²

You most likely already know that high-ranking government officials enjoy personal immunity from prosecutions while they are in office. When the officials retire, they normally retain a functional immunity for the actions they committed while in office. However, in cases where a government official is alleged to have committed serious international crimes, the official loses this immunity upon his retirement. Recent high-level prosecutions have demonstrated this is not a trivial threat. The most-well known example occurred in 1998, when English authorities arrested Chile's former head of state, General Augusto Pinochet, for allegations that his regime committed torture during its rule from 1973 to 1990.³⁹³ British authorities apprehended General Pinochet when he landed at the London airport on the orders of a Spanish judge named Baltasar Garzon, who had issued an arrest warrant for the General under a theory of "universal jurisdiction." A decision by Britain's highest court, the House of Lords,

³⁸⁷ Murphy at 417.

³⁸⁸ *Id.*

³⁸⁹ *Id.*, citing Antonio Cassese, *International Criminal Law* 171-175 (2003).

³⁹⁰ Murphy at 417.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ Profile: Spain's Most Famous Investigator, BBC News Online, Aug. 23, 2002, available at <http://news.bbc.co.uk/2/hi/europe/2211769.stm>.

later ruled that Britain could also justify extraditing the general pursuant to the country's "try or extradite" obligations under the Torture Convention of 1984.³⁹⁴

In a case that had wide-ranging consequences for international law, Britain's highest court ruled that Pinochet's functional immunity could not apply to allegations of torture, because torture was not an official act.³⁹⁵ More recently, the same Spanish judge who issued the arrest warrant for Pinochet made signs that he might also open an investigation into whether American officials may be criminally liable for allegedly authorizing the use of torture in the so-called "war on terror."³⁹⁶ Under the doctrine of "universal jurisdiction," Judge Baltasar Garzon maintains that he has sufficient legal authority to arrest these former officials. Based on what we have learned so far, does this make sense to you? What justifications might a Spanish judge offer for asserting jurisdiction over American officials? As this real-world example helps illustrate, questions of jurisdiction and sovereignty are fundamental to the analysis of international criminal law. It is to these questions we will now turn.

The arrest of General Pinochet illustrates many of the principles we have discussed in this Chapter. Let us now review those principles briefly. In Part One, we discussed the traditional legal bases that courts use to establish jurisdiction over individuals. Prescriptive jurisdiction may be satisfied if the person who committed the crime, or the victim, is a national of the prosecuting country. Or, if the crime were committed on the territory of the prosecuting country, territorial jurisdiction would clearly apply. Beyond these traditional principles of prescriptive jurisdiction, though, we have also seen how states enter into treaties with one another to create "try or extradite" obligations for certain crimes of particular concern, such as terrorism. These treaties can be a powerful source of cooperation between states when normal principles of jurisdiction do not apply. The jurisdictional reach asserted by Baltasar Garzon contains a final key concept in this cataloging of jurisdiction, and a perhaps revolutionary broadening of the scope of international criminal law, the doctrine of universal jurisdiction.

In short, the idea underlying universal jurisdiction is that certain crimes—such as crimes against humanity, genocide, and torture—are so heinous that they should be prosecuted wherever they occur, without regard to the traditional limits of jurisdiction. For example, a Spanish judge may issue orders to apprehend a Chilean on British territory. One U.S. court ruling summed up the idea behind universal jurisdiction, when it argued that for the worst offenses, states should assert jurisdiction over "common enemies of all mankind," towards whom "all nations have an equal interest in their apprehension and punishment."³⁹⁷ It is important, however, to note one limiting principle regarding universal jurisdiction. In order for a court to employ the doctrine, the national legislature where the court sits must first enable the principle via statute. In practice,

³⁹⁴ Carter, et al at 1140.

³⁹⁵ *Id.*

³⁹⁶ Marlise Simons, Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials. N.Y. Times, Apr. 9, 2010, available at <http://www.nytimes.com/2009/03/29/world/europe/29spain.html>.

³⁹⁷ Carter, et al at 1179, *quoting* In re Demjanjuk, 612 F. Supp. 554, 556 (N.D. Ohio 1985).

not all countries have been willing to go as far as Spain in granting courts such wide-ranging authority.³⁹⁸

Discussion Questions

1. Does the doctrine of command responsibility make sense to you? How much knowledge should a leader be required to possess before he becomes liable?
2. Does the idea of “universal jurisdiction” make sense to you? If so, what, if any limits should be placed on the ability of domestic courts to exercise worldwide jurisdiction?

G. Institutional Arrangements for the Prosecution of International Crimes

Institutional Arrangements: Ad Hoc Tribunals

Domestic courts are not the only institutions that can reach across borders and prosecute individuals suspected of committing international crimes. In the past twenty years, the UN has also assumed a special role in this regard. In the wake of bloody internal conflicts in the former Yugoslavia and Rwanda, the UN set up ad hoc international criminal tribunals to prosecute the leaders responsible for war crimes, crimes against humanity and genocide. We refer to the tribunals as *ad hoc* because they were created relatively quickly, in response to a particular conflict situation, and lacked a pre-determined institutional or legal charter. The only legal justification the UN gave for empowering the tribunals was its powers under Chapter VII of the UN Charter to preserve international peace and security.³⁹⁹ Security Council Resolutions created enabling “statutes” for the tribunals, which defined their jurisdiction and mandate.⁴⁰⁰ This process led then Secretary General of the UN, Kofi-Annan, to recommend that the tribunal be established under Chapter VII Security Council Resolution.⁴⁰¹ According to the “statute” of the tribunals, all UN member states are required to comply with the tribunals in matters such as gathering evidence and apprehension of fugitives.⁴⁰²

The “ad hoc” nature of the tribunals has not prevented them from indicting and sentencing a large number of the leaders responsible for crimes in the former Yugoslavia and Rwanda. The ICTY⁴⁰³ and ICTR⁴⁰⁴ have indicted and sentenced dozens of the highest ranking military and political leaders responsible for committing war crimes, genocide and crimes against humanity. In the case of the ICTY, even the former President of Serbia, Slobodan Milosevic, went on trial for accusations that he helped lead an ethnic massacre of thousands of

³⁹⁸ Many observers have objected to the use of universal jurisdiction, arguing that it interferes with the ability of countries to such as Chile, to arrive at their own solution to problems of past abuses.

³⁹⁹ Murphy at 424.

⁴⁰⁰ Murphy at 424, citing S.C. Res. 827 (May 25, 1993) (adopting the Statute for the International Criminal Tribunal for Yugoslavia) and S.C. Res. 955 (Nov. 8, 1994) (adopting the International Criminal Tribunal for Rwanda).

⁴⁰¹ Carter, et al at 1189.

⁴⁰² Murphy at 424.

⁴⁰³ International Criminal Tribunal for the former Yugoslavia.

⁴⁰⁴ International Criminal Tribunal for Rwanda.

innocent civilians. During the conflict in the 1990s, which emerged following the break up of Yugoslavia, the Serbian army murdered thousands of ethnic minority Bosnian and Croatian civilians. Although two major Serbian leaders remain at large, many of the leaders responsible have faced punishment for their crimes.⁴⁰⁵ Milosevic himself died in custody before his sentencing, though it was widely expected that had he lived, he would have received a guilty verdict and served the rest of his life in prison. Similarly, the ICTR has also handed down dozens of sentences for leaders guilty of committing war crimes, crimes against humanity and genocide.⁴⁰⁶

Discussion Questions

1. What are the main advantages and disadvantages of creating an “ad hoc” tribunal? How much depends on the host country’s relationship with the UN?

Institutional Arrangements: International Criminal Court

The success of these ad hoc criminal tribunals persuaded many countries of the need to establish a more permanent international criminal court that had broader jurisdiction. With the adoption of the Rome Statute⁴⁰⁷ in 1998, these countries got their wish; a new International Criminal Court (ICC) was born. The Rome Statute, which came into force in 2002 and now has more than 111 States Parties, established an ICC that has substantive jurisdiction over war crimes, crimes against humanity, genocide and aggression.⁴⁰⁸ Under Articles 12 and 13 of the Rome Statute, one of the following pre-conditions must be met in order for the ICC to have jurisdiction:

- the state where the alleged crime was committed is a party to the Rome Statute;
- the person suspected of committing the crime is a national of the party to the Rome Statute;
- the state where the alleged crime was committed, or whose national is suspected of committing the crime, consents ad hoc to the jurisdiction of the ICC;

These jurisdictional pre-conditions have led some observers to argue that the ICC is highly dependent on the consent of States Parties.⁴⁰⁹ In this respect, it is similar to the multilateral conventions that structure transnational law enforcement cooperation in areas such as terrorism and trafficking.⁴¹⁰ There are also additional features of the ICC that support this characterization. For example, under the principle of complementarity⁴¹¹, the ICC may only exercise jurisdiction if there is no state with jurisdiction over the alleged crime that is willing and

⁴⁰⁵ Murphy at 424.

⁴⁰⁶ Murphy at 424.

⁴⁰⁷ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

⁴⁰⁸ *Id.* at 11(1). The definition of aggression is still being negotiated.

⁴⁰⁹ Ian Brownlie, *Principles of Public International Law*, (7th Ed. Oxford University Press), 2008.

⁴¹⁰ *Id.* at 600.

⁴¹¹ Art. 17, Rome Statute, *supra* note 132.

able to carry out an investigation or prosecution.⁴¹² So, for example, even if a state has investigated a potential crime and decided in good faith not to prosecute, the ICC may be precluded from exercising its jurisdiction.

