CHAPTER 14

International Law

'Whenever law ends, tyranny begins.'

JOHN LOCKE, *Second Treatise on Government* (1690)

PREVIEW

International law is an unusual phenomenon. As traditionally understood, law consists of a set of compulsory and enforceable rules; it reflects the will of a sovereign power. And yet, no central authority exists in international politics that is capable of enforcing rules, legal or otherwise. Some, therefore, dismiss the very idea of international law. Nevertheless, international law has greater substance and significance than first appearances suggest. In particular, more often than not, international law is obeyed and respected, meaning that it provides an important – and, indeed, an increasingly important – framework within which states and other international actors interact. However, what is the nature of international law, and where does it come from? Also, if international law is rarely enforceable in a conventional sense, why do states comply with it? The growing significance of international law is reflected in changes in its scope, purpose and operation since the early twentieth century. These include a shift from 'international' law, which merely determines relations between and among states, to 'world' or 'supranational' law, which treats individuals, groups and private organizations also as subjects of international law. This has drawn international law into the controversial area of humanitarian standard-setting, especially in relation to the so-called 'laws of war'. It has also, particularly since the end of the Cold War, led to attempts to make political and military leaders at all levels personally responsible for human rights violations through a framework of international criminal tribunals and courts. To what extent has 'international' law been transformed into 'world' law? How have the laws of war been developed into international humanitarian law? And have international criminal tribunals and courts proved to be an effective way of upholding order and global justice?

KEY ISSUES

- How does international law differ from domestic law?
- What are the sources of international law?
- Why is international law obeyed?
- How and why has international law changed in recent years?
- What are the implications of holding individuals responsible for violating international humanitarian law?

CONCEPT

International law

International law is the law that governs states and other international actors. There are two branches of international law: private and public. Private international law refers to the regulation of international activities carried out by individuals, companies and other non-state actors. As such, private international law relates to the overlapping jurisdictions of domestic legal systems, and so is sometimes called 'conflict of laws'. Public international law applies to states, which are viewed as legal 'persons'. As such, it deals with government-to-government relations as well as those between states and international organizations or other actors. International law nevertheless differs from domestic law, in that it operates in the absence of an international legislative body and a system of enforcement.

NATURE OF INTERNATIONAL LAW

What is law?

Law is found in all modern societies, and is usually regarded as the bedrock of civilized existence. But what distinguishes law from other social rules, and in what sense does law operate at an international or even global level? Is there such a thing as 'international law'? In the case of domestic law, it is relatively easy to identify a series of distinguishing characteristics. First, law is made by the government and so applies throughout society. Not only does this mean that law reflects the will of the state and therefore takes precedence over all other norms and social rules, but it also gives domestic law universal jurisdiction within a particular political society. Second, law is compulsory; citizens are not allowed to choose which laws to obey and which to ignore, because law is backed up by a system of coercion and punishment. Law thus requires the existence of a legal system, a set of norms and institutions through which legal rules are created, interpreted and enforced. Third, law has a 'public' quality in that it consists of codified, published and recognized rules. This is, in part, achieved by enacting law through a formal, and usually public, legislative process. Moreover, punishments handed down for law-breaking are predictable and can be anticipated, whereas arbitrary arrest or imprisonment has a random and dictatorial character. Fourth, law is usually recognized as binding on those to whom it applies, even if particular laws may be regarded as unjust or unfair. Law is therefore more than simply a set of enforceable commands; it also embodies moral claims, implying that legal rules *should* be obeyed.

Although the term 'international law' came into common use only in the nineteenth century, the idea of international law is much older and can be traced back at least as far as to ancient Rome. Nevertheless, the origins of international law as an **institution** are usually located in sixteenth- and seventeenth-century Europe and the passage of a series of treaties that, in establishing the rules of the emerging state-system, laid down the foundations of international public law. These treaties included the following:

- The Peace of Augsburg, 1555 – this consisted of a series of treaties that, amongst other things, reaffirmed the independence of German principalities from the Holy Roman Empire, and allowed them to choose their own religion.
- The Peace of Westphalia, 1648 – consisting of the Treaties of Osnabrück and Münster, this initiated a new political order in central Europe based on the principle of state sovereignty (see p. 3) and the right of monarchs to maintain standing armies, build fortifications and levy taxes.
- The Treaties of Utrecht, 1713 – these established the Peace of Utrecht, which consolidated the principle of sovereignty by linking sovereign authority to a fixed territorial boundary.

Ideas and theories of international law also emerged against this backdrop, not least through the writings of Hugo Grotius (see p. 334), an important early figure in the emergence of international law. Much of this early theorizing

● **Institution:** A body of norms, rules and practices that shape behaviour and expectations, without necessarily having the physical character of an international organization (see p. 433).

focused on the conditions of the just war (see p. 257). Nevertheless, it was evident from the outset that international law differs from domestic law in a number of important respects. Most importantly, international law cannot be enforced in the same way as domestic law. There is, for example, no supreme legislative authority to enact international law and no world government or international police force to compel states to uphold their legal obligations. The closest we have come to this is through the establishment in 1945 of the United Nations (see p. 449), which is endowed, at least in theory, with certain supranational powers, and through its principal judicial organ, the International Court of Justice (ICJ) (see p. 342). However, the ICJ has no enforcement powers, and even the UN Security Council, which has the ability to impose military and economic sanctions, possesses no independent mechanism for ensuring compliance with its resolutions, even though its decisions are technically binding on all UN members. International law is thus **'soft' law** rather than **'hard' law**. On the other hand, levels of compliance with international law, particularly, but not only, international private law, are surprisingly high, even by domestic standards. This is sometimes referred to as the paradox of international law, as it reflects the extent to which a system of international law can operate effectively despite the absence of conventional compliance mechanisms. To some extent this was acknowledged by Grotius, for whom the enforcement of international law was largely based on a sense of solidarity, or potential solidarity, amongst states.

However, as law has developed, two quite different accounts of its nature, and especially its relationship to morality, have emerged. Those thinkers who insist that law is, or should be, rooted in a moral system subscribe to some kind of theory of **natural law**. The central theme of all conceptions of natural law is the idea that law should conform to a set of prior ethical standards, implying that the purpose of law is to enforce morality. Medieval thinkers such as Thomas Aquinas (see p. 255) thus took it for granted that human laws have a moral basis. Natural law, he argued, could be penetrated through God-given natural reason and guides us towards the attainment of the good life on Earth. However, this notion came under attack from the nineteenth century onwards through the rise of the 'science of **positive law**'.

The idea of positive law sought to free the understanding of law from moral, religious and mystical assumptions. Many have seen its roots in Thomas Hobbes' (see p. 14) command theory of law: 'law is the word of him that by right hath command over others'. By the nineteenth century, such thinking had been developed into the theory of 'legal positivism', in which the defining feature of the law is not its conformity to higher moral or religious principles, but the fact that it is established and enforced by a political superior, a 'sovereign person or body'. This boils down to the belief that law is law because it is obeyed. One of the implications of this is that the notion of international law is highly questionable. If, for example, treaties and UN resolutions cannot be enforced, they should be regarded as a collection of moral principles and ideals, and not as law. Although the rise of legal positivism made natural law theories distinctly unfashionable in the nineteenth century, interest in them revived significantly during the twentieth century. This occurred, in part, through unease about the cloak of legality behind which Nazi and Stalinist terror had taken place. The desire to establish a higher set of moral values against which national law could be judged was, for

- **Soft law**: Law that is not binding and cannot be enforced; quasi-legal instruments that impose only moral obligations.
- **Hard law**: Law that is enforceable and so establishes legally binding obligations.
- **Natural law**: A moral system to which human laws do, or should, conform; natural law lays down universal standards of conduct derived from nature, reason or God.
- **Positive law**: A system of enforceable commands that operates irrespective of their moral content.

