NYU International Law Course (Kingsbury)

Unit 2: International Courts and Tribunals

Users' Guide
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A. Framework

What role do international tribunals play in international law? How have they evolved over time, to accommodate actors beyond the state? This unit explores evolution of international tribunals, and their gradual development into institutions with preferences and actions exogenous to the political desires of the state. This evolution is further explored by comparing the development of international tribunals in the markets logic (international economic tribunals) versus those concerned with the morals and security logics (international criminal tribunals).

The theory of the ***two-level game***, developed by Robert Putnam, is of interest here; we will return to this theory in later units. Putnam envisions a single actor playing a role in two different structures of politics: the international and domestic systems.[1] Thus, an executive might make an international move with an eye toward domestic politics, and vice-versa. The U.S. president might try to gain international concessions when negotiating a treaty, for example, by using domestic politics (e.g., pointing to the fact that the president would not be able to get the Senate to ratify the treaty as currently written). States might also calculate the two-level game occurring in other states. Thus, the U.S. decided to go to the Security Council for a resolution authorizing the Iraq war in 2002 hoping that that move would help get other states with reluctant domestic populations on board, especially Turkey. As we can see from the examples in this unit, international court decisions can have a significant effect on both international and domestic politics.

B. Trajectory

Unit 2 begins with a study of the ICJ, and then moves to a study of international criminal tribunals, followed by international economic tribunals. The unit follows a major theme of the course, studying how in some ways the foreign office model of international law has given way

[1] Robert D. Putnam, *Diplomacy and Domestic Politics: the Logic of Two-Level Games*, 42 International Organization (1988).

to a global governance model, discussed at length in Unit 1. The ICJ closely follows the foreign office model, as states must give consent to jurisdiction before the ICJ can take a case. International criminal tribunals depart from a model where all states must consent; the U.N. Security Council set up the tribunals for Rwanda and Yugoslavia using Chapter VII authority rather than the consent of the countries of nationality of the perpetrator or the consent of the territory in question. Hybrid courts challenge the foreign office model even further, with their mixture of national and international law and participants. One might argue that these courts do not depart from a traditional understanding of international law, as the majority of the offenses before them (grave breaches of the laws of war, crimes against humanity, and genocide) are crimes which constitute jus cogens and with regard to which states have consented to universal jurisdiction and an obligation to prosecute. Nonetheless, as we will see in Unit 5, universal jurisdiction is a contested concept. The shift to individual responsibility and to a legal rather than solely political authority over crimes constitutes a significant shift away from the foreign office model toward international institutions governing individual conduct directly.

Similarly, an examination of truth commissions and NGO participation presents further challenges to the foreign office model, by bringing actors into the mix that are not the state (both sub-state and non-state actors). Economic tribunals also challenge the foreign office model in many ways. NAFTA, for instance, permits an investor to sue a state, thus envisioning a role for the individual in enforcing international law. The structure of the unit also permits comparison between the different logics; for example, economic tribunals seem to have gone the furthest in recognizing a role for the individual, while security cases may rely more on state-to-state interaction.

C. The ICJ

Unit 2 begins by examining the International Court of Justice, exploring the court's system of double consent, the necessary parties doctrine, provisional measures, and the court's advisory jurisdiction. The cases help illustrate the difference between jurisdiction and admissibility. Three important concepts of jurisdiction are *ratione personae* (jurisdiction over the person), *ratione temporae* (jurisdiction over the timing), and *rationae materiae* (jurisdiction over the subject matter). Cases such as the *South West Africa Cases* (ICJ, 1961) and *Thailand v.*

Cambodia (ICJ, 1962) illustrate suspicion of the court by developing countries, at least early on in the court's history.

The system of double consent is key to the ICJ's assumption of jurisdiction: states become parties to the ICJ statute and also must consent to jurisdiction in a specific case, through one of the four methods:

- Declaration of general jurisdiction
- Compromissory clause in treaties
- Special agreements
- Forum prorogatum.

Although the ICJ can be seen as a strong exemplifier of the foreign office model, with only states (and consenting states at that) as parties to contentious cases, elements of the global governance model continue to push on this view. ***Nicaragua v. United States (ICJ, 1984)*** demonstrates the effects of national democracy and the disaggregated state. Because Democrats in Congress at the time strongly opposed Reagan's policy in South America, the ICJ did not have to be in a position against the United States as a whole when it held that it had jurisdiction over the case. The United States did not have a unitary national interest, and, in fact, Congress made this case possible by producing evidence through its own hearings. In the case itself, the ICJ held that it had jurisdiction and that the case was admissible, despite the arguments to the contrary presented by the U.S.

