LAW 511 PUBLIC INTERNATIONAL LAW 1

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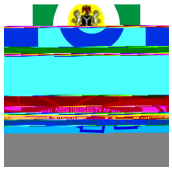

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TABLE OF CONTENTS PAGE

MODULE 1

UNIT 1 THE DISTINCTIVE NATURE OF INTERNATIONAL LAW - I

CONTENTS

1.0 INTRODUCTION

This unit seeks to introduce you to international law. Although it is introductory, some of the concepts remain contentious even now, and not everyone would agree with the views expressed here. This is important because it should be immediately clear to you that international law is not a static object of study. Indeed, its very 'legal quality' remains a matter of debate, while the continuing changes in international law give the subject a unique fluidity. Nevertheless, the core of this unit supports the view that international law really is 'legal' and that it is important that this perspective is understood.

Since the time of the removal of the Berlin Wall in 1989, the world has seen many important changes which are affecting the way international law is conceived and operates. In Iraq, a government and ruler have been forcefully removed by a US-led coalition, in circumstances whose legality has been strongly disputed. This has brought twentieth-century notions of sovereignty and the rules for the international use of military force into question.

The place of the United Nations is also in question, as is the broader picture of the world as a place of economic and political diversity. The power of the USA is unchallenged, and its will prevails in international relations. Unipolar military force may be imposing solutions that international law, lacking sanctions, is unable to achieve. In studying the basis and structures of international law in this course, therefore, we will continually be obliged to consider how international law can stand up to this challenge.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Explain why international law is law;
- Describe the distinguishing features of the international law regime;
- Explain and account for the differences between international law and domestic law;
- Appreciate the broad changes in international law since the nineteenth Century;
- Appreciate that international law will always have a political aspect;
- Understand that international law functions by making situations fit its categories;
- Understand why it may be seen as objective and politically neutral.

3.0 MAIN CONTENT

3.1 What is International Law?

Note: Before you begin your study of this unit, go to the reference and read the pages in the books referred to.

There is no agreed definition of international law and it is easier to describe the role of international law and the tasks it performs than to rely on a dictionary definition. The international legal regime (that is, the system of international law) may be described as 'consisting of a body of laws, rules and legal principles (sometimes not easy to isolate or identify as one or the other) that are based on custom, treaties or legislation and define, control, constrain or affect the rights and duties of states in their relations with each other'. Unfortunately almost every meaningful statement in that description may be queried or require modification as this course will illustrate. It is, however, a working model. Among the things it fails to take account of is the dynamic

quality of international law which has led -and is leading - to changes in both the subjects of international law and its content. Although states are still central to the international law regime there is no doubt that for some purposes at least, some international organisations such as the United Nations, the International Labour Organization and the World Bank are now subjects of international law. And individuals too have been granted subject status for some purposes.

It was traditionally thought that because international law governed the relations **between** states it did not affect their domestic arrangements. Because each state was said to be sovereign, this suggested that internally a state could behave as it wished. If this was ever true in practice, it certainly requires modification now. In particular, the development of human rights law places obligations upon state governments to conform to international norms in their domestic governance.

Sometimes international law is criticised for the lack of sanctions it is able to apply in the event of non-compliance or breach of obligation. Dixon, in your readings, answers this criticism by explaining that sanctions are not a necessary element of a legal regime. Nevertheless, as we shall see in the second semester, the criticism has not disappeared and remains relevant to the position adopted towards international law by some states.

Some writers, of whom Cassese is one, regard the development of international law as rather disappointing. Many would prefer to see it as a stage on the way to world governance in which the role of law would be much more like that in a domestic legal regime. Such goals, however, also have their own severe critics. These regret the way in which international law has come to constrain states in their internal conduct and sense a conspiracy to remove power from democratic states to a central and largely unaccountable body. This perspective too will be more fully considered in the second semester.

SELF ASSESSMENT EXERCISE 1

What is international law? (See *Feedback at the end of this unit)*.

SELF ASSESSMENT EXERCISE 2

i. Why is it argued that sanctions are not a necessary part of law?
ii. Why is the development of international law considered as disappointing?

3.2 The Differences between International Law and Domestic Law

Essential Reading

Cassese, Chapter 1: 'The main legal features of the international community', pp.3-10.

Read these pages now.

It is indisputable that there are significant and crucial distinctions between international law and domestic law. In international law there is of course no supreme legislature which can promulgate binding international laws. There is no international law-making body and no equivalent of a domestic legislature. The international legal regime is overwhelmingly, but not exclusively, one which requires the consent of those whom it would govern. International law can, by and large, be created only by consent - it can rarely coerce those state subjects who would not be bound. It is this that leads Cassese in your readings to suggest that the international law regime is best understood as a **horizontal** system of organisation rather than **vertical**. By this he means that whereas in domestic law, laws are passed down to the subjects from the law making body, in international law it is the parties themselves who make the law for themselves. Cassese regards this as unsatisfactory but it might be better seen as the necessary result of international law being concerned primarily with rules directed to sovereign states.

Similarly there is no international court before which states in breach of international law may consistently be forced to appear. There is an International Court of Justice (which we will consider next semester) but this concerns itself only with disputes between parties who have standing before the Court (and only states do have standing if the Court is to make an authoritative ruling rather than giving an advisory opinion). The Court has no role in punishing states in breach of their international law obligations. Its role is to resolve disputes between states, and without use of sanctions. And although some states have accepted the compulsory jurisdiction of the International Court of Justice this will only be effective in disputes between states where all parties to the dispute have accepted that compulsory jurisdiction. A minority of states do so. More frequently the Court will have jurisdiction only where the parties to the dispute consent to the jurisdiction of the Court for a particular dispute. Thus here too the emphasis remains upon consent.

This emphasis on consent rests upon two crucial, but not natural, facts. The first is that each state is said to be sovereign in its own territory.

This does not mean that the rulers of any state can rule with utter impunity. Humanitarian law in particular has been accepted (generally, if not in particular cases) as constraining states in their internal governance. Nevertheless there is universal acceptance that while subject to some qualifications, sovereignty gives total control of domestic jurisdiction (discussed further in Module 2 Unit 2). This remains true even though a state may willingly accept limits upon its sovereignty, as have for instance the states of the European Union.

The second fact is that there is universal acceptance of the sovereign equality of states - that is, each is equal in its sovereignty. Needless to say, and this does have implications for the arguments presented in this course, the sovereignty is formal and legal in its equality rather than actual. The relative power of states does not alter this aspect of equality. Just as under the rule of law, each individual has formal equality before the law, so in international law each state is equal. This acceptance of sovereignty and sovereign equality makes clear just why it is generally unrealistic to expect a greater level of coercion and sanction in international law than presently exists.

SELF ASSESSMENT EXERCISE 3

Explain and account for the differences between international law and domestic law. *(See Feedback at the end of this unit)*.

SELF ASSESSMENT EXERCISE 4

i. State the major differences between domestic law and international law.
ii. Why does Dixon argue that international law exists as a *system* of law?

3.3 The changing nature of international law

Essential Reading

Cassese, Chapter 2: 'The historical evolution of the international community', pp.22- 45. Read these pages now.

The reading you have completed from Cassese suggests that it is useful to recognise four major stages in the development of international law. His history will reinforce the argument that it is largely to be found in the history of Europe. This is certainly true of the first two stages and partly true of the third. What emerged as international law in the first period up to 1914 were almost exclusively rules governing the relations between states. Overwhelmingly this was inter-state regulation and

individuals scarcely figured at all. Of course, in so far as states have always been inanimate entities, the reality was that international law governed the relationships between state governments (composed of people but in their official capacity). It has been suggested that this period should be seen as one in which international law was primarily descriptive in that it described how states generally conducted affairs with other states, but was hardly normative - it did not seek to direct states as to their conduct, but merely recognised practice. In particular there was little or no restraint upon the threat or use of force by states powerful enough to do as they wished. Such international rules as there were reflected the interests of those same states.

Following the First World War, with the creation of the League of Nations and the Permanent Court of International Justice (PCIJ) (the forerunner of the International Court of Justice), perspectives on world organisation changed significantly. The creation of the League of Nations recognised for the first time the importance of a structure that could take part in the governing of relations between nations. One of its central goals was to limit the right of states to resort to war to a number of stated causes, and it also provided for cooling off periods before resort to war. The PCIJ was available for the adjudication of disputes.

These changes could not be described as dramatic in their effect. And of course the League of Nations failed to preserve peace. Its efforts were hindered by the decision of the USA to remain outside of the League and by the non-participation of the Soviet Union. The Bolshevik revolution in Russia in 1917 also challenged such economic and political consensus as existed in Europe. The League did not challenge the European colonial empires and some argued that French and British influence in the League was excessive.

Nevertheless the War had concentrated minds to the extent that it became fashionable to emphasise the desirability of peace. In 1928 the Paris Pact on the Banning of War was signed, though its effects were hardly satisfactory. The judicial structure of the PCIJ survived although it achieved less than its advocates had anticipated.

One aspect of the League's functioning remains historically important. Under its auspices many Minority Treaties were negotiated. These were more important as precursors of human rights protection in international law than as successes in their own terms. Peace treaties negotiated at the end of the War insisted that certain nation states with significant ethnic minorities accepted, in return for recognition (discussed further in Module 1 Unit 5), agreements to protect the rights of these minority populations. The responsibility for guaranteeing and supervising these treaties was allocated to the League, which developed a (rather

ineffective) 'minority petition procedure' which has been described as the procedure that initiated trans-national claims making. You should remember a final point. Although the Minority Treaties were implicitly about human rights, they were concerned not with the rights of individuals but with those of groups or collectivities.

Developments in Cassese's third period are continuing in their significance. The end of the Second World War led to:

(a) the creation of the United Nations
(b) the Nuremberg trials which asserted that individuals had responsibilities in international law
(c) the development of concepts of self-determination and an era of decolonisation with ex-colonies at last able to contribute to international law creation.

The principal goal of the UN was to be the preservation of peace, stimulated, as your reading observes, by the potential of nuclear weapons to annihilate humanity. Also of great and continuing international law significance was the drafting and signing of the Universal Declaration of Human Rights - not least for its assertion of individual human rights. Most of these developments will be discussed in subsequent units because they all remain of importance in the present role of international law.

Much the same may be said of Cassese's final period, from the end of the Cold War to the present, although the significance of the changes wrought by the end of the USSR is still by no means clear. What is clear, however, is that the end of the Cold War dramatically changed the balance of power between states. Because of the frequent use of the veto in the Security Council between 1948 and 1990, actions by the UN aimed at preserving or creating peace had been very limited. Many thought that the demise of the USSR would enable the UN to become much more powerful and active. The first Gulf War, aimed at restoring the sovereignty of Kuwait, seemed to suggest that this might be the case. In fact the outcome has been distinctly mixed, although as we will see in second semester, changes have occurred both in the actions of the UN and in international law, prompted in part by the terrorist attacks upon the US in 2001.

The other major change in inter-state power relations has been the rise of the USA to become the only world super-power. The significance of this for the international legal regime is discussed next semester.

4.0 CONCLUSION

In conclusion, the development of international law has arisen from reactions to the results of historical events rather than as spontaneous legal reform.

5.0 SUMMARY

It is because the world is not organised as if it were a single state that we should not and cannot expect to find state institutions in world organisation.

6.0 TUTOR MARKED ASSIGNMENT

1. Why do you think international law has not developed as a form of world government?
2. What are the major features of Cassese's four stages in the development of international law?

7.0 REFERENCES/FURTHER READINGS

Dixon, Chapter 1: *'The Nature of International Law and the International System'*, pp.1-20.

Cassese, Chapter 1: *'The Main features of the international community'*, pp.3-17.

Kaczorowska, Chapter 1: *'History and Nature of International Law'*, pp. 1-11.

FEEDBACK ON SELF ASSESSMENT EXERCISES 1 & 3

SELF ASSESSMENT EXERCISE 1

This requires a consideration and synthesising of the readings. International law is first and foremost the means by which the relations between nations are regulated. But because international law usually depends upon the consent of those it governs, international law is not identical to domestic law. Rather international law is said to be a horizontally organised system rather than a system where the rules come down from legislatures. Although states are the main subjects of international law this does not preclude other bodies, or even individuals, from being subjects for some purposes.

SELF ASSESSMENT EXERCISE 3

Describing the differences is straightforward. To account for them is less easy. The differences derive from the fact that the international system does not mirror the organisation of a state. Because the relationship of the subjects of international law is usually one of formal sovereign equality, a majority has no power to promulgate rules for the minority. In addition, there is no equivalent of a domestic constitution and hence no division of powers.

UNIT 2 THE DISTINCTIVE NATURE OF INTERNATIONAL LAW - II

CONTENTS

1.0 INTRODUCTION

Since the time of the removal of the Berlin Wall in 1989, the world has seen many important changes which are affecting the way international law is conceived and operates. In Iraq, a government and ruler have been forcefully removed by a US-led coalition, in circumstances whose legality has been strongly disputed. This has brought twentieth-century notions of sovereignty and the rules for the international use of military force into question. The place of the United Nations is also in question, as is the broader picture of the world as a place of economic and political diversity. The power of the USA is unchallenged, and its will prevails in international relations. Unipolar military force may be imposing solutions that international law, lacking sanctions, is unable to achieve.

In studying the basis and structures of international law in this course, therefore, we will continually be obliged to consider how international law can stand up to this challenge.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Understand that international law functions by making situations fit its categories;
- Understand the method of international law.

3.0 MAIN CONTENT

3.1 International Law and Common sense

Essential Reading

Cassese, Chapter 3: 'The fundamental principles governing international relations', pp.46-68.

This reading is obliquely relevant to this section but a quick reading will help you to understand the section. Read these pages now.

One issue that is important to think about at the beginning of this course is the assertion that is sometimes made that the international law way of understanding the world is actually very 'Eurocentric'. What is asserted is that although the method of international law looks very reasonable and obvious to those trained in the common law or civil law tradition, in fact it is important to be able to see it as something contingent rather than necessary. This means that we have to be able to appreciate that international law is not common sense but a particular way of attempting to deal with international relations and problems.

The foundations of current international law were laid in an era which predates the creation of the majority of nation states. Equally clearly the antecedents of international law are overwhelmingly European (within which, for this purpose, we should include the United States) and the system was one which evolved in a time of European hegemony, most overtly expressed through colonialism. Because of this it can be persuasively argued that the international legal regime is crucially European in its method and in its ideology.

What is meant by this is that an argument may be made (and probably should be made) to the effect that international law reflects **one** particular way of perceiving the world, in which even the most fundamental premises underlying the system - such as those of the nature of sovereignty, and even the acceptance of the principle of *pacta sunt servanda* (roughly translated as 'treaties must be observed' but with rather wider implications) – are arguably imbued with Western perceptions.

Before discussing the significance of this further, a broader but related point must be made. It is not insignificant that most (British in particular) international law textbooks seem implicitly to reject the assumption that international law is intimately and necessarily interrelated with contemporary international events.

The inference to be drawn from the content of some of the most eminent texts is not only that law is separate and distinct from political

relationships and international relations, but because of this, a study of international law can be a very pure one indeed. (Rather like pure mathematics which remains a sensible subject even though its applications may be entirely absent.) To the extent that the political world does impinge upon such texts, it tends to be a historical rather than contemporary world, and it is a history which is usually decontextualised and 'objective'. History, if necessary, is treated as an uncontested series of facts. Very often if the greatest international events appear at all, they appear only in the form of desiccated legal decisions or opinions.

The majority of such texts also have a remarkably standard set of contents, with the main differences to be found in the depth of analysis and variety of emphasis. Such orthodoxy should breed suspicion, particularly if it is accepted that any study of international law must be concerned with the politics that underlie it, the power relations that it may disguise, and the ideology that the law way of thinking conceals. In turn it should be clear that the ideological assumptions which underpin international law are not only to be found in the content of international law but equally in the very process and procedure of the law.

To illustrate this proposition it is useful to consider one exception to the generalisation about British international law textbooks. This is Antonio Cassese's *International law in a divided world* which, although written while the Soviet Union was yet extant (in 1986), remains pertinent. In this book written 20 years ago, Cassese does address the lack of universal acceptance of international law method. His argument with regard to the so-called 'developing' countries and the 'socialist states' (obviously inappropriately labelled but nevertheless significantly different from the liberal capitalist states of the West at the time when he was writing) is that there are crucial differences in perceptions in, or of, international law.

At this point mention is made of only his assessment of the ideological perception of the governments of certain African states. Obviously, given the very different cultural traditions of these states and their inhabitants, with emphasis upon lineage and clan, a different perception of international law is not unlikely. Cassese suggests that for such states international law cannot be seen as an abstract problem solver (as it often appears in textbooks and international texts); rather 'to them international law is relevant to the extent that it protects them from undue influence by powerful states and is instrumental in bringing about social change with more equitable conditions stimulating economic development'.

Whether or not we are comfortable with such enormous generalisations is less important than the consequences that are drawn from the statement. Cassese argues that it is because of this generalisation that we can see many developing states very much preferring to 'elaborate general principles as opposed to detailed and precise legal rules', and he uses a telling quotation from an Egyptian international lawyer which requires comment:

> ...in dealing especially with the Western countries, anything which could be formulated in the very precise terms of an operational rule was considered nonsense [by developing countries] while Third World representatives in general attached great weight to general principles which sometimes could not be refined into operational rules. If we look at the same thing from a different point of view I would say that in most cases the attitude of the Third World was defined by the total effect of a proposed solution...I think that the Western powers put too much emphasis on the mechanistic elements [of law] while for Third World countries if by going through all the motions and respecting all the procedural rules you end up with an unjust solution, this would be bad law. And if you have a general directive, even if you cannot reduce it to very precise procedural rules, it is still good law, though it may be imperfect in terms of application.

In some ways that quotation summarises a fundamental distinction in perceptions of international law in particular (but also, to some extent, of municipal law). It is of the essence of the law way (meaning the 'rule of law way') of dealing with the world, that the rules precede the facts to which they are to be applied. Indeed it is this that makes the writing of 'pure international law textbooks' apparently sensible. It is also of the essence of both contract law and treaty law that in general, rules are laid down providing for future possibilities. To most of us this seems, no doubt, obvious and sensible but the quotation should highlight the potential shortcomings of the structuring of rules to ensure justiciable disputes (disputes in a form that allows law to be applied).

If the application of rules or treaty provisions, or even contracts, leads to results which one party is very unwilling to accept, particularly arising from situations unforeseen or unexpected at the time of the rule or contract formulation, then those who do not identify with the Western view of international law might well consider it dysfunctional. The preoccupation of international lawyers with the need to structure problems in a way which makes them justiciable is of central importance. Indeed, from the perspective of Western international lawyers, treaties, rules or resolutions which do not allow the formulation of problems in this way are often accorded significantly less respect. (A point to which we will return.)

Crucially (and this proposition underlies much of the argument of this course), only if the 'rule of law' approach to international law is seen as a particular way of organising the world, rather than as common sense, can we begin to appreciate the significance of international law in the international community as a whole. What have been suggested to be singular about the international law way of encompassing the world is both:

1. 'rule magic', by which I mean that situations in the future are governed by rules which, when made, had either not contemplated the facts of all future cases or, when they were made, they were made without the participation of a party now said to be subject to them; and

2. the method by which social facts are translated (or selected) as legally relevant.