Hugo Grotius (1583–1645)

Dutch jurist, philosopher and writer. Born in Delft into a family of professional lawyers, Grotius became a diplomat and political adviser and held a number of political offices. In *On the Law of War and Peace* (1625), he developed a secular basis for international law, arguing that it is grounded not in theology but in reason. This was largely accomplished by constructing a theory of the just war, based on natural rights. For Grotius there were four causes of a just war: (1) self-defence, (2) to enforce rights, (3) to seek reparations for injury and (4) to punish a wrong-doer. By restricting the right of states to go to war for political purposes, Grotius emphasized the common purposes of the international community and helped to found the idea of international society (see p. 10), as developed by the 'neo-Grotian' English School.

example, one of the problems which the Nuremberg Trials (1945–49) and Tokyo Trials (1946–48), sought to address. This was made possible by reference to the notion of natural law, albeit dressed up in the modern language of human rights (see p. 304). Indeed, it is now widely accepted that both domestic and international law should conform to the higher moral principles set out in the doctrine of human rights. As far as international law is concerned, this has been reflected in a substantial expansion of **international humanitarian law**, as discussed later in the chapter.

Sources of international law

Where does international law come from? In the absence of world government and an international legislative body, the sources of international law are various. As defined by the Statute of the International Court of Justice, there are four sources of international law:

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting states.
- International custom, as evidence of a general practice accepted as law.
- The general principles of law recognized by civilized nations.
- Judicial decisions and teachings of the most highly qualified legal scholars of the various nations.

The most common form of international convention, and the most important source of international law, is **treaties**, formal, written documents through which states agree to engage in, or refrain from, specified behaviours. Treaties may be either bilateral or multilateral. Bilateral treaties are concluded between two states, such as the START treaties through which the USA (see p. 46) and Russia (see p. 177) have agreed to reduce their stockpiles of nuclear weapons. Most treaties are nevertheless multilateral treaties, in that they are concluded by three or more states. Some multilateral treaties have specific provisions, such as the 1968 Nuclear Non-Proliferation Treaty (NPT), while others are broad and far-reaching, such as the Charter of the United Nations. Treaties, nevertheless, are

● **International humanitarian law**: A body of international law, often identified as the laws of war, that seeks to protect combatants and non-combatants in conflict situations.

● **Treaty**: A formal agreement between two or more states that is considered binding in international law.

GLOBAL POLITICS IN ACTION . . .

The Nuremberg Trials

Events: The Nuremberg Trials were a series of military tribunals that took place 1945–49, which were used by the victorious Allied forces of WWII to prosecute prominent figures from the defeated Nazi regime. They were convened largely as a reaction to the shocking cruelties of the Nazi regime, and in a brief flurry of legal activity that took place after the end of WWII, but before the Cold War really took grip. The military tribunals themselves were composed of US, UK, French and Russian judges, and key defendants included Hermann Göring, Martin Bormann, Rudolph Hess and Joachim von Ribbentrop. Four charges were laid against these and other Nazi leaders: conspiracy against peace, crimes against peace, war crimes and crimes against humanity. In the first, most famous trial (1945–46), 22 of the most senior captured Nazi leaders faced prosecution; twelve of them were sentenced to death, seven received long prison sentences and three were acquitted. This trial was followed by twelve further trials of 177 people altogether, of whom 24 were sentenced to death.

Significance: The Nuremberg Trials were significant for a wide range of reasons. These include that the trials brought to light many details about Nazi atrocities, that they appeared to ignore the responsibility of countries other than Germany for waging aggressive war, and that, in highlighting the personal responsibility of individual Nazi leaders, they appeared to exonerate German society at large for the WWII and other atrocities. However, from the perspective of global politics, the Nuremberg Trials had their greatest influence on the development of international criminal law, in particular by extending international law into the areas of human rights and humanitarian standard-setting. The Nuremberg Trials thus marked a watershed in international jurisprudence, emphasizing the individual responsibility of leaders, organizers, instigators and accomplices for perpetrating mass atrocities. It was also at these trials that the concept of 'crimes against humanity' first found formal expression and codification, in a language that has shaped interpretations ever since. In so doing, the principles applied at Nuremberg, formulated by the UN International Law Commission in 1950 into the Nuremberg Principles, filled a void in international law, namely, the failure adequately to address atrocious policies which in many cases did not fit the technical definition of war crimes (for example, inhumane acts against civilians who are not enemy nationals) and yet were contrary to the 'dictates of the public conscience and general principles of law recognized by the community of nations'. The Nuremberg Principles helped to shape the provisions of, and the thinking behind, documents such as the Genocide Convention and the Universal Declaration of Human Rights, both introduced in 1948. The Nuremberg Trials went a long way to preparing the ground for the later establishment of international criminal tribunals for Rwanda and Bosnia and the creation of the International Criminal Court, which came into operation in 2002.

However, the Nuremberg Trials have also been controversial in terms of their impact on international law. Some, for example, have argued that concepts such as 'crimes against peace' or 'crimes against humanity' were ill-defined and, perhaps, inherently vague. Others have viewed the Nuremberg Trials as an example of 'victors' justice', the punishment of a defeated country and its leaders that has little or no basis in law. The principles applied at Nuremberg have therefore been seen as an example of *ex post facto* law: the defendants were prosecuted for actions that were only defined as crimes after they had been committed. A wider criticism is that the Nuremberg Trials drew international law into questionable areas. By emphasizing issues of human rights and humanitarian considerations, the trials created, at minimum, confusion about the proper role and scope of international law and, more seriously, created circumstances in which international law might be used to challenge, rather than uphold, state sovereignty.

a distinctive form of international law in two key respects. First, with the possible exception of the UN Charter, they violate one of the usual characteristics of law, which is that law applies automatically and unconditionally to all members of a political community. Treaties, by contrast, only apply to states that are party to the agreement in question, although it is sometimes argued that certain treaties, such as the NPT, are so widely respected that they impose customary obligations even on states that have not signed them. Second, the legal obligations that arise from treaties are very clearly rooted in **consent**, in that states enter into treaties freely and voluntarily. Once treaties are signed and ratified, they must be obeyed, as expressed in the principle of ***pacta sunt servanda***. This consent is nevertheless conditional in that states can contract out of treaties on the grounds that significant changes have occurred in the conditions existing at the time the agreement was originally entered into. In these cases, the notion of ***rebus sic stantibus*** can be invoked. The contractual nature of treaties and conventions places them clearly within the tradition of positive law, as international law in these cases is a product for negotiations between sovereign states, not the command of God or the dictates of higher morality. International law has therefore come to assume the character of reciprocal accord.

