Reading Guide for International Law Unit II
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Prepared by Jennifer Hainsfurther and Doreen Lustig, building on work by Erin Delaney and Odette Lienau

The ICJ

Be sure to review the practical workings of the ICJ; know about the Optional Clause (Art. 36 ¶ 2). Think about the ICJ in relation to other international tribunals [WTO, ECHR, ICC, Investment Courts (NAFTA), etc.]. Do these courts 'adjudicate' in an adversarial manner, or are they designed to find a peaceful settlement of disputes (no winners/losers)? What is the basis of jurisdiction? What should the basis of jurisdiction be? (Plenary vs. Consent?) How does the purpose of the individual Court tie into the basis of its jurisdiction? How do reservations work? How does enforcement work? (Art. 94) Against whom will decisions be enforced? What happens with the permanent members of the Security Council? Why might certain states be skeptical of the ICJ/unwilling to consent to its jurisdiction? Review the concepts of: ratione temporae; ratione materiae; ratione personae.

Jurisdiction and Admissibility

Know that the system of double consent that is key to the ICJ's assumption of jurisdiction. In both *Interhandel* and *Nicaragua*, the ICJ drew a distinction between jurisdiction and admissibility – what is this distinction and what does admissibility mean?

Recognize that in *Interhandel*, Switzerland brought a ***diplomatic protection claim*** (where the state makes a claim on behalf of its nationals.) In these types of claims, the exhaustion of local remedies doctrine requires that nationals must first exhaust their local remedies. Why might exhaustion be required? What are the advantages to an 'orderly sequencing' of legal action? Is there a local interest? In other types of claims (such as under NAFTA, which will we see later in this unit), exhaustion of local remedies is not required.

After you read *Nicaragua v. USA* and *East Timor*, ask yourself if the ICJ is being consistent. If you feel the ICJ is being inconsistent by finding jurisdiction in the *Nicaragua* case while some arguably "necessary" parties are excluded, and not in *East Timor*, then ask yourself (1) how did the ICJ, legally, come to its decision and (2) why politically did the ICJ rule this way? Note that in *East Timor*, the ICJ finds that the right of self-determination is a right of the East Timorese people ***erga omnes***. This right to self-determination ultimately means the right of colonial units to become independent, under the doctrine of ***uti possidetis juris***.

Serbia and Montenegro v. France touches upon the issue of who may appear before the ICJ, particularly with regard to the new Federal Republic of Yugoslavia (Serbia and Montenegro). What do you think of the ICJ's ruling here, particularly in light of its ruling (mentioned in the excerpted portion of the decision) as to FRY's status under the Genocide Convention? How should international law, which tends to follow a state-centric model, deal with liminal international actors whose status is unclear? Is there no place for them, and does this mean that current international law should be modified? How does the ICJ deal with 'precedent'? Should the ICJ act in consort with what the Security Council in the UN is doing?

Provisional Measures, Remedies, and National Law

LaGrand is a good place to explore your knowledge of the two-level game – what are the international and domestic issues of note here? Along the same lines, do you think the German

government wanted to bring this case? (Do you think the British government wanted to press claims for British citizens held in Guantanamo Bay by the United States?) What do you think of the Court's discussion of the French versus English ramifications of the word "indicate"? Is the court justified in its ruling concerning provisional measures or is the ICJ power-grabbing, and why would it power grab in this case? In *Avena* (discussed in Unit I), the ICJ applied *LaGrand* to issue a provisional measure halting the U.S. execution of Mexican nationals, and further stated that this measure was binding. What do you think of the American response? Is it overall a win for the ICJ if the U.S. instructs states such as Texas to comply with the Vienna Convention on Consular Relations but then withdraws from the optional protocol granting the ICJ jurisdiction in Vienna Convention cases? (And was this withdrawal proper under the terms of the statute?)

In *LaGrand*, the ICJ looks to the preliminary works/negotiating history (travaux preparatoires), and it looks to all of the texts. How should interpretation be done? Is the negotiating history a valid way to understand the working of the Treaty now? Compare and contrast the ICJ's interpretation of its own statute with its interpretation of the Vienna Convention on Consular Relations.

<u>Necessary Parties to Contentious Cases</u>

While reading the *East Timor* case, ask yourself if the Court did *anything* to help the people of East Timor. By noting the importance of self-determination, did the ICJ send a "message" to the Australian government? Was this message strong enough? Alternatively, isn't there a difference between international law and politics, and where should the court stand? If you were an oil company executive who wanted to invest in Timor, would you have something to worry about from this decision? (Along the same lines, if you were an American corporation like Bechtel or Chevron-Texaco, would you invest in Iraq without a UN mandate or an authentic Iraqi government?) Read the Evans book for a good overview of the international law of self-determination, statehood, and recognition. What is a 'state'?

<u>The Court's Advisory Jurisdiction</u>

What is the purpose of Advisory Opinions? Do International Organizations (WHO, GA) have the same capacity to comply as a state does? Does this cut against their use? Without Advisory Opinions, would international organizations lose leverage in the international system? Does international action through the ICJ strengthen transnational networks – what are the roles for NGOs here? How might the General Assembly of the UN play a different role, and can the GA be 'law-generating'?