What always distinguishes legal disputes from other disputes will be the structuring of the issues whereby many of the facts which parties (or at least one party) to the dispute might think important are irrelevant for the purposes of legal resolution.

What is the significance of this? Firstly it should be made clear that in translating social and political situations into the legal world, one effect is often to apparently de-politicise a dispute. Legal questions have an appearance of legal objectivity and political neutrality. It is the law which is being questioned and considered and this **seems** very different from political dispute. This will be further considered in Unit 4 of Module 2. You should appreciate nevertheless that law questions do, in fact, always have a political dimension, as indeed does the law itself.

3.2 Why should international law be defined as law?

Essential Reading

Dixon, Chapter 1: *'The Nature of International Law and the International System'*, pp.1-20.

Most international lawyers would claim that what distinguishes international law from international relations and brings it within the definition of law is that it is a 'distinctive mode of discourse' - that is, the law way of discussing international issues is distinctive because of the rules, procedure and process which it brings to bear upon questions. Indeed even the formulation of the questions in a dispute will be affected by the input of international law knowledge.

Secondly, every state does accept the existence of international law as something distinct from ordinary international intercourse. Dealing with the second point first, this acceptance of the reality of international law by states is important in the refutation of those who suggest that international law is not really law. In domestic law it can be argued that the fact that laws are often broken and wrongdoers often escape punishment is of only marginal importance to the existence of law. Much more significant is that most citizens have actually internalised the values of criminal law even if they do not agree with them. Domestic wrongdoers very seldom attempt to deny the authenticity of the law; rather they try to justify their transgression.

This is just as true in international law. When Saddam Hussein ordered the invasion of Kuwait in 1990 he did not announce that he intended to flout or, worse still, ignore international law. Rather he attempted, perhaps not terribly convincingly, to defend his actions as being consistent with international law. Thus he not only suggested that the invasion was legitimate self defence but he also referred to historic Iraqi claims over the territory of Kuwait.

When the United States invaded Grenada in 1983 it too, albeit belatedly and a little half-heartedly, attempted to justify the invasion legally. The fact that the 'justification' withstood little scrutiny is less important for our argument than the fact that the United States felt bound to make it. Very much the same was true of the US invasion of Panama to capture General Noriega. Even the claim by China that both Tibet and Taiwan are integral components of the Chinese territory is couched in terms calculated to appeal to international law.

More recently the intervention by NATO in the territory of the former Republic of Yugoslavia was defended as being consistent with international law; while it is argued (at least by Israel and the United States) that Israel's activities in Palestine are not necessarily a breach. Most recently of course has been the bitter legal debate concerning the intervention of the US 'coalition' in Iraq. Quite remarkably the debate over the legality of the intervention has been absolutely central to the debate over intervention itself. There are those, both teachers of international law and politicians, who argued forcefully that the matter should have been finally resolved by its persuasively argued illegitimacy. This debate was very important in the 2005 general election in the UK.

And as Brierly (an eminent UK authority on international law) wrote in 1944:

> The best evidence for the existence of international law is that every actual state recognises that it does exist and that it is itself under obligation to observe it. States may often violate international law, just as individuals often violate municipal law, but no more than individuals do states defend their violations by claiming that they are above the law.

As to the first point, the distinctiveness of international law derives in part from its sources and origin. International law and laws essentially came into existence either through treaties (which obviously require the consent of those who are to be bound by them) or through custom, and usually, but not always, custom which has been long established. Of course not all custom is held to be international law, rather only that which has been regarded by states as legally binding custom. Thus custom becomes international law only when the states observing the custom do so in the belief that the custom is indeed a part of international law.

The fact that there is no law-creating legislature really, it can be argued, simply reflects the reality of sovereignty. As Shabtai Rosenne observes in a book published in 1984, 'International law is a law of co-ordination not as is the case of most internal law, a law of subordination. By law of co-ordination we mean to say that it is created and applied by its own subjects, primarily the independent states (directly or indirectly), for their own common purposes.'

But let us return to the argument that the law way of dealing with international issues is a distinct way (that is to say that legal discourse is distinguishable from the language of general international relations). In domestic terms it can be argued that what distinguishes most clearly the law way from the social way of resolving disputes is that law always requires a **translation** of social facts into legal facts. This is no less true of international law.

But the argument also suggests that this necessary translation is both law's greatest strength and paradoxically its greatest weakness. It is a strength in that when a dispute is put in legal terms with legal issues, it becomes legally resolvable in that there will be (almost invariably) a legal solution to the legal problem. It may also be a weakness because the resolution, while it will resolve the legal issue, may not resolve the social (untranslated) problem. The law way of resolving disputes works 'best' when all the parties to the dispute accept the legalisation of the dispute.

Very much the same applies in international law, which is a central factor in explaining the reasons why only a minority of states accept the compulsory jurisdiction of the International Court of Justice. There is

little point in having a dispute legally resolved if the underlying political problems remain. Unless the parties to the dispute, together with the constituencies they represent, accept that the legal outcome **resolves** the problem, the resolution itself may in fact simply lead to further disputes.

In due course when we consider at some length the role, effect and politics of the International Court of Justice, this argument will be made by reference to selected cases which have come before it. Suffice to say at this point, that while any number of cases could be selected to illustrate the proposition, a crucial feature of the translation from social to legal dispute will always be concerned with the initial selection of **legally relevant facts.** Almost invariably the selection of these facts not only structures the legal issues and thus the questions for judgment, but involves at the least a modification of the political arguments.

SELF ASSESSMENT EXERCISE 1

What distinguishes international law from international relations? *(See Feedback at the end of this unit)*.

4.0 CONCLUSION

In conclusion, international law should be understood as a particular way of governing international relations rather than as common sense.

5.0 SUMMARY

International law is a way of regulating the relations between nations which is distinctively legal. The lack of sanction for non- compliance or breach, even where true, does not destroy the legal quality.

6.0 TUTOR MARKED ASSIGNMENT

Are there any consequences to a conclusion that international law reflects a 'Western' way of understanding the world?

7.0 REFERENCES/FURTHER READINGS

Dixon, Chapter 1: *'The nature of international law and the international system'*, pp.1-20.

Cassese, Chapter 1: *'The main features of the international community'*, pp.3-17.

Kaczorowska, Chapter 1: *'History and nature of international law'*, pp. 1-11.

Roseanne, S. *Practice and Method of International Law*. (Dobbs Ferry, NY: oceana Publications, 1984)

FEEDBACK ON SELF ASSESSMENT EXERCISE 1

International law is a different way of understanding issues that arise in international relations. It has been described as a distinctive 'mode of discourse' by which is meant that it functions by selecting facts which allow a ‘judicialisation’ of issues. The art of international law lies in selecting legally relevant facts, which often will not be those of most relevance in the eyes of the parties.

International law can be seen as one of the tools of international relations.

UNIT 3 THE SOURCES AND METHOD OF INTERNATIONAL LAW - I

CONTENTS

1.0 INTRODUCTION

In domestic law the question of the source of a rule or law is seldom controversial. Common law systems rely upon statutes and the decisions to be found in court judgments for evidence of the existence of the rule or law; civil law systems rely upon the appropriate legislation or codes. It is rarely necessary in either system to inquire whether a legal rule is in fact a legal rule and its existence, if not its interpretation, will be uncontroversial. Exceptionally a further question may arise as to the legitimacy of the rule. If it does it will usually concern the status of the rule that might be affected by procedural defects, or be beyond the power of the body that purported to create it. When such a question does arise there are other rules and procedures that allow for the testing of the validity of the rule in question.

Various authors have described such domestic systems in terms of primary and secondary rules. The rules that simply govern conduct are the primary rules, while the 'rules about the rules' (that is, those used to determine their legitimacy) are said to be secondary.

International law presents different problems, which is why all international law textbooks have a section devoted to the question of sources. Significantly there is no agreed statement about what does constitute a source of international law. Thus questions relating to the secondary rules are not only more frequent, but also more difficult to resolve. The validity or reality of international customary rules is often contentious and many cases turn on whether the existence of a rule can be proven.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Understand why the question of sources receives a different answer in international law from that in domestic law;
- Understand that customary international law is still a matter of contention both in the manner in which it is created and in its application;
- Describe the content of Article 38 of the Statute of the International Court of Justice;
- Recognise that treaty and customary international law are overwhelmingly the major sources of international law;
- Understand the meaning and impact of the peremptory norms of international law *(jus cogens)* upon treaties.

3.0 MAIN CONTENT

3.1 Article 38 of the Statute of the International Court of Justice

Essential Reading

Cassese, Chapter 8: 'International law-creation: custom', pp.153-55.

Dixon, Chapter 2: 'The sources of international law', pp.21-24.

Kaczorowska, Chapter 2: 'Sources of international law', pp.12-14.

Read these pages now.

The closest approximation to an authoritative list of relevant sources, and the one usually quoted, is to be found in Article 38 of the statute of the ICJ. This states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognised 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. subject to the provisions of Article 59 ['The decision of the Court has no binding effect except between the parties and in respect of that particular case'] 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.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* et *bono,* if the parties agree thereto.

Of course what you will notice is that this is not a general statement of sources but an instruction to the ICJ as to the law the Court is to apply in disputes before it. It has been argued that even in its own terms as a general statement it is inadequate, because it is not complete. Nevertheless, so overwhelmingly dominant are the sources of treaty and 'international custom, as evidence of a general practice accepted as law' (customary international law) that it is these with which we will be primarily concerned.

In your Cassese reading he makes the point that custom and treaty can be seen as closely related. Both rely upon the consent of the parties to be bound, but in customary international law the consent **is tacit or implicit** whereas in treaty it is **expressed** and **explicit** Nevertheless they do differ, in that customary law comes to affect all states, whereas treaties are generally confined in their effect to the states that are parties. But sometimes a treaty may simply explicitly state a rule of customary international law and sometimes, where the terms of a treaty are very widely accepted by states that are not parties to the treaty, they may develop as customary international law.

This will become clearer in your next readings.

SELF ASSESSMENT EXERCISE 1

What is the status of Article 38 of the Statute of the International Court of Justice? Could the sources of international law be clarified? How?
(See *feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

What are the sources of international law? Is Article 38 sufficient to define them?

3.2 International treaties

Essential Reading

Dixon, Chapter 2: 'The sources of International Law', pp.24-28.

Cassese, Chapter 9: 'Treaties', pp.170-82.

Kaczorowska, Chapter 2: 'Sources of International Law', pp.14-15.

The major contemporary source of international law is the treaty. Treaties may be bilateral (between two states) or multilateral (where there are more than two states). Generally speaking, treaties will be binding only upon the state parties to any particular treaty and the nature of the obligation will be defined within the treaty. The generic term 'treaty' covers a multitude of international agreements and contracts between states. As well as those describing themselves as treaties the term may include conventions, pacts, declarations, charters, protocols and covenants.

The binding nature of treaties lies at the very heart of international law and is derived from the *pacta sunt servanda* principle, which roughly translates as 'promises must be kept', or, more precisely with regard to treaties, as 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Quite what the status of this principle is, is a more complex question than it might appear. Some have argued that it is a basic customary international rule, others that it is simply a premise upon which the edifice of international law is built. Either way, although it may be criticised it is difficult to envisage any international legal system in which state promises were not overwhelmingly regularly kept, and even sometimes enforced.

But it is important to realise that the principle is not as neutral as is often assumed. As will be seen in the ICJ case of the *Gabcikovo-Nagymaros Project* (discussed in Module 2 Unit 5), the effect of the principle may both directly impact upon and constrain democratic decision making. It was also argued in the previous unit that the very concept of being bound by an agreement even when faced with changed (but not fundamentally changed) circumstances is a quintessentially Western legal way of interpreting the world.

While there are obvious similarities with contracts in domestic law there is of course no need for consideration in the contractual sense, and the benefit may be all one way. And although Article 52 of the Vienna Convention on the Law of Treaties (1969) (which is considered in Module 2 Unit 4) provides that a treaty will be void if its conclusion 'has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, this is the only sort of coercion accepted as necessarily voiding treaties according to the Vienna Convention.

Indeed, the fact that the Vienna Conference issued a separate 'Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties' strongly suggests that such

coercion, though it may not be acceptable, is nevertheless not (at least necessarily) contrary to international law and will not have the effect of making such a treaty void.

This is important because mere sovereign equality cannot disguise extraordinarily unequal economic or other bargaining power in treaty negotiation. One recent example where a coerced treaty would not have been void had it been concluded was the so-called 'Rambouillet Accords' (Interim Agreement for Peace and Self-Government in Kosovo) of February 1999 which Serbia was pressed to accept. Others are less controversial because they are less well known, and this is particularly true of trade agreements. The result of a breach of a treaty obligation will often be defined by the terms of the treaty.

SELF ASSESSMENT EXERCISE 3

'International conventions or treaties are the only way states can consciously create international law.' (Dixon, p.24.) Discuss. (See *feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 4

What does Dixon say of the debate between those who argue that treaties create law and those who argue that treaties impose obligations which the 'law' says must be carried out?

3.3 Treaties and *jus cogens*

Essential Reading

Cassese, Chapter 11: 'The hierarchy of rules in international law: the role of *jus cogens;* pp.201-12.

Dixon, Chapter 2: 'The Sources of International Law', pp.37-38.

Kaczorowska, Chapter 2: 'Sources of International Law', pp.33-36.

There is one significant constraint upon terms which may be included within a treaty. Article 53 of the Vienna Convention provides that:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified

> only by a subsequent norm of general international law having the same character.

This is extended by Article 64 to provide that where new peremptory norms of international law arise, any existing treaty which is in conflict with the norm becomes void and terminates. What are such peremptory norms (also known as *jus cogens)* and what is their significance? At their broadest they are rules of almost international constitutional importance. Their significance is that there exists a body of principles accepted by the international community as a whole that are of such fundamental gravity as to ensure that no treaty which contemplated their breach would, or could, be valid. Examples would be 'the establishment or maintenance by force of colonial domination, slavery, genocide or apartheid' (from your Cassese reading), together with the crimes enumerated in the Geneva Conventions, 1949.

Unfortunately, while some principles such as the prohibition of genocide are accepted and uncontroversial as peremptory norms, there is widespread disagreement as to the status of other norms. Thus while many would argue that the principle of the prohibition of the use of force in international relations as laid out in the United Nations Charter has achieved this status, subsequent practice makes this doubtful and less than clear. Surprisingly this is so notwithstanding the agreement between both parties in the *Nicaragua (Merits) Case* (referenced in your reading) that the prohibition of the use of force had come to be recognised as *jus cogens.*

4.0 CONCLUSION

In conclusion, Article 38 indicates the sources of international law, but because it is directed to the ICJ it should not be regarded as definitive. Customary international rules that are regarded as fundamental and have the status of peremptory norms may not be excluded by treaty. Any attempt to do so will arguably render such a treaty void.

5.0 SUMMARY

Treaties are voluntary (subject to some qualification) agreements between two or more states generally binding only upon the parties. Unlike contacts in domestic law there need be no consideration and all the benefit may flow to one party. Reservations to treaties allow states to accept treaties on their own specified terms. These will only be acceptable if they are compatible with the treaty itself. Reservations limit the obligations of other parties in their relations with the reserving state.

6.0 TUTOR MARKED ASSIGNMENT

Why do you think peremptory norms have developed in international law? What are the political views that created a debate?

7.0 REFERENCES/FURTHER READINGS

Cassese, Chapter 8: 'International Law-Creation: Custom', pp. 153-69; 170- 82.

Dixon, Chapter 2: 'The Sources of International Law', pp.21-48.

Kaczorowska, Chapter 2: 'Sources of Multinational Law', pp.12-36.

FEEDBACK ON SELF ASSESSMENT EXERCISES 1 & 3

SELF ASSESSMENT EXERCISE 1

Article 38 of the Statute of the International Court of Justice is apparently restricted in its application, being directed only to that court. However (possibly because there is no other authoritative statement) Article 38 is generally accepted as a starting point in the definition of sources. Because of a lack of agreement it is difficult to clarify the sources of international law. In addition, of course, there is no body with the power to lay down such a definition.

SELF ASSESSMENT EXERCISE 3

This would seem to be a statement that is largely but not entirely true. Unanimity or something approaching it in a General Assembly Resolution might have the same effect. It can also be argued that most treaties, rather than creating law, create obligations which the law will enforce.

UNIT 4 THE SOURCES AND METHOD OF INTERNATIONAL LAW - II

CONTENTS

1.0 INTRODUCTION

The point has been made in earlier units that the sources of international law are not the same as those in domestic law. You should remember, too, that the two major sources creating legally binding rules of international law are treaty and custom. This unit considers those sources and, briefly, other sources.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Understand the meaning and significance of reservations in multilateral treaties;
- Understand the concept of customary international law;
- Appreciate the nature and quality of sources beyond custom and treaty;
- Appreciate the nature and quality of 'soft' law and its relationship to hard law on the one hand and political discourse on the other.

3.0 MAIN CONTENT

3.1 Treaties and Reservations

The final aspect of treaties that must be considered in this guide concerns reservations, defined in Article 2(1) (d) of the Vienna Convention on the Interpretation of Treaties as meaning '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'. Reservations are of significance here for two reasons. The first is that reservations essentially recognise the necessity of consent by a state to all the terms of a treaty by which it is bound. This in turn, because of the principle of reciprocity, means that a reservation established with regard to another party to the treaty:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
(b) modifies those provisions to the same extent for that other party in its relations with the reserving State, as is stated in Article 20 of the Convention.

Thus no party to a treaty can be bound to a greater extent as against any other party than that party is itself bound. Any reservation by a state also limits the obligations of other states towards the reserving state to the same extent as the reservation.

The second matter of note is that reservations are often used in a way which has a very significant effect upon the obligations apparently accepted and undertaken. The so-called compulsory jurisdiction provision in the Statute of the ICJ (Article 36(2)) which provides that the state parties to the Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation the jurisdiction of the Court in all legal disputes concerning:

(i) the interpretation of a treaty
(ii) any question of international law
(iii) the existence of any fact which, if established, would constitute a breach of an international obligation
(iv) the nature or extent of the reparation to be made for the breach of an international obligation

has been accepted by some 65 states. But of these many have provided declarations which reserve substantial areas of dispute from compulsory jurisdiction. There is always a question as to when such reservations must be seen as incompatible with the treaty itself, as is discussed in your readings with regard to the *Genocide Convention (Reservations) Case* of 1951. Reservations will generally be acceptable so long as they are not incompatible.

SELF ASSESSMENT EXERCISE 1

What complications do you envisage arising from the existence of separate and different individual state reservations to multilateral treaties? (See *feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

In what ways and to what extent do reservations to treaties by one state affect the obligations of other states?

3.2 Customary International Law

The concept of international customary law is not easy to understand. It is usually said (as in Article 38) that there are two elements required. The first is the custom itself, but only custom which evidences a general practice accepted as law. The second element, commonly entitled *opinio juris sive necessitatis* (opinion as to law or necessity), means that only where a state complies with custom **in the belief that it is legally required to do so** will law be evidenced.