The four methods of consent to jurisdiction also exemplify the ways in which the global governance model pushes back on the foreign office model. With respect to ***forum prorogatum***, examining France's motives for consenting to the suit by Djibouti reveals that the state may not be a unitary actor. In that case, the executive branch wanted to stop the French court from its investigation, but didn't have the power to do so at the domestic level. In the end, it turned to an outside legal authority, the ICJ. Similarly, in the *Gulf of Maine* case, the U.S. also turned to an international institution—again, the ICJ—to overcome national democracy. The U.S. Senate refused to ratify a treaty negotiated by the executive branch with Canada to settle the boundary. The executive branch then agreed with Canada to refer the case by ***special agreement*** to the ICJ.

Another case of special agreement was the Belize-Guatemala territorial dispute. That case initially went to the OAS, as the government of Belize thought it was too costly to take it to

the ICJ. Nonetheless, negotiations stalled, and the president of the OAS finally recommended that the ICJ take the case. In that case, however, the ICJ is not being used to get around national democracy; before the special agreement enters into effect, it must pass national referenda in both countries. Instead, the ICJ is being used to settle a dispute that is costing both countries money through loss of investments due to uncertainty of land and maritime rights at the border. As negotiation has been ineffective, third party arbitration is seen as a way to speed the process along.

Compromissory clauses and the Optional Declaration help illustrate the concept of ***precommitment***. A state may precommit to referring certain types of cases to the ICJ because national interest will be best served by locking the state into this agreement, rather than giving in to local political interests at a later time.

In the case involving ***Serbia and Montenegro v. France (ICJ, 2004)***, it is interesting to contrast the ICJ's decision with other cases under the Genocide Convention, such as *Bosnia v. Serbia*, where the court permitted Serbia to be a party to the case as a continuation of Yugoslavia (a former party to the Genocide Convention.) By contrast, in the case against France (discussed in this unit), the ICJ rejects the ability of Serbia to bring its claim on the ground that it was not a state eligible to bring claims to ICJ under the statute.

We can also see the difficulty of ascertaining jurisdiction under a compromissory clause in the ***Georgia v. Russia (ICJ, 2008)*** case. Georgia brought charges of ethnic cleansing and discrimination under the Convention to Eliminate Racial Discrimination (CERD) against Russia in the ICJ, based on events during the war of 2008. This claim was filed while Russian forces were engaged on Georgian soil. CERD has a compromissory clause (Art. 22) to which both Georgia and Russia are party. Russia responded based on *rationae materiae*, saying "the present dispute between Georgia and Russia has nothing to do with racial or ethnic discrimination." This objection did not stop the court from issuing provisional measures calling on both parties to abstain from any conduct constituting racial discrimination and to ensure security, protection of property and freedom of movement without distinction based on ethnicity in the contested area of South Ossetia. The dissenting justices argued that the parties should be required to exhaust other remedies, such as negotiation and a complaint before the CERD committee, before coming

to the ICJ. They also argued that there was not the requisite urgency and irreparable harm for provisional measures.

The ICJ statute permits the court to indicate interim **provisional measures** prior to judgment, in order to preserve the status quo until the issue is actually properly adjudicated. In ***LaGrand (Germany v. United States, ICJ, 2001)***, the ICJ looks to the preliminary works/negotiating history (travaux preparatoires), and it looks to all of the texts to finally hold that provisional measures are binding. Additionally, the court held that Article 36(1) of the Vienna Convention on Consular Relations creates individual rights in addition to the right of the state.

The doctrine of ***necessary parties*** is illustrated in the ***East Timor Case (Portugal v. Australia, ICJ, 1995)***, where the ICJ held it could not rule on the case at bar because it would be necessary to adjudicate Indonesia's rights in order to adjudicate Australia's alleged breaches. The founding case for necessary parties was the *Monetary Gold Case*, a case initially focusing on the rights of states and the ability of states to participate in decisions. Yet notice that in the *Nicaragua* case some arguably "necessary" parties (such as El Salvador and Honduras) are excluded, yet the court finds jurisdiction anyway. Similarly, in *Nauru v. Australia*, the decision might have had some effect on the rights of Britain and New Zealand; nonetheless, as those states did not actually object, the court went forward with the case. 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***. The important language about the East Timorese right to self-determination indicates a shift from a foreign office model of the rights of states to a global governance model of the rights of peoples.

In the ***Interhandel Case (Switzerland v. USA, ICJ, 1959)***, the ICJ held that it did not have jurisdiction because the Swiss company had not exhausted its domestic remedies in the U.S. The ***exhaustion of local remedies rule***—requiring that local remedies must be exhausted before international proceedings may be instituted—is a well-established rule of customary international law. The rule applies when an international wrong has been done to a state's citizen (such as the corporation here), where the state is bringing a claim on behalf of that citizen. A situation where a State brings a case against another State, claiming the State did a wrong to the first State's

national, is known as a ***diplomatic protection claim***. If the international wrong had been done to Switzerland itself, this rule would not apply. The exhaustion rule may have been imposed because the court was hesitant to interfere in a case dealing with security and morals.