International **custom**, or what is often called customary international law, is the second most important source of international law, although until the rapid expansion of treaties during the twentieth century, it was the most important. Customary international law derives from the actual practice of states, in that practices among states that are common and well-established come, over time, to be viewed as legally binding. Customary obligations thus arise from the expectation that states should carry out their affairs consistently with past accepted conduct. Unlike treaties, customary law does not require explicit consent; rather, consent is inferred from the behaviour of states themselves. On the other hand, unlike treaties, customary international law is often assumed to have universal jurisdiction, particularly when it is grounded in deeply held norms and moral principles, in which case it is closely associated with the natural law tradition. Examples of customary law include many of the laws regarding how diplomacy is carried out, which developed over time as rules of conduct shaped by the mutual convenience of the states concerned. These, for instance, include the practice of granting **diplomatic immunity** to foreign diplomats.

The weakness of customary law is that, being based on practice rather than formal, written agreements, it may be difficult to define, and it may be difficult to decide when and how common practices have acquired the force of law. For this reason, there has been a growing tendency to translate customs into treaties and conventions. The Vienna Conventions on Diplomatic and Consular Relations (1961, 1963) thus gave many of the norms related to the conduct of diplomacy the status of written law, while the 1926 Slavery Convention gave formal recognition to long established customs prohibiting slavery and the slave trade. However, in circumstances in which customary law reflects deeply held moral understandings, it may appear to be more powerful than treaty-based law. For example, it is usually accepted that the custom-based prohibition on genocide (see p. 326) would apply regardless of whether a state had signed up to the 1948 Genocide Convention, making it a universal moral imperative.

The final two sources of international law are of less significance than treaties or customs. The rather vague notion of the 'general principles of law' and the

● **Consent:** Assent or permission; a voluntary agreement to be subject to binding obligations or a higher authority.

● ***Pacta sunt servanda:*** (Latin) The principle that treaties are binding on the parties to them and must be executed in good faith.

● ***Rebus sic stantibus:*** The doctrine that states can terminate their obligations under a treaty if a fundamental change of circumstances has occurred.

● **Custom:** A practice that is so long established and widely accepted that it has come to have the force of law.

● **Diplomatic immunity:** A collection of rights and dispensations that accredited diplomats enjoy in foreign countries, usually including freedom from arrest and trial on criminal charges and privileged travel and communication arrangements.

idea of 'legal scholarship' tend to be invoked when no clear rights or obligations can be identified through formal agreements between and amongst states or through custom and practice. The former is usually used to imply that actions that are recognized as crimes in most domestic legal systems should be treated as crimes if they occur in an international context. Thus, although the invasion of another country's territory and the attempt to annex it by force may breach treaty obligations and ignore the customary expectation that sovereign states should live in peace, it can also be seen as a violation of international law on the grounds that it offends what could be viewed as the general principles of civilized conduct. In the case of legal scholarship, the ICJ recognizes that the sum of written arguments of the most highly qualified and respected judges and lawyers can be used to resolve points of international law when these are not resolved by reference to the first three sources.

Why is international law obeyed?

Those who dismiss the very idea of international law tend to view law strictly in terms of command. This implies that enforcement is the only reliable means of bringing about compliance. However, if compliance were seen as the core feature of an effective legal system, few, if any, domestic legal arrangements would qualify as such. Rape, theft and murder continue to occur in all countries of the world despite being legally prohibited. Indeed, if laws were never violated, there would be little need for them in the first place. Nevertheless, it is difficult to view widespread non-compliance, reflected in a wholesale breakdown of social order and the routine use of intimidation and violence, as compatible with a functioning system of law. In all legal systems, then, there is a balance between compliance and violation, and international law is no exception. However, the remarkable thing about international law is just how high levels of compliance with it tend to be, even though violations have often been grotesque and highly publicized (Franck 1990). Even a noted realist such as Hans Morgenthau (1948) acknowledged that, 'during the 400 years of its existence international law has in most instances been scrupulously observed'. But how can this level of compliance be explained if enforcement, in the conventional sense of the punishment of transgressors, is the exception rather than the rule? Countries tend to obey international law for a variety of reasons, including the following:

- Self-interest and reciprocity
- Fear of disorder
- Fear of isolation
- Fear of punishment
- Identification with international norms

The main reason why states comply with international law is that it is in their interests to do so. States do not need to be forced to comply with the rules that they have, in the main, either made themselves or explicitly consented to. This is sometimes called utilitarian compliance, because states abide by laws because they calculate that in the long run doing so will bring benefit or reduce harm. The key to this benefit is reciprocity (see p. 338), a relationship of mutual exchange between or amongst states that ensures that favours are returned for

CONCEPT

Reciprocity

Reciprocity refers to exchanges between two or more parties in which the actions of each party are contingent on the actions of the others. Good is thus returned for good, and bad for bad, with a rough equivalence applying in terms of reciprocal benefits and rewards. Positive reciprocity ('you scratch my back and I'll scratch yours') explains how and why states are able to cooperate in the absence of an enforcing central authority, as occurs through compliance with international law, the establishment of international regimes or multilateralism (see p. 460). Negative reciprocity ('an eye for an eye, a tooth for a tooth') helps to explain tit-for-tat escalations of conflict and arms races (see p. 266).

favours or that punishment is returned for punishment (Keohane 1986). For example, although diplomatic immunity may at times mean that immoral or even flagrantly criminal actions by foreign diplomats in one's own country go unpunished, states around the world recognize that this is a price worth paying to ensure that their own diplomats in foreign lands can live and work in safety and security. Similarly, the World Trade Organization's (see p. 511) rules about free trade and the abandonment of tariff and non-tariff barriers are usually upheld by states on the grounds that they will benefit from reciprocal action taken by other states.

A second, and related, reason why states tend to comply with international law is out of a general preference for order over disorder. On one level, this is reflected in the ability of international law to create a set of common understandings, through which states become aware of the 'rules of the game'. The framework of rules that international law helps to establish and publicize thus reduces uncertainty and confusion in the relations among states, each of them benefiting from shared expectations and enhanced predictability thus established. States, in other words, have a better sense of how other states will behave. At a deeper level, however, there is a fear of chaos and disorder. This may occur through negative reciprocity, as initial, and perhaps relatively minor, violations of international law lead to an escalating series of **reprisals** that threaten to unravel the entire system of international order and stability. Such considerations may be particularly emphasized by defensive realists, who, like all realists, believe that international order is inherently fragile, but who argue that the primary motivation of states is to maintain security rather than to maximize power (see Offensive or defensive realism p. 234).

Third, a state's level of conformity to international law is a key determinant of its membership of international society (see p. 10). International law is therefore one of the chief institutions through which cultural cohesion and social integration among states are achieved, facilitating cooperation and mutual support. A record of compliance with international law can therefore enhance the standing and reputation of a state, giving it greater 'soft' power and encouraging other members of the international community to work with it rather than against it. Such considerations can influence even the most powerful of states. For example, after the 2003 invasion of Iraq by the USA and a 'coalition of the willing', which was criticized as a breach of international law by, amongst others, the then UN Secretary-General, Kofi Annan, the USA came under considerable pressure to demonstrate conformity with international law. In order to build wider support for its 'war on terror' (see p. 223), the USA was increasingly forced to work within a framework of UN resolutions. States that routinely defy international law run the risk of isolation and may even be treated as international pariahs, sometimes paying a high price for this in diplomatic and economic terms. This applied, for instance, to Libya, which suffered decades of isolation from the international community due to its links with terrorism (see p. 284) and attempts to develop weapons of mass destruction. This isolation forced Libya, in 2003, to make a clean break with its past and acknowledge its obligations under international law.