As to the element of custom, it has been held by the ICJ that the requirement is that state practice should be 'both extensive and virtually uniform' *(North Sea Continental Shelf Case* (1969) as discussed in Dixon and Cassese), although it need not be absolutely consistent. On the assumption that this may be proven (evidenced by state practice), this element presents no difficulties. The second element, however, is sufficiently opaque to have warranted a plethora of academic articles and discussions within textbooks.

The concept of customary international law derives from a time when international law was overwhelmingly the law of (and between) nations. In the nineteenth century international law was very much more concerned with **describing** the actual conduct of states in their relationships with each other, rather than with **prescribing,** by which I mean that it was concerned to encompass what nations in fact did, rather than what they ought to do, or ought to have done. Under those circumstances it was perhaps easier to infer *opinio juris* from state conduct. But now the obvious difficulties are not readily resolved.

The statement that it is necessary to show that compliance arose because of the state's belief that it was legally required to comply, implies a mental element from a non-sentient legal personality which is merely an institution, albeit reified (turned into a social fact). Institutions as such are capable of many things but such mental apprehension is not one of them. The *opinio juris* is to be inferred from the words and actions of

personnel within the institution whose status so empowers them. More particularly, examples of state practice required to evidence *opinio juris* include official government statements, diplomatic exchanges between governments, the opinions of national legal advisers, national legislation, bilateral treaties, decisions of national courts, and possibly also voting patterns of a state in an international organisation.

Even more significant is the difficulty of what Michael Byers, in a book on international law, calls 'the chronological paradox' and which has been observed by many writers. If, as was stated in the *North Sea Continental Shelf* cases:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.

Then it is difficult to see how new customary rules could ever develop since the required *opinio juris* could only exist where the custom or rules already had that legal element.

You should also remember the concept of the **persistent objector** in international customary law. Because law requires consent to develop, it has been accepted (with some qualification) that where a state makes it clear that it does not agree with rules which appear to be crystallising into law, that objecting state will remain unbound. The qualification is that where a rule receives overwhelming acceptance over a period of time by very many states, then even a persistent objector may come to be bound.

This in turn leads to a further problem. On the one hand customary international law is said to be constantly developing, and yet on the other hand, quite how it can develop is not clear. A former US Attorney-General, Bill Barr, was reported to have said, 'Well, as I understand it, what you're saying is the only way to change international law is to break it.' This aptly captures the difficulty of creating new custom sufficient to gestate international law.

Here too the question of power becomes relevant. Shabtai Rosenne once observed that the creation of customary international law was rather analogous to animals creating a track through a jungle, in that each animal following the trail left its imprint but the bigger the animal the bigger the impact on trail creation. Certainly since the intervention in

Kosovo there have been arguments that new customary international law is developing concerning the use of force for purposes of humanitarian intervention. This, it has been argued, is more likely because of the weight of the states and the international organisation (NATO) involved.

Malcolm Shaw, a writer in international law, provided the following example:

> If a state proclaims a twelve mile limit to its territorial sea in the belief that although the three mile limit has been accepted law, the circumstances are so altering that a twelve mile limit might now be treated as becoming law, it is vindicated if other states follow suit and a new rule of customary law is established. If other states reject the proposition, then the projected rule withers away and the original law stands, reinforced by state practice and common acceptance.

Of course if new customary international law really can be created by ignoring the old, crucial problems arise concerning the quality of legality. This is one of the central arguments of John Bolton, US Ambassador to the UN, who has argued forcefully that, at the least, customary international law should find no unlegislated place in US domestic law. (This point is discussed further next semester.)

There is one final problem with customary international law which is observed frequently by some writers. This concerns the proof of custom. The argument is that the ICJ has chosen (when it wished) to find the evidence of custom either in passive acquiescence by states or even in their inactivity. The difficulty here is that inactivity or passivity gives no evidence of reason or intent, either of which may have nothing to do with legal concerns. If this is the case then the notion of customary international law is further sullied. This issue will be considered further next semester.

3.3 Other Sources of International Law

Essential Reading

Dixon, Chapter 2: 'The Sources of International Law', pp.38-47.

Cassese, Chapter 10: 'Other Lawmaking Processes', pp.183-97.

Kaczorowska, Chapter 2: 'Sources of International Law', pp.22-33.

It is important that you remember that international law is overwhelmingly concerned with treaty and custom, and that other international law 'law-making processes' are very much subsidiary to

them. But as two further sources are mentioned in Article 38, for the sake of completeness it is necessary for us to briefly consider them here. They are:

(a) 'the general principles of law recognised by civilised nations', and
(b) 'judicial decisions and the teachings of the most highly qualified publicists of the various nations'.

The phrase 'general principles of law' refers to legal principles which exist in almost all domestic legal systems. These principles will be applied (if their existence can be proven) where neither treaty nor customary international law seems applicable to a particular event. Because the international law regime is not totally comprehensive (that is, it does not have ready international law for every unique event), general principles are sometimes necessary. Examples of such principles used in international law include:

(i) recognition of the principle that violation of an obligation leading to injury or damage should lead to reparation;
(ii) the right of parties to a dispute to be heard before judgment is given;
(iii) the concept of limited liability.

The general principles also probably include principles of equity, in the sense of legal fairness rather than the rather refined UK area of law.

In your reading, Dixon makes the very sensible point that even if such 'principles' do not qualify as binding law, it is clear that they may have a profound impact on the development of international law, either as furnishing a reason why specific norms **should be** adopted or as the catalyst for state practice leading to the creation of customary and treaty law (p.40).

The second subsidiary source is said to be judicial decisions and the teachings of the most highly qualified publicists of the various nations. Debate as to the meaning of this has been lengthy and intense. It is stated in Article 38 as being only a subsidiary means **for the determination of rules of law** - that is, it is not the rules themselves. What does this mean? The first point you should understand here is that international law makes no use of the common law system of *stare decisis.* In international law no court binds itself or any other court by its decisions and it is explicitly stated in the Statute of the ICJ that decisions have no binding quality beyond the parties to a particular case.

Nevertheless, as you will quickly appreciate if you read some ICJ cases, they do refer to earlier relevant cases in order to identify the law.

Although the analogy is not exact, in international law judicial decisions and the writings of the highly qualified publicists are used as, in the common law system, decisions from different jurisdictions and the writings of legal academics are used. That is, they may be more or less persuasive not because of their status but because of the logic in their reasoning and argument.

Finally there are some resources recognised as potential sources of international law which do not appear in Article 38. The most important of these are Resolutions of international organisations which may carry weight of their own in addition to evidencing state practice.

3.4 'Soft' Law

Essential Reading

Cassese, Chapter 10: 'Other Lawmaking Processes', pp.196 -97.

Dixon, Chapter 2: 'The Sources of International Law', pp.47-48.

Kaczorowska, Chapter 2: 'Sources of International Law', p.33.

In the previous unit, in discussing the singular nature of international law we saw that not everyone agrees with the law way of resolving disputes. We saw that some have suggested that rather than attempting to lay down binding rules for future situations foreseen and unforeseen, an obligation to conform only when the rules lead to an acceptable outcome might seem fairer. Such arguments have in part been encompassed by the recent development of what has come to be known as 'soft' law. But it is here that we can observe 'law' moving away from our usual understanding and back towards the political world.

A number of meanings may be assigned to 'soft' law, some seemingly more legal in character than others. At its most nearly 'legal' soft law may encompass agreements between states which simply have no provision for enforcement, regardless of any default. Frequently they do not explicitly define rights or obligations. These will often arise from agreements where the parties simply want to oblige themselves in good faith to endeavour to promote a particular objective. Sometimes agreements which look orthodox and appear as treaties will come within 'soft' law definitions because they contain a provision stating explicitly that they are not intended to create legal relationships, but more often the status will depend upon the intentions of the parties inferred from the document and the circumstances as to whether they intended to create legal relations.

It is important to realise that such law is not without consequences. One of the earliest examples is to be found in the Helsinki Final Agreement of 1975 which established the Conference on Security and Co-operation in Europe. Cassese also suggests that 'soft' law often has the potential to crystallise into hard law but that will almost always require a change in the intentions of the parties.

4.0 CONCLUSION

In conclusion, customary international law with its requirement of custom and *opinio juris* is both central to international law and also difficult to explain cogently. This is largely because of the necessity to attribute a mental element to an institution (the state).

5.0 SUMMARY

The importance of the general principles of law lies in their ability to indicate international law where both custom and treaty are inadequate. They are however less easily identified and more problematic for those seeking to identify international law. 'Soft' law lies between the world of politics and the world of law. It is apparently less coercive than law and it does not require a reinterpretation of the political world. It exists where the parties do not intend to create legal relations but do wish to record their agreement.

6.0 TUTOR MARKED ASSIGNMENT

1. What, if anything, necessitates the use of sources over and beyond treaty and custom?
2. What might be the reasons for the development of 'soft' law?

7.0 REFERENCES/FURTHER READINGS

Cassese, Chapter 9: 'Treaties', pp.173-75.

Dixon, Chapter 3: 'The Law of Treaties', pp.61-65.

Kaczorowska, Chapter 11: 'The Law of Treaties', pp.241-45.

Dixon, Chapter 2: 'The sources of international law', pp.28-37.

Cassese, Chapter 8: 'International law-creation: custom', pp.153-69.

Kaczorowska, Chapter 2: 'Sources of international law', pp.16-22.

Byers, M. Custom, Power and the Power of Rules: International Relations and Customary International Law. (Cambridge: Cambridge University Press, 1999).

FEEDBACK ON SELF ASSESSMENT EXERCISE 1

SELF ASSESSMENT EXERCISE 1

Complications that arise, although significant, are manageable. They arise from the fact that if many parties have different reservations, each party is likely to have different obligations to those parties with a different reservation. This arises from the fact that each reservation has a reciprocal effect upon obligation. The registering of treaties and reservations makes this transparent however.

UNIT 5 THE DYNAMIC QUALITY OF INTERNATIONAL LAW - I

CONTENTS

1.0 INTRODUCTION

This unit is intended to introduce you to three concepts that are central to an understanding of international law. They are introduced in the same unit because they interrelate and overlap in their significance, but they are also distinct. The reason why they are introduced here is that not only are they central but their meaning and relationship has altered significantly over the last 150 years. This historical change was alluded to in Module 1 Unit 1, section 3.3, and discussed broadly in the relevant readings. Each of the concepts is also of relevance to other units. In particular the concept of sovereignty is important in the discussion of self- determination.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Understand the meaning, significance and centrality of the concept of sovereignty;
- Explain the relationship between sovereignty and jurisdiction;
- Understand that the meaning of sovereignty is not fixed and explain why the changes in meaning have occurred;
- Appreciate the significance of the UN Charter in its assertion of the equality of states;
- Understand the meaning of legal personality in international law;
- Appreciate that the concept of international legal personality has changed over time and is still capable of further change.

3.0 MAIN CONTENT

3.1 The Concept of Sovereignty

Essential Reading

Dixon, Chapter 6: 'Jurisdiction and Sovereignty', pp.144-56.

Cassese, Chapter 3: 'The Fundamental Principles Governing International Relationships', pp.48-55.

Kaczorowska, Chapter 6: 'Sovereignty and Equality of States' pp.95-97.

Read these pages now.

Although this section is concerned with defining sovereignty we will not deal with all aspects in detail. In particular the question of the limits of jurisdiction implied by sovereignty, which is of major importance, will only be alluded to here as it is more fully considered in Module 2 Unit 2.

Sovereignty and the state

A first obvious but important point to remember is that the concept of sovereignty in international law is intimately related to the concept of a state. Sovereignty is what independent states are said to possess. In international law sovereignty is the power possessed by such states and the right or ability to exercise it. Typically such power includes the 'power to wield authority over all the individuals living in the state's territory' (Cassese).

This power, although once regarded as at least theoretically absolute (the sovereign, or rulers of a state could do as they wished in their own state and to their own citizens), was probably never quite as broad as this. The political reality has always exercised some constraint over the conduct of state rulers either by resistance from subjects or by 'influence' from other states. Nevertheless such was the theory of sovereignty that, as an example, when the British first learned of the atrocities being committed in Germany against Jewish people in the 1930s, not even a note of protest was sent by the British Government because it was thought that such intervention breached German sovereignty!

The acquisition of statehood and territory

Because sovereignty has close links with physical territory it is important to understand how statehood and territory are acquired. Acquisition of statehood will be considered next semester, when we

consider self-determination. Subject to what is said in future units, ordinarily questions of a state's acquisition of territory are largely academic. The United Nations Charter proscribing as it does 'the threat or use of force against the territorial integrity or political independence of any state' (Article 2(4)) implicitly outlaws the acquisition of territory by a state except through peaceful agreement.

This position is reinforced by an important Declaration of the General Assembly of the UN known as the *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the* UN (Resolution 2625 of 1970). Here it is stated that 'The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force' and although the exact legal status of the declaration remains controversial, the statement was relied upon in the ICJ when in the case of *Nicaragua* V. *USA* (which we will consider in a later unit) it concluded that international customary law also proscribed the threat or use of force.

This, together with the ICJ's *Palestinian Advisory Opinion* of 2004 which made it clear that lawful title to territory could not be obtained by force of arms and/or effective occupation, leads to a clear position in international law which you should remember - namely 'Title to territory cannot be achieved by conquest'. As Dixon puts it, 'from the moment aggressive force becomes unlawful it has been impossible for a state to acquire title to territory by conquest'. Given the nineteenth century's recognition of a right to colonise by conquest this is a remarkable change in international law.

The principle of sovereign equality

Sovereignty has two other important aspects. The first lies in the principle of sovereign equality. This lies at the heart of the present international law regime. The second, which is closely related and will be discussed in the next section, is that states have a duty of non-intervention in any area that falls within the exclusive jurisdiction of other states.

The traditional view of sovereignty is usually traced back to the Treaty of Westphalia of 1648. This is a little arbitrary but convenient because the Peace of Westphalia, of which the Treaty was a part, did create the foundations of a new European system that has, since the creation of the United Nations, developed into a world system of independent and separate states. In the words of one author, the Treaty may be said to have 'created the basis for a **decentralised system of sovereign and equal nation states'.**

This reaction to the Thirty Years War, which had devastated Europe, was a move to enable separate states to co-exist with a reciprocal prohibition on interference with the internal affairs of other states. Thus the foundations were laid for a state to enjoy unlimited power over its own territory without interference. The agreement effectively recognised that inter-state wars could only be avoided by recognition of this principle. Needless to say, this Treaty was not entirely effective and there were many subsequent wars and interventions, though possibly fewer than would have occurred without it.

The acceptance of at least the theory of sovereign equality is now enshrined in the UN Charter, where Article 2(1) states that 'The Organisation is based on the principle of the sovereign equality of all its members'. I say 'at least the theory' because of course the reality of a Security Council with permanent members having special powers does seem to undercut such equality.

This feature of sovereign equality is of fundamental importance in the international legal regime because it is this which ensures a form of 'Rule of Law' in that system. Just as in domestic law each individual (that is, each subject of the legal system) enjoys formal equality before the law, so in international law each state, as a subject of the international legal system, enjoys formal equality. We will see the significance (and limitations) of this proposition when we consider the methodology of the ICJ. We will also consider the opposition to the idea of sovereign equality in the second semester.

The authority of sovereignty

Sovereignty also brings with it total discretion for the government of a state to decide matters that are essentially within domestic jurisdiction. Again this is an important principle also enshrined in the UN Charter in Article 2(7) but the meaning of the principle has not remained unchanged. In the early days of the UN some states argued that for their internal policies even to be discussed internationally was a breach of the principle. Needless to say, the states that held that view usually pursued policies which were anathema to the majority. Apartheid states were prominent proponents of this interpretation of the principle.

SELF ASSESSMENT EXERCISE 1

What is sovereignty? (See *Feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

i. What historical factors meant that sovereignty was never (or almost never) absolute?
ii. Explain the significance of the sovereign equality of states.

3.2 Legal Personality in International Law

Essential Reading

Cassese, Chapter 4: 'States as the Primary Subjects of International Law', pp.71-72.

Cassese, Chapter 7: 'Other International Legal Subjects', pp.124-50.

Dixon, Chapter 3: 'The Law of Treaties', pp.1 03-17.

Kaczorowska, Chapter 4: 'International Personality', pp.52-72.

Read these pages now.

As Cassese points out, domestic legal systems have as their primary objective the governance of individuals within their jurisdiction. Thus the primary subjects of domestic law are individuals, although other created entities such as partnerships, companies and local authorities may also both be governed by the domestic law and have 'legal personality' which allows them to sue or be sued under defined circumstances. Obviously such entities have no *real* personality at all in the sense that unlike individuals, created organisations have no mind or consciousness of their own. Nevertheless they are treated as though they have an existence independent of the individuals within them.

In international law the primary subjects are not individuals but states, and traditionally international law regarded states as the **only** subjects of international law.

3.2.1 States and Legal Personality

Of course states themselves might seem to us no less and no more than a collectivity of individuals occupying a defined territory. But while in some senses this is true, just as in domestic law corporations are regarded as real entities, so too are states in international law. Actions and reactions by states are regarded as the acts of those states, divorced from the individuals responsible for the state action.

In the nineteenth century few would have argued that international law was about anything more than the international regulation of state conduct. Domestic law governed individuals, but the individuals of international law were states and states alone. The question of the role of real individuals in international law led to rather arid discussions which often concluded that while only states were the subjects of international law, individuals were the objects of international law. This was supposed to suggest that international law was for the benefit of individuals through the medium of the regulation of states.

While such a perspective is now of little significance, it does remain the case that only states are said to be full subjects of international law because only states have complete legal capacity in that regime. This complete legal capacity means that they have the power to exercise legal rights in international law and are subject to the duties prescribed by international law. The position is most easily understood by contrasting it with the position of other actors in the international law regime.

SELF ASSESSMENT EXERCISE 3

What are the implications of regarding states as the only subjects of international law? (See *Feedback at the end of this unit*).

3.2.2 Non-state Actors and International Law

Your reading from Dixon provides a very clear discussion of the concept of personality in international law. Most importantly he points out that the answer to the question as to whether a particular entity is to be regarded as a subject of international law is seldom capable of a simple positive or negative response (except in the case of states). This is because many entities may be subjects for some purposes and yet not for others. Dixon explains this by outlining the main capacities of a subject of international law. These include:

(a) the ability to make claims to directly establish rights granted under international law;
(b) being subject to some or all of the obligations imposed by international law;
(c) the capacity to make binding treaties under international law;
(d) 'to enjoy some or all of the immunities from the jurisdiction of the national courts of other states' (see Module 2 Unit 3).

While only states enjoy all these capacities to the full, other entities will enjoy some of the rights or be subject to some of the duties. To have international legal personality is to be able to participate in some ways within the system of international law.

The non-state actors within international law are basically threefold. Firstly there are individuals, particularly private persons but sometimes private corporations. These are considered in the next Unit. Secondly there are intergovernmental international organisations, and thirdly are the so-called NGOs -international non–governmental organisations.

An obvious example of the second category (which includes myriad organisations) is the United Nations itself. In an early case in the newly reconstituted International Court of Justice (1949) the Court was called upon to define the status of the UN. It did this in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations.*

The Opinion held that it was indispensable to attribute international personality to the UN because its Charter assigned to it specific tasks such as international peace-keeping together with the promotion of international economic, social, cultural and humanitarian co-operation. In concluding that the UN was an international person the Court went on to say:

> That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a super-State, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

In addition to the requirement that when the organisation was set up it was intended to have international functions and obligations in order to have international personality, is the need to show that the organisation also enjoys autonomy from its member states. In that same case, the Court added that it must be shown that such an organisation constitutes a 'collective unity detached from the member states'.