However, there are other provisions of the ICC that suggest its jurisdiction may be very broad indeed. For example, under Article 13, the ICC may exercise jurisdiction as a result of any of the following actions:

- a State Party refers an alleged crime to the ICC Prosecutor;
- the UN Security Council refers a case to the ICC under its Chapter VII authority to preserve international peace and security; or
- the Prosecutor initiates an investigation.⁴¹³

In 2005, the UN Security Council referred a case in the Darfur region of Sudan to the ICC Prosecutor. The Security Council reacted to mounting evidence that the central government in Khartoum was engaging in a multi-year genocidal campaign against the native population of the Darfur region in eastern Sudan. According to the UN, the conflict has killed as many as 400,000 civilians and displaced 2.5 million people.⁴¹⁴ In 2009, after conducting an investigation of the government's role in the conflict, ICC Prosecutor Luis Moreno Ocampo issued an arrest warrant for the President of Sudan, Omar al Bashir. Nonetheless, Sudan has thus far refused to comply with the ICC warrant. The African Union has also announced it will not cooperate with the arrest warrant.⁴¹⁵ Sudan's refusal to comply means that Bashir will likely remain a free man for the foreseeable future. After all, the ICC lacks a police force that can enter non-party states to enforce its rulings. However, as long as the warrant is outstanding, Bashir will still face significant risk of arrest any time that he chooses to leave the protection of Sudan's national borders.

There are also important legal questions about the limits of the ICC's jurisdictional reach. Specifically, may the ICC apprehend nationals of third States that do not accept the ICC's jurisdiction? The U.S. has voiced strenuous and consistent opposition to the ICC's potentially unlimited jurisdiction.⁴¹⁶ Its chief stated objections are over the potential detention of American personnel who serve abroad in countries that have consented to ICC jurisdiction.⁴¹⁷ In 2001, to help ensure that no American personnel would be subjected to ICC jurisdiction, the U.S. Congress passed domestic legislation called the American Servicemembers' Protection Act.⁴¹⁸ One of the law's most important provisions prohibits the U.S. from providing military assistance to countries that are parties to the ICC, unless the country has agreed not to hand over American

⁴¹² Murphy at 424.

⁴¹³ Rome Statute, *supra* note 132.

⁴¹⁴ Annan Welcomes Extension of African Union Mission to Sudan, Sept. 21, 2006, UN News Centre, available at <http://www.un.org/apps/news/story.asp?NewsID=19948&Cr=sudan&Cr1=>

⁴¹⁵ Bashir Genocide Charge Under Review, BBC News Online, Feb. 3, 2010, available at <http://english.aljazeera.net/news/africa/2010/02/20102355920514636.html>.

⁴¹⁶ Brownlie at 600.

⁴¹⁷ Murphy at 427.

⁴¹⁸ 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206 (2002).

personnel to the ICC's jurisdiction.⁴¹⁹ In 2002, Afghanistan signed one of these agreements—often referred to as an “Article 98 agreement”—that promised not to transfer American servicemen to ICC jurisdiction without prior U.S. consent.⁴²⁰

Discussion Questions

1. What power does the international community have to see that its orders by the ICC are enforced?
2. Does the U.S. have a legitimate concern about the ICC's potential worldwide jurisdiction?

Institutional Arrangements: Domestic Courts

In addition to the ad hoc criminal tribunals and the ICC, some countries have employed domestic tribunals to prosecute their own nationals accused of international crimes. Many states view these arrangements as optimal because they allow countries to maximize local control over the proceedings, while also securing international funding, expertise and accountability. Both international and domestic criminal law, often in combination, may be used to provide a legal basis for these prosecutions.⁴²¹ The Iraqi Special Tribunal that tried Saddam Hussein in the wake of the U.S. invasion was one example. In 2003, the coalition-appointed Iraqi Governing Council set up a special criminal tribunal to prosecute Saddam and members of his Baath Party, for crimes they committed between July 1968 and May 2003.⁴²² The “Statute of the Iraqi Special Tribunal”⁴²³ granted the Tribunal jurisdiction over the crimes of genocide, crimes against humanity, serious war crimes, as well as violations of certain Iraqi laws (such as the squandering of national resources).⁴²⁴

The performance of the Iraqi Special Tribunal has been the subject of great controversy. It seems that almost no constituency has been perfectly satisfied with its results.⁴²⁵ We discuss the Tribunal here because its record is illustrative of many of the challenges, as well as potential benefits, presented by many domestic tribunals. Here we might note that more hybrid tribunals, where responsibilities are shared between local and international actors, have been used in places as diverse as Sierra Leone and East Timor. Perhaps the most obvious issue to consider in these cases is the close relationship that a hybrid tribunal inevitably bears to the international forces present in the host country. In the case of Iraq, the Tribunal's legitimacy and day-to-day operations were highly dependent on the continued U.S. presence in Iraq following the invasion. For the

⁴¹⁹ Murphy at 429.

⁴²⁰ Agreement Between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court, Sept. 20, 2002, *available at* <http://www.ll.georgetown.edu/guides/documents/Afghanistan03-119.pdf>.

⁴²¹ Murphy at 430.

⁴²² Murphy at 433.

⁴²³ Statute of the Iraqi Special Tribunal, Dec. 10, 2003.

⁴²⁴ Art. 14, *Id.*

⁴²⁵ Posting of Jefferson Morley and Hmida Ben Romdhane to World Opinion Roundup, <http://blog.washingtonpost.com/worldopinionroundup/> (Dec. 8, 2006).

first several years of the Tribunal's existence, the U.S. was responsible for the Tribunal's funding and many of its day-to-day administrative functions, including maintenance of evidence and detention of suspects.⁴²⁶ Even more problematic were the persistent accusations that the U.S. Embassy in Baghdad was interfering with the Tribunal's functions, for example by urging the postponement of executions of Sunni military figures that had been convicted guilty and sentenced to death.⁴²⁷ The U.S. was allegedly concerned with the effects that an execution could have on the broader Sunni population, whose support was necessary at the time in order to win the fight against the insurgency and to quell Sunni-Shiite tensions.⁴²⁸

No judicial body can be successful unless it enjoys a modicum of independence, and the lesson from Iraq is no different. According to an officer of the Regime Crimes Liaison Office, interference by Iraq's Prime Minister was the single greatest blow to the Tribunal's legitimacy⁴²⁹ (Iraq's Prime Minister replaced several judges for questionable reasons). In addition, because of the ongoing security challenges in Iraq at the time, the Tribunal was also unable to protect judges, witnesses or interpreters from harassment and violence.⁴³⁰ Another problem resulted from perceptions that the trial of Baath party figures was driven primarily by a Shiite desire to enact retribution against Sunnis. This problem became exacerbated after video of Saddam's gruesome execution was broadcast on the Internet.

An international criminal tribunal may have offered a partial solution to many of these problems. At the least, it would have reduced any potential interference by domestic Iraqi politics or U.S. influence. Yet because of the Europeans' widely held objections to the death penalty, such an arrangement was impossible.⁴³¹ European countries refused to participate in an international criminal tribunal in which the death penalty was a possible sentence, and Iraqis were equally unwilling to compromise. For many people who lived under Saddam, the crimes of his Baathist regime were simply too heinous not to allow for the death penalty. In your view, should difficulties in securing international cooperation influence a country's decision whether to maintain the death penalty? Recall our earlier discussion of this issue in the context of extradition.

For all its flaws, the domestic tribunal in Iraq also yielded many important benefits. Perhaps the most obvious is the control it allowed Iraqis to manage their own affairs. As part of the evidence gathering process, the Anfal court also produced the first ever written account, in Arabic, of the Baath Army's Anfal campaign, in which Saddam's forces destroyed thousands of Kurdish villages in 1991-2. More than 100,000 Kurds were killed during the massacre, and several hundred thousand more were displaced. The trial of the generals who led the campaign produced the world's third genocide conviction in history, after only Nuremberg and the ICTR. In all, more than ten senior officials in the Baath party have been convicted guilty and sentenced

⁴²⁶ Chatham House, *The Iraqi Tribunal: The Post Saddam Cases* (Dec. 4, 2008), *available at* http://www.chathamhouse.org.uk/files/13117_il041208.pdf.

⁴²⁷ Chatham House.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 5.

⁴³⁰ *Id.*

⁴³¹ *Id.*

by the Tribunal.⁴³² These actions have set an important precedent for ending impunity in both Iraq and the wider world.

IV. CONCLUSION

The debate over the virtues and flaws of the Iraqi Special Tribunal raises many of the fundamental questions that arise in other post-conflict settings. In the wake of such wrenching internal conflicts, indigenous institutions are often still relatively weak. Further, in many cases, the same underlying tensions that started the conflict may be still pose latent dangers to a country's fragile peace. The bitter sectarian strife that broke out between Iraq's Sunni and Shiite populations in 2004 was a painful reminder of this reality. In such contexts, establishing transitional justice is a necessarily difficult and problematic endeavor. Those who seek to end impunity and redress past grievances must also consider the potentially destabilizing effect that a trial might have on a country. Unfortunately, there is often no easy way to reconcile the claims of those who seek justice with those who argue that it's better to focus on peace and reconciliation, leaving painful memories in the past.

Discussion Questions

1. How important is it for a country to take the lead in its quest for justice? Is there any role for the international community to play?
2. Does the Iraqi experience with its own domestic tribunal have lessons for Afghanistan? If so, what are they?

