

*Of Law there can be no less acknowledged than that...her voice  
[is] the harmony of the world.*

—Richard Hooker (1554–1600), English cleric and theologian

## ■ I N T R O D U C T I O N ■

In learning about Canadian law, you have seen just how difficult it is both to create and to enforce laws that can be applied to all Canadians. Imagine the challenge, then, of trying to create and enforce one legal code for the entire world in order to promote good relations among nations and protect mutual interests. In considering this idea, start with the broad question: How is the nature of laws by which people should live or be ruled determined? And once it is determined and laws are created, how should they be enforced and revised? Some international laws might be created because they would provide nations with mutual benefit. Other international laws might be created because they would be considered ethically correct by some powerful nations. In determining the substance of these laws, enforcing them, and revising them, however, it is essential to consider diversity. Diversity refers to differences among people in terms of their political systems, religion, culture, traditions, belief systems, and geography. As well, the concept of sovereignty (the right of nations to make and enforce laws within their own boundaries) affects the realization of international law. Considering all these differences that exist among the world's countries, can any consensus on laws ever be reached, or do the self-interest and competing goals of these countries make any form of international law unrealistic?

## Defining International Law

### Is International Law Real Law?

Given the degree to which countries differ on their approaches to law, can international law be considered real law as we have come to define and understand it? Do long-standing practices or agreements that exist among countries constitute actual law in some form, or are they more like rules of etiquette? We can approach these questions by examining the differences between the concept of **domestic law** (laws specific to one

state or nation) and practices that have occurred among countries, commonly called “international law.”

In order for any domestic law to be effective, it must contain three parts. First, the law must specify the behaviour that people or parties must follow. Second, the law must specify what the penalties are for people or parties who fail to comply with it. Third, the law must specify how the ongoing enforcement of it will be achieved. Those who suggest that international law is not



**FIGURE 14.2** A seven-year-old Iraqi boy, Sari Ali, working in a blacksmith shop in Baghdad in 2001. Many Iraqi children work hard to improve their family's standard of living. After the Persian Gulf War in 1991, a trade embargo was imposed on Iraq. In what ways do long-term trade embargoes affect average citizens?

real law point out the lack of a universal governing or legislative body to make laws, of a single court to determine penalties, and of a global police force to enforce penalties.

Consider how realistic it might be in a global context to establish such governing bodies, determine penalties, and then enforce these penalties. How willing would nations be to surrender sovereignty to some higher authority such as a world government? Then there is the matter of adjudication, which is a judgment made by a third party that was not determined through negotiation. With this type of judgment, one side wins and the other loses. In creating a system of adjudication, it would be an ambitious task to create a court that has jurisdiction over all issues, something comparable to the Supreme Court of Canada.

Regarding the penalties themselves, consider this extreme example. A country that does not agree with the laws of another country would never attempt to arrest, let alone imprison, all of its citizens. So what type of governing body would enforce penalties throughout the entire

world? To address this question thoughtfully, it is important to accept that international law, by definition, is quite different from the domestic legislation of individual countries.

Current laws among countries were neither formulated nor passed by a supreme legislative body. However, there is an international agency that has facilitated solutions—the United Nations (UN). While it would be misleading to characterize the United Nations as any type of world government, it has certainly aided nations in reaching common goals and in settling disputes.

The international community has met with varying degrees of success when it comes to punishing nations in breach of agreements or policies. When some nations consider the actions of another country to be offensive, they may turn a critical spotlight on that country in the hope that their criticism will shame or pressure the country