Sometimes international legal personality may be explicitly provided for in the enabling document. Cassese gives the example of the Statute of the International Criminal Court where Article 4.1 states that 'The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.'

But there are clear limits to such personality in relation to international organisations. In particular only states and never international

organisations are allowed to bring claims in the International Court of Justice. International organisations may sometimes have standing before regional international courts - as an example the Council and Commission of the European Union may appear before the European Court of Justice.

In addition any international agreements they make do not come within the definition of 'treaties' within the Vienna Convention on the Law of Treaties (discussed in Module 2 Unit 4), although there is a separate Convention (the Vienna Convention on Treaties Concluded Between States and International Organisations or Between International Organisations, 1986) governing such agreements.

You should also appreciate that not all international inter- governmental organisations have identical capacity in international law. The EU along with the United Nations most nearly approach the status of a state in international law while other organisations will have much more limited capacity.

Very much more limited is the status of international NGOs in international law. They certainly have a part to play in international law - particularly in standard setting and in contributing to the drafting of international documents - and most recently in the creation of the International Criminal Court. However, they seldom enjoy rights in international law as defined by Dixon. In spite of such limited capacity in international law, such international bodies as the International Red Cross and Amnesty International, to mention but two, influence both the creation and the administration of international law concerned with human rights in particular.

4.0 CONCLUSION

In the nineteenth century only states were thought to be subjects of international law, by recognising different aspects of legal personality it is now clear that non-state actors also have a role in international law.

5.0 SUMMARY

The dynamic nature of international law is clearly related to changes in world society, both political and social. International law is able to reflect these changes either by explicit decision - making by the international community, as in the Universal Declaration of Human Rights, or by decisions of the International Court of Justice or its predecessor (when for instance it accepts a role in international law for intergovernmental organisations).

6.0 TUTOR MARKED ASSIGNMENT

1. What is legal personality? Why is an understanding of international legal personality crucial for any appraisal of international law?
2. Define and explain the different attributes of legal personality.

7.0 REFERENCES/FURTHER READINGS

Dixon, M. *Textbook on International Law* (Oxford: Oxford University Press, 2005) fifth edition.

Cassese, A. *International Law* (Oxford: Oxford University Press, 2005) second edition.

Kaczorowska, A. *Public International Law.* (London: Old Bailey Press, 2005) third edition.

FEEDBACK ON SELF ASSESSMENT EXERCISES 1 & 3

SELF ASSESSMENT EXERCISE 1

The readings should have provided the answer here. Sovereignty is concerned with statehood, of which it is a central attribute. In essence it is the power each state possesses as a state. Primarily this includes the power to govern all those within the state's borders. It used to be theorised that sovereignty brought absolute power to a state regime over its inhabitants, but this was never entirely true because of inter-state relations. Since the creation of the United Nations, at least theoretically every state is constrained by fundamental norms of human rights and by the international agreements to which it is a party. Sovereign equality is a central proposition in international law but it is of limited significance - primarily before judicial bodies.

SELF ASSESSMENT EXERCISE 3

When in the nineteenth century states were the only subjects of international law, the entire concept of international law was significantly different from the situation today. In particular (as observed in Unit 1) international law tended to be descriptive of how nations conducted their international relations. The normative element of how nations **ought** to conduct themselves was much less obvious than it is now. The tradition of the primacy of states is maintained in the ICJ where only states have standing unless an advisory opinion is being sought. Only states could and can enter into treaties subject to the Vienna Convention on Treaties. Finally, if states were to be the only

international law subjects, individuals could not be held responsible under international law for international crimes.

MODULE 2

UNIT 1 THE DYNAMIC QUALITY OF INTERNATIONAL LAW - II

CONTENTS

1.0 INTRODUCTION

This unit is a continuation of the last one. The concept of personality is crucial to an understanding of the discussion of jurisdiction in international law (Module 2 Unit 2); and the place of the individual in international law is relevant to the consideration of international human rights law.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Explain the place of the individual in international law and why it has changed;
- Understand the relationship between the concepts of sovereignty, personality and the place of the individual; and
- Understand the relationship between changes in sovereignty and legal personality.

3.0 MAIN CONTENT

3.1 The Place of the Individual in International Law

Essential Reading

Dixon, Chapter 5: 'Personality, Statehood and Recognition', pp.114-16.

Cassese, Chapter 7: 'Other International Legal Subjects', pp.142-50.

Kaczorowska, Chapter 19: 'Criminal Responsibility of Individuals under International Law', pp.521-49. Read these pages now.

3.1.1 The Place of the Individual in International Law before 1945

The idea that international organisations would ever acquire international legal personality, albeit limited, would have been quite alien to nineteenth century international law writers. The idea that individuals would ever acquire such standing would have been simply incredible.

There were a number of reasons for this perspective. The first was that the international legal regime was obviously (at that time) concerned only with states and related to this was the view that states, by definition, had the right to deal with their own nationals and an obligation to respect that right of other nations. In addition there were really no international organisations capable of imposing obligations on or granting rights to individuals in international law.

This does not mean that international law ignored individuals entirely. Questions which affected them were often the concern of the international regime. Questions of international commerce, marine matters and rules relating to 'passports, rights of ambassadors and piracy' were all, according to Blackstone writing in the eighteenth century, matters for the concern of the law of nations.

But Blackstone also maintained that such international law was directly applicable only through municipal courts. His view was that because the law of nations was (according to him) a full part of the common law and the law of England, its principles could be directly applied by English courts. Even so, if this were true, international law could affect individuals but was still seen as a law for states alone. Because such a position left the use of international law in the hands of state courts, it was also consistent with the Westphalian rules prohibiting interference in the affairs of one sovereign state by another.

At the same time, this view of the state as solely responsible for its nationals did give international law an indirect means of providing remedies to individuals for claims which they could not themselves enforce. It was held in a case heard in the Permanent Court of International Justice in 1924 *(Mavrommatis Palestine Concessions Case)* that doctrine and procedure provided for states to protect their individual nationals in an international arena. The Court justified this position as follows:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.
>
> The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

It is when one realises the indirect effect of international law upon individuals before the Second World War, that sense can be made of the proposition that whereas states were the subjects of international law, individuals were its objects.

3.1.2 The Place of the Individual in International Law After 1945

Such perspectives have been dramatically transformed since (and to a considerable extent, because of) the Second World War. Whereas in the past it had been accepted that it was states that waged war, in the aftermath of the Second World War, with its appalling humanitarian cost and the events of the Holocaust, international individual responsibility even for the acts of states seemed not only appropriate but essential.

The development of an international law of human rights has now rendered obsolete the view that individuals had no direct place in international law.

Critical in this fundamental change were the events surrounding the creation and operation of the International Military Tribunal at Nuremberg in 1945. The dilemma for the victorious Allied Powers who wished to punish individual German Nazis responsible not only for waging an aggressive war but for the mass murder of German and other nationals who were categorised as Jewish, homosexual, Gypsy, Communist, or other groups regarded as unacceptable to the Reich, was that the perpetrators of these atrocities had broken no national German laws.

They had, of course, actually written the laws which were intended to make legal their foul deeds themselves. Legal positivists (those who argued that international law was for states alone and that for individuals there was no law above domestic law) found it difficult to come up with a basis for prosecution.

Nevertheless, pursuant to promises made by the Allies during the War, the USA, the Soviet Union, Great Britain and France created the International Military Tribunal for violations of international law perpetrated by individuals. This Tribunal established irrevocably that rules of international law not only should, but in fact **did** apply to individuals. In a ringing endorsement of the role of individuals in international law the Tribunal asserted, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.

While the truth of that statement is self-evident, the legal basis for it was not, but that international assertion of control and authority over those who committed the most appalling acts has come to be accepted as representing contemporary international law. In the now accepted words of the International Military Tribunal which have echoes in the Statute of the International Criminal Court,

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) 'Crimes against peace:' namely, planning, preparation, initiation or waging of 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;
> (b) 'War crimes:' namely, violations of the laws or customs of war. Such violations shall include, but not

> be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) 'Crimes against humanity:' namely, 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 within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This position was further developed, initially by the UN General Assembly in its Universal Declaration of Human Rights of 1948 asserting many rights belonging to all individuals. At the time the Declaration was not intended to be a legal document; a legal Covenant would be drafted to encompass the rights enumerated in the Declaration. Also in 1948 the Convention on the Prevention and Punishment of the Crime of Genocide was created (commonly referred to as the Genocide Convention). This did create legally binding obligations and was explicit in its attribution of international legal responsibility to individuals. Article IV provided:

> Persons committing genocide...shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Thus by the second half of the twentieth century the fact of a status for individuals in international law could not be doubted, though it remained confined to the arena of human rights.

3.1.3 The Individual in International Law as Exemplified by the European Convention on Human Rights and Fundamental Freedoms

The history of the place of the individual in international law is well illustrated by the development of the European Convention, especially as it affected individuals in the United Kingdom. It was drafted under the auspices of the Council of Europe, which at that time was an intergovernmental organisation the purpose of which was to facilitate European co-operation over a broad range of subjects. When the

Convention was drafted in 1950 there were 25 members of the Council and a requirement under the Council's Statute (Article 3) provided that each member, upon joining, must 'accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'.

The motivation underlying the Convention was clear. It was to further democracy, guard against the rise of any totalitarian regime (either Nazi or Communist), and protect human rights. Many argued that these goals were all interrelated. For our purposes what is significant is the role assigned to the individual in all this. When drafted, provision was made within the Convention for one member state to petition against another if the petitioner considered the respondent state to be in breach of its obligations. It was probably the case that this was seen as the appropriate method under international law to achieve enforcement. Such petitions were to be judged by an adjudicatory body and significant sanctions were available. A respondent state was not permitted to assert that matters complained of were within its domestic jurisdiction and so unavailable for external review.

But while it was thought that inter-state petition would be the central mechanism of enforcement, this has proved not to be the ' case. Article 25 of the Convention provided that the European Commission of Human Rights (a body created by the Convention) could receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the state parties of the rights guaranteed in the Convention. Before this could happen, however, each state was given the right to decide whether to grant this right of individual petition to those within their jurisdiction. With the passage of time more and more states accepted this right, some initially for limited periods but most finally and irrevocably.

The United Kingdom accepted the right only in 1966. But even then the UK position was curious to those not familiar with international law. An individual was entitled to bring an application to Strasbourg, where the Commission and European Court of Human Rights resided, having exhausted the possibility of a domestic remedy. Such an applicant could not however invoke the guarantees of the Convention before UK courts because, although the UK was a party to the Convention, the provisions of the Convention had not been made a part of the domestic law.

Furthermore, having taken a case to Strasbourg and having won, the successful applicant had no way of enforcing the judgment through UK courts. Rather he or she must rely upon the UK fulfilling its international obligations under the Convention in providing the remedy

ordered, and only other parties to the Convention could insist upon that obligation.

The UK did in fact give effect to judgments against it, but that nevertheless was the legal position. It was only with the passage of the UK Human Rights Act of 1998, which effectively incorporated the provisions of the Convention into domestic law, that UK courts could give effect to Convention content.

This digression into the status of the individual under the European Convention highlights the relationship between the citizen and his state on the one hand - a direct relationship within which rights are directly provided; and on the other hand the relationship between a citizen and other states and international bodies with whom his own state has entered into international legal relations. This is to be contrasted with those international legal documents which provide for direct individual responsibility (as opposed to rights) for international crimes. The Genocide Convention, together with the Statute of the International Criminal Court, both provide for such responsibility unmediated by the state.

The conclusion you should draw, therefore, regarding the place of the individual in the international legal regime is that individuals may be given rights in international law with the acquiescence of their state but responsibilities may be imposed irrespective of the position adopted by a national's state.

3.2 The Interrelationship between Sovereignty, Personality and the Individual in International Law

Essential Reading

There is no reading of direct relevance to this section but the reading that you have already completed for this unit needs to be reconsidered. Re-read those pages now.

Obviously the first thing that the concepts we have considered have in common is that they are all in a state of change or have in fact changed. What we will consider here is whether that change is simply coincidental or whether it illustrates some general phenomena of relevance to a study of international law. The argument is that by examining the changes we can gain some idea of the relationship between the social and political world and the world of international law. What were the major political and social changes from the nineteenth to the twenty-first century that necessitated major

international legal change? At one level this question is too broad to be sensible but some generalisations are important.

The nineteenth century was dominated by European states and it was from these that nineteenth century international law emanated. Not surprisingly, therefore, international law reflected the wishes and needs of these states as perceived by those who ruled them. In turn these wishes and needs reflected a very idiosyncratic perception of the world. Colonialism was accepted as unproblematic and sovereignty was defined accordingly. Along with this concept was carried the right to use what we would now call 'gun-boat diplomacy' (or unrestricted force) in order to assert possession of colonial territory.

The ideology that accompanied colonialism could be described as social-Darwinism - a stated belief in the superiority of European development and a belief that colonial societies required development before they could reach such a stage. Indeed many Europeans saw no possibility of 'primitive' peoples ever reaching a point where they would be capable of running their own affairs. Deeply offensive as these views now appear, it is important to realise that they underpinned much international law. European empires and their preservation lay at the heart of international law.

Changes in the concept of sovereignty accompanied the period of decolonisation and it reflected the new-found voice of colonial peoples in their self-assertion. From the concept of sovereignty being entirely at home with empire it was redefined so that it legitimated and sustained anti-colonial freedom movements. As the power of empire waned, so sovereignty as the guarantor of state independence grew. Yet even as it did so its nature modified as the human rights era qualified its previously arguably absolute character.

The nineteenth century also saw the beginnings of a system of intergovernmental organisations that foreshadowed a role for such bodies in international law. Improvements in transport, communications and trade led in the second half of the nineteenth century to a plethora of these organisations, beginning with the 1865 founding of the International Telegraphic Union and the 1874 Universal Postal Union. This precursor of 'globalisation' made it inevitable that such bodies, created with the express consent of states, yet having an independent existence, were obvious candidates for at least limited international legal personality.

As for individuals in international law, as long as one attribute of sovereignty was complete and exclusive control over those within a state's jurisdiction, there could be no place for the individual in

international law. Such an attribute however rendered the international community entirely legally impotent in the face of atrocities committed by a government against its own people (or in occupied territories). Whereas this had been accepted with something approaching equanimity in colonial legal circles, social pressures arising especially from Nazi atrocities dictated reconsideration, manifested both at Nuremberg and in the Universal Declaration.

What should be clear, then, is that in spite of there being no mechanism for enacting new international law, through the medium of treaties, and through the development of customary international law, it is possible for international law to at least reflect changing times, changing power structures and changing international public opinion.

SELF ASSESSMENT EXERCISE 1

In what ways do you think international law responds to political changes in the world?

4.0 CONCLUSION

Although it is clear that individuals now have a status in international law that they did not enjoy before the Second World War, it is also clear that this status is limited. It gives individuals responsibility for international crimes and, with state acquiescence, individual rights to protect guaranteed human rights.

5.0 SUMMARY

The dynamic nature of international law is clearly related to changes in world society, both political and social. International law is able to reflect these changes either by explicit decision-making by the international community, as in the Universal Declaration of Human Rights, or by decisions of the International Court of Justice or its predecessor (when for instance it accepts a role in international law for intergovernmental organisations).

6.0 TUTOR MARKED ASSIGNMENT

1. Why have individuals come to occupy a place in international law since the Second World War?

2. What if anything is the relationship between sovereignty and personality in international law?

7.0 REFERENCES/FURTHER READINGS

Dixon, M. *Textbook on international law* (Oxford: Oxford University Press, 2005) fifth edition.

Cassese, A. *International law* (Oxford: Oxford University Press, 2005) second edition.

Kaczorowska, A. *Public international law.* (London: Old Bailey Press, 2005) third edition.

UNIT 2 JURISDICTION IN INTERNATIONAL LAW

CONTENTS

1.0 INTRODUCTION

In Module 1 Unit 5, we considered the meaning of sovereignty and suggested that it may be understood as 'the power possessed by states and the right or ability to exercise it'. The purpose of this unit is to consider more closely just what this power is and the limits or constraints which circumscribe it.

The central consideration will be the issue of when a state may claim authority, derived from sovereignty, to act in accordance with international law. In other words, under what circumstances does a state have legal competence to make, apply and enforce rules of conduct? Clearly this question may have different answers in different circumstances. We would probably assume that, generally speaking, a state may do what it wishes in its own territory - though there are obvious qualifications to that statement arising not least either from international treaty obligations or international human rights law.

More significant for international law purposes is the question of when a state may exercise power **beyond** its borders and what justification can be provided for doing so. While we will see that principles have developed that define the occasions when such an exercise of power is regarded by the international community as legitimate, it is important to remember that the reality of power imbalance between states (notwithstanding the principle of sovereign equality discussed in Module 1 Unit 5) means that some states will be better able to exercise power beyond their borders than others.

Throughout this unit, it should be borne in mind that answers to questions of jurisdiction are never final in a world of constant change.

Most recently the rise of the global Internet has necessitated reconsideration of some aspects of jurisdiction, particularly concerning criminal matters.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- See why and how questions of jurisdiction relate to the concept of sovereignty;
- Distinguish between jurisdiction to prescribe and jurisdiction to enforce;
- Recognise the natural link between territory and jurisdiction;
- Understand the nationality principle in international law;
- Explain protective jurisdiction;
- Appreciate the controversial nature of the passive personality principle and the effects doctrine; and
- Discuss the meaning and significance of universal jurisdiction.

3.0 MAIN CONTENT

3.1 Jurisdiction to Prescribe and Jurisdiction to Enforce

Essential Reading

Dixon, Chapter 6: 'Jurisdiction and Sovereignty', p.133.

Cassese, Chapter 3: 'The Fundamental Principles Governing International Relations', pp.49-S0.

Kaczorowska, Chapter 8: 'Jurisdiction', pp.121-22.

If you have already studied public law you will probably remember that as a matter of constitutional principle a state may pass any laws it wishes. Most students remember the statement that the UK parliament could, if it so wished, pass a law banning smoking in the streets of Paris. The point made by this rather extraordinary statement is that the ability to legislate is not limited. This too is a premise of international law, as was expressly recognised in one of the most famous cases to come before the PCIJ -*The Lotus Case* (1927). The facts are not difficult, but unfortunately the questions of exactly what propositions of international law the case stands for continues to exercise legal academics. It is however comparatively clear concerning the jurisdiction to prescribe and the jurisdiction to enforce.