⁴³² *Id.*

GLOSSARY

- ◆ “Above-board”: Performed a way that is in adherence to the rules
- ◆ Command responsibility: The doctrine of command responsibility holds individuals accountable for failing to prevent crimes from taking place under their command, for instance if a military officer fails to prevent his subordinates from carrying out attacks on civilians.
- ◆ Exonerated: To relieve of responsibility or obligation.
- ◆ Extraordinary rendition: Extraordinary rendition occurs when State A arranges for a person to be transferred from State B to State C. The purpose of the transfer is so that State C may employ harsher interrogation techniques than are permitted in State B to extract information from the person for the benefit of State A.
- ◆ Extradition: Extradition is the official process through which one state surrenders a suspected or convicted criminal to another state.
- ◆ Incitement: An act that provokes or urges on another act.
- ◆ Irregular rendition: Irregular rendition occurs when states transfer a person from State A to State B without going through the formal extradition process.
- ◆ “Lacks teeth”: Does not have enough strength to be meaningfully enforced.
- ◆ Mechanistic: Like a mechanism, or capable of being distilled down to a machine-like process
- ◆ Mutual Legal Assistance Treaty: MLATs commit each signing country to assist each other’s law enforcement agency fully in areas such as evidence gathering, information and intelligence sharing, locating and summoning witnesses or suspects to court, or taking testimony from witnesses or suspects.
- ◆ “On the loose”: Unconstrained
- ◆ Rendition: Rendition refers to when one country uses informal, covert methods to transfer an unwilling suspect from one jurisdiction to another.
- ◆ Sectarian: Of, or relating to, a sect (usually pertaining to conflicts between two different groups or sects of people)

CHAPTER 8: AN INTRODUCTION TO INTERNATIONAL TRADE AND INVESTMENT LAW

I. INTRODUCTION AND OPENING INQUIRIES

As the violence in Afghanistan stabilizes, international trade and investments will become increasingly key components of the state's economic development. These international forces bring with them important benefits for Afghanistan as well as potential negative impacts. To maximize the benefits and minimize risk, it is important to understand the structures and rules that govern international trade and investment. International commercial law is made up of a body of private international law that sets rules on what country's domestic law applies to persons and transactions.⁴³³ This chapter focuses instead on international trade and investment law – the set of public international rules that set substantive limits on how a government may exercise its domestic regulatory authority.

Before a discussion of the international regulation of trade and investment, it is important to define the two terms.

Trade is the simplest form of commerce. At its most basic, it occurs when two parties each have something that the other one wants. Person A, in Iran, has one gram of gold, but needs money. Person B, in Afghanistan, has 1,300 Afghanis, but needs gold. The law of trade governs how A can get B's money and B can get A's gold. What taxes will A have to pay? What subsidies can the government provide to help B? What procedures do they have to follow to make the exchange?

Investment is an acquired ownership interest in some property for future financial benefit. An international investment is an ownership interest in some foreign property. In other words, you have an international investment when you own any part of a foreign property. For example, if Person A buys a goldmine in Afghanistan, he has an international investment. Another example of an international investment is when the government of one country lends money to another country to build infrastructure, such as a road.

II. INTERNATIONAL TRADE REGULATION: PREFERENTIAL TRADE AGREEMENTS AND THE WORLD TRADE ORGANIZATION

World Trade Organization

The World Trade Organization (WTO) is a multilateral trade organization, which means that it is a group of countries that have agreed to peacefully negotiate trade agreements amongst themselves. The WTO serves as a forum for governments to negotiate trade agreements and resolve international trade disputes. It also creates trade policies and rules that its member

⁴³³ In order to get a more thorough understanding of the law that governs commerce in Afghanistan, you may also want to read the ALEP textbook, "An Introduction to the Commercial Laws of Afghanistan."

countries must comply with.⁴³⁴ The primary aim of the WTO is *trade liberalization*, which is the reduction of economic barriers to trade between nations, such as *subsidies* for domestic producers, and *tariffs* (customs duties) on imports.

WTO agreements set policies that member states agree to implement domestically. Initially, the WTO focused on trade in goods. Today, the WTO governs goods, services, inventions, creations, and designs.⁴³⁵ It also touches areas as diverse as trade and environment, dumping, transparency in government procurement, and intellectual property.⁴³⁶ Afghanistan is currently not a member of the WTO, although it has begun the membership application process.

Discussion Questions

1. With a partner, think of some examples of “barriers” to trade in addition to the ones given above.
2. Now, imagine that one of you grows apples in California, United States. The other grows apples in Wardak Province, Afghanistan. Both of you sell your apples to consumers in the United States. The United States decides to pass a law that creates a 12% tax on all apples that are imported into the United States. How does this law impact each of you? Why would the United States want to pass this law?
3. If you were the President of Afghanistan when the United States passed this law, what are some possible actions you could take in response?
4. Now imagine that the Afghanistan legislature passes a law that subsidizes the export of Afghan apples to India (by giving tax breaks to Afghan farmers that export apples to India, for example). How does this impact each of you?
5. Why would an international organization made up of different countries like the WTO want to reduce barriers to trade between nations?
6. How do you think WTO’s policies on barriers to trade would change if only the world’s poorest countries made them? Only the world’s richest countries?

A. The History of the World Trade Organization

In 1948, the United States, Europe, and some countries in Latin America and Asia had just finished fighting World War II and were looking for a way to jumpstart economic growth. As a result, 23 countries created the General Agreement on Tariffs and Trade (GATT) as a set of rules that they agreed to follow in order to liberalize trade. The GATT governed for decades, but by the 1980s, many of its members decided that they wanted a new regime to try to deepen trade liberalization further. In 1995, after a round of negotiations called the Uruguay Round, 123 countries created the World Trade Organization (WTO).

⁴³⁴ *Understanding the WTO* (2008),
http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm.

⁴³⁵ *Id.*

⁴³⁶ The World Trade Organization In Brief,
http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm.

B. Why Do Countries Join the World Trade Organization?

As with all agreements, a country that is considering whether or not to join the WTO must weigh the costs and benefits of joining.

Most countries join the WTO because it standardizes the rules for international trade. Signing on to a multilateral agreement with many parties is easier than the alternative – negotiating bilateral trade agreements with each country it intends to trade with. Not only is joining the WTO often easier for a country that wants to trade openly with many different countries around the world, but it can also create opportunities for trade that the country might not otherwise have.

In addition, countries that join the WTO agree to a set of principles that govern its imports and exports. The government of a country that decides to join the WTO usually believes that these principles will help to improve the country's economy. These principles are:⁴³⁷

Trade without Discrimination

By joining the WTO, a country agrees to treat all other countries in the WTO equally as trading partners. That means that it cannot impose tariffs on one WTO country that it does not impose on all others. Similarly, it cannot give a favor, like lower customs duty rates, to one country that it does not give to all others. This system of treating all WTO trade partners equally is called *most-favored nation treatment*. There are certainly some exceptions and variations, but for the most part, granting most favored nation treatment to all WTO countries is a standard requirement for joining the WTO.

Not only does a WTO country agree to treat all foreign producers equally, it also agrees to treat all foreign producers the same as it treats its domestic producers once the foreign goods have arrived in the country. This treatment is called *national treatment*. Under a system of national treatment, a WTO country, like Vietnam, cannot impose a sales tax on bananas produced in Australia unless it imposes the same sales tax on bananas that come from Vietnam. It does not mean, however, that Vietnam must make domestic banana producers pay a customs fee. That is because the customs fee that a foreign producer has to pay to import bananas into Vietnam is imposed *before* the bananas actually get into Vietnam. Remember that national treatment only applies after the foreign goods have arrived in the country.

⁴³⁷ These principles are taken from: *Understanding the WTO* (2008), http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm.

Case Study⁴³⁸

Following a 1990 amendment to the Clean Air Act, the US Environmental Protection Agency (EPA) passed the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States.

From January 1, 1995 (coincidentally the date when the WTO came into being), the Gasoline Rule permitted only gasoline of a specified cleanliness (“reformulated gasoline”) to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 (“conventional gasoline”) could be sold.

The Gasoline Rule applied to all US refiners, blenders and importers of gasoline.

It required any domestic refiner which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990.

The Environmental Protection Agency also established a statutory baseline, intended to reflect average US 1990 gasoline quality.

The statutory baseline was assigned to all refiners who were not in operation for at least six months as of 1990, and to all importers and blenders of gasoline. For all refiners in the United States that had been in operation for six months or more, the individual refinery baseline applied. Compliance with the baselines was measured on an average annual basis.

1. Did the United States’s law violate the concept of *most favored nation treatment*? Why or why not?
2. Did the United States’s law violate the concept of *national treatment*? Why or why not?
3. If so, do you think that the United States should have had to change its law? Why or why not?
4. Now consider that foreign refiners were dirtier than United States refiners, so allowing foreign refiners to use an individual refinery baseline would have permitted them to export to the U.S. gasoline that was dirtier than the average U.S. gasoline. Does that fact change your answer?

For the WTO dispute resolution panel’s decision on this matter, see its report at http://www.wto.org/english/tratop_e/dispu_e/2-9.pdf.

Predictability

Under the WTO, member countries agree to adopt a set of policies. Once they accept these policies, they are bound to comply with them within a certain amount of time. For example, by joining the WTO, a country might agree to reduce its tariff rates (the same thing as customs duties) for all agricultural imports to 2% of the value of the goods being imported. It would then set a date when it promises that it will reach the 2% level. The country is then bound to reduce its tariffs on agricultural imports to 2% by that date.

⁴³⁸ Taken from *World Trade Organization*, Environment: Disputes 7, http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm.

By setting these kinds of goals, agricultural producers in other countries know how much they will pay to import their goods into that country and can plan accordingly. In theory, producers will be more willing to import to that country when they can predict how much they will have to pay in tariffs.

Transparency

Transparent governance can lead to better predictability for trade partners. The WTO agreements usually require governments to disclose their policies and practices to the public within their country or to disclose them to the WTO. There is also a review mechanism within the WTO that keeps track of national trade policies and publicizes them.

C. How does the WTO Regulate Trade Between Member Countries?

The Agreements

The rules of trade for WTO countries are listed in documents called “Agreements.” There are main Agreements for goods, services, and *intellectual property*. By joining the WTO, a country agrees to follow all three of the Agreements. The Agreement for goods is called the General Agreement on Tariffs and Trade (GATT); the Agreement for services is called the General Agreement on Trade in Services (GATS); and the Agreement for intellectual property is called Trade-Related Aspects of Intellectual Property Rights.