The Resolution of the WHO is a short interesting document. While reading this piece, ask yourself: does this document provide fuel to the argument the United States had made against the ICC? (Specifically, the United States has argued that the court, and especially the special prosecutor, may potentially exceed its mandate.) Has the WHO exceeded its mandate? Is it being 'politicized'? This is a repeat issue in international law. Also, did the ICJ do any good in this circumstance? Some scholars would argue that the ICJ opened the door for lawyers to get involved in such decisions, though the claim that lawyers' involvement constitutes an improvement is debatable. Others, like Professor Koskenniemi would argue that the ICJ has ruined the social taboo of nuclear weapons by creating a de-humanizing equation that balances human life on one side against practical circumstances on the other. What do you think?

In the Opinion on the Legal Consequences of the Wall, how does the ICJ's discussion of its jurisdiction in this advisory context compare with its discussion of jurisdiction and

admissibility in contentious cases? Note the Israeli Supreme Court's opinion on the wall, issued just one week before the ICJ opinion (described in the newspaper article.) Was the Supreme Court trying to get out ahead of the ICJ and assert its own control over the wall? Do you think it hoped to influence the ICJ in any way?

International Criminal Tribunals

This part of the unit gives you some of the contours of international criminal law, as applied in two internationally administered region-specific tribunals (which have *primacy* over national proceedings) and in the ICC. Keep in mind as you read through this the differences between different types of criminal law forums, and think about how different levels of criminal law might be managed in global governance. Instead of relying on national courts, *should* there be extra-national criminal tribunals?

Tadic, the first person tried before the ICTY, argues in *Prosecutor v. Tadic*, that the tribunal was illegally constituted. As such, the court undertakes a major effort to judiciously go through the arguments regarding its own jurisdiction. Note that the tribunal argues that Chapter VII of the UN Charter (re. Sec. Council power) may grant powers to take actions that are not specifically mentioned, i.e. set up tribunals. What do you think of this argument? And how does the tribunal frame its own power of 'judicial review' vis a vis Security Council actions?

In the Rwanda materials, Security Council Resolution 955 exemplifies how the Security Council has gone about setting up ad hoc criminal tribunals. Interestingly, Rwanda at the time of the resolution was a non-permanent member of the Security Council and voted against the tribunal's establishment because the tribunal did not provide for the death penalty and Rwandan law did. The additional materials provide some background to the conflict, including Romeo Dallaire's famous fax to the United Nations, trying to get permission for greater United Nations involvement to stop the massacre. There is also a memo from the State Department legal office analyzing whether the situation in Rwanda constituted genocide.

International Criminal Court

Become familiar with the basic provisions of the ICC statute. The bases for jurisdiction are limited (security council referral, national, or territorial), and the ICC can only act if a state with jurisdiction over the offense is unable or unwilling to investigate or prosecute (it works by 'complementarity,' whereas ICTY and ICTR used 'primacy'). What role does the prosecutor play? The principle of ***complementarity*** reflects the idea that the ICC can only proceed if the relevant national systems are unable or unwilling to go forward. Does this work? How is this different from ICTY and ICTR, which operate on a principle of ***primacy***.

Think about the potential policy issues involved in an international criminal court – do you want universal norms to be upheld in this way? Is there some concern with a loss of local process and democratic rule? Would 'truth and reconciliation' be a better alternative than this judicial approach?

Why is the US against the ICC? Who are parties to the ICC? Of the world's 10 largest states in population, only 3 are parties (Brazil, Nigeria, and Japan). Why so few large states? Can the ICC be reconciled with the Foreign Office Model of international relations? Does it make sense to take the agenda out of the Foreign Office?

Hybrid Courts, Truth Commissions, and NGO Participation

Hybrid courts may seem to challenge the foreign office model even further. Often seen as the third generation of international criminal bodies, these courts blend international and domestic law, as well as international and domestic actors. What role do truth commissions play? What role should they play? Dugard argues for the legitimation of amnesty in international law, and for the important role that reconciliation can play in moving a society forward.

How does one go about choosing a method of dealing with past criminal actors and repressive regimes? Who should be choosing this method—the state itself? The United Nations? What role are NGOs playing in international criminal tribunals, further undermining the foreign office model?

International Economic Tribunals

Note that under NAFTA, a private person can initiate binding arbitration procedure against foreign state, a significant challenge to the foreign office model of international law. Furthermore, investors do not have to exhaust local remedies first.

Loewen highlights how multiple levels of law, particularly in a federal system such as the U.S., can lead to areas of conflict and uncertainty in governance; it is a key example of the 'disaggregated state'. It also shows how international treaties may have unexpected ramifications for their signatories. Did the parties to NAFTA (the US, Canada, and Mexico) want the treaty to be used in the way the private claimants tried to use it in *Loewen*? How might NAFTA be used to overcome problems at the state level? Why would the U.S. agree to set up arbitral bodies when it has an effective legal system of its own?