The case concerned a collision between ships on the high seas (that is, beyond territorial jurisdiction) between a French steamer, the *Lotus*, and a Turkish steamer, the *Boz-Kourt.* Eight people died in the collision, the *Boz-Kourt* sank, and having rescued the survivors the *Lotus* entered Constantinople (now Istanbul) where the Turkish authorities arrested and charged Lieutenant Demons, the officer of the watch on the *Lotus* (they also arrested the captain of the *Boz-Kourt).* M. Demons was convicted of manslaughter and after prolonged French objection to the Turkish exercise of jurisdiction over him, the Turkish Government accepted a reference concerning jurisdiction to the PCIJ. By the President of the PCIJ's casting vote, the Court held that Turkey had not acted contrary to the principles of international law. It stated as follows:

> Now the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect, a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

What this seems reasonably clearly (and in my view, clearly reasonably) to assert is no more than the proposition that sovereignty includes the right to **prescribe** almost as the state wishes. But there is an equally clear difference between a right to prescribe jurisdiction and a right to enforce jurisdiction. While a UK parliament may legislate to criminalise

Parisian smokers, it does not have the right to enforce such legislation against French citizens - although if such a smoking Parisian came into UK territory and was charged the position would require further consideration (see below).

Thus there is a crucial distinction between the almost unfettered right to prescribe and the much more limited right to enforce. In the first case sovereignty allows the exercise of right which comes with territory, but once action takes place beyond the territory - that is, where there is no longer sovereignty - other rules recognising this difference apply.

SELF ASSESSMENT EXERCISE 1

Explain and justify the distinction between jurisdiction to prescribe and jurisdiction to enforce. (See *Feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 2

Paraphrase the above quotation from *The Lotus Case.*

3.2 Uncontroversial Bases for International Jurisdiction

Essential Reading

Dixon, Chapter 6: 'Jurisdiction and Sovereignty', pp.136-37.

Kaczorowska, Chapter 8: 'Jurisdiction', pp.122-23.

Read these pages now.

3.2.1 Territorial Jurisdiction

Dixon is adamant that territorial jurisdiction is complete and absolute. This is because, as he would argue, sovereignty is at least co-extensive with jurisdiction. They are aspects of the same phenomenon of statehood which implies power and authority over all persons, property and events occurring within its territory. The fact that a state may grant, by treaty or otherwise, limitations upon this right, does not affect its absolute nature.

There is therefore no contentious issue of jurisdiction if an act is perpetrated within a state's territorial jurisdiction (which includes both its territorial sea and its airspace). If the act is criminal, prosecution may follow regardless of other factors such as the nationality of the perpetrator (subject only to what is said below about individual immunity from prosecution, particularly for diplomats). Slightly more

problematic are criminal acts that are not confined to the territory of a single state. For example, if a criminal act is planned in Pakistan and executed in India; or, to take a real case, if a bomb is planted on an aircraft in Malta and explodes while the aircraft is in UK airspace, where does the criminal act take place and which country has jurisdiction?

In fact states have adopted a flexible approach with the assistance of two concepts which usually enable a single state to at least take the lead in the investigation and prosecution of an offence. The concepts are 'subjective territorial jurisdiction' and 'objective territorial jurisdiction'. Because of objective territoriality a state will have jurisdiction over all offences that are completed within its territory. Thus in the Lockerbie bombing where an American passenger aircraft crashed in Scotland on 21 December 1988 following the explosion of a bomb on board, the UK clearly had jurisdiction over the perpetrators because this was where the murders took place.

On the other hand, subjective territorial jurisdiction will allow a state to exercise jurisdiction where a crime has been set in motion within its territory but completed elsewhere. The UK had not always exercised jurisdiction in such cases but with the great rise in cross-border crime, it chose to do so and explicitly enacted legislation - The Criminal Justice Act, 1993 - enabling courts in England and Wales to exercise jurisdiction for some crimes where an element of the crime had occurred within the UK. The recent rise in the fear of international crime has reinforced the trend of states asserting jurisdiction in such cases.

3.2.2 Nationality Jurisdiction

Essential Reading

Dixon, Chapter 6: 'Jurisdiction and Sovereignty', p. 137.

Kaczorowska, Chapter 8: 'Jurisdiction', pp.123-24.

Read these pages now.

A national (or subject) of a state is subject to that state's jurisdiction wherever in the world he may be, and a state is entitled to prosecute and punish its nationals for crimes committed anywhere in the world. It is said that this is the corollary of the privilege of citizenship which offers the diplomatic protection of the state to its nationals wherever they may be. It is because allegiance is owed by a national to his state that the state in turn may exercise jurisdiction over him wherever in the world he is.

Such a position is exemplified by the UK case of *Joyce V. DPP* [1944] AC 347. William Joyce had voluntarily made propaganda broadcasts from and for Germany during the Second World War. (He was popularly known in wartime Britain as 'Lord Haw Haw, the Humbug of Hamburg'.) After Germany's defeat he was returned to England and charged with treason. Joyce's defence was that he had in fact been born in the USA of Irish parents and therefore as a US citizen he owed no loyalty to the British Crown. However, he had not only lived in the UK for a considerable period but had also (improperly) obtained a UK passport which was still current at the time of his broadcasts. The House of Lords held that Joyce's assertion of nationality in obtaining the passport indicated the acceptance of a duty of allegiance as he would have been entitled to claim the protection of the Crown. Joyce was convicted and executed.

Obviously the nationality principle gives rise to important questions as to who is to be defined as a national of a state (as *Joyce* makes clear). In fact international law does not define the conditions an individual must satisfy before becoming a national. Each state is left to decide this for itself and such a decision is within its internal jurisdiction. The role of international law is, however, of importance where one state objects to the granting of nationality by another state. For one state to be compelled to recognise the granting of nationality to an individual by another state it has sometimes been suggested that there must exist a real link between the national and his state. In fact this is doubtful and almost invariably the question of nationality remains at the discretion of the awarding state. The only exception would seem to be where a state has attempted to impose nationality upon an unwilling subject in order to gain nationality jurisdiction.

3.2.3 Protective Jurisdiction

Essential reading

Dixon, Chapter 6: 'Jurisdiction and Sovereignty', pp.139-41.

Kaczorowska, Chapter 8: 'Jurisdiction', pp.124-25.

Read these pages now.

International law reflects and accepts the reality that states will act to punish deeds committed beyond their borders which they regard as prejudicial to their security, regardless of the nationality of the perpetrators. It is the so-called protective principle that legitimates this fact. In the case of *Joyce V. DPP* (above) this was accepted as an alternative basis for Joyce's conviction. Whereas in the past the principle

was most applied to such acts as espionage, the counterfeiting of currency or attempts to evade immigration regulation, more recently the 'vital interests' of concern to a state have been interpreted more widely. Both acts of terrorism and international drug offences are accepted as acts coming within the protective principle.

While the UK had traditionally been conservative in its use of this principle, preferring to find other bases where possible, the Privy Council decision in *Liangsiriprasert V. Government of the USA* [1991] 1 AC 225 signalled a change of policy which indicated that this may no longer be the case. In that case the defendant was a Thai national suspected of drug smuggling. A US agent lured him to Hong Kong on the pretext of a possible drug deal. While in Hong Kong, where he had committed no offence under Hong Kong law, he was arrested although the charges which were the basis for an extradition request concerned offences committed outside of the Territory.

Indeed the defendant's only connection with Hong Kong was the fact that he was temporarily there. This notwithstanding, the Privy Council permitted his extradition, implying that the protective principle was relevant to the recognition that the common law had to adapt to the new reality of crime being no longer largely local in origin and effect.

There is little doubt that such a view enjoys widespread support among the international community of states.

SELF ASSESSMENT EXERCISE 3

Define the concept of jurisdiction. (See *Feedback at the end of this unit*).

SELF ASSESSMENT EXERCISE 4

i. Why is it necessary to distinguish between jurisdiction to prescribe and jurisdiction to enforce?
ii. Why is it necessary to distinguish between objective territoriality and subjective territoriality?

3.3 Controversial Bases for International Jurisdiction

Essential Reading

Dixon, Chapter 6: 'Jurisdiction and sovereignty', pp.137-42.

Kaczorowska, Chapter 8: 'Jurisdiction', pp 124-44.

Read these pages now.

3.3.1 The 'Effects' Doctrine as an Extension of Protective Jurisdiction

In the last section we defined protective jurisdiction as jurisdiction necessitated by the reality that states will act to protect themselves from extra-territorial acts that they regard as prejudicial to their security. More controversially some states have, as Dixon observes, 'enacted legislation designed to give themselves jurisdiction over **any** matters which produce an effect in their territory'. Obviously, for a state to make such legislation meaningful, that state must have either substantial international power or substantial international co-operation, or both. Thus it is not surprising that the USA has been the main claimant of such a basis of jurisdiction.

There are two major aspects to such jurisdiction as claimed by the USA, both intended to further its economic and political interests. The first is complicated and a detailed examination is beyond the parameters of your syllabus. It concerns US anti-trust legislation. This is legislation intended to prevent anti-competitive measures in business, and abuse of monopoly/oligopoly business positions. The US has enacted legislation under which foreign companies that also operate or have business interests in the US, may receive heavy penalties for business activities taking place wholly outside US territory. Such penalties could become payable even though the actions of the offending company not only took place outside of the US but were actually quite lawful in the state where they did take place.

Not surprisingly, other states (and the European Union in particular) have objected strenuously. If such legislation became normal for states, international trade and co-operation would be greatly hampered and Dixon's comment that 'These difficulties, and the tensions they produce between trading partners, mean that negotiation and self-restraint among states will be necessary if jurisdictional disputes of this nature are to be minimised' is entirely accurate.

The second aspect to such extra-territorial claims to jurisdiction is situations where the US has sought to enforce a trading embargo against states of which it disapproves. The most extraordinary of these was directed towards Fidel Castro's Cuba. In 1996 Congress passed the Cuban Liberty and Solidarity Act (also known after its promoters as the 'Helms-Burton' Act). The stated purpose of this Act is to help the Cuban people 'to restore its freedom', to which end it provides for unilateral measures against foreigners or foreign companies engaging in commercial activities involving assets 'confiscated' (arguably 'nationalised' is the more appropriate term) in Cuba in the early 1960s.

Such attempts to prohibit trade by foreign companies with states which the US disapproves of have been bitterly resented and criticised by most other states. Cassese simply asserts that such jurisdictional claims are contrary to international law. Nevertheless the fact that they have been asserted by the world's only super-power is important and will receive further consideration later.

3.3.2 Passive Personality Jurisdiction

Whereas protective jurisdiction asserted rights in situations where the acts outside a state's territory were prejudicial to its security, the so-called 'passive personality' jurisdiction claims to allow jurisdiction over foreigners, committing acts beyond the territory of the asserting state, where their acts have an effect not upon the national territory but upon the subjects (nationals) of that state. As an example, the French Civil Code gives jurisdiction to French courts over persons anywhere who are legally responsible to French nationals even concerning obligations incurred outside France.

More usually the passive personality principle is framed in terms of a state asserting a right to punish aliens for crimes committed abroad against its nationals. Such a jurisdictional claim is controversial and not all states regard it as compatible with international law. Traditionally it has been opposed by the common law countries while countries such as Italy and Turkey have asserted it. Nevertheless even in common law jurisdictions there have been rare occasions where the principle has formed at least an alternative basis for the assertion of jurisdiction. One such case was that of *US* V. *Yunis* 681 F Supp 896 (1988) where a Lebanese national was prosecuted in the US for his alleged part in the hijacking of a Jordanian aircraft in the Middle East. The only connection between the US and the airliner was that there were a number of US citizens on board the hijacked aircraft. It was accepted by the court that the passive personality principle did provide an appropriate basis for jurisdiction.

Dixon explains the theoretical objections to this jurisdictional justification. In particular as he says, most criminal acts will give rise to liability in a state more intimately connected with the offence and clearly able to exercise jurisdiction under a non-controversial head.

Secondly, the passive personality principle effectively means that each national carries the protection of his home state wherever he goes, in that anyone committing an offence against him anywhere becomes liable under his national law.

These theoretical objections notwithstanding, a view is that at least on some occasions this basis is not only acceptable but desirable, but only if the defendant arrives voluntarily or lawfully (that is, pursuant to extradition proceedings) in the state of the offended national. This would seem appropriate when the offence is a serious one, and for whatever reason the state of the offender is unwilling to prosecute.

3.3.3 Universal Jurisdiction

A claim of universal jurisdiction as the basis of a prosecution is seldom made but its place is nevertheless important as it highlights once more the relationship between international law and international relations. Most writers claim to find the history of universal jurisdiction in the treatment meted out to pirates in and after the seventeenth century. International law accepted that every state had jurisdiction over pirates, partly because the pirate was to be regarded as *hostis humani generi* (meaning 'an enemy of all mankind') but more practically because by plying their 'trade' upon the high seas pirates would, or could, otherwise have remained beyond the jurisdiction of territorial states, and states capturing pirates might have been unable otherwise to punish and prevent piracy.

In the contemporary world the concept of universal jurisdiction has little to do with piracy. Rather it proposes that so-called international crimes are so heinous that each state has an interest and a right to prosecute such an enemy of all mankind. The most important discussion of universal jurisdiction (at least until the case concerning General Pinochet, on which, more later) is to be found in, and was a result of, the trial of Adolf Eichmann *(Attorney General of Israel V. Eichmann* [1961] ILR 18). Eichmann had been unlawfully abducted from Argentina where he was living, by members of the Israeli Secret Service. During the Second World War Eichmann's post in the Third Reich made him responsible for organising the deaths of many hundreds of thousands of Jewish people in concentration camps.

Following Germany’s defeat, he escaped to Argentina where he lived with his family until his abduction. He was charged and convicted by the Israeli court on counts of war crimes and crimes against humanity under an Israeli Act of 1950. In the course of his trial Eichmann's defence counsel challenged the jurisdiction of the court, arguing not only that he had been unlawfully abducted, but that he was charged with crimes that did not exist at the time he was supposed to have committed them, and furthermore, in and by a state, Israel, which did not then exist.

Not surprisingly, given the enormity of the effect of Eichmann's deeds, all these arguments were rejected and the court held that the crimes

committed by Eichmann were crimes known to international law, and therefore the principle of universal jurisdiction enabled the court to hear the case. In its judgment the court stated:

> The crimes defined in this [Israeli] law must be deemed to have always been international crimes, entailing individual criminal responsibility; customary international law is analogous to the common law and develops by analogy and by reference to general principles of law recognised by civilised nations, these crimes share the characteristics of crimes...which damage vital international interests, impair the foundations and security of the international community, violate universal moral values and humanitarian principles...and the principle of universal jurisdiction over 'crimes against humanity'...similarly derives from a common vital interest in their suppression. The state prosecuting them acts as agent of the international community, administering international law.

Since *Eichmann,* which was accepted overwhelmingly by the international community, further application of universal jurisdiction has not been extensive, in spite of marked enthusiasm from human rights activists. But some states have explicitly legislated to provide universal jurisdiction for their courts in the event of grave international crimes. Belgium in particular used such legislation as the basis upon which to prosecute (and convict) a number of Rwandan nationals in Belgium who had significant responsibility for the massacres of Tutsi people in Rwanda in 1994. According to Amnesty International, some 120 states have passed acts that provide for universal jurisdiction over war crimes, crimes against humanity, genocide and torture. Nevertheless prosecutions have not been numerous. There are a number of reasons for this.

The first is that the creation of the International Criminal Court provides what many consider to be a more appropriate forum for such trials. Secondly, states such as Belgium that have attempted to promote universal jurisdiction have come under substantial political pressure from states that fear what they regard as unfortunate possibilities (on one occasion an attempt was made to have the then Prime Minister Ariel Sharon of Israel prosecuted). Thirdly, questions of immunity from prosecution arise, as we will see later in the next unit.

Rather than utilising universal jurisdiction, many states, including the UK, have elected to enact the provisions of international treaties that prohibit international crimes and have thereby provided themselves with jurisdiction where appropriate. Thus, for example, the provisions of the

Torture Convention, 1984 and the Genocide Convention, 1948 have both been explicitly incorporated into the domestic law of the UK.

In 2002, when the ICJ had the opportunity to consider the status of universal jurisdiction it rather avoided the issue. The *Case Concerning the Arrest Warrant of* 11 *September 2000 (Congo V. Belgium)* arose as a result of a Belgian attempt to have an ex-foreign minister of the Congo arrested in order to be charged with grave violations of human rights. The attempt was based upon the principle of universal jurisdiction. (It was perhaps politically unfortunate that such a case arose between Belgium and a state it had cruelly administered as a colony.) There was strong evidence to support the Belgian allegations but the Court upheld the ex-minister's claim of immunity from prosecution and so it was not necessary to determine the validity of universal jurisdiction in such a case.

As Dixon observes in your readings (p.138), the majority of the Court 'assumed for the purpose of the case that universal jurisdiction was established as a principle of customary law', whereas the minority took the view that while historically universal jurisdiction had been exercised where there was some positive tie between the state exercising the jurisdiction and the individuals charged, they did not conclude that this necessarily remained the case, and effectively elected to stand back and await developments.

3.3.4 Universal Jurisdiction and Customary International Law

It is clear, at least in the UK, that treaties entered into by the state are binding upon the state but do not, without more being done, automatically become a part of the domestic law. This was exemplified in Module 2 Unit 1 when we considered the place of the European Convention on Human Rights in UK domestic law.

The position is less clear with regard to customary international law which many argue to be a part of the common law and therefore may, and should, be applied in domestic courts without the need for legislation. An example of the debate is to be found within the saga of attempts by the Spanish government to extradite General Pinochet to Spain to face charges arising from his period in office as Head of State of Chile. Among the international criminal charges against him was the crime of torture. Under the requirements of extradition law, extradition may only be granted where the alleged offence was, at the time of commission, an offence under the law of both the state requesting extradition and the state to whom the request is made.

Thus in Pinochet's case it was necessary to show that in the UK at the time of the alleged torture, it was a crime to torture a non-UK citizen outside of UK territory. In fact the position was that while the UK had been party to the Torture Convention it had not enacted its provisions into domestic law until the passage of an Act which provided for criminalisation of acts of torture occurring after 28 September 1988. In its final judgment the House of Lords concluded that extradition was possible only for acts of torture for which General Pinochet was allegedly responsible occurring after that date.

Only Lord Millett took a significantly different view. He was of the opinion that torture by public officials, carried out as an instrument of state policy, was already an international crime attracting universal jurisdiction by 1973 when General Pinochet had seized power. Writing of the events later, Lord Millett explained his position:

> On the question of jurisdiction, five of the six ruled that there was no jurisdiction over offences committed by foreigners abroad before the Criminal Justice Act 1988 conferred extraterritorial jurisdiction on the English courts. At first sight, the difference between us appears to be a technical one. We all agreed that torture by public officials carried out as an instrument of State policy was already an international crime of universal jurisdiction by 1973. The majority considered that this meant that, as a matter of international law, the United Kingdom was free to assume extraterritorial jurisdiction, which it eventually did in 1988. I considered that it meant that, as a matter of customary international law, which is part of the common law, the United Kingdom already possessed extraterritorial jurisdiction.
>
> But the difference really goes far deeper than that. The majority considered that torture by foreigners abroad was not a crime at all under English law before the 1988 Act made it one. I could not accept that. In my opinion torture has always been a crime under every civilised system of law. It is just that, until 1988, our courts had no jurisdiction over it if it was committed abroad.

Thus even he (contrary to Dixon's comments on p.92) conceded that courts required the statutory incorporation of this international crime before they would be able to hear cases.

This position has also been confirmed in Australia, where it was held that the admittedly international crime of genocide which, if any crime does, gives rise to universal jurisdiction was nevertheless not a crime

under Australian federal law because there was no enactment by the Australian parliament.