Each Agreement starts with a general text that specifies the rules that countries agree to follow when they write their laws and policies for trade in that area. What happens if the WTO countries want to make a rule that applies only to a specific kind of good? For example, how can the GATT specify that a rule applies only to agriculture if the agreement is supposed to regulate the trade of all goods? Each Agreement has a series of Annexes and Extra Agreements that cover conditions for specific classes of products within the general Agreement.

Finally, each agreement has “schedules” (lists) of commitments that each country has agreed to. This is important because sometimes individual countries promise to make certain commitments that other countries do not promise to make. These commitments often allow specific foreign products or service providers access to their markets. For example, under the GATT, one country might commit to reduce tariffs on the import of roasting chickens to 3%, while another country might commit to 4%.

Enforcement

The WTO has a dispute resolution process, contained in the Uruguay Round Agreement,⁴³⁹ that countries agree to follow when they become members to the organization.

⁴³⁹ See Annex II *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#dispute (April 15, 1994).

You can refer back to Chapter 5: The Peaceful Resolution of International Legal Disputes for a discussion on the benefits of this type of dispute resolution system.

Under the WTO's dispute resolution process, any dispute between WTO members is first brought before a panel of three experts from the WTO countries. When acting as panelists, these experts do not represent their countries. Instead, they act more like impartial judges. Generally, the panel is chosen by the countries having the dispute. The WTO director-general only appoints the panel members if the two sides cannot agree. The panel examines the evidence and decides who is right and who is wrong. The WTO also sets out a binding time schedule for this process to ensure that disputes are resolved quickly. For example, the countries can take up to 45 days to appoint a panel, and then the panel can take up to 6 months to examine the evidence and make a decision.

After the panel makes a decision, it submits a report to the entire WTO body. Only if all of the members of the WTO agree that the panel was wrong, will the decision be reversed. As you learned in Chapter 5: The Peaceful Resolution of International Legal Disputes, there is also an appellate body and an enforcement mechanism for reviewing and enforcing the panel's decisions.

Many countries resolve their own disputes through negotiations before the panel makes a ruling. The WTO actually requires the countries to talk to each other before bringing their dispute to the panel to see if they can reach their own agreement. It also allows the countries to ask the WTO director-general to mediate or try to help solve the dispute.

D. How Do Countries Join the World Trade Organization?

Before a country can become a member of the WTO, it must amend its trade laws and policies to meet WTO requirements. This means that Afghanistan must amend tariff schedules that comply with those established in the WTO to become a member.

The process by which a country becomes a member of the WTO is called the accession process. There are four steps in the accession process.⁴⁴⁰ First, the country must submit a memorandum to the WTO describing all aspects of its trade and economic policies that are relevant to WTO agreements.⁴⁴¹ During this process, the country must work to align its policies with WTO policies.⁴⁴² Second, the country begins bilateral talks with individual WTO countries regarding tariff rates, market access commitments, and other policies in order to determine the benefits that the other WTO countries will get when the new member joins.⁴⁴³ Third, the working party of the WTO finalizes the terms of accession.⁴⁴⁴ In the fourth step, the final package is

⁴⁴⁰ *Understanding the WTO* (2008), http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

presented to the WTO General Council or the Ministerial Conference for a vote. If it passes by a two-thirds majority, the applicant country is free to accede to the WTO.

Discussion Questions

1. What do you think the benefits to joining a multilateral trade organization like the World Trade Organization would be for Afghanistan? What are some potential downsides?

Preferential Trade Agreements

Preferential trade agreements (PTA) are agreements between two or more countries meant to liberalize trade between those countries. In other words, the countries agree to reduce the barriers to trade between them. Many of the conditions that countries agree to implement through PTAs are similar to those that the WTO seeks to implement between its members, such as instituting national treatment, and decreasing or eliminating tariffs on imported goods.

Currently, Afghanistan is party to a PTA with India. Afghanistan is also a party to the Economic Cooperation Organization Trade Agreement (ECOTA), by which the Transitional Islamic State of Afghanistan, the Republic of Azerbaijan, the Islamic Republic of Iran, the Republic of Kazakhstan, the Kyrgyz Republic, the Islamic Republic of Pakistan, the Republic of Tajikistan, the Republic of Turkey, Turkmenistan and the Republic of Uzbekistan agree to establish most-favored nation treatment, national treatment, and to commit to reduce tariffs and non-tariff trade barriers among each other.

Let's analyze Afghanistan's PTA with India in more detail. This PTA is a good model to examine because many PTAs have very similar provisions.

Preferential Treatment

Preferential Trade Agreement Between The Republic of India and the Transitional Islamic State of Afghanistan – selected provisions

Article II

Definitions

For the purpose of this agreement:

1. "Tariffs" means basic customs duties included in the national schedules of the Contracting Parties;
2. "Products" means all products including manufactures and commodities in their raw, semi-processed and processed forms.
3. "Preferential Treatment" means any concession or privilege granted under this Agreement by a Contracting Party through the progressive reduction and/or elimination of tariffs on the movement of goods.

Article III

Elimination of Tariffs

The Contracting Parties hereby agree to establish a Preferential Trading Arrangement for the purpose of free movement of goods between their countries through reduction of tariffs on the movement of goods in accordance with the provisions of Annexures A & B which shall form an integral part of this Agreement.

Article IV

General Exceptions

Nothing in this Agreement shall prevent any Contracting Party from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, those relating to importation or exportation of gold and silver, the conservation of exhaustible natural resources and the protection of national treasures of artistic, historic and archaeological value.

Article V

National Treatment

Both Contracting Parties agree to accord to each other's products imported into their territory, treatment no less favourable than that accorded to like domestic products in respect of internal taxation and in respect of all other domestic laws and regulations affecting their sale, purchase, transportation, distribution or use.

Annex A of the Agreement is a list of goods for which Afghanistan agrees to grant preferential tariffs to India. Annex B of the Agreement provides a list of goods for which India agrees to grant preferential tariffs to Afghanistan.

Discussion Questions

Black Tea is in Annex A of the Preferential Trade Agreement between Afghanistan and India, but it is not on Annex B. Assume that "preferential tariffs" means the elimination of tariffs.

1. Can Afghanistan apply a tariff on black tea imported from India?
2. Can India apply a tariff on black tea imported from Afghanistan?
3. Can Afghanistan apply higher sales tax on black tea imported from India than black tea produced in Afghanistan?
4. Can India apply higher sales tax on black tea imported from Afghanistan than black tea produced in India?

Most preferential trade agreements also specify conditions when one of the signing countries can deny preferential treatment. For example, *safeguard measures* allow the country parties to raise tariffs in the case of a situation, which would result in serious economic injury to domestic producers if the tariff rates in the treaty were honored. Imagine that in 2010, the world commodity prices for pistachios crashes from 25 AFN/kg to 10 AFN/kg. To protect Indian pistachio growers, the government of India wants to raise tariffs on the import of pistachios from

Afghanistan. Pistachios, however, are on Annex B of the preferential trade agreement between India and Afghanistan.

India can still restrict the import of pistachios in that case because the agreement contains a clause in Article VIII Safeguard Measures that says, “[i]f any product, which is the subject of preferential treatment under this Agreement, is imported into the territory of a Contracting Party in such a manner or in such quantities as to cause or threaten to cause, serious injury in the importing Contracting Party, the importing Contracting Party may, with prior consultations except in critical circumstances, suspend provisionally without discrimination the preferential treatment accorded under the Agreement.”

Discussion Questions

Consider Article IX of the preferential trade agreement between Afghanistan and India:

Domestic Legislation

1. The Contracting Parties shall be free to apply their domestic legislation to restrict imports, in cases where prices are influenced by unfair trade practices including subsidies or dumping.
2. The contracting parties undertake to notify at the earliest opportunity, through the competent bodies, of the opening of investigations and preliminary and final conclusions regarding such unfair trade practices that affect reciprocal trade.

1. Say that India starts exporting pistachios to Afghanistan. To make its pistachios more competitive, India decides to subsidize these pistachio exports. This way, India’s pistachio exporters can sell Indian pistachios in Afghanistan at prices lower than Afghanistan pistachio producers can sell them. Would this violate Article IX? Why? Could Afghanistan pass domestic legislation to restrict the imports of pistachios from India? India’s conduct in this example is called “dumping.”

1. Origin of Goods

Most PTAs cover only goods that originate in the contracting parties. For example, consider a hypothetical PTA between the United States and the European Union (EU). Under that PTA, the EU may give preferential treatment only to manufactured goods made in factories in the United States. Therefore, the preferential treatment would not cover t-shirts manufactured in factories in China, even if the t-shirts are shipped from China to the United States, and then from the United States to Germany – a country in the EU.

Now look again at the PTA between Afghanistan and India:

Preferential Trade Agreement Between The Republic of India and the Transitional Islamic State of Afghanistan – selected provisions

Article VII

Rules of Origin

1. Products covered by the provisions of this Agreement shall be eligible for preferential treatment provided they satisfy the Rules of Origin as set out in Annexure C to this Agreement which shall form an integral part of this Agreement.
2. For the development of specific sectors of the industry of either Contracting Party, lower value addition norms for the products manufactured or produced by those sectors may be considered through mutual negotiations.

Annexure C

5. Originating products:-
Products covered by the Agreement imported into the territory of a Contracting Party from another Contracting Party which are consigned directly within the meaning of rule 9 hereof, shall be eligible for preferential treatment if they conform to the origin requirement under any one of the following conditions:
 - (a) Products wholly produced or obtained in the territory of the exporting Contracting Party as defined in rule 6; or
 - (b) Products not wholly produced or obtained in the territory of the exporting Contracting Party, provided that the said products are eligible under rule 7 or rule 8 read with rule 7.