Fourth, although international law is not routinely enforceable, there are circumstances in which obedience to international law is brought about through a fear of punishment. Punishment in these cases is not dispensed by a world police

● **Reprisal:** An act of retaliation designed either to punish a wrongdoer or redress an injury; reprisal suggests proportionality and usually stops short of war.

force but by states themselves, acting individually or collectively. International law, indeed, recognizes a right of reprisal or retaliation, which makes actions that would otherwise be impermissible acceptable if they occur in response to a state's violation of established norms and principles. Article 51 of the UN Charter thus stipulates that states have a right to self-defence in the event of an armed attack by another state. Israel therefore justified its June 1967 destruction of the Egyptian airforce, at the beginning of the Six Day War, on the grounds that it was a reprisal for an attack launched by Egypt and Syria. Similarly, the 1991 Gulf War could be seen as a form of legally ordained punishment carried out against Iraq for its attempt to forcibly annex Kuwait. Indeed, one of the features of the supposed 'new world order' was the idea that in the post-Cold War world, collective security (see p. 440) would be used to punish military adventurism.

Finally, it would be a mistake to assume that international law is only respected because of considerations that, in their various ways, boil down to concerns about short- or long-term self-interest. In a large proportion of cases, international law is upheld not because of calculations related to the consequences of violating it, but because international law is considered to be rightful and morally binding (Buchanan 2007). This, after all, applies in relation to domestic law, where most citizens, most of the time, refrain from theft, physical attacks and murder not because of the existence of a criminal justice system, but because they view these acts as distasteful or immoral. The same applies to international law, especially when international law embodies norms of behaviour that enjoy widespread popular support, such as prohibitions on slavery, unprovoked attack or genocide (see p. 326). Liberals, who believe that human beings are rational and moral creatures, are likely to place a greater emphasis on moral motivation for state compliance with international law than do realists. However, many would agree that state behaviour in such matters is shaped by mixed motives, as practical considerations, linked to self-interest and possibly a fear of punishment, are entangled with ethical considerations of various kinds. Constructivists, for their part, highlight the extent to which both state interests and a sense of what is morally right in the international sphere are socially constructed, which means that they are shaped, in part, by international law itself.

INTERNATIONAL LAW IN FLUX

Since the early twentieth century, international law has become not only increasingly prominent but also more politically controversial. The scope, purpose and, indeed, nature of international law has changed in a variety of ways. These include the following:

- A shift from 'international' law to 'world' or 'supranational' law
- The development in the laws of war into international humanitarian law
- The wider use of international criminal tribunals and courts

From international law to world law?

In its classical tradition, international law has been firmly state-centric. This is the sense in which it is properly called 'international' law: it is a form of law that governs states and determines the relations amongst states, its primary purpose

APPROACHES TO . . .

INTERNATIONAL LAW

Realist view

Realists are generally sceptical about international law and its value, usually drawing a sharp distinction between domestic law and international law. While domestic law derives from the existence of a sovereign authority responsible for enacting and enforcing law, the absence of a central political authority in the international realm means that what is called 'international law' is perhaps nothing more than a collection of moral principles and ideals. As Thomas Hobbes (see p. 14), put it, 'where there is no common power, there is no law'. For Morgenthau (see p. 58), international law amounted to a form of 'primitive law', similar to the behavioural codes established in pre-modern societies. However, only ultra-realists go as far as dismissing international law altogether. Most realists accept that international law plays a key role in the international system, albeit one that is, and should be, limited. International law is limited by the fact that states, and particularly powerful states, are the primary actors on the world stage, meaning that international law largely reflects, and is circumscribed by, state interests. Realists also believe that the proper, and perhaps only legitimate, purpose of international law is to uphold the principle of state sovereignty. This makes them deeply suspicious of the trend towards 'supranational' or 'world' law, in which international law becomes entangled with the idea of global justice and is used to protect individual rights rather than states' rights.

Liberal view

Liberals have a clearly positive assessment of the role and importance of international law. This stems from the belief that human beings are imbued with rights and guided by reason. As the international sphere is a moral sphere, core ethical principles should be codified within a framework of international law. For idealists, such thinking implied that in international politics, as in domestic politics, the only solution to the disorder and chaos of anarchy is the establishment of a supreme legal authority, creating an international rule of law. This doctrine of 'peace through law' was expressed, for example, in the establishment of the League of Nations and in the 1928 Kellogg-Briand Pact, which in effect banned war. Although modern liberals and particularly neoliberals have long since abandoned such idealism, they nevertheless continue to believe that international law plays an important and constructive role in world affairs. For them, regimes of international law reflect the common interests and common rationality that bind statesmen together. By translating agreements among states into authoritative principles and by strengthening levels of trust and mutual confidence, international law deepens interdependence (see p. 8) and promotes cooperation. The idea that there is a tendency for interdependence to be consolidated through formal rules of international behaviour is reflected in the functionalist theory of integration, as discussed in Chapter 20.

Critical views

The three main critical perspectives on international law have emerged from social constructivism, critical legal studies and postcolonialism. Although there is no developed or coherent constructivist account of the nature of international law, the assertion that political practice is crucially shaped by norms and perceptions emphasizes the extent to which norms embodied in international law structure the identities of states as well as the interests they pursue. This helps to explain why and how state behaviour changes over time, as, for instance, once accepted practices such as slavery, the use of foreign mercenaries and the ill-treatment of prisoners of war become less common. Influenced by poststructuralist analysis, critical legal studies highlights the inherently indeterminate nature of international law, based on the fact that legal language is capable of multiple and competing meanings. Such insights have, for instance, been used by feminists to suggest that international law embodies patriarchal biases, either because the legal 'person' (whether the individual or the state) is constructed on the basis of masculine norms, or because international law perpetuates the image of women as victims. Postcolonialists, for their part, have viewed international law as an expression, in various ways, of western global dominance (Grovogui 1996; Antony 2005). From this perspective, international law developed out of Christian and Eurocentric thinking about the nature of legal and political order, is tainted by the inheritance of colonialism and possibly racism, and operates through institutions, such as the International Court of Justice, that are wedded to the interests of the industrialized West.

being to facilitate international order. In this view, state sovereignty is the foundational principle of international law. States thus relate to one another legally in a purely *horizontal* sense, recognizing the principle of **sovereign equality**. Not only is there no world government, international community or public interest that can impose its higher authority on the state-system, but legal obligations, determined by treaties and conventions, are entirely an expression of the will of states.