The conclusion must therefore be that, at least for common law states, international crimes give rise to universal jurisdiction. But domestic courts will only be able to hear such cases where the international provisions and definitions have explicitly been made a part of the domestic law.

4.0 CONCLUSION

To conclude, the three uncontroversial bases of jurisdiction in international law are territorial jurisdiction, jurisdiction based on nationality and protective jurisdiction. In each case there is a clear and close connection between the state and either the person or the act giving rise to jurisdiction. In each case the international community is effectively unanimous in its acceptance of these bases.

5.0 SUMMARY

Controversial bases for international jurisdiction include situations where there is no direct or obvious link between the state wishing to assert jurisdiction and the event or individuals over which or whom it wishes to assert it. The more powerful a state the more likely it is to assert international jurisdiction, even where this is opposed by some, or many other states.

6.0 TUTOR MARKED ASSIGNMENT

What do you consider to be the essential differences between the non-controversial and the controversial bases for international jurisdiction?

7.0 REFERENCES/FURTHER READINGS

Dixon, M. *Textbook on international law* (Oxford: Oxford University Press, 2005) fifth edition.

Cassese, A. *International law* (Oxford: Oxford University Press, 2005) second edition.

Kaczorowska, A. *Public international law.* (London: Old Bailey Press, 2005) third edition.

FEEDBACK ON SELF ASSESSMENT EXERCISES 1 & 3

SELF ASSESSMENT EXERCISE 1

This distinction reflects the difference between the theoretical absolute power of a state within its borders, and the reality of the confines of power. The absolute power (of course in fact greatly constrained by political and even treaty realities) allows the sovereign legislature to pass any enactment it wishes over any matter wherever. There is no power to strike down such a duly passed law (subject only to the internal constitutional rules). On the other hand, problems of enforcing such an expression of absolute power may well be insuperable. And international law has developed rules relating to the exercise of jurisdiction which limits what can lawfully be done. It is necessary to observe that the more powerful a state, the more it will be able to assert extra-territorial jurisdiction.

SELF ASSESSMENT EXERCISE 3

The concept of jurisdiction is intimately related to the concept of the power of a state. It has power (jurisdiction) over its territory and power over its nationals, although it may only be able to exercise the latter if the national is within the territory. Such jurisdiction is uncontroversial, as is what is known as the protective principle. This allows the claim of jurisdiction relating to acts committed outside the territory of the state but intended to harm the interests of the state. There is international acceptance that jurisdiction may be claimed in these circumstances. Beyond these categories there are other occasions when jurisdiction is claimed but the acceptance of these is not universal. In other claims of jurisdiction the strength and success of the claim will often depend upon the power of the state making the claim.

UNIT 3 IMMUNITY FROM JURISDICTION

CONTENTS

1.0 INTRODUCTION

The necessary counterpart to a discussion of jurisdiction is a consideration of immunity from municipal jurisdiction. Immunity from jurisdiction provides the exception to the permissive rules of jurisdiction discussed thus far. Such immunity from suit (meaning immunity from being called upon to appear in the domestic courts of a state) is most widely and most importantly extended to all other states.

Under international law, because states are equal in their sovereignty, no state is entitled to call another state before its courts. This sovereign immunity also extends to diplomatic representatives. Originally sovereign immunity was almost always granted on an absolute basis and this was the case in the UK. Such broad-based immunity however gave rise to some problems.

The first was that, particularly after the Russian revolution of 1917, and then in the period of decolonisation, many activities that had been private commercial activities attracting no immunity became state enterprises whose commercial dealings were immune from suit. Even states which were not command economies extended their commercial activities and interests. This brought problems both for those who would otherwise have been able to sue on a breached contract and for states enjoying immunity, as other parties would be unwilling to enter into contracts where there was no remedy in the event of breach. These problems led to provision for immunity being modified.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Explain the basis and effect of state immunity from jurisdiction;
- Explain the basis and effect of individual immunity from jurisdiction; and
- Describe diplomatic immunity.

3.0 MAIN CONTENT

Essential Reading

Dixon, Chapter 7: 'Immunities from National Jurisdiction', pp.163-94.

Cassese, Chapter 6: 'Limitations on State Sovereignty: Immunities and Treatment of Individuals', pp.98-23.

Kaczorowska, Chapter 9: 'Immunity from Jurisdiction', pp.145-73.

Read these pages now.

3.1 Sovereign Immunity

There is a Latin maxim which neatly summarises the justification for sovereign immunity. It states *'par inparem non habet imperium',* usually translated as 'one equal cannot exercise authority over another'. It was also said in earlier English cases that a sovereign was not to be 'impleaded' (meaning 'brought into litigation') in the court of another sovereign. In addition it was accepted that where some act of a foreign sovereign fell for consideration in a domestic court, that court could not pronounce upon the legality of that act in the foreign jurisdiction. It did not have the power to make such a judgment and an issue of this kind is said to be 'non-justiciable'.

Whereas the immunity was once absolute, the reality of states being heavily involved in commerce made the rule increasingly difficult to justify. Although the precise scope of the immunity depends upon the domestic law of each state, the principle of state immunity remains. A very brief history of the change from absolute immunity to restricted immunity should help you to understand this rather arcane (but important) area of international law. There are many examples of immunity in action.

One of the earliest, later accepted into British law, which well illustrates the principle and the rationale of immunity is the decision of the US Supreme Court in 1812, in *The Schooner Exchange* V. *McFadden.*

The trading vessel *The Exchange* had been seized on the high seas by persons acting on the orders of the French Emperor, Napoleon Bonaparte, taken to France, confiscated under French law, and then fitted out as a French warship. Bad weather later forced her into the port of Philadelphia. While there, the plaintiffs, who were the owners of the vessel at the time of its seizure on the high seas, issued a writ for the return of the schooner. Without sovereign immunity the position at law would have been clear and the boat restored to the owners from whom it was improperly appropriated. Marshall CJ, however, giving the judgment of the Court, held that a vessel of a foreign state with which the USA was at peace, and which the US Government allowed to enter its harbours was exempt from the jurisdiction of the courts. He stated:

> The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.

Further, he added that there was a 'perfect equality and absolute independence of sovereigns' from which it was inferable that no state could exercise territorial jurisdiction over another. (Interestingly for later developments, it was submitted in argument that if a sovereign engaged in trade he would enjoy no immunity in respect of his trading operations, but that question was left open in the judgment.)

Typical of the UK cases following *The Schooner Exchange* was *The Parlement Belge* of 1880, another case concerning a ship. *The Parlement Belge* was a Belgian vessel which carried mail and passengers between Ostend and Dover. Through incompetence and negligence by her crew, she collided with the British sea tug, *Daring,* whose owners sought to recover damages. It was argued in defence that *The Parlement Belge* was the property of the King of the Belgians, and was therefore immune from such an action.

The Court of Appeal, reversing the decision of the court below and granting immunity, stated that the court could not exercise jurisdiction if either an attempt was being made to sue a foreign sovereign in person, or an action '*in rem'* (an expression from Latin meaning that the action is 'against or about a thing', in this case the vessel) was brought where the ship was being used substantially for public purposes, as was the case with *The Parlement Beige.* Again, in later cases the question of

immunity in *The Parlement Beige* had the ship been wholly or substantially in ordinary commerce was left open.

Nevertheless it was widely accepted that at least in the UK such sovereign immunity was absolute. This was not the way the law was developing in all countries. With the dramatic increase in state involvement in commercial deals, particularly in an era of decolonisation where many new states nationalised significant commercial enterprises, it was difficult to defend total immunity and not helpful to trade or international contracts. Some states (particularly 'first world' or developed states) moved towards a position of accepting only a restricted doctrine of immunity. They did this by providing that a state has immunity for only a limited class of acts. The distinction is between acts *jure imperii* and acts *jure gestionis.* In Dixon's appropriate explanation the purpose is to ensure 'that the state is treated as a normal litigant when it behaves like one, and as a sovereign when it exercises sovereign power'.

Thus the first category, acts *jure imperii,* are acts in and of public authority for which there would still be immunity; whereas acts *jure gestionis* are acts which are commercial or private where immunity would not apply. Policy in some countries and in the USA began to restrict immunity in this way as early as 1950. But the change to restrictive immunity in the UK started through judicial decision only in the 1970s leading to legislation in the State Immunity Act, 1978. The cases which led to the passage of this Act well illustrate the urge for modification but we will briefly examine only two.

The first, significantly, was a decision of the Privy Council - significant because the Privy Council was able to decide not to follow previous House of Lords decisions that appeared to compel absolute immunity. In *The Philippine Admiral* [1977] AC 373, the Privy Council determined that a ship that had been operated throughout its life as an ordinary merchant ship, earning freight by carrying cargo, was beyond sovereign immunity. This was consistent with decisions elsewhere and probably reflected the appreciation that jurisdictions, not limiting immunity, stood to lose business to those states that did and where those trading with foreign governments were given more protection.

Shortly after that case, an action giving rise to the same questions fell to be decided in an English court, which was of course technically still bound by House of Lords decisions thought to assert absolute liability. The case was *Trendtex Trading Corp.* V *Central Bank of Nigeria* [1977] QB 529. Both the facts and the decision are memorable.

In the 1970s Nigeria suffered a significant and destructive scandal concerning the importation of cement. While there was a considerable need for cement for Nigeria's extensive building projects, orders were placed for cement delivery in 1976 of some twenty million tons. This was approximately ten times the capacity of Nigeria's ports for the whole year. The result was that many ships arrived carrying cement which could not be unloaded (and, apparently, because of the delay in discharge and the humid conditions much of the cement 'went off (hardened) in the ships' holds).

Trendtex was one of the companies that had a contract for the delivery of cement. They were to be paid against a letter of credit issued via a London bank, from the Central Bank of Nigeria. The Bank of Nigeria effectively prevented payment for the unwanted and undeliverable cement and when sued sought to rely upon state immunity. The Court of Appeal held that the Central Bank of Nigeria was a separate entity from the Government of Nigeria (a rather strained interpretation) and thus was not entitled to immunity. (The effect of this decision was consistent with similar cases heard in other European jurisdictions.)

Lord Denning, however, went further than was strictly required and through remarkable judicial gymnastics concluded that past House of Lords decisions applying international law were no longer relevant as, he argued, international law had developed to accept restricted immunity. Precedents based on outdated principles of international law could, he said, be ignored. He added:

> ...It follows, too, that a decision of this court - as to what was the ruling of international law 50 or 60 years ago - is not binding on this Court today. International law knows no rule of *stare decisis.* If this Court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it.

Doubtful though Lord Denning's arguments were (earlier cases had determined what English law held concerning immunity, not what international law said), the conclusion he reached was followed in the House of Lords in a case in 1981, *I Congreso del Partido,* when applying the law as it was before legislation. *Trendtex* did highlight the need for legislation, and this came in the State Immunity Act, 1978. This Act effectively enacted the provisions of the European Convention on State Immunity, 1972, which had been intended to harmonise European perspectives on immunity. Like the Convention, the Act begins by providing for general sovereign immunity before proceeding to list exceptions which accord with the restrictive immunity perspective.

Under the Act a plaintiff must show that the action complained of by a foreign state comes within these exceptions.

In essence, where the transaction is commercial, immunity is excluded. Nevertheless it is provided that the 'exception to the exception' is where although the transaction is commercial, it was entered into 'in the exercise of sovereign authority'. The test really is as follows, as quoted in *I Congreso del Partido:*

> ...it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform.

Dixon also refers to and considers the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property (Draft UN Convention) (p.174). This has now become the UN Convention on Jurisdictional Immunities of States and their Property, adopted by General Assembly Resolution on 2 December 2004 and now open for signature. Although the Convention represents a compromise between states favouring something approaching absolute immunity (primarily developing states) and others, existing UK legislation seems to be compatible with its provisions.

3.2 Head of State Immunity

So far in considering state immunity we have considered the state itself, and indeed historically the state and its sovereign were regarded as the same entity. The ruler **was** the state, in the sense that he (or rarely she) personified the territorial entity. Of course this rather strains language, as most of us would readily distinguish between persons and things. It is apparent, though, that state or sovereign immunity would only be meaningful if it extended to those people who by their actions determine the actions of the state.

For this reason S.14(1)(a) of the State Immunity Act, 1978 explicitly states what had already been accepted in both international and domestic law, namely that the immunities granted to a foreign state extend to '(a) the sovereign or other heads of that State in his public capacity, (b) the government of that State, (c) any department of that government', but do not extend to any separate entity which is distinct from the executive organs of the government of the state.

The *Pinochet* Case

The extent of the immunity granted to a head of state was at issue in the case of General Pinochet, referred to earlier in the unit. The final decision of the House of Lords in this case is well worth reading -see *R* V. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No.3)* [1999] 2 All ER 97. In brief the well known facts were that General Pinochet led a violent right wing military coup in Chile in 1973. The elected President, Allende, was deposed and killed and General Pinochet became Head of State of Chile until he resigned in 1990. In 1998 while on a private visit to the UK he was arrested after a Spanish request for his extradition to Spain to face a wide range of alleged crimes including torture and conspiracy to torture.

A first and important question for the House of Lords was whether General Pinochet, by reason of his position of Chilean Head of State, enjoyed, and continued to enjoy, immunity from UK domestic courts even for acts as extreme as torture. (As explained earlier in this unit when discussing universal jurisdiction, the Court decided that extradition would only be possible, if at all, for acts of torture committed after the date on which the Torture Convention was incorporated into domestic UK law.)

The case was extraordinarily important. This was the first time it had been suggested that a domestic court could refuse head of state immunity on the basis that there could be no immunity against prosecution for serious international crimes. There would seem to be little doubt that if General Pinochet had still been Chilean Head of State at the time of his arrest, he would have enjoyed immunity. While this is manifestly unfortunate and harsh towards those tortured, it represents the law, because international relations could hardly survive otherwise. If the position was not as it is, heads of state, whether of Israel, Zimbabwe, USA, Pakistan, the UK or Russia, to name but a few, could scarcely venture beyond their borders without fear of arrest. Thus the House of Lords (Lord Browne-Wilkinson) stated:

> ...This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae.*

But what is the position of a head of state who is no longer in office? Here the Court found the position of ex-heads of state to be identical to ex-ambassadors. Lord Browne-Wilkinson said:

> The continuing partial immunity of the ambassador after leaving post is of a different kind from that enjoyed *ratione personae* while he was in post. Since he is no longer the representative of the foreign state he merits no particular privileges or immunities as a person. However in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is necessary to provide that immunity is afforded to his official acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador's time. Accordingly under Article 39(2) [of the Vienna Convention on Diplomatic Relations, 1961] the ambassador, like any other official of the state, enjoys immunity in relation to his official acts done while he was an official. This limited immunity, *ratione materiae,* is to be contrasted with the former immunity, *ratione personae* which gave complete immunity to all activities whether public or private.
>
> In my judgment at common law a former head of state enjoys similar immunities, *ratione materiae,* once he ceases to be head of state. He too loses immunity *ratione personae* on ceasing to be head of state...

You will probably realise that there is some parallel between absolute as opposed to restricted immunity for states and the distinction between acts *ratione peronae* and acts *ratione materiae* for ex-heads of state and ambassadors in that immunity continues to attach to ex-heads of state and ambassadors for things they did in an official capacity, that is, 'both enjoy [continuing] immunity for acts done in performance of their respective functions whilst in office'. As with absolute and restricted immunity, the test is concerned with the nature of the act performed.

In the *Pinochet* case, however, a further question arose. Could it ever be said that the alleged organisation of torture would constitute an act committed by General Pinochet as part of his official functions as head of state? The Court recognised that 'Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*'. The House of Lords concluded that there were strong grounds for concluding that the implementation of torture, as defined by the Torture Convention, could not be a state function and there could be no surviving immunity because the acts were contrary to international criminal law.

3.3 Diplomatic and Consular Immunity

The previous section briefly alluded to the position of ambassadors with regard to judicial immunity. Here we will consider diplomatic immunity in a little more depth. Again the position is largely dictated by the history of international relations. This has long recognised that reciprocal respect for those representing foreign states in the territory of another is fundamental to international intercourse. In the words of the ICJ, diplomatic immunity is 'essential for the maintenance of relations between states and is accepted throughout the world by nations of all creeds, cultures and political complexions'.
As with the head of state, the immunities granted to diplomatic and consular officers are personal and enjoyed by individuals, but it is of course because they are an integral part of the government of the state they represent, that immunity extends to them. UK legislation protecting diplomats goes back to the Diplomatic Privileges Act, 1708 and is currently governed by the Diplomatic Privileges Act, 1964 which is based upon the Vienna Convention on Diplomatic Relations, 1961. The latter has been ratified by more than 180 nations.

Dixon's summary (on pp.189-90) of the immunities granted to such persons is accurate and brief. One point that should be noted, however, when he suggests that such officials have immunity from all criminal prosecutions is that, while this is true, such an official will remain liable to prosecution in the state that he represents on the nationality principle of jurisdiction. Again the immunity is closely related in definition to the distinction between absolute and restricted state immunity. Immunity will not be available only where there is a civil action which arises from an enterprise unrelated to the diplomat's official position.

The immunity provided extends to other matters as well. In particular diplomatic premises are inviolable and can only be entered with the permission of the head of mission. Freedom of movement (though not totally free movement, see Article 26 of the Convention) is assured and free and secret communication between mission and home state is permitted. Diplomatic bags intended for official use may not be searched. ('Bag' is a euphemism for any container, including even containers from a container ship.)

Nevertheless the receiving state retains the ultimate sanction of being able to ask, without cause, for the withdrawal of any person enjoying diplomatic privilege and they may be declared *'persona non grata'*.

SELF ASSESSMENT EXERCISE 1

i. Had English courts already achieved through the common law that which was enacted in the State Immunity Act?
ii. Summarise the law concerning the immunity of a head of state in the light of the *Pinochet* decision.

4.0 CONCLUSION

In conclusion, diplomatic immunity is 'essential for the maintenance of relations between states and is accepted throughout the world by nations of all creeds, cultures and political complexions'. The immunities granted to diplomatic and consular officers are personal and enjoyed by individuals.

5.0 SUMMARY

The immunity of states was once generally absolute and this was the position adopted by the English courts. But at the time when the rule developed, state governmental activities overwhelmingly remained in the public sphere. This position changed with both the creation of socialist states after 1917 and decolonization following the Second World War. States came to participate much more directly in commercial activities to which state immunity seemed less appropriate.

These different circumstances were recognised both by the English courts and by the State Immunity Act, 1978. This Act reflected the European Convention on State Immunity, 1972 and ensured that European states harmonised their state immunity law.

6.0 TUTOR MARKED ASSIGNMENT

What principles underlie the doctrine of sovereign immunity? Does the doctrine of sovereign immunity achieve its goals?

7.0 REFERENCES/FURTHER READINGS

Dixon, M. *Textbook on International Law* (Oxford: Oxford University Press, 2005) fifth edition.

Cassese, A. *International Law* (Oxford: Oxford University Press, 2005) second edition.

Kaczorowska, A. *Public International Law.* (London: Old Bailey Press, 2005) third edition.