White cement is on Annex A of the PTA. Remember that means that the government of Afghanistan agrees to give a preferential tariff rate to white cement that is imported to Afghanistan from India. According to the Article VII and Annexure C of the PTA, white cement that is produced entirely in India falls under the preferential tariff rate.

White cement is made by heating limestone with small amounts of other materials, such as clay. Imagine that a company in India combines limestone from India with small amounts of clay from Thailand to make white cement. The company now wants to export that cement to Afghanistan. Can Afghanistan apply a higher tariff rate than the preferential rate under the PTA? Annexure C, Number 5(b) of the PTA specifies that for products that are only partially obtained in India, you must look at rules 7 and 8. Those rules give very specific instructions for determining whether the preferential tariff rate applies or not.

Exercise

Find the Preferential Trade Agreement Between The Republic of India and the Transitional Islamic State of Afghanistan. Go to Annexure C, and read Rules 7 and 8 carefully.

1. In the hypothetical above, imagine that the white cement is made up of 60% limestone from India and 40% clay from Thailand. Does Afghanistan have to apply the preferential tariff rate?
2. What if it is 40% limestone from India and 60% clay from Thailand.

Preferential Trade Agreements and the WTO

India has been a member of the World Trade Organization since January 1, 1995. Remember that under the WTO, India must give all WTO member countries most-favorable nation treatment. The tariff rates for trade between India and Afghanistan are lower than the tariff rates India gives to WTO countries. Isn't the preferential trade agreement a violation of India's obligations under the WTO?

First, remember that the conditions of the WTO only apply to trade between WTO member countries. Because Afghanistan is not a member of the WTO, the conditions of the WTO do not apply to trade between India and Afghanistan.

But, even if Afghanistan becomes a member of the WTO, the preferential trade agreement between Afghanistan and India will not violate WTO rules. Under a provision of the 1979 General Agreement on Tariffs and Trade that was adopted by the WTO in the Uruguay Round,⁴⁴⁵ preferential arrangements are allowed for trade in goods among developing countries, subject to certain conditions.⁴⁴⁶

Controversy over the World Trade Organization and PTAs

The World Trade Organization is often criticized, particularly for its treatment of developing countries. Some argue that the preferential trade policies of the WTO prevent developing countries from obtaining the benefits of international trade that developed countries get. Consider this excerpt from economist Jagdish Bhagwati of Columbia University.

Excerpt: Reshaping the WTO

Jagdish Bhagwati, Reshaping the WTO, Far Eastern Economic Review (January 1, 2005)

[T]here are also some serious threats to the WTO's well-being. The threats come from two directions: the escalating erosion of non-discrimination and the steady encroachment by rich-country lobbies seeking to impose their unrelated agendas on trade agreements. Institutional reform requires two main changes: relaxing the "tightness" of obligations that the WTO now incorporates and creates political waves, and augmenting its minuscule resources.

The Erosion of Non-Discrimination

Non-discrimination was at the heart of the General Agreement on Tariffs and Trade (GATT) that merged into the WTO in 1995. The most-favored nation clause ensured that every GATT member faced the lowest tariffs that any other member enjoyed. The few exceptions were explicit—for instance, Article 24 exempted countries entering into Preferential Trade Agreements

⁴⁴⁵ See GATT ¶ 1(a) (1994).

⁴⁴⁶ Under the WTO, countries can classify themselves as "developing countries." The term "least developed countries," however, specifically refers to the United Nations classification system. Some provisions of the WTO apply only to least developed countries, including specially favorable treatment. See *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, 28 November 1979 (L/4903); *Guide to the Uruguay Round Agreements*, Part 5: Developing Countries in the WTO System 235, 236 n.518 (1998).

such as a Free Trade Agreement or a Customs Union from having to extend their tariff cuts automatically to non-member countries.

But today, the central principle of non-discrimination has been virtually destroyed. Thus, PTAs have proliferated to close to 300 and the number is growing by the week. The agreements which the architects of the GATT thought would be minor exceptions have now swallowed up the trading system.

All economists now recognize the resulting “spaghetti bowl” problem, as I have christened it. The world trading system is characterized by a chaotic crisscrossing of preferences, with a plethora of different trade barriers applying to products depending on which countries they originate from. This is a fool’s way of doing trade—not only does it destroy the efficient allocation of resources, but it flies in the face of the fact that today it is becoming almost impossible to define which product is whose. It is hard to believe that sensible men in charge of trade policy today, including the USTR, the EU Trade Commissioner and other luminaries of trade are so unmindful of the fact that, in the name of free trade, they are damaging the world trading system through discriminatory PTAs as much as the protectionists did in the 1930s.

At the same time, non-discrimination has been undermined by discrimination in favor of developing countries in diverse ways. They enjoy preferential access to rich-country markets under the Generalized Scheme of Preferences (GSP), giving them market access at lower-than-MFN tariff rates. Moreover, they are allowed to reduce without any restrictions whatsoever trade barriers by any percentage and for any products preferentially among themselves under the Enabling Clause. This “Special & Differential” treatment sounds desirable; but its undermining of non-discrimination in the world trading system has serious downsides from the viewpoint of the developing countries as well.

The grant of one-way preferences to the developing countries under the GSP schemes turns out, on examination, to be full of holes. The product eligibility is limited, the preferences terminate when exports are successful, and reverse preferences for the rich countries are almost always built into these schemes. Both the EU and the U.S. have also used these schemes to extract not just preferential trade concessions (such as provisions favoring the import of the rich country’s intermediates) but also, as discussed below, a number of unrelated concessions. The EU has taken matters further by cynically differentiating, in pursuit of political agendas, among different developing countries in the grant of preferences.

That the Enabling Clause permits two or more developing countries to reduce any trade barrier among themselves, regardless of restrictions such as in Article 24 which requires chiefly the restrictions that the preferential tariff reductions for members of a PTA must be on “substantially” all products and that there must be a commitment to reaching full 100% reduction by a target date, is also an option that poses real harm to the developing countries by cluttering up their trade regime with a mass of inefficiencies. It is usually defended by its proponents on the ground that these countries need “policy space.” But this is like saying that the ability to shoot oneself in the foot gives one policy space.

Therefore, between the proliferation of PTAs and the spread of S&D, the centrality of non-discrimination has virtually vanished. Consider that the EU’s MFN tariffs now apply only to five countries, with all others enjoying politically driven lower-tariff access to the EU under multiple PTAs, differentiated GSP (Generalized Scheme of Preferences) , EBA (Everything But Arms) and other schemes. Evidently, the MFN tariff in the EU has now become the LFN, the least favored nation, tariff!

It is too late to put the genie back in the bottle. So the report concludes, along with many thoughtful observers, that the only way to kill the PTA-generated preferences, which are of course relative to the MFN tariff, is to bring the MFN tariff itself down to negligible levels. In short, conclude the Doha Round and go on to another multilateral trade negotiation until we get the MFN tariffs virtually down to zero—a U.S. aspiration, as it happens.

Yet another threat to the multilateral trading system arises from the ability of rich-country lobbies to capture, through use of PTAs and the design of S&D preference schemes, the trade liberalization process to advance their unrelated agendas. These lobbies pretend, of course, that “fair trade” and respect for “collective preferences”—both self-serving phrases that conceal the pernicious nature of the demands—require that their pet concerns such as labor standards be worked into trade agreements and institutions such as the WTO.

This has united the major developing countries such as India and Brazil, both led by democratically elected progressive leaders, against the inclusion of such extraneous issues into trade negotiations and institutions. The Free Trade Agreement of the Americas (FTAA) has also been held up by Brazil, which insists correctly on confining it to trade liberalization, while the United States wishes to corrupt the FTAA with several extraneous issues. Revealingly, none of the many PTAs among the poor countries ever include these extraneous issues—their inclusion arises only when the U.S. and the EU are members.

Discussion Questions

1. Consider Professor Bhagwati’s arguments about potential pitfalls of the World Trade Organization. Do you agree with his analysis? What additional information do you think you need to be able to assess his argument better?

Professor Bhagwati criticizes Preferential Trade Agreements for undermining the goals of the World Trade Organization. Preferential Trade Agreements have been criticized for other reasons as well. For example, consider the Afghan Transit Trade Agreement (1965) between Afghanistan and Pakistan.

The agreement eliminated tariffs for all goods imported to Afghanistan through Pakistan. The elimination of tariffs was intended to prevent Afghanistan from paying extra tariffs simply because it does not have its own ports through which it could receive imports. Instead, however, smugglers have benefited by importing goods into Afghanistan through Pakistan, and then smuggling them back over the border to Pakistan. This allows them to avoid the tariffs that would apply if the goods were imported directly into Pakistan. The smugglers can then sell the goods at markets for a price cheaper than goods imported directly into Pakistan.⁴⁴⁷

III. INTERNATIONAL INVESTMENT LAW

“It may well be that, as the second half of the 20th century was characterized by the establishment of an international trade law system, the first half of the 21st century may be characterized by the establishment of an international investment law system.”⁴⁴⁸

⁴⁴⁷ Ashfaq Yusufzai, “Smugglers Profit from Landlocked Afghanistan,” IPS News (Aug. 4, 2007), available at <http://ipsnews.net/news.asp?idnews=38794> (last viewed May 8, 2010).

⁴⁴⁸ UNCTD, *I International Investment Agreements: Key Issues*, xxi (2004).

Foreign Direct Investment

According to UNCTAD, a “foreign direct investment” is “an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor. Further, in cases of FDI, the investor’s purpose is to gain an effective voice in the management of the enterprise.”⁴⁴⁹ In other words, foreign direct investment (FDI) occurs when someone (the “investor”) purchases a *lasting interest* in a foreign enterprise. The investor may be an individual or a corporation. The enterprise may be any economic organization, including a company or an organization. The foreign country is called the “host country” because it “hosts” the investment. A “lasting interest” means that there is a long-term relationship between the investor and the enterprise and that the investor is involved in managing the enterprise. For example, if a U.S. company purchases 100% of a textile factory in Afghanistan, it certainly has a lasting interest because it owns the factory until it sells it to someone else, and it is entirely responsible for managing the factory. Generally, a lasting interest means 10% ownership or more.⁴⁵⁰ Therefore, a foreign direct investment is a 10% or more ownership interest by an individual or corporation in a foreign company or organization.