This classical view can be broken down into four features. First, states are the primary *subjects* of international law. Indeed, in this view, the state is a meta-juridical fact: international law merely recognizes the consequence of the establishment of states; it is not able to constitute states in the first place. The 1933 Montevideo Convention on the Rights and Duties of States therefore acknowledged that a state should be admitted into the international legal community so long as it fulfils three criteria: it possesses a stable government, controls a definite territory and enjoys the acquiescence of the population. Second, states are the primary *agents* of international law. In other words, they are the only actors empowered to formulate, enact and enforce international law. Third, the *purpose* of international law is to regulate inter-state relations, which means, in practice, upholding the cardinal principle of sovereignty. Sovereignty not only defines the terms of legitimate statehood, but it also implies the norms of **self-determination** and **non-intervention**. Finally, the *scope* of international law should be strictly confined to issues of order, rather than issues of justice. International law therefore exists to maintain peace and stability, and it should not be used for wider purposes. If humanitarian issues or questions of distributive, environmental or gender justice are to be incorporated into the framework of law, this should happen only at the domestic level, where states, as sovereign entities, are able to address moral concerns in the light of the distinctive values, culture and traditions of their own society. This classical view of international law is exemplified by the role and powers of the International Court of Justice.

However, the classical conception of international law has increasingly been challenged by attempts to use international law to found a world constitutional order, a process described by Habermas (2006) as the 'constitutionalization of international law'. This 'constitutionalist' conception of international law has become, over time, the dominant mainstream approach to international **jurisprudence**. It is constitutional in the sense that it aims to enmesh states within a framework of rules and norms that have a higher and binding authority, in the manner of a **constitution**. This establishes a *horizontal* relationship between states and international law, transforming international law into what is sometimes called 'supranational' law or 'world' law (Corbett 1956). Stemming probably from the impact of WWI on western consciousness, this trend has been closely related to the emergence of a system of global governance (see p. 455) and is evident in four main developments.

First, individuals, groups and private organizations have increasingly been recognized as *subjects* of international law. States, in other words, are no longer the only legal 'persons'. This has been particularly evident in the focus within modern international law on individual rights, giving rise to an ever-expanding body of international human rights law and a substantial broadening of the 'laws of war', as considered in the next section. Second, non-state actors have become important *agents* of international law, in the sense that civil society organizations

● **Sovereign equality:** The principle that, regardless of other differences, states are equal in the rights, entitlements and protections they enjoy under international law.

● **Self-determination:** The principle that the state should be a self-governing entity, enjoying sovereign independence and autonomy within the international system.

● **Non-intervention:** The principle that states should not interfere in the internal affairs of other states.

● **Jurisprudence:** The science or philosophy of law, or a system or body of law.

● **Constitution:** A set of rules, written or unwritten, that define the duties, powers and functions of the various institutions of government, define the relations between them and also the relations between the state and the individual.

GLOBAL ACTORS . . .

INTERNATIONAL COURT OF JUSTICE

Type: International court • **Established:** 1945 • **Location:** The Hague, Netherlands

The International Court of Justice (commonly referred to as the World Court or the ICJ) is the principal judicial organ of the United Nations. It was established in June 1945 by the Charter of the UN and began work in April 1946. The role of the ICJ is to settle, in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies. The ICJ is composed of 15 judges elected to 9-year terms of office by the UN General Assembly and the Security Council voting separately. One-third of the Court is elected every three years. Permanent members of the Security Council always have a sitting judge, but if a state appearing before the Court does not have a judge of its own on the Court, it may appoint an *ad hoc* judge. A President (since 2009, Hisashi Owada (Japan)) and a Vice-President are elected by the members of the Court every three years by secret ballot. The President presides at all meetings of the Court, directs its work and the work of its various committees, and has a casting vote in the event of votes being equally divided.

Significance: The ICJ is the most far-reaching attempt to date to apply the rule of law to international disputes. The Court, indeed, has had many successes in laying down principles by which disputes may be judged. It has, for example, drawn baselines concerning issues such as territorial waters, fishing rights and methods of calculating the continental shelf beneath the sea. The Court has also had a number of notable successes in settling international disputes, including the border dispute between El Salvador and Honduras, which led to the so-called 'soccer war' of 1969, and the violent dispute between Cameroon and Nigeria over the ownership of an oil-rich peninsula, which was settled in 2002. In addition, the Court has handed down a number of 'advisory opinions', which have helped set the tone for post-conflict international affairs. These include the decision in 1971 to declare that South Africa's presence in Namibia was illegal, which helped to prepare the ground for South Africa's eventual acceptance of Namibian independence in 1989.

However, the ICJ has a number of significant weaknesses. In the first place, the jurisdiction of the Court is strictly limited to states. Individuals, corporations, NGOs and other non-state bodies are excluded from direct participation in cases. This prevents the Court from taking action over a wide range of human rights and humanitarian issues, meaning that other tribunals and courts (such as the international criminal tribunals for Rwanda and former Yugoslavia, and the International Criminal Court) have had to be established, with the ICJ not being able to establish umbrella responsibility for these thematic courts. Second, the greatest weakness of the ICJ is that it lacks compulsory jurisdiction and has no mechanism for enforcing its judgements. States that have signed the treaty creating the ICJ are allowed to choose whether they want to be subject to the compulsory jurisdiction of the Court by signing the optional clause (the clause that gives countries the option of agreeing or not agreeing in advance to be bound by the decisions of the Court), and only about one-third of states have agreed to do so. Moreover, states are able to revoke their commitments under the optional clause, as the USA did in 1984 when Nicaragua asked the ICJ to determine whether the mining of Nicaraguan harbours by the CIA constituted a violation of international law. In theory, the Court can appeal to the Security Council to enforce its judgements; however, this has never happened. Finally, the Court, especially in its early days, was widely criticized by developing countries for operating in the interests of western states and interests, in part because of their preponderant representation on the Security Council, and therefore on the Court itself. Nevertheless, this criticism has been advanced less frequently since the end of the Cold War, as the number of cases brought before the ICJ annually has more than doubled with the parties appearing before the Court also becoming more diverse.

and particularly NGOs (see p. 6) have increasingly helped to shape, and even to draft, international treaties and conventions. The Rome Statute, which led to the establishment of the International Criminal Court(ICC) in 2002, was thus drafted by some 250 NGOs working alongside representatives from 160 countries. Third, the *purpose* of international law has widened substantially beyond attempts to manage inter-state relations, particularly as it has been drawn into regulating the behaviour of states with their own territories. For instance, the World Trade Organization, the foremost legal body in the area of international trade, has substantial powers to order states to dismantle tariff and non-tariff barriers in the process of resolving trade disputes. Finally, the *scope* of international law has come to extend well beyond the maintenance of international order and now includes the maintenance of at least minimum standards of global justice. This is evident not only in attempts to establish international standards in areas such as women's rights, environmental protection and the treatment of refugees, but also moves to enforce international criminal law though the use of *ad hoc* international tribunals and the International Criminal Court.

The existence of rival conceptions of international law has nevertheless thrown up disagreements, tensions and confusions. These disagreements are largely between realists, on the one hand, and liberals and cosmopolitans, on the other. For realists, any attempt to construct a world constitutional order, based on 'world' law, threatens to weaken sovereignty and put international order at risk (Rabkin 2005). In this view, once international law ceases to be rooted in a commitment to state sovereignty, it ceases to be legitimate. Liberals and cosmopolitans, for their part, have always had concerns about untrammelled state sovereignty, and have often been eager to use international law to give global politics an ethical dimension (Brown 2008). The tensions and confusion have resulted from the fact that 'world' law, if it exists at all, incorporates and extends 'international' law; it has not replaced it. International law thus continues to acknowledge the cornerstone importance of state sovereignty, while, at the same time, embracing the doctrine of human rights and the need for humanitarian standard-setting. In that sense, the 'international' conception continues to enjoy political ascendancy over the 'world' conception. The future development of international law is nevertheless bound to be shaped by how, and how successfully, the tensions between these opposing norms and principles can be managed.