UNIT 4 THE LAW OF TREATIES

CONTENTS

1.0 INTRODUCTION

In Module 1 Unit 3, we briefly considered treaties as a major source of international law. We observed that it may be argued that treaties are now the most important of all sources of international law. While much customary international law remains contentious (and contended) treaties are supposed to be explicit and clear, expressing the will of the parties who wish to be bound by agreement to the negotiated terms stated in the document. That at least is the theory. States voluntarily commit themselves to perform in accordance with the negotiated terms. Underlying international law is this obligation *-pacta sunt servanda* -which was suggested to be a legal principle which takes such obligations beyond 'mere' international relations.

Although that is the theory the reality is much less clear and remains controversial. Indeed such is the potential for dispute that the International Law Commission spent much time codifying and drafting rules that finally received significant international approval in the form of the Vienna Convention on the Law of Treaties (VCLT), 1969 which came into force in January 1980. This Convention is an attempt to clarify rules of both interpretation and definition with the intention of ensuring a uniform approach to problems arising out of treaties, whether concerned with the formation of the treaty, the content of the treaty, or the continuation or termination of the treaty.

This might seem a rather dull topic. It is not. Crucially important questions of policy and politics arise in cases concerned with the interpretation of treaties. In order to exemplify this aspect we will consider in some depth in the next unit the ICJ's decision in the 1997

Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia). This case not only further exemplifies the method of the ICJ but, more importantly for this unit, demonstrates the attitude of international law to international treaties.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Define a treaty;
- Describe the place and effect of the Vienna Convention on Treaties, 1969;
- Understand the legal quality of *pacta sunt servanda;*
- Explain why a treaty is not identical to a contract;
- Describe the means by which treaties are concluded and understand the formal requirements;
- Define and explain the significance of treaty reservations;
- Understand the meaning and impact of the peremptory norms of international law *(jus cogens)* upon treaties; and
- Outline the rules for treaty validity.

3.0 MAIN CONTENT

3.1 The Formation and Formalities of Treaties

Essential Reading

Cassese, Chapter 9: 'Treaties', pp.172-73.

Dixon, Chapter 3: 'The Law of Treaties', pp.57-61.

Kaczorowska, Chapter 11: 'The Law of Treaties', pp 231-40.
VCLT Articies 1-18.

This section summarises the ways by which treaties may be concluded and their formal requirements. These are both remarkably few and extraordinarily flexible. The Vienna Convention on the Law of Treaties, Article 2(1) (a) defines a treaty to which the Convention applies as follows:

> ...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.

It also provides, however, that this does not affect the legal force of other agreements between states and other bodies having international legal personality, or agreements between states not in written form. For our purposes, though, it is only agreements between states that are of interest and only those in written form.

Because Article 102 of the UN Charter provides for all treaties to be registered with the UN Secretariat (without which a treaty may not be invoked before any organ, including the ICJ) it is clear that this may only be done if the agreement was in writing, and there are thus very few unwritten treaties; these too we will ignore.

Furthermore, as Cassese points out in your reading, political positions and considerations had much to do with the eventual formulation of the Vienna Convention and it finally represented a shift in thinking about treaties. Whereas traditionally the emphasis in treaty law was upon the equivalent of 'freedom of contract' in that states could enter any treaty of any terms under any circumstances in the expectation that it would be upheld, the Vienna Convention introduced constraints and controls that had not previously existed.

Of course, just as in 'freedom of contract' theory, so too in international treaty-making the freedom was not what it seemed. The effect of upholding such treaties was often a willful refusal to see the unequal bargaining power which had led to the treaties. In colonial times particularly, strong states were able to impose 'agreements' upon weaker states. The spirit of the Convention is very much opposed to validating such coercion, although this remains controversial. It is controversial because strong states consider coercion of weaker states to be a normal aspect of international relations. The Convention also limited the terms a treaty might include by proscribing the inclusion of terms in contravention of the 'central core of international values' from which no country, however great its economic and military strength, may deviate.

It is essential to understand that the Convention contains both codification of existing customary law and also innovative new provisions. The effect of this must be remembered. Obviously codification of existing law makes no change and ordinarily all states will be bound as they were before. Where, however, the provision is innovative, under the Convention's provisions it will apply when interpreting only those treaties made after its entry into force (27 January 1980). Under these circumstances too, it will apply only where the parties to a disputed treaty are themselves parties to the Convention. (And remember that the United States is not a member.) Nevertheless it has been argued that the exception to this final point is where innovative

provisions of the Convention can be shown to have developed into customary international law, affecting even those states not party to it.

One further important difference between treaties and contracts should be remembered. Although not formally defined as a treaty, it is possible in international law for a unilateral statement made by one state in the expectation that another state or states will rely upon it to have legal effect as though it were a treaty. Thus in the *Nuclear Test Cases (Australia V. France, New Zealand V. France)* (1974) the ICJ held that when France, through both its President and Foreign Minister, issued a statement to the effect that its current round of atmospheric nuclear tests would be its last, this was a statement upon which the international community could rely. Here obviously, unlike contract, there is no need for reciprocity or even acceptance by other states.

Because the Convention refers to agreements 'governed by international law' it is possible to infer the requirement of the need to create legal relations (and thus legal obligations). Agreements which do not meet this requirement are not without effect but have no legal content. An example of such an agreement was the Final Act of the Helsinki Conference on Security and Co-operation of 1975 which was stated in the final document to be 'not eligible for registration under art 102 of the Charter of the United Nations' and this was understood to mean that the Act was not legally enforceable. It was, however, a document of immense political significance which came to influence international law.

The making of a treaty is usually a three-stage process involving:

1. the negotiation of the treaty ;
2. the authentication of the drafted document (usually by signature or initialing);
3. ratification.

Article 12(1) of the Convention nevertheless provides that if a treaty does not require ratification and the signature was intended to express the consent of a state to be bound, then the signature shall have that effect. Much more commonly the signature represents a step along the way to treaty creation and the treaty will require ratification.

Ratification

There are two aspects of importance in ratification. For domestic law purposes in the UK, ratification is effected by the Crown. How this is done in other states depends upon their domestic law. Once ratified, the treaty exists in domestic law as an international treaty to which the UK

is bound. Without more, however, it will not be a part of domestic law and it will thus not be enforceable in municipal courts.

The second aspect of ratification is ratification in international law. This ratification, which brings the treaty into force, is a procedure usually requiring the deposit of ratification documents or their exchange. This common two-stage process of signature and ratification allows time for domestic consideration of a signed treaty. The only obligation of a signatory before ratification (where this is required) is not to work against the signed but unratified treaty. This is why when the US signed the Rome Statute of the International Criminal Court in 1988 in the last days of the Clinton presidency, the incoming Bush administration took steps to 'un-sign' (withdraw signature) to enable it to oppose the effect of the treaty.

Finally it should be noted that the question of when a treaty enters into force will usually be resolved by provision in the treaty document itself. This will often be explicitly stated, such as, for example, upon the deposit of the 60th ratification, or on a date some time after such ratifications are received. If the treaty is silent as to when it is to enter into force, the date will be inferred.

SELF ASSESSMENT EXERCISE 1

Explain the status of the provisions of the Vienna Convention on the Law of Treaties. Is the present position satisfactory? (Give your reasons). See *Feedback* at the end of this unit.

SELF ASSESSMENT EXERCISE 2

Which provisions in the Vienna Convention codify and which are innovative, and what are the consequences? (See Dixon, pp.55-61).

3.2 Treaties and Reservations

Essential Reading

Dixon, Chapter 3: 'The Law of Treaties', pp.61-65.

Cassese, Chapter 9: 'Treaties', pp.173-75.

Kaczorowska, Chapter 11: 'The Law of Treaties', pp.241-45.

VCLT Articles 19-23.

Reservations to treaties are obviously relevant only to multilateral treaties. In a bilateral treaty each party will be bound to the same terms. Where there are more than two parties, however, there are many occasions when not all parties will be prepared to accept all the provisions of a treaty as drafted. The Vienna Convention codifies customary law in defining a reservation to a treaty in Article 2(1) (d) 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 modify the legal effect of certain provisions of the treaty in their application to that state.

The status and effect of a reservation is not exactly the same in customary international law as it is under the Convention and it is necessary to understand both. The traditional approach to reservations was that they would be valid only if permitted by the treaty terms, and if all other parties to the treaty accepted the reservation. Such an approach, which seemed consistent with principle, was not well suited to multilateral treaties with large numbers of states where such total agreement would be unlikely.

The approach was reviewed in an important ICJ advisory decision of 1951 - *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide.* Here the General Assembly of the United Nations had adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 and a dispute arose over whether reservations to the Convention could be accepted. There was no provision for reservation within the Convention.

The majority of the Court held that a state could be 'regarded as a party to a treaty, even if its reservation had not been accepted by all other parties, so long as that reservation [was] compatible with the object and purpose of the Convention' (Dixon, p.62). Where, however, another state would not accept such a reservation the refusing state would be entitled to regard the reserving state as not being in a treaty relationship with itself.

Although the International Law Commission thought the compatibility test too subjective, the Convention, in Articles 19-23, followed the principles of the *Reservations Case,* but with a slight modification in that it accepted that for some treaties every reservation will be held incompatible except where all treaty parties unanimously agree otherwise.

The effect of valid reservations in a multilateral convention must be clearly understood. The effect is not only to restrict the obligation of the

reserving state in accordance with the reservation but also effectively to redraft the treaty as between the reserving state and all others so that all have the same reservation. In other words, because treaties must affect all parties equally among each other, no party can rely upon a reservation to give it an advantage against a state that has not made a similar reservation. This is stated in Article 21 of the Vienna Convention, which explains the legal effect of reservations, stating that a reservation not only modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation, but also modifies those same provisions to the same extent for other parties in their relations with the reserving state.

There are occasions when a state does not want to make a formal reservation but does want to make explicit its interpretation of a provision. These so-called 'interpretive declarations' may on occasion be interpreted as reservations. In the words of the International Law Commission, 'Such a declaration may be a mere clarification of a state's position or it may amount to a reservation, according to whether it does or does not vary or exclude the application of the terms of the treaty as adopted'. This test remains and what matters is not the form of words used, but the effect of those words.

SELF ASSESSMENT EXERCISE 3

'The acceptance of reservations in treaty law meets a need created by multilateral treaties with many parties (often more than one hundred). Unless reservations were accepted, agreement between so many states would be almost impossible. That notwithstanding, reservations do severely compromise the goal of consistency and uniformity in the creation of international obligations.' Discuss. (See *Feedback* at the end of this unit).

SELF ASSESSMENT EXERCISE 4

When and under what circumstances may a treaty affect states not party to it? (See Dixon, Chapter 3: 'The law of treaties', pp.70-71.)

3.3 The Validity of Treaties

Essential Reading

Cassese, Chapter 9: 'Treaties', pp.176-78.

Dixon, Chapter 2: 'The Sources of International Law', pp.36-38; Chapter 3: 'The law of treaties', pp. 72-77.

Kaczorowska, Chapter 11: 'The Law of Treaties', pp.246-50.

VCLT Articles 26-30. D VCLT Articles 42-53.

Article 26 of the VCLT formally states the principle of *pacta sunt servanda.* It provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. The strength of the principle is reinforced in the following article, which forbids any state from relying on the provisions of its domestic law as justification for its failure to perform its obligations under a treaty.

Questions as to the validity of a treaty again may resonate with considerations concerning the validity of contracts in domestic law. Unfortunately the parallels, while attractive, are not exact and it is better to consider treaty validity quite separately. Under the VCLT the validity of a treaty can only be impeached by using the provisions of the VCLT. Similarly the termination of a treaty, its denunciation or the withdrawal of a party will be valid only if it is consistent with the provisions of the treaty itself, or the provisions of the Convention. The application of this principle is illustrated in our case study at the end of this unit.

Error, Fraud and Corruption

The VCLT states the reasons and causes that may justify a treaty being held invalid. The first is that under Article 48 error may be invoked if the 'error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty', but this will not apply if the state in error 'contributed by its own conduct to the error' or should have been aware of the mistake. Article 49 provides for invalidating an expressed consent to be bound to a treaty if a state has been induced to conclude it by the fraudulent conduct of another negotiating party, and Article 50 provides similarly where a state's consent has been procured by the corruption of its representative.

Coercion of a State or its Representative

Much more significant are the provisions of Articles 51 and 52 concerning the coercion of a state or its representative. Article 51 states that where a state's consent to be bound by a treaty has been procured by the coercion of its representative through acts or threats directed against him, that expression of consent shall be without any legal effect. Article 52 states that a treaty is void if its conclusion has been procured by the threat or use of force 'in violation of the principles of international law embodied in the Charter of the United Nations'.

Such coercion of a state has been widely considered. As the Law Commission observed, prior to the Covenant of the League of Nations it had not been thought that the validity of a treaty could be affected because it had been concluded where one party was under threat from another. Many treaties had been concluded by powerful states insisting upon acquiescence from weaker ones and this had simply been accepted as a description of how international relations were conducted. Article 2(4) of the Charter of the United Nations proscribing the threat or use of force had however recognised a major change in such relations and the emphasis upon sovereign equality in the Charter was also important. Furthermore, the VCLT was negotiated during a period of decolonisation and the newly independent states wanted their independence to be real.

Within the International Law Commission there were arguments as to what sort of coercion should be proscribed. Pressure to define coercion beyond 'threat or use of force in violation of the principles of the Charter' was resisted. While the Soviet Union existed, international law writers from there often argued that the crucial principle determining the binding nature of a treaty should be that it was concluded on the basis of the equality of the parties; and that unequal treaties were not legally binding.

At the Vienna Treaty Conference a compromise was reached with the provisions being reinforced by a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, adopted by the Conference and stating that the Conference:

> Solemnly condemns the threat or use of pressure in any form, whether military, political or economic, by any state in order to coerce another State to perform any act relating to the conclusions of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.

That notwithstanding, the exact scope of the provisions remains uncertain. Many states have been forced to conclude treaties with other states or to assume obligations required by such international bodies as the International Monetary Fund or the World Bank because their parlous financial position left them with little alternative. There is no indication that the ICJ will accept such economic reality as coercion.

Treaties Conflicting with a Peremptory Norm of International Law (*Jus Cogens*)

Article 53 is another provision of the Convention over which debate has been long. It provides that a treaty will be void if it conflicts with a peremptory norm of international law, which is defined within the

Article as 'a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted...'. This was a provision that attracted strong support from Eastern European countries and from developing countries but was resisted by others. It was included because of the widespread acceptance of the reality of *jus cogens* which at the least included the prohibition on the unlawful threat or use of force, genocide, slavery or piracy. The Commission considered listing examples of peremptory norms but concluded that to do so might appear to prioritise or privilege those listed.

The effect of the provision is to recognise that under the rules and principles of international law there are some (generally humanitarian) principles that are so basic to international relations that their exclusion could not be permitted. Thus a treaty intended to further aggression against another state or to forcibly acquire territory from another is to be void regardless of the level of support and acceptance it receives internationally.

3.4 The Interpretation of Treaties

Essential Reading

Cassese, Chapter 9: 'Treaties', pp.178-80.

Dixon, Chapter 3: 'The Law of Treaties', pp.65-70.

Kaczorowska, Chapter 11: 'The Law of Treaties', pp.255-56.

VCLT Articles31-33.

The art of treaty interpretation is not dissimilar from that of statutory interpretation in domestic law. Problems of interpretation arise where treaty provisions are ambiguous, unclear or contested. Historically in international law different rules of interpretation were applied in particular circumstances. That said, the first and most common principle was that the words of a treaty should be given their common meaning, provided this was uncontroversial.

Thus in the *Interpretation of the Peace Treaties Case* (1950) the ICJ decided that the case was at an end if the language of the text was clear. Nevertheless other considerations might be relevant, especially if the objective is to give effect to the obligations intended by the parties when concluding their agreement. It has also been suggested that a 'teleological' approach might on occasion be helpful. This would

consider the objectives of a treaty and what interpretation or construction of the treaty would best satisfy those objectives.

Article 31 of the VCLT adopts a sensible and modified 'ordinary meaning' approach. It states that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Thus object and purpose will not be irrelevant. The Article also allows, in order to understand the context, reference to matters in addition to the text of the treaty with its preamble and annexes, including other agreements and instruments between the parties relating to the treaty; any instrument made by the parties (such as letters or declarations) in connection with the negotiation and conclusion of the treaty; and any subsequent agreements or practice between the parties concerning the interpretation or application of the treaty.

Furthermore, if the parties intended any special meanings to be given to any term these too will be applied. As a supplementary means to interpretation, recourse may be had to other sources including the *travaux preparatoires* but only to confirm the meaning or to resolve ambiguity.

4.0 CONCLUSION

In conclusion, the principle of *pacta sunt servanda* underlies treaty law. Nevertheless there is a recognition that rules are necessary to ensure the validity of treaties and to provide the circumstances in which an apparent treaty may be void. Customary international rules that are regarded as fundamental and have the status of peremptory norms may not be excluded by treaty. Any attempt to do so will arguably render such a treaty void.

Treaties are interpreted by applying a number of not necessarily consistent rules. While the first task is to give the words of the treaty their ordinary meaning, it is equally important that the intentions of the parties be identified and the object and purpose of the treaty be achieved.

5.0 SUMMARY

Treaties represent the explicit intention of states to be bound to agreed terms within the treaty document. It is this voluntary assumption of obligation that lies at the heart of international law. The Vienna Convention on the Law of Treaties, 1969 is an important Convention, codifying some aspects of treaty law and innovative in other aspects.

Reservations enable one state party to a multilateral treaty to modify the terms of the treaty for itself and yet remain a party to the treaty, although on different terms from other parties. Not all reservations are valid or permissible. If they are in conflict with the object and purpose of the treaty they will not be valid, nor yet if the treaty prohibits reservations. In addition, where another party to the treaty objects to the reservation, the effect, depending on the intentions of the objecting state, will either be that the treaty does not operate between itself and the reserving state, or that while the treaty remains in force the provision to which reservation is made is not operative between those two parties.

6.0 TUTOR MARKED ASSIGNMENT

1. Why do you think peremptory norms have developed in international law? What are the political views that created a debate?
2. Paraphrase Article 31 of the VCLT. Do you think it actually goes further than declaring that treaties are to be interpreted using common sense in the light of the intentions of the parties?

7.0 REFERENCES/FURTHER READINGS

Cassese, Chapter 9: 'Treaties', pp.170-82.

Dixon, Chapter 3: 'The law of treaties', pp.49-78.

Kaczorowska, Chapter 11: 'The law of treaties', pp.231-62.

Vienna Convention on the Law of Treaties, 1969 (VCL T).

FEEDBACK ON SELF ASSESSMENT EXERCISES 1 & 3

SELF ASSESSMENT EXERCISE 1

This activity is aimed at testing your familiarity with the Vienna Convention. It is reasonable to note at the outset that the exact status of particular articles of the Convention - that is whether they simply codify existing customary international law, or whether they go further but have been accepted as now stating the customary law that has developed, or whether they are innovative and so binding only on parties to the Convention, remains contentious. It is however clear in the case of most important provisions. Thus Articles 60, 61 and 62 have been accepted as codification. Articles relating to reservations are not pure codification as there were matters of contention in customary international law which the Treaty aims to clarify. Those relating to coercion are probably not simply codification although customary

international law had been developing towards this position. Under Article 53 a treaty is void if it conflicts with an existing rule of *jus cogens* and Article 64 provides that a Treaty becomes void if it conflicts with an emerging rule of *jus cogens.* These provisions are the matter of disagreement between states as to their status.