In a globalized economy, Foreign Direct Investment (FDI) is an important source of capital for both developed and developing countries. In 2008, Afghanistan received USD 300 million in FDI.⁴⁵¹ South Asia altogether received over USD 50 billion.⁴⁵² Although the financial crisis of 2008-2009 led to decreased levels of FDI in the last couple of years, it remains an important part of the global economy. It is worth, therefore, describing the institutions and legal frameworks that govern it.

FDI in Afghanistan is governed by the *Law on Domestic and Foreign Private Investment in Afghanistan*, which was passed in 2002.⁴⁵³ The law regulates the coordination and monitoring of investments, tax and tariff exemptions, transfer of capital and profit, sales of enterprises and shares, seizure and confiscation of property, and default dispute resolution mechanisms.

But, remember that the *Law on Domestic and Foreign Private Investment in Afghanistan* is domestic law. This part of the chapter will look the international law that governs foreign investment, with an emphasis on the international law that is binding on Afghanistan.

Multilateral Organizations

There is no big multilateral organization that governs foreign investment globally. Instead, there are regional agreements and organizations that taken together make the binding law that governs investment between the contracting countries.

⁴⁴⁹ *Foreign Direct Investment*,

<http://www.unctad.org/templates/Page.asp?intItemID=3146&lang=1>.

⁴⁵⁰ <http://www.oecd.org/dataoecd/10/16/2090148.pdf>.

⁴⁵¹ United Nations Conference on Trade and Investment, World Investment Report 2009, Country Fact Sheet: Afghanistan.

⁴⁵² *Id.*

⁴⁵³ See *Doing Business in Afghanistan: 2009 Country Commercial Guide for U.S. Companies*, U.S. Department of State (2009); Business and Investment Resource Guide; The Embassy of Afghanistan, Washington DC (January 2009).

International Investment Agreements

Individuals and companies worry about investing in countries that are politically, economically, or legally unstable because these kinds of instability make it easier for them to lose their investment. To mitigate against these risks, countries enter into *International Investment Agreements* (IIAs). Under these IIAs, countries guarantee that they will not implement new laws or policies that will hurt certain interests of the foreign investor. Most IIAs protect against the *nationalization* of foreign investments, which is when the government takes a foreign investment in the context of social and economic reform, and *expropriation*, which is when the government takes an individual foreign investment.⁴⁵⁴

International Investment Agreements also make investing more attractive for foreigners because they reduce the barriers to investment, much in the same way that preferential trade agreements reduce the barriers to trade. Therefore, developed countries generally enter into IIAs to protect the foreign investments of their citizens; developing countries usually enter into IIAs as a way to attract the money that comes along with foreign direct investment. Afghanistan is not currently a party to any IIAs, but it may begin to enter into IIAs in the near future.

Most IIAs follow a standardized format. However, nearly all of them are adapted to the specific circumstances of the countries they bind.⁴⁵⁵ Most IIAs follow the general structure of: 1) provisions that limit the conditions that host governments can impose on foreign investors who are party to the agreement; 2) provisions that set out how the host country agrees to protect the investment; and 3) provisions that describe the system that the countries agree to use to solve disputes about the interpretation or application of the agreement. This section of the chapter identifies and explains some of the clauses that are most commonly found in IIAs. While not comprehensive,⁴⁵⁶ it provides the tools necessary to analyze certain key provisions.

A. Conditions on Foreign Investors

Rights of Admission and Establishment

While all International Investment Agreements (IIAs) govern how host countries treat foreign investments, not all IIAs tell the contracting countries which foreign investments they should allow and which ones they should not. In other words, some IIAs govern the *admission* and *establishment* of foreign investors, and some do not. Admission is the process of entering the country. Establishment is the process of settling and remaining in the country. When IIAs do not govern admission and establishment, domestic legislation does. Afghanistan has its own laws on admission and establishment, contained in the *Law on Domestic and Foreign Private Investment in Afghanistan*.

Under Article 3, “qualified domestic or foreign entities, real or legal, may invest in all sectors of the economy—whether production or service-related.” Furthermore, under Article 4, a

⁴⁵⁴ 1 International Investment Agreements: Key Issues, United Nations Conference on Trade and Development Report, 2 (2004).

⁴⁵⁵ *Id.*

⁴⁵⁶ For a thorough analysis of trends in international investment treaty provisions, see UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (2007).

foreigner can make an investment up to 100% ownership. A foreigner can also co-own an investment with a domestic investor or with the government of Afghanistan.

Under Article 14, “Foreign investors, based on the classification of their Approved Enterprise as short-term, medium-term or long-term . . . , may lease real estate for ten, twenty or thirty years, respectively. Lease of land is conditional to implementation of the project.”

Discussion Questions

The American University of Afghanistan Foundation was founded in 2003 in the United States. The same year, the foundation decided to invest in a private university in Afghanistan.

1. Under the *Law on Domestic and Foreign Private Investment in Afghanistan*, can the American University of Afghanistan Foundation be the 100% owner of a university in Afghanistan? Why or why not?
2. Once the Foundation established the American University of Afghanistan, it needed land to use to build the university. Can the Foundation buy a piece of land in Afghanistan as a 100% owner? Can it buy land in Afghanistan as the 10% owner? Can it lease the land? Why or why not?
3. In 2003, the Afghanistan High Commission for Private Investment offers to lease 48 acres of land to the Foundation to use as the American University of Afghanistan until 2103. However, the Foundation needs to raise money to build the university campus on that land. While it is raising money, it starts holding classes on an interim campus. It is now 2010 and the Foundation has not started building on the land. Does the government of Afghanistan have any argument for revoking the lease? Does AUAF have any argument that it is entitled to the lease? Do you think that the answer to this question depends on the terms of the lease agreement?

B. National Treatment

Just as we discussed in the international trade section, many IIAs prohibit nationality-based discrimination by requiring host countries to grant national treatment and/or most-favored nation treatment to investors from the contracting countries.⁴⁵⁷

According to the Organization of Economic Cooperation and Development’s (OECD) definition in the 1976 Declaration on International Investment and Multinational Enterprises, in order to give *national treatment*, countries must:

“consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government . . . treatment under their laws, regulations, and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises.”

Therefore, there are four factors that determine whether discrimination between investors constitutes a violation of national treatment⁴⁵⁸:

⁴⁵⁷ Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties*, 194 (2009).

- 1) Any discrimination that is prohibited must be between foreigners and nationals;
- 2) Any discrimination that is prohibited applies only in “like circumstances;”
- 3) When discrimination is prohibited, it means that the foreign enterprise is to receive no less favorable treatment than the national enterprise;
- 4) Certain legitimate interests, such as in maintaining public order, protecting national security, or fulfilling commitments relating to international peace or security, may justify giving preferential treatment to a domestic investor over a foreign investor.

Requirement number two, that the discrimination be in “like circumstances” has received a lot of attention from courts and arbitration bodies. What does it mean that discrimination is prohibited only in like circumstances? If two investors are competitors, are the investors automatically in like circumstances?

In *United Parcel Service of America v. Canada*,⁴⁵⁹ arbitrator Ronald A. Cass, stated that a competitive relationship between two companies creates a presumption of like circumstances. In other words, if the claimant can show that the action harms a foreign investor, but it does not harm a competing domestic investor, the court will decide that the two are in like circumstances, unless the country can persuade the judge that in this specific case there is some reason why they are not.

A showing that there is a competitive relationship and that two investors or investments are similar in that respect establishes a *prima facie* case of like circumstances. Once the investor has established the competitive relationship between two investors or investments, the burden shifts to the respondent Party to explain why two competing enterprises are not in like circumstances.⁴⁶⁰

In *United Parcel Service of America*, the American company, United Parcel Service (UPS) complained that Canada violated the national treatment clause in the investment provisions of the of the North American Free Trade Agreement (of which the United States is a party) by imposing certain duties and taxes on products imported through the mail (by companies like United Parcel Service of America and United Parcel Service of Canada) and not on similar products imported under a Courier Service (Canada Post).⁴⁶¹ Canada Post is a Canadian company.

The national treatment clause, Article 1102, required Canada to give foreign investors from other States Parties to the agreement no less favorable treatment than that given to investors or investments of Canada who are “in like circumstances” with respect to the complaining investor or investment. UPS argued that the UPS and Canada Post must be in “like situations” because they are both mail carriers. Canada, on the other hand, argued that UPS and Canada Post were not in “like situations” because even though they were both mail carriers, Canada had a valid public policy for distinguishing between UPS and Canada Post because the Canada Post provides services to Canada’s customs agency. According to Arbitrator Cass, “Given the weight of this evidence, Canada must bear a heavy burden if it is to establish that, with respect to

⁴⁵⁸ *Id.* at 151.

⁴⁵⁹ ICSID (Merits Award May 24, 2007) (Separate statement Of Dean Ronald A. Cass).

⁴⁶⁰ Paragraph 16.

⁴⁶¹ *Id.* at para. 29-32.

delivery of express mail and express or courier parcel products, UPS and UPS Canada are not in like circumstances with Canada Post. Evidence of the essential similarities of UPS and Canada Post products, their customers, and the uses of their delivery products, together with evidence of direct, overt competition between UPS Canada and Canada Post (the businesses that develop and promote these products), more than meets the like circumstances test.”⁴⁶² In the end, Cass decided that Canada did not meet its burden.⁴⁶³

Case Study

“Occidental”, a US company, was engaged in exploration and production of oil in Ecuador, under a 1999 contract with an Ecuadorian State-owned corporation. In 2000-2001 Occidental was regularly reimbursed amounts of Value Added Tax (VAT; similar to sales tax) paid by it on purchases required for its activities. However, in mid-2001 the Ecuadorian tax authority issued resolutions denying all further applications for VAT refunds by Occidental and required Occidental to return the amounts previously reimbursed – on the grounds that VAT reimbursement was already accounted for in the contract.