This can be illustrated by the contentious issue of the legality of humanitarian intervention (see p. 319). The international law dealing with humanitarian intervention has evolved significantly since the early 1990s, but a consensus has yet to emerge on what these laws mean. On the face of it, intervention, for whatever purpose, is usually judged to be a violation of international law. For example, Article 2 of the UN Charter states that, 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations'. Article 7 states that, 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. The General Assembly Resolution 2131, adopted in 1965, expresses this even more clearly: 'no State has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another State.' However,

at the same time, a variety of legal instruments have also come into existence that affirm the protection of civil, political, social and economic rights, which, at minimum, call the principle of sovereignty, and therefore the norm of non-intervention, into question. These include the Genocide Convention and the two UN Covenants on Human Rights, drafted in 1966. Although there exists no clearly defined and legally binding treaty justifying humanitarian intervention, it may nevertheless be understood as a form of customary international law.

Such confusions were evident in relation to the 1999 Kosovo intervention. In this case, once it became apparent that the UN Security Council would not authorize military action against Serb forces, the USA and its allies turned to NATO (see p. 253) as a regional organization through which they could undertake such action. The then UN Secretary-General, Kofi Annan, recognized that the intervention was clearly not legal, but nevertheless suggested that it was morally justified. This led him to suggest that the principle of state sovereignty should be revised to mean 'responsible sovereignty', in which a state's entitlement to sovereign jurisdiction is conditional on carrying out its responsibility to protect its own citizens. As discussed in Chapter 13, the idea of a 'responsibility to protect', or R2P, has been widely used by those who wish to provide a legal basis for humanitarian intervention. However, such thinking is by no means universally accepted, humanitarian intervention seeming destined to continue to have an uncertain status in international law, hovering somewhere between its broad but perhaps ill-defined acceptance in customary international law and its clear prohibition in treaty-based law.

Developments in the laws of war

One of the clearest examples of the shift from 'international' law to 'world' law has been the evolution of the laws of war into a body of international humanitarian law. The advent of industrialized warfare, and the experience of the two world wars of the twentieth century, altered thinking about both aspects of just war theory: the idea of *jus ad bellum*, or a just recourse to war, and the idea of *jus in bello*, or the just conduct of war. In the case of the former, there was a backlash against the belief that had become established during the nineteenth century that a state's right to wage war is a fundamental sovereign right. In this view, sovereignty stemmed primarily from the *ability* of a state to establish control over a territory and its people, meaning that claims to rightful authority could result from conquest and expansion. The consequences of such thinking were evident in the European imperialism of the late nineteenth century that provided the backdrop for WWI, and in German, Italian and Japanese expansionism in the run-up to WWII. In effect, might was right. However, the 1945 UN Charter significantly narrowed the scope of legally justified warfare. It laid down only two circumstances in which force could be legitimately used: self-defence, in which states have an unqualified sovereign right to use force if subjected to a physical attack by another state (Article 51), and when the use of force has been sanctioned by the Security Council as part of a peace enforcement action (Article 42). The Nuremberg Principles extended such thinking into international criminal law by establishing the idea of 'crimes against peace', allowing individuals to be prosecuted for 'planning, preparing, initiating or waging a war of aggression, or conspiring to do so'.

In the case of just war thinking related to the conduct of war, rather than the justifications for war, the principal development has been the idea of **war crimes**. There is nothing new about war crimes prosecutions, however. Examples of legal proceedings that stem from misconduct or abuses that occur during war can be traced back to Ancient Greece. The trial of Peter von Hagenbach in 1474 is sometimes thought of as the first war crimes trial. Hagenbach was convicted and beheaded on the authority of an *ad hoc* tribunal of the Holy Roman Empire, having been accused of carrying out wartime atrocities committed in Austria. Modern thinking about war crimes nevertheless stems from the Hague Peace Conferences of 1899 and 1907, which established a permanent court of arbitration for states in dispute wishing to use its services, and also formulated a series of conventions designed to limit the horrors of war. Creating the basis for the modern laws of war, the Hague Conventions prohibited, among other things, the launching of projectiles and explosives from balloons and the use of 'dum dum', or explosive, bullets, and set out rules related to the treatment of prisoners of war and the rights of neutral powers. The war crimes that were recognized by the Nuremberg Principles included the murder or ill-treatment of civilian populations, hostages and prisoners of war. The four Geneva Conventions, adopted in 1949, with two additional protocols in 1977 and a third one in 2005, marked the widest and most detailed attempt to codify war crimes, providing one of the foundations for international humanitarian law. Amongst the war crimes they identified are the following:

- Wilful killing
- Torture or inhuman treatment, including biological experiments
- Wilfully causing great suffering or serious injury to body or health
- Compelling civilians or prisoners of war to serve a hostile power
- Wilfully depriving civilians or prisoners of war of a fair trial
- The taking of hostages
- Unlawful deportation, transfer of confinement
- Wanton destruction and appropriation of property not justified by military necessity.

One of the most significant, if controversial, developments in the laws of war is the development of the idea of **'crimes against humanity'**. The earliest notion of a crime against humanity (even though the terminology was not used) surfaced during the campaign to abolish the slave trade. The 1815 Declaration on the Abolition of the Slave Trade, for instance, condemned the slave trade for offending against the 'principles of humanity and universal morality'. The idea that such actions might be considered crimes first emerged in response to what later became known as the 'Armenian genocide', a series of massacres carried out against Armenians, Greeks and Assyrians living in the Ottoman Empire, which peaked between 1915 and 1917. The Triple Entente, an alliance of Russia, France and the UK, declared that the massacres amounted to 'crimes against humanity and civilization'. The 1945 Nuremberg Charter nevertheless took the matter further by drawing a formal distinction between war crimes and crimes of humanity, which has guided international jurisprudence ever since. Whereas war crimes are 'violations of the laws and customs of war', crimes against humanity have the following three characteristics:

● **War crime:** A violation of the laws or customs of war, for which individuals can be held to be criminally responsible.

● **Crimes against humanity**: Intentionally committed acts that form part of a widespread, systematic and repeated attack against a civilian population.

- The crimes must target civilians.
- They must be widespread or systematic, and repeated.
- They must be intentionally committed.

The most detailed and ambitious attempt to codify the crimes that can be categorized as crimes against humanity is found in the 1998 Rome Statute, which established the International Criminal Court. This highlights crimes including murder, extermination, enslavement, deportation, torture, rape or sexual slavery, racial and other forms of persecution, and the crime of apartheid. Although genocide is clearly a crime against humanity in a general sense, it is treated as a separate category of crime, indeed as the 'crime of crimes', by the Genocide Convention and in the Rome Statute. The virtue of incorporating the concepts of crimes against humanity and genocide into international law is that they attempt to deal with the issue of widespread atrocities by establishing individual responsibility for actions that may not conform to the conventional notion of a war crime. The concept of crimes against humanity in particular is underpinned by a form of moral cosmopolitanism (see p. 21) that holds that the proper stance towards humanity is one of respect, protection and succour, humanity being morally indivisible. Critics of the concept have nevertheless questioned whether such a broad category of crime can ever be meaningful, and have also raised doubts about the supposedly universal moral principles on which it is based. These and other concerns about international humanitarian law have become more acute as a result of steps to anchor individual responsibility for war crimes, crimes against humanity and genocide through the establishment of international criminal tribunals and the International Criminal Court.