SELF ASSESSMENT EXERCISE 3

At first sight the concept of treaty reservations seems incompatible with the agreement necessary for a treaty. Parties not wholly in agreement are able to have treaty relations. This has largely been a pragmatic solution to a practical problem allowing reservations to enable a number of states to be voluntarily bound by at least some of the central provisions of the treaty if such reservations are compatible with the treaty's object. It is always possible to draft a treaty not permitting reservations if this is thought to be necessary. A reservation never enables one party to be bound to any other except reciprocally.

UNIT 5 THE AMENDMENT AND TERMINATION OF TREATIES

CONTENTS

1.0 INTRODUCTION

Remembering that all treaty law is based upon the consent of the parties, it is not surprising that this is the first source by which treaties may be amended, suspended or terminated. Broadly speaking, the parties to a treaty may agree between or among themselves to treat a treaty as at an end, or modify it, or suspend it. Often the treaty itself will provide either for its termination or will define the circumstances that will bring it to an end. It may also provide for the withdrawal of one or more parties. Difficulties arise when not all parties are agreed and it is here that rules become important. Most of these are customary international law rules that have been codified in the VCLT. Again the case study concerning the Danube dams in the next section will exemplify the law.

What reasons then may be advanced to justify the termination of a treaty? The three main non-consensual grounds that may lead to termination are material breach, supervening impossibility of performance, and fundamental change of circumstances.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- Describe the rules of treaty termination;
- Understand and explain the restrictions on the possibilities of treaty Termination; and

- Be familiar with and critical of the law of treaty interpretation as exemplified in the *Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia).*

3.0 MAIN CONTENT

3.1 Material Breach

The VCLT defines a material breach as 'a repudiation not sanctioned by the present Convention' or 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. Such a material breach of a bilateral treaty entitles the party not in breach to 'invoke the breach as a ground of terminating the treaty or suspending its operation in whole or in part'. Where one party to a multilateral treaty is in material breach, this allows all the other parties by unanimous agreement to suspend the treaty in whole or in part, or to terminate it either as between themselves and the defaulting party, or as amongst all parties.

A single state especially affected by material breach may invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between it and the defaulting state; and otherwise allows any party not in breach to invoke the breach as a ground for 'suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty' (Article 60).

As we will see in the case study, the ICJ is reluctant to accept that a breach is sufficiently material to permit termination. There seems to be no objective definition of 'material breach', and when a breach is to be deemed material has not been defined. Emphasis always seems to remain upon the performance of treaty obligations wherever possible.

3.2 Supervening Impossibility of Performance

Once more the interpretation of this Article (Article 61) is to be understood in the light of a determination to ensure performance except in the most extraordinary circumstances. While it is provided that there is a right to terminate where there is impossibility of performance resulting from 'the permanent disappearance or destruction of an object indispensable for the execution of the treaty' it may not be invoked if the impossibility is the result of a breach by the party wishing to terminate either an obligation under the treaty or any other international obligation owed to any other party to the treaty.

Again the case study will show just how high the ICJ will set the criteria before permitting termination. The fact that performance has become considerably more difficult than could have been (or was) foreseen by the parties at the time of negotiation and agreement has been held to be insufficient.

3.3 Fundamental change of circumstances *(rebus sic stantibus*)

Once more it is clear that while Article 62 provides for termination in the event of a fundamental change of circumstances, instances of termination are few and far between. Indeed the Article is drafted to emphasise this negative attitude, stating as it does that an unforeseen (by the parties) change of circumstances may only be invoked as a ground for terminating or withdrawing from a treaty if the existence of those circumstances constituted an essential basis of the consent of the parties to be bound and also the effect of the change is to radically transform the extent of obligations still to be performed under the treaty.

As an additional qualification, under Article 62(2) fundamental change of circumstance cannot be invoked to challenge the validity of a treaty establishing a boundary or if the change results from the breach of the party seeking relief. Thus once more the emphasis of Article 62 and the customary international law it codified is upon performance of treaty obligations wherever possible. The perils of this course of action are all too apparent (in my opinion) in the case study that follows.

3.4 *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 1997

Essential reading

Dixon, Chapter 3: 'The Law of Treaties', pp.74-78.

Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) 1997 (available on the web).

In September 1977, Hungary and the then Czechoslovakia entered into a major and significant treaty providing for the construction and operation of the Gabcikovo-Nagyrnaros system of locks on the Danube river. The agreement was for the creation of a typically 'Communist' East European 'modernist' project, never known for their environmental or social sensitivity. According to the preamble to the treaty the barrage system was designed to attain 'the broad utilisation of the natural resources of the Bratislava-Budapest section of the Danube River for the development of water resources, energy, transport, agriculture and other

sectors of the national economy of the Contracting Parties'. The utilisation was primarily to result in hydro-electric power generation and supposed or intended improvements to navigation and flood defences.

The two states agreed that the development was to be a joint investment and 'a single and indivisible operational system of works'. The intended control of this section of the Danube was to be achieved by damming it at Dunakiliti on Hungarian territory with the majority of the river flow diverted through a constructed asphalt-lined bypass canal to Gabcikovo in Czechoslovakia where electricity was to be generated twice daily ('peak power generation'). The intended intermittent damming and releasing of water in this way necessitated a further dam downstream of Gabcikovo to regulate flow. This was to be built at Nagymaros in Hungary where electricity was also to be generated, though on a smaller (non-peak power) scale.

Although environmental protection was hardly central in the treaty provisions, it did nevertheless provide that the development was not to compromise water control in the Danube (Article 15) and that it should 'ensure compliance with the obligations for the protection of nature' (Article 19), and that the parties should protect fishing interests in conformity with a 1958 Convention concerning fishing in the waters of the Danube. Whether, however, the completion of the construction could ever have been achieved while giving effect to these provisions is highly doubtful.

Work on the project began in 1978, but while Czechoslovakia made rapid progress, work at Nagymaros by the Hungarians began only in 1986. By this time concerns had already surfaced, especially in Hungary, about the potentially damaging nature of the project on the environment. In addition to the direct environmental impact of the construction, concerns centred on the reduction in quantity and quality of surface and ground waters and the consequences thereof. Decreasing the flow in the Danube by 95 per cent through the use of the asphalt-lined bypass canal threatened to dry up the last inland delta in Europe, comprising the islands of Szigetkoz (in Hungary) and Zitny astrov (in Slovakia), and hosting unique wetland ecosystems. Eutrophication (an excess of nutrients) leading to changes in the nature of surface water quality was also feared.

It was also argued that damming the river would lead to a slow but certain deterioration in water quality in the aquifer under the inland delta (one of Europe's largest and used to supply the Hungarian capital, Budapest) due to the accumulation of pollutants so that the drinking water source would be either undrinkable, or drinkable only after prohibitively expensive treatment. As a final threat, damage to

biodiversity at the delta wetlands, due to the lowering of the water table and the lack of floods, was likely. These wetlands have been referred to as the 'fish-crib of the Danube', and it is an area of exceptional importance for biodiversity. There were also fears of risks to fisheries and the loss of recreational amenities.

These concerns finally gave rise to large-scale public demonstrations in Budapest against the project. Despite agreeing in February 1989 to accelerate the project, in May of that year the Hungarian government suspended work at Nagymaros and then extended the suspension of operations to all works on its territory until a full investigation into the environmental consequences of the project had been completed.

Despite ongoing negotiations between Czechoslovakia and Hungary in September 1991, the Czechoslovakian government proceeded to provide its own 'provisional solution' to the inactivity of the Hungarians and their failure to proceed as required.

This 'provisional solution' came in the face of now considerable opposition to the scheme in Czechosloviakia itself. This solution came to be known as 'Varient C' and it involved the Czechoslovakian government doing as much as it could to maximise the benefits of the scheme in the face of Hungarian inactivity. 'Varient C' provided for the completion of the Gabcikovo reservoir and all works on Slovak territory originally envisaged downstream, together with the construction of a dam at Cunovo on Czechoslovak territory where the Danube would be diverted into the headrace canal leading to Gabcikovo. As work at Nagymaros had ceased, peak power production had to be abandoned. Although further negotiations were held, in May 1992 the Hungarian government issued a written termination of the 1977 Treaty.

On 24 October 1992, despite the involvement of the European Commission as mediator, the damming of the Danube at the diversion weir at Cunovo began and the vast majority of flow was directed through the artificial bypass canal to Gabcikovo. Thereafter a temporary water management plan was put in place pending final reference to the International Court of Justice.

Under this plan Slovakia (which peacefully separated from the Czech Republic on 1 January 1993) was committed to maintaining 95 per cent of the flow in the Danube and to refrain from operating the power plant, yet it continued to divert more than 80 per cent of flow to Gabcikovo for power production. The environmental consequences were stark. In November 1992 the Danube floodplain dried out completely.

From 1993 both countries instigated artificial floodplain water supply systems, as well as joint monitoring of environmental impact, and in 1995 Slovakia guaranteed a minimum flow into the original Danube bed below Cunovo. Together with the construction of a new Hungarian weir near Dunakiliti, this would enable water to be supplied to the side-arms of the Danube at Szigetkoz. Yet there is evidence of considerable drought stress to large forest areas as a result of the two-to-four metre drop of river and ground water levels in the Danube floodplains after diversion.

It is obvious that the consequent dispute, which the International Court of Justice was called to resolve, was of immense complexity. A construction treaty had been entered into by two so-called communist states, both of whose governments had given way to democratically elected regimes by the time the case fell for judgment. In addition Czechoslovakia had divided into two new states - the Czech and Slovak Republics. Czechoslovakia had expended large sums of money in respect of its obligations, Hungary very much less.

Evidence was increasingly available to suggest that if construction were to be completed environmental damage could be catastrophic. There were also social considerations concerning the people who would be adversely affected by this development. In fairness to the parties and to the Court, an obvious and just solution was not apparent. Nevertheless the subsequent events do much to suggest the shortcomings of legal dispute resolution concerned with possible treaty termination.

The very questions agreed by the parties (obviously on the advice of their lawyers) exemplify just what was gained and lost by translating the complex dispute into one which the Court could be called upon to resolve. The questions referred to the Court on 2 July 1993 by agreement of the parties were as follows:

1. Was Hungary entitled to suspend and subsequently abandon, in 1989, the work on the Nagymaros Project and on its part of the Gabcikovo Project?
2. Was Czechoslovakia entitled to proceed, in November 1991, to the 'provisional solution' and to put this system into operation from October 1992 (that is, by the damming of the Danube at Cunovo on Slovak territory)?
3. What were the legal effects of the notification of the termination of the Treaty by Hungary?

The parties also asked the Court to rule on their respective legal obligations arising from its answers to those three questions.

You will immediately notice how restricted those legal questions were - even though they could not be answered satisfactorily without a consideration of at least some of the social questions. In particular, the first question should have been answerable only if there was in-depth consideration of the environmental risks posed by the completed (or even incomplete) project. In considering that element of risk, however, the Court answered it simply by considering in the main, the law relating to treaties. The judgment considered the status of the contract (treaty) and gave a judgment as narrow as the questions asked.

In terms wider than simply legal terms, the decision of the Court suffers from two significant defects. The first arises from the application of the law itself; the second from an inability to determine environmental issues concerned with water. As to the first, the questions posed by the parties seemed far removed from the realities of environmental and health concerns, from commercial and development matters, political and social concerns, and of course from a post-communist East Europe with new democracies and market economies. The questions addressed were concerned with treaty law. Given the way the questions for the Court were termed, it would have been difficult for the Court to give centrality even to the crucial environmental issues.

Difficult - but not impossible, however. In the four and a half years between the date the legal questions were jointly submitted and the date judgment was given, 10,000 pages of supporting evidence had been provided, much of which the Court considered superfluous to its needs and did not consider. Even though the questions were narrow, the Court should have found it necessary to ask itself whether the treaty might be incapable of performance in conformity with the environmental provisions it contained.

Legally those provisions are not simple for they provide (Article 15) that the Contracting Parties shall ensure **by the means specified in the joint contractual plan** that the quality of water **in the Danube** is not impaired as a result of the envisaged construction, and (Article 19) that the Contracting Parties shall **through the means specified in the joint contractual plan** ensure compliance with the obligations for the protection of nature. Thus the underlying assumption of the Treaty is that construction of the locks and dams will be possible, if necessary after research and negotiation, in a way which compromises neither water resources nor conservation.

Evidence was, however, provided which suggested that these provisions were simply incapable of being complied with. The evidence was not incontrovertible but is nonetheless formidable. Given the perils to the environment, it might be thought to have been appropriate to have

required clear evidence, acceptable to neutral experts, that neither water quality, conservation nor fisheries would be affected in a way which breached the important articles.

In answer to Hungary's contention that the Treaty had become impossible to perform because 'the essential object of the Treaty - an economic instrument which was consistent with environmental protection and which was operated by the two contracting parties jointly - had permanently disappeared...' the Court was dismissive. It stated that the Articles concerned with environmental protection 'actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives'. The idea that those two imperatives may always be amenable to compromise and 'adjustment', fundamentally ignores the potential impossibility of reconciliation. Hungary had put forward evidence, which the Court found it unnecessary to consider, suggesting that the inevitable result of the constructions proposed was a risk of irreversible ecological and environmental damage, no matter how the 'economic imperatives' were adjusted.

Not surprisingly, then, the Court's answer to the three questions were narrow answers applying the provisions of the Vienna Convention on the Law of Treaties. It held that Hungary was not entitled to terminate the Treaty, there being no sufficient legal grounds for termination. It also held that the purported termination could not justify Czechoslovakia's 'provisional solution' which was a clear violation of the express provisions of the Treaty and thus an internationally wrongful act.

Having answered the first two questions the Court avoided detailed findings as to the respective future obligations of the parties. It did stress the need, unless the parties agreed otherwise, for the joint regime to be restored, taking into account 'essential environmental concerns'. As to the basis upon which any compensation should be payable, the Court held that given the intersecting wrongs of both parties the issue of compensation could be resolved if each of the parties were to renounce or cancel all financial claims and counterclaims. But in relation to the settlement of accounts for the construction of the works, this was to be resolved in accordance with the 1977 treaty and related instruments: 'If Hungary is to share in the operation and benefits of the Cunovo complex, it must pay a proportionate share of the building and running costs.'

As to the solution to the dispute itself, in essence the Court instructed the parties to negotiate an agreement in the light of the Court's legal

findings, but gave little indication as to how such an agreement could be reached. Thus the legal questions were answered but the resolution of the dispute remained elusive, if not illusory.

A final parenthetic point should also be made. One of the arguments made by Hungary was that it should have been able to invoke the legal concept of fundamental change of circumstances to justify termination. A part of the claimed fundamental change was advances in scientific environmental understanding which suggested that the Treaty was incapable of performance in a way that complied with the environmental provisions.

Another argument, however, was that the change of governmental system from 'communist' dictatorship to democracy, together with the change of economic system, might be sufficient to absolve Hungary from its obligations under the law of treaties. This was rejected by the Court which continued to lay primary emphasis upon the crucial premise of international law - that of *pacta sunt servanda.*

Few international lawyers would question that rejection but the emphasis does perpetuate, through the concept of international legal personality, the injustice by which democratic governments and the people they represent, remain bound by contracts and treaties signed by dictators or non-representative governments (as in the case of apartheid South Africa) which they have overthrown or replaced, even when the other party to such a treaty or contract was well aware of the non-representative nature of the previous regime.

The result of the emphasis upon *pacta sunt servanda* is well summed up by Professor Eyel Benvenisti (in Byers, M. (ed.) *The role of law in international politics.* (Oxford: Oxford University Press, 2000) [ISBN 0198268874] p.121) as follows:

> In reaching [its] conclusion the Court deliberately emphasised international undertakings at the expense of domestic pressures. It rejected Hungary's claim that a 'state of ecological necessity', if it existed, precluded the wrongfulness of the unilateral suspension of the project, and did so because Hungary could instead have recourse to negotiations to reduce the environmental risks. It similarly rejected Hungary's claim to impossibility of performance, fundamental change of circumstance, and of a lawful response to Czechoslovakia's earlier material breach (namely, Slovakia's construction of the provisional diversion project). The ICJ also found that Slovakia's diversion of the Danube waters breached its obligation towards Hungary to respect the right to an equitable and

> reasonable share of the river. Despite its findings to the effect that both sides failed to comply with their obligations under the treaty, the ICJ concluded that 'this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination'.
>
> Finding the agreement flexible and therefore renegotiable, the ICJ held that the 1977 treaty continued to apply, requiring both sides to negotiate its implementation, taking into account current standards on environmental protection and sustainable development, and to regard Slovakia's diversion dam and canal as a jointly operated unit' under the treaty regime.

Without entering into the doctrinal aspects of the judgment, it is revealing to examine its implications for the interface between domestic and international politics. The judgment clearly seeks to insulate international politics from the influence of domestic politics. Notwithstanding momentous internal political, economic and social changes affecting both countries, and despite strong public pressure and even parliamentary resolutions, domestic options remain constrained by an international agreement entered into during a past era. Even when one government breaches its obligations to renegotiate in good faith, the other government cannot bow to internal public pressure and take unilateral action.

SELF ASSESSMENT EXERCISE 1

'The purpose of the *rebus sic stantibus* doctrine is to excuse states from obligations that have changed out of all recognition rather than to provide an escape from what has turned out to be a bad bargain.' (Dixon, p.75) Discuss.

4.0 CONCLUSION

To conclude, the possibility of being excused performance of treaty obligations is extremely restrictive. *Pacta sunt servanda* is elevated in a way that may be more consistent with a contract way of understanding the world than a recognition that it is not always appropriate to enforce obligations that have, for whatever reason, become more difficult or impossible to perform.

5.0 SUMMARY

The International Court of Justice in its decision in the *Gabcikovo/Nagymaros Case* re-emphasised the importance of *pacta sunt servanda.* The effect of this course of action, while understandable,

really did not resolve the issues. The decision rests on the doubtful assumption that it could be possible to perform the treaty in accordance with its terms. It was arguable that the environmental protection provided for in the treaty was simply impossible to achieve if the central purpose of the Treaty was to be performed. The Court ignored this possibility.

6.0 TUTOR MARKED ASSIGNMENT

1. What arguments can be made in favour of the restrictive approach of international law to allowing unilateral withdrawal from treaty obligations? Is it sufficient to say (with Dixon) that the object is to excuse states from obligations that have changed beyond all recognition, rather than to provide an escape from what has turned out to be a hard bargain?
2. Assume that it is possible to appeal from the decision of the ICJ in the *Gabcikovo/Nagymaros Dam Case.* Draft the grounds of appeal for Hungary.

7.0 REFERENCES/FURTHER READINGS

Dixon, Chapter 3: 'The Law of Treaties', pp.72-77.

Cassese, Chapter 9: 'Treaties', pp.180-82.

Kaczorowska, Chapter 11: 'The Law of Treaties', pp.253-61.

Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) 1997 (available on the web).

Vienna Convention on the Law of Treaties, 1969 (VCLT).