In 2002, Occidental instituted arbitral proceedings against Ecuador under the Ecuador – United States Bilateral Investment Treaty (BIT), which is an international investment treaty. Occidental claimed multiple violations of BIT provisions, including the provision on national treatment. Occidental argued that Ecuador had breached its national treatment obligation because foreign and domestic companies involved in the export of other goods (e.g., flowers, mining, seafood products), were still entitled to receive VAT refunds.

Occidental requested to be reimbursed for all VAT amounts already paid on goods and services used for the production of oil for export, as well as for future VAT amounts (US\$ 201 million in total).

Based on these facts, if you were the arbitrator in this case, would you rule that Ecuador violated national treatment by denying Occidental VAT refunds and making Occidental pay back refunds that it had already received? Why or why not? Make sure you analyze each of the four components of national treatment.

For the court’s decision, see *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA No. UN 3467 (Final Award July 1, 2004). This summary was adapted from S Ripinsky with K Williams, *Damages in International Investment Law* (BIICL, 2008).

C. Most-Favored Nation Treatment

Almost all IIAs include a most-favored nation clause. The clause binds the contracting countries to treat foreign investors at least as well as any other foreign investor in certain policy areas. Most-favored nation clauses originated in trade treaties, but are now equally prevalent in investment agreements.⁴⁶⁴

⁴⁶² Paragraph 26.

⁴⁶³ Paragraph 35.

⁴⁶⁴ Newcombe, at 195.

Austria's model bilateral investment treaty provides a good model most-favored nation clause:

Each contracting party shall accord to investors of the other Contracting Party and to their investments treatment no less favourable than that it accords . . . to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor.⁴⁶⁵

Notice that this clause prohibits contracting countries from discriminating between contracting countries and their most favorably treated foreign investors only in the areas of management, operation, maintenance, use, enjoyment, sale, and liquidation. Some most-favored nation clauses also apply to admission and establishment. In fact, the United States and Canada only sign IIAs that apply national treatment and most-favored nation treatment to admission and establishment.⁴⁶⁶

Generally, the same factors discussed under “national treatment” also apply to most-favored nation treatment. Sometimes national treatment and most-favored nation treatment are even combined into one clause.⁴⁶⁷

D. Key Personnel

Many newer IIAs include different clauses than IIAs traditionally contained. For example the United Nations Conference on Trade and Development (UNCTAD) identifies a recent trend in IIAs dealing with the employment of key personnel.⁴⁶⁸ This is important because host countries sometimes have laws mandating that foreign companies hire their nationals for management positions in their investments.

In some sectors, countries justify these policies on national security grounds, while in others Governments seek to ensure that their nationals receive technical training and managerial experience. These kinds of policies may conflict with the interests of investors, who would like to employ the most suitable managers regardless of their nationality.

Most BITs [(Bilateral Investment Treaties)] lack specific provisions on this matter. However, more recently, a number of countries have started to include disciplines on top managerial personnel in their treaties.

Subject to the domestic legislation of the contracting party concerned, some BITs allow foreign investors and their existing personnel, regardless of nationality, to enter and remain in the host country. In addition, these BITs permit foreign investors to employ new key technical and managerial personnel of their choice — regardless of nationality — unless the legislation of the host country states otherwise. The BIT between Australia and Egypt (2001) is an example:

*“Article 5
Entry and sojourn of personnel*

⁴⁶⁵ UNCTAD, *Key Terms and Concepts in IIAs: A Glossary*, 119 (2004) (quoting Austria's Model Bilateral Investment Treaty, Art. 3(3)).

⁴⁶⁶ UNCTAD, *Key Terms*, at 5. Parties often make exceptions to national treatment and most-favored nation treatment for certain sectors or matters by specifying them in annexes. *Id.*

⁴⁶⁷ Newcombe, at 201.

⁴⁶⁸ *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (2007).

1. *Each Party shall, subject to its laws applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are investors of the other Party and personnel employed by companies of that other Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.*
2. *Each Party shall, subject to its laws applicable from time to time, permit investors of the other Party who have made investments in the territory of the first Party to employ within its territory key technical and managerial personnel of their choice **regardless of citizenship.*** (emphasis added)

Another group of agreements provides, at least in principle, the investor with the right to employ top managerial personnel regardless of nationality, without making it subject to domestic legislation. The BIT between Lithuania and the United States (1998) illustrates this concept:

“Article II

[...]

1. *Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.”*

A further category of BITs addresses the issue of top managerial personnel in the framework of the prohibition of certain performance requirements. The BIT between Japan and Viet Nam (2003) is an illustration:

“Article 4

1. *Neither Contracting Party shall impose or enforce, as a condition for investment activities in its Area of an investor of the other Contracting Party, any of the following requirements:*

[...]

- f) *to appoint, as executives, managers or members of boards of directors, individuals of any particular nationality; [...]*

This concept makes a distinction between managers and members of the board of directors — a differentiation not made in the previous category of BITs. However, regardless of this distinction, the agreement provides the investor with the same treatment concerning these two groups.⁴⁶⁹

Writing Exercise

Write a IIA provision to prohibits discrimination by nationality for the employment of top managers, but not for the board of directors. Make sure you include information about when the provision applies and whether it is subject to domestic legislation.

Settling Disputes: ICSID

As with the international trade agreements, many IIAs contain arbitration provisions, which mandate arbitration in the case of a dispute. One major international institution that plays a role in the arbitration of international investment disputes is the International Center for Settlement of Investment Disputes (ICSID). ICSID is an international organization that was

⁴⁶⁹ *Id.* at 72.

established to provide facilities for conciliation⁴⁷⁰ or arbitration of investment disputes. It was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention), which Afghanistan signed on September 30, 1966 and for which it deposited an instrument of ratification on June 25, 1968 without any reservations.

“ICSID does not conciliate or arbitrate disputes; it provides the institutional and procedural framework for independent conciliation commissions and arbitral tribunals constituted in each case to resolve the dispute.”⁴⁷¹ In other words, it provides the physical facilities as well as a set of rules of procedure for the conciliation or arbitration. To submit to ICSID, both parties to a dispute must voluntarily consent to conciliation or arbitration under the convention. However, once the parties consent, neither may unilaterally withdraw.⁴⁷² In many cases, the parties settle before a determination is reached, and so the parties agree to withdraw from the proceeding under the convention.⁴⁷³

“A further distinctive feature is that an arbitral award rendered pursuant to the Convention may not be set aside by the courts of any Contracting State, and is only subject to the post-award remedies provided for in the Convention. The Convention also requires that all Contracting States, whether or not parties to the dispute, recognize and enforce ICSID Convention arbitral awards.”⁴⁷⁴

Discussion Questions

1. For a company investing in a country like Afghanistan, what are the benefits of subjecting a dispute to arbitration under the Washington Convention? What are the costs?
2. Do you think that many IIA disputes are resolved by arbitration under the convention? What are some other ways that IIA disputes might be solved?

IV. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Although this chapter does not address international commercial law – essentially a body of private international law that sets rules on which country’s domestic law applies to persons and transactions, it is important to address the body of public international law that regulates how

⁴⁷⁰ Conciliation, as discussed in Chapter 5, is a dispute resolution process where a third party conciliator examines the dispute between two parties and issues a nonbinding resolution. Conciliators are not required to rely on applicable law and parties may refuse to implement the conciliator’s resolution. See Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *Fordham Intn’l L.J.* 578, 582-83 (1990).

⁴⁷¹ ICSID, *ICSID Dispute Resolution Facilities*, [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute Settlement Facilities&pageName=Disp_settl_facilities](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities).

⁴⁷² *Id.*

⁴⁷³ See ICSID: List of Concluded Cases, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>.

⁴⁷⁴ *Id.*

governments recognize and enforce foreign and international arbitral awards. Foreign and international arbitral awards are the awards granted by foreign and international arbitration to resolve international commercial disputes.

The most influential body of public international law in this area is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York" Convention. Afghanistan ratified the New York Convention on November 30, 2004 without any reservations and the convention entered into force in Afghanistan on February 28, 2005.

In many ways, some provisions of the New York Convention are similar to provisions that we have already seen in this chapter, as a major aim of the convention is "that foreign and non-domestic arbitral awards will not be discriminated against."⁴⁷⁵ This aim should remind you of the idea of national treatment, which we saw in international investment agreements. For a more detailed description of the substance of the New York convention, consider this excerpt:

Excerpt: New York Convention

Gary Born & Rachael Kent, Memorandum, July 17, 2009

The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")⁴⁷⁶ is widely regarded as the cornerstone of modern international arbitration, and it is widely credited with making international arbitration the most popular method of resolving international commercial disputes. The convention has been ratified by more than 135 nations, including all significant trading states and most major developing states.⁴⁷⁷ . . .

A. Key Obligations of Contracting States under the New York Convention

The New York Convention obligates contracting states to recognize and enforce international arbitration agreements and arbitral awards, subject only to limited exceptions.

1. Enforcement of Arbitration Agreements

With respect to arbitration agreements, Article II of the convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

⁴⁷⁵ 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the "New York" Convention,

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

⁴⁷⁶ United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

⁴⁷⁷ Gary B. Born, *International Commercial Arbitration* 99 (Kluwer Law International, 2009) [hereinafter Born].