With respect to advisory opinions, a general proposition exists that if an international organization makes an advisory opinion request on a subject within that body's competence, the ICJ will give the opinion. However, this principle is subject to the *Eastern Carelia* exception (advisory jurisdiction cannot be used to substitute for a lack of consent to address certain issues in a contentious case.) The court explores the question of its jurisdiction at length in the ***Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ, 2004)***. The ICJ may give an advisory opinion, but is not required to do so.

The ***Nuclear Weapons Opinion (ICJ, 1996)*** is one of the best known advisory opinions, where the court answered a question posed to it by the U.N. General Assembly: is the threat or use of nuclear weapons in any circumstances permitted under international law? The court segments international law into a number of topics, such as genocide and the environment, among others, to find that neither customary and conventional international law specifically authorizes nor prohibits the use of nuclear weapons. The court concludes that the threat or use of nuclear weapons would generally be contrary to rules of international law applicable in armed conflict, particularly international humanitarian law. However, the court cannot definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense.

Note that in this case, NGOs tried to file amicus briefs but were rejected. Only IGOs that can petition ICJ for advisory opinion can also file amicus briefs. The ICJ's response to the ***Resolution of the World Health Organization*** demonstrates an instance where the ICJ finds it was not within a body's competence to request an opinion on the subject matter (here, on the health and environmental effects of nuclear weapons.) Some scholars would argue that the ICJ opened the door here 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.

D. *International Criminal Tribunals*

This part of the unit provides some of the contours of international criminal law, as applied in two internationally administered region-specific tribunals, the ICC, and newer hybrid courts and truth commissions. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both have ***primacy*** over national proceedings: the Tribunal can require that it will conduct a trial instead of the state. By contrast, the ICC works by ***complementarity***—the ICC can only act if a state with jurisdiction over the offense is unable or unwilling to investigate or prosecute. Furthermore, the bases for jurisdiction in the ICC are limited (security council referral, national, or territorial.)

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 (concerning the Security Council) may grant powers to take actions that are not specifically mentioned, i.e. set up tribunals.

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.

This history of the ICTY, ICTR, and ICC can be traced back to the Nuremberg and Tokyo Tribunals. After World War II, the four Allied powers set up the Nuremberg Tribunal to prosecute and try Nazi aggressors. The Tokyo Tribunal similarly tried the leaders of the Japanese Empire after WWII. These trials significantly shaped international criminal law, including the development of the three primary international law crimes for which later criminal tribunals have had jurisdiction: crimes against humanity, crimes against peace (war crimes), and genocide. These crimes are defined in Articles 6-8 of the Rome Statute of the ICC. The crime

of aggression is also contemplated as within the court's jurisdiction, but it is left to the parties to define at a later date.

Note that the ICC signatories are mainly stable, rich countries. Why would fragile or war-torn countries decide to sign on to the Rome Statute? What impact have the Uganda and Congolese indictments had on national politics within those countries? Note that states parties are now meeting to consider how to define the crime of aggression, which has not yet been included in the Rome Statute. As the Security Council is also charged with defining aggression (and reacting to it via resolutions), which of these two institutions has the ultimate right to define breaches of the peace? Note the tension in the ICC between a model of government consent requirements (which Art. 98 agreements are designed to provide by country of nationality) and a model of exogenous court independence (such as provisions allowing the prosecutor to raise cases *proprio motu*, subject only to the approval of the Pre-Trial Chamber or deferral by the Security Council under Art. 16).

The ICC, with its acceptance of a role for NGOs (*see* ***Human Rights Watch Report: How NGOs Can Contribute to the Process of War Criminals***) and its move beyond territorial jurisdiction pushes on the foreign office model. 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. Truth commissions present yet another method of dealing with international crimes, particularly after a war. Dugard argues for the legitimation of amnesty in international law, and for the important role that reconciliation can play in moving a society forward. The localized system of justice present in truth commissions contrasts with an international tribunal such as the ICTR, ICTY, or ICC, where a deliberate distance is built into the process, denationalizing it. For example, in the context of the ICTY, it was thought that holding the trials too close to the community would be disruptive and also impossible, as Milosevic was still in power and the war was still going on.