International tribunals and the International Criminal Court

After the Nuremberg and Tokyo trials, superpower disagreement precluded the use of international criminal tribunals for the remainder of the Cold War. Such prosecutions as took place, occurred in national courts. For instance, in 1971 Lieutenant William Calley was convicted and sentenced to life imprisonment by a US court for ordering the My Lai massacre in 1968, during the Vietnam War. Calley served less than four years before his release in 1974 on the orders of President Nixon. However, the end of the Cold War and the breaking of the logjam in the UN Security Council created circumstances in which international tribunals could once again be established. Reports of massacres and ethnic cleansing in the former Yugoslavia led in 1993 to the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), located in The Hague, the Netherlands, the first genuinely international tribunal convened since Nuremberg and Tokyo. The ICTY was also the first tribunal to invoke the Genocide Convention. The Tribunal was mandated to prosecute crimes against humanity, violations of the laws of war, and genocide committed in the various Yugoslav wars. The most prominent figure indicted by the ICTY was Slobodan Milošević, the former head of state of the Federal Republic of Yugoslavia. Milošević was the first head of state to be prosecuted under international

humanitarian law. He was arrested in 2001, and his trial on 66 counts of genocide, crimes against humanity and war crimes began the following year. However, the proceedings were cut short by Milošević's death in 2006. By May 2010, 135 people had been tried and convicted by the ICTY, receiving sentences of up to life imprisonment. The Tribunal aims to complete all trials by 2011 and all appeals by 2013, although an exception has been made for Radovan Karadžić, the former Bosnia Serb politician, who is accused of committing war crimes against Bosnian Muslims and Bosnian Croats, including the Srebrenica massacre.

The UN authorized a second international tribunal following the 1994 genocide in Rwanda, which had led to the murder of about 800,000 Rwandan Tutsis and moderate Hutus. The new tribunal, the International Criminal Tribunal for Rwanda (ICTR), was located in Arusha, Tanzania, and held its first trial in 1997. By May 2010, 50 trials had been completed, leading to the conviction of 34 people with 8 cases on appeal. In the most significant of these trials, Jean Kambanda, the former prime minister of Rwanda, became the first, and so far the only, head of state to plead guilty to genocide, when he was convicted in 1998 and sentenced to life imprisonment. In 2002, the Special Court for Sierra Leone was set up jointly by the UN and the government of Sierra Leone, to consider serious violations of international humanitarian law that had occurred during Sierra Leone's ten-year civil war. This involved the indictment in 2003 of the former president of Liberia, Charles Taylor, for his alleged role in supporting rebel forces that used amputations and rape to gain control of Sierra Leone's diamond mines. After living in exile in Nigeria, Taylor was arrested once he crossed the border into Cameroon and transferred to a specially convened tribunal of the ICTR in The Hague, where his war crimes trial started in 2006. In 2003, the UN reached an agreement with the Cambodian government to bring to trial the surviving leaders of the Khmer Rouge, who had presided over the deaths of over a million people in Cambodia during a four-year rule of terror in the late 1970s.

In other cases, criminal tribunals have been set up at a national level. These have included the East Timor Tribunal, established in 2002 to investigate human rights violations carried out during the period of Indonesian occupation and control, and the war crimes tribunal in Iraq, which in 2006 found Saddam Hussein guilty of the 1982 massacre that took place in Dujail, north of Baghdad, and sentenced him to death. In the case of General Augusto Pinochet, he was indicted in 1998 by a court in Spain for human rights violations committed while he was the dictator of Chile, 1973–90. However, although he was arrested in London on an international arrest warrant, he was released in 2000 on the grounds that he was too ill to face trial and allowed to return to Chile, where he enjoyed immunity from prosecution as part of the agreement under which he had left office.

These various tribunals and courts, and especially those set up to examine atrocities committed in former Yugoslavia and Rwanda, influenced the development of international criminal law in a number of important ways. In the first place, they re-focused attention on large-scale human rights violations, particularly through high-profile trials of senior political figures. Apart from anything else, this strengthened the idea that establishing personal culpability for war crimes, crimes against humanity or genocide may reduce the incidence of mass

atrocities, as leaders recognize they are no longer able to act as if they are above international law. Second, whereas previous war crimes trials had been concerned with acts that took place in the context of inter-state war, the ICTY and the ICTR recognized that crimes against humanity may take place during an internal armed conflict or even during periods of peace, thereby expanding the remit of international humanitarian law. Third, the tribunals nevertheless highlighted the enormous cost and often inefficiency of dealing with crimes against international humanitarian law through the mechanism of *ad hoc* UN-backed tribunals. For instance, it took over two years to begin trying cases in the ICTY and the ICTR, and many trials lasted for months and, in some cases, years. During 2000, these tribunals accounted for over 10 per cent of the UN's regular budget, with their total cost by 2009 being estimated at $1.6 billion. Such concerns led to pressure for the replacement of *ad hoc* tribunals by a permanent institution with global jurisdiction, in the form of the International Criminal Court (ICC).

In 1998, delegates from 160 countries, 33 international organizations and a coalition of NGOs met in Rome to draft the Statute of the ICC. The Rome Statute established the ICC as a 'court of last resort', exercising jurisdiction only when national courts are unwilling or unable to investigate or prosecute. The ICC, which came into being in 2002, has broad-ranging powers to prosecute acts of genocide, crimes against humanity, war crimes and, potentially, aggression (a decision on crimes of aggression was reserved to a later date, but its inclusion is now highly unlikely). Although the ICC, like the ICJ, is located in The Hague, Netherlands, it is an independent international organization and not part of the UN system. However, the ICC's relationship with the UN Security Council has been particularly significant and controversial. The USA, an early and enthusiastic supporter of the idea of an international criminal court, had proposed that the Security Council act as the court's gatekeeper, reflecting Security Council's primary responsibility for the maintenance of international peace and security. But this proposal was rejected at Rome, on the grounds that it would have given the USA and other permanent members of the Security Council (the P-5) the ability to prevent the ICC from hearing cases in which their citizens were accused of human rights violations by using their veto powers. Instead, under the so-called 'Singapore compromise', the Rome conference allowed the Security Council to delay a prosecution for twelve months if it believes that the ICC would interfere with the Council's efforts to further international peace and security. However, as the Security Council must do this by passing a resolution requesting the Court not to proceed, this effectively prevents any P-5 country from blocking an investigation simply by exercising its veto.

The controversial nature of the ICC was apparent from the outset. Although 120 states voted in favour of the Rome Statute, 21 abstained, including India and a range of Arab and Caribbean states, and 7 voted against. It is widely believed that the states which voted against the Statute were the USA, China (see p. 251), Israel, Libya, Iraq, Qatar and Yemen (although the states were not formally identified). As of May 2010, 111 countries were members of the Court and a further 37 countries have signed but not ratified the Rome Statute. Non-member states include China, India, Russia and the USA, which significantly reduces the scope of the ICC's jurisdiction and threatens its international credibility, perhaps in a way that is reminiscent of the League of Nations. Only two permanent members

Debating . . .