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁴⁷⁸

Article II has generally been interpreted to require contracting states to recognize and enforce international arbitration agreements, provided that the agreement is in writing, unless the agreement is “null and void, inoperative, or incapable of being performed.” As a consequence, the courts in a contracting state may not allow an action to proceed in the courts if there is a valid arbitration agreement among the parties. Instead, the courts are required to dismiss the action and refer the parties to arbitration as provided in their arbitration agreement.⁴⁷⁹

Most authorities agree that the courts of contracting states should apply only internationally-accepted contract defenses – such as fraud, duress, or waiver – to their consideration of whether an arbitration agreement is “null and void, inoperative, or incapable of being performed.”⁴⁸⁰

Article II of the New York Convention is generally interpreted to prohibit the application of particular national requirements that discriminate against arbitration agreements.⁴⁸¹

Under Article II, a contracting state may exempt certain categories of disputes from arbitration altogether, and refuse enforcement of an arbitration agreement concerning such a dispute, by defining them under its own national law as disputes not “capable of settlement by arbitration.”⁴⁸² Many states exclude at least some specific categories of disputes from arbitration, including, for example, disputes concerning family law, employment, or consumer claims.⁴⁸³ In general, a state has broad latitude under the Convention to define what categories of disputes are non-arbitrable.⁴⁸⁴

2. Recognition and Enforcement of Arbitral Awards

With respect to arbitral awards, the New York Convention provides that contracting states must recognize and enforce arbitral awards that are “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought” and awards that are “not considered as domestic awards in the State where their recognition and enforcement are sought.”⁴⁸⁵ Thus, the New York Convention requires contracting states to enforce arbitral awards that were made in another state. Contracting states may extend the reach of the Convention to awards that were made within their own territory, by defining, through their own national legislation, certain categories of arbitral awards as “non-domestic” (e.g., awards involving a party

⁴⁷⁸ New York Convention, Art. II.

⁴⁷⁹ New York Convention, Art. II(3).

⁴⁸⁰ Born, at 707, 709-12.

⁴⁸¹ Born, at 495-97, 558-59.

⁴⁸² New York Convention, Art. II(1).

⁴⁸³ Born, at 772-91.

⁴⁸⁴ *Id.*

⁴⁸⁵ New York Convention, Art. I(1). The Convention also stipulates that it applies only to arbitration awards and agreements which arise from “defined legal relationship[s]”, but this requirement is not limited to contractual relationships and has been consistently interpreted broadly. New York Convention, Art. II(1); Born, at 256-58.

domiciled outside of the state). The Convention is not meant to affect contracting states' authority to regulate domestic arbitration awards.⁴⁸⁶

The obligation to recognize and enforce foreign arbitral awards is set out in Article III of the Convention:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.⁴⁸⁷

Under Article III, contracting states must recognize and enforce foreign arbitral awards and may not impose on foreign arbitral awards any procedural requirements more onerous than those applicable to domestic arbitral awards.⁴⁸⁸ Article VI requires a party seeking recognition and enforcement of a foreign arbitral award to provide in the local official language a "duly authenticated original award or a duly certified copy thereof" and "the original agreement [to arbitrate] . . . or a duly certified copy thereof."⁴⁸⁹

The New York Convention provides a list of narrow and exclusive grounds on which contracting states may refuse the recognition and enforcement of a foreign arbitral award.⁴⁹⁰ Under the Convention, foreign arbitral awards are presumed to be valid, and the party resisting enforcement has the burden of proving that one of the enumerated grounds is met.⁴⁹¹

The enumerated grounds in Article V are intended to allow courts in contracting states to refuse enforcement of foreign arbitral awards only where the arbitrators lacked jurisdiction, where there was a violation of a party's due process rights, or where the enforcement of the award would be contrary to the public policy of the enforcing state. The specific grounds are as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - a. The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - b. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which

⁴⁸⁶ Born, at 2364-65, 2380-81.

⁴⁸⁷ New York Convention, Art. III.

⁴⁸⁸ Born, at 2336-38.

⁴⁸⁹ New York Convention, Art. IV.

⁴⁹⁰ New York Convention, Art. V.

⁴⁹¹ *Id.*

contains decisions on matters submitted to arbitration may be recognized and enforced; or

- d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- e. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- b. The recognition or enforcement of the award would be contrary to the public policy of that country.⁴⁹²

These exceptions to the presumed validity and enforceability of foreign arbitral awards have been interpreted narrowly.⁴⁹³

In particular, Article V(2)(b), which allows an enforcing court to refuse enforcement where it would be “contrary to the public policy” of the enforcing state, is generally interpreted as referring to only the most fundamental public policies of the enforcing state. Many commentators argue that Article V(2)(b) can be invoked only if the “public policy” in question is broadly established and consistent with international principles.⁴⁹⁴ Thus, the public policy exception can be invoked to resist enforcement of an award that requires conduct that would be illegal under national law, or that itself violates fundamental, national laws.⁴⁹⁵

Just as Article II of the Convention allows contracting states to refuse enforcement of an arbitration agreement if it concerns a subject matter not capable of settlement by arbitration, Article V(2)(a) allows contracting states to refuse enforcement of an arbitral award if the “subject matter of the difference is not capable of settlement by arbitration under the law of that country.” As discussed above, many states have defined certain categories of disputes as non-arbitral under their own national law.

B. Reservations when Ratifying the New York Convention

A state acceding to the New York Convention may elect to make two reservations. First, a state “may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.”⁴⁹⁶ Second, a contracting state may “declare that it will apply the Convention only to differences arising out of

⁴⁹² New York Convention, Art. V.

⁴⁹³ Born, at 2721-22.

⁴⁹⁴ Born, at 2827-38.

⁴⁹⁵ Born, at 2838-40.

⁴⁹⁶ New York Convention, Art. I(3).

legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.”⁴⁹⁷

More than half of the contracting states have made the commercial reservation, including the United States, China, India, Indonesia, Malaysia, Nepal, Philippines, and Vietnam. . . .

The Convention does not define the term “commercial,” which is instead subject to the national law of each contracting state. Most courts and commentators have interpreted the term “commercial” broadly – and consequently, the exception to enforcement narrowly – but disputes do occasionally arise regarding whether an arbitral award concerns a “commercial” dispute and is therefore subject to enforcement under the Convention.⁴⁹⁸

Discussion Questions

1. What would Afghanistan have to do to take advantage of the Convention’s protection of the states’ ability to refuse enforcement of foreign arbitral awards if the subject matter of the dispute is not capable of settlement by arbitration under national law? For what subject matters do you think Afghanistan might want to refuse enforcement?
2. Under the Convention, can Afghanistan refuse enforcement of a foreign arbitral award if enforcement would violate a provision of Islamic Law? Make some arguments to support your answer.

V. CONCLUSION

International trade and investment law is a complex set of public international rules that limit how governments may exercise domestic regulatory authority. This area of law is becoming increasingly important for Afghanistan, particularly as foreign investment in Afghanistan increases and as the country gets closer to joining the WTO. With economic growth, Afghanistan’s international obligations regulated by international law will grow too. This chapter and this book have covered many of the most important concepts and laws that together constitute International Public Law. As the number of international treaties, agreements, and organizations to which Afghanistan is party, those lawyers, businessmen and politicians aware of the dynamics of international law will be best positioned to help Afghanistan navigate in the increasingly globalized world.

⁴⁹⁷ *Id.*

⁴⁹⁸ Born, at 260-67, 2361; Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 442 (Sweet & Maxwell, 2004).

GLOSSARY

- ◆ Admission: With respect to IIAs, Admission is the process of entering the country.
- ◆ Establishment: With respect to IIAs, Establishment is the process of settling and remaining in the country.
- ◆ Expropriation: In international law, expropriation is a state action reflecting the compulsory divestment of ownership for public purposes, e.g. nationalization (see below). Basically, expropriation is when a state takes away something that is owned by someone else.
- ◆ Intellectual property: Intellectual property, unlike real property, is the extension of the notion of ownership to items that are created by an individual or company, such as inventions, literary works, artistic works, images, business processes and so on.
- ◆ International Investment Agreements (IIA): IIAs are agreements between countries that govern cross-border investments, usually favoring the liberalization of trade. The agreement sets the rules for the investments, including permissible taxes, uses, and restrictions.
- ◆ Investment: An investment is an acquired ownership interest in some property for future financial benefit. An international investment is an ownership interest in some foreign property.
- ◆ Lasting interest: In terms of foreign direct investment, lasting interest is generally construed as being an ownership of more than 10% in foreign property.
- ◆ Most-favored nation treatment: MFN treatment refers to a relationship between states. One country agrees to give another country trade advantages as good as those that the country gives to the "most favored nation" of that country, meaning as good as the country that gets the best treatment, or is subject to the fewest barriers to trade.
- ◆ Nationalization: Like expropriation, nationalization refers to a state taking from someone something that is owned, and then putting it under state control. The private property in effect becomes property of the state.
- ◆ National treatment: When a country gives an individual, business or good the same level of benefits that it gives to its citizens, this is called national treatment. In international law, national treatment is used to describe the process of a country extending the same benefits to imports as it does to locally produced goods.
- ◆ Safeguard measures: As used in international trade, safeguard measures enable a country to raise barriers to trade to protect the domestic economy. In other words, a country that otherwise has agreed to eliminate barriers to trade may enact a barrier if it is the only way to prevent serious damage domestically.
- ◆ Subsidies: A subsidy is a government payment or reduction in tax to a company or individual.
- ◆ Trade: Trade occurs when two parties swap goods, services or property. International trade occurs when two parties, they can be states, international organizations or private parties, transfer goods, services or property.

- ◆ Trade liberalization: Liberalizing trade refers to the removal or reduction of barriers to trade, including tariffs, like duties or export subsidies, and non-tariff barriers, like quotas.
- ◆ Tariffs: A tariff is a tax placed on an import or export. A tariff is considered a barrier to free trade.