E. International Economic Tribunals

Two international economic regimes and their differing mechanisms for dispute settlement are explored. Chapter 11 of NAFTA, a 1994 economic treaty between the U.S.,

Canada, and Mexico, empowers a private person to initiate a binding arbitration procedure against foreign state, moving away from the state-to-state actions envisioned by the foreign office model. Unlike many areas of international law, the investor does not have to recruit the state to take action on its behalf. Furthermore, the investor does not have to exhaust local remedies: it can go through a local system or can go straight to arbitration. The U.S. sought to enable its investors to have the ability to get around what the U.S. perceived as corrupt courts in Mexico. By contrast, in the WTO, private actors do not have standing and must rely on the state to assert their interests. The WTO sets up a multi-stage dispute settlement procedure. First, the states must attempt to talk to one another to resolve their dispute. If that fails, a panel will be appointed. The panel makes a ruling, which can then be appealed to the Dispute Settlement Body, a permanent appellate body (in contrast with the ad hoc panels.)

Both economic regimes exemplify the way a state can magnify its own power by getting a decision from an international body: the U.S. receives large gains from trade and can move to halt domestic opposition to free trade by internationalizing the issue. It is for this reason that some scholars worry that international precommitments—such as through the WTO or NAFTA—are anti-democratic in nature, because leaders can turn to international law to get around domestic opposition.

In *Loewen*, an individual brought a dispute before ICSID under Chapter 11 of NAFTA arguing violations of the treaty. A Mississippi jury had returned a verdict against him, and local law required him to post such a large bond in order to appeal the verdict that he could not appeal without going into bankruptcy. Interestingly, the arbital tribunal restored the local remedies rule—seemingly not required by NAFTA—in a subset of cases, such as when a person is contesting a judicial decision. This restoration can be read as an instantiation of the principle that one must give the body about which one complains a chance to rectify the problem—not at the level of the state, as in the original local remedies rule (which mandated going to national courts) but perhaps at the level of the particular body (going to the end of an administrative appeals process, for example, or in this case, petitioning for certiorari). *Loewen* is thus a key example of the 'disaggregated state'; it also raises questions of federalism and internalization of remedies. International treaties may have unexpected ramifications for their signatories: the parties to NAFTA (the US, Canada, and Mexico) may not have wanted the treaty to be used in

the way the private claimants tried to use it in *Loewen*. After *Loewen* and *Pope & Talbott*, there was an interpretive decision by all three states in 2001, which provided that fair and equitable treatment is limited to the minimum standard under international law.

The *Shrimp Turtle* case illuminates the myriad dynamics at work in the two-level game. The U.S. was sued by environmental groups in its own court for not rigorously complying with a regulatory law requiring fisherman to get certified that they caught shrimp with a net that would exclude turtles. Other states then brought the U.S. to the WTO for enforcing its rule. The WTO Appellate Body found that the measure taken by the U.S. could be justifiable as an exception to GATT for conservation, but that it was not justifiable here because the U.S. did not give India and Thailand proper notice or a hearing where they could make representations. (*The Shrimp/Turtle* case is one of the most wrongly cited cases in international law. Professor Weiler notes in his trade law class the existence of a "New York Times" interpretation of the decision: that the WTO, as a slave to free trade, found against the turtles and the environment.) Notably, although the WTO's mandate is to apply trade law, and despite the fact that it is not set up as a general international law body, it nevertheless must take into account other bodies of law, such as environmental law. As well, the arbitrariness test in the Art. XX *chapeau* allows the WTO to evaluate the due process given in national administrative systems.

F. Questions to Consider

- The ICJ
  - What is the distinction between jurisdiction and admissibility?
  - Why might exhaustion be required in diplomatic protection claims? What are the advantages to an 'orderly sequencing' of legal action?
  - 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?
  - By noting the importance of self-determination in *East Timor*, 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?
  - What is the purpose of Advisory Opinions?

- Do International Organizations (e.g., WHO, General Assembly) have the same capacity to comply as a state does? Does this cut against the use of advisory opinions?
- 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'?
- Does the WHO Resolution provide fuel to the argument the United States had made against the ICC (that the court, and especially the special prosecutor, may potentially exceed its mandate)? Has the WHO exceeded its mandate? Is it being 'politicized'?
- 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
  - Keep in mind 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?
  - In *Tadic*, how does the tribunal frame its own power of 'judicial review' vis-à-vis Security Council actions?
  - 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?
  - Who is the prosecutor working on behalf of? Is he working on behalf of the state? Is he an agent of the UN states? Is he working on behalf of the "international community"?

  - 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 do truth commissions play? What role should they play?
  - What role are NGOs playing in international criminal tribunals, further undermining the foreign office model?
- International Economic Tribunals
  - Why don't international economic tribunals such as NAFTA arbitration panels require the exhaustion of local remedies first?
  - 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?
  - Given the political and institutional constraints of the WTO appellate body, how might you have decided *Shrimp Turtle*?
  - Does *Shrimp Turtle* impose too great an administrative burden on national regulatory regimes in requiring them to evaluate and re-evaluate other countries' factual circumstances to justify the exclusion of products?