Is the International Criminal Court an effective means of upholding order and justice?

The ICC has proved to be a highly controversial international organization. While it has been hailed by some as an essential guarantee for justice and human rights, others view it as a deeply flawed body, even, sometimes, as a threat to international order and peace.

YES

Strengthening international humanitarian law. The ICC has codified norms and principles of international humanitarian law that have been widely accepted since the Nuremberg and Tokyo trials, in the process providing the most authoritative and detailed definitions of genocide, crimes against humanity and war crimes currently available. By comparison with the system of *ad hoc* tribunals, the ICC brings a much needed coherence to the process of enforcement, and also, by keeping Security Council interference to a minimum, (potentially) prevents the P-5 from exempting themselves from their responsibilities.

Tackling the global justice gap. The global justice gap condemns millions of people to abuse and oppression either because of the repressive policies of their own governments or because of their government's unwillingness or inability to prevent gross human rights violations. The ICC has been designed specifically to address this problem, providing the basis for external intervention when internal remedies are unavailable. This task is nevertheless being put in jeopardy by a collection of powerful countries that are unwilling fully to sign up to the ICC, either because they want to protect their own military freedom of manoeuvre, or in order to shield allies from criticism. This amounts to a serious failure of global leadership.

Deterring future atrocities. The aim of the ICC is not merely to prosecute crimes that have been committed since its inception in 2002, but also to shape the future behaviour of political and military leaders throughout the world. In this view, atrocities occur, in part, because leaders believe that their actions will go unpunished. The significance of the trials of heads of government is that they demonstrate that this may not be the case in future. No leader is now above international humanitarian law. The fear of possible legal proceedings by the ICC may, indeed, have been instrumental in persuading leaders of the Lord's Resistance Army in Uganda to attend peace talks in 2007.

NO

Threat to sovereignty and national security. The most common criticism of the Court is that it is a recipe for intrusions into the affairs of sovereign states. The ICC threatens state sovereignty because its jurisdiction extends, potentially, to citizens of states that have not ratified the Rome Statute. This happens if their alleged crime was committed in a state that has accepted the jurisdiction of the Court, or when a situation has been referred to the ICC by the UN Security Council. This issue is of particular concern in the USA, because, as the world's sole remaining superpower, the USA deploys its military to 'hot spots' more often than other countries.

Unhelpful obsession with individual culpability. By highlighting the criminal responsibilities of individuals rather than states, the ICC contributes to a worrying trend to use international law to further moral campaigns of various kinds. Not only are questions of personal culpability for humanitarian crimes highly complex, but once international law is used as a vehicle for advancing global justice, its parameters become potentially unlimited. Moreover, by prioritizing individual culpability and criminal prosecution over wider concerns, the ICC may damage the prospects of peace and political settlement, as, arguably, occurred over the indictment of President Bashir of Sudan.

A political tool of the West. The ICC has been criticized for having a western or Eurocentric bias. In the first place, it is based on western values and legal traditions that are grounded in ideas of human rights, which are rejected in parts of Asia and the Muslim world, thus demonstrating the absence of a global moral consensus. Second, the ICC is sometimes seen to be disproportionately influenced by EU member states, all of whom have ratified the Rome Statute. Third, the cases brought before the ICC overwhelmingly relate to events that have occurred in the developing world. The ICC is therefore seen to perpetuate an image of poor countries as chaotic and barbaric.

of the P-5 – the UK and France, its least powerful members – have ratified the Rome Statute. Not one of the nuclear powers outside Europe has ratified the treaty, meaning that the ICC is dominated by European, Latin-American and African states. The opposition of the USA to the ICC has been particularly damaging. President Clinton signed the Rome Statute on his final day in office in 2000, but stated that, as the treaty was fundamentally flawed, it would not be forwarded to the US Senate for ratification. The Bush administration effectively 'unsigned' the treaty in 2002, and took concerted steps to reduce the USA's exposure to ICC jurisdiction. It did this by negotiating bilateral immunity agreements (BIAs), sometimes called 'Article 98' agreements, with as many countries as possible, under which neither party would transfer citizens of the other country to the jurisdiction of the ICC. Over 100 BIAs have been negotiated, even though their legal status is unclear. The Obama administration's shift towards multilateralism has certainly modified the Bush administration's implacable hostility towards the ICC, but this has yet to produce a clear commitment to 're-sign' the Rome Statute and press ahead with ratification. Nevertheless, opinion is divided on the extent to which the reservations expressed by the USA and other states about the ICC have been based on pragmatism and self-interest, and the extent to which they have been based on principle.

SUMMARY

- International law is law that governs states and other international actors, although it is widely considered to be 'soft' law, because it cannot, in most circumstances, be enforced. The two most important sources of international law are treaties and international custom. In the former, legal obligations are clearly rooted in consent, while in the latter obligations arise from long-established practices and moral norms.
- International law is largely obeyed because states calculate that in the long run abiding by laws will bring them benefit or reduce harm. Other reasons for obedience include a fear of disorder, a fear of isolation, a fear, in some cases, of punishment and the wider belief that international law is rightful and morally binding.
- In its classical tradition, international law has been firmly state-centric, being based on the cornerstone principle of state sovereignty However, this conception has increasingly been challenged by a 'constitutionalist' conception of international law, sometimes called 'supranational' law or 'world' law, whose scope includes the maintenance of at least minimum standards of global justice.
- One of the clearest examples of the shift from 'international' law to 'world' law has been the evolution of the laws of war into a body of international humanitarian law. This has largely happened through the development of the idea of war crimes, which allows individuals to be held to be criminally responsible for violations of the customs of war, and through the notion of crimes against humanity.
- The end of the Cold War allowed international humanitarian law to be implemented more widely through international tribunals and courts. This happened through ad hoc tribunals set up to examine reports of atrocities carried out in former Yugoslavia and Rwanda in particular, but the most significant development was the establishment of the International Criminal Court, which came into operation in 2002. However, the Court has sometimes been seen as a threat to international order and peace.

Questions for discussion

- Is international law really law?
- How and why have treaties become the most important source of international law?
- Why is it in the interest of states to obey international law?
- How strong is the moral motivation for states' compliance with international law?
- What are the implications of the 'constitutionalist' conception of international law for international jurisprudence?
- To what extent are 'international' and 'world' law compatible?
- Is humanitarian intervention justifiable in international law?
- Is a state's right to sovereignty conditional, and if so, on what?
- Is the notion of crimes against humanity too vague and confused to be legally meaningful?
- Should political leaders be held individually culpable for breaching international humanitarian law?

Further reading

Byers, M. (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law* (2000). An excellent collection of essays that explore the political implications of international law in an age of globalization.

Gray, C. *International Law and the Use of Force* (2008). A useful and up-to-date discussion of the implications of the use of force for international law.

Koskenniemi, M. *From Apology to Utopia: The Structure of International Legal Argument* (2006). A key work outlining the critical approach to international law.

Shaw, M. *International Law* (2003). A clear, authoritative and comprehensive introduction to the study of international law.

Links to relevant web resources can be found on the *Global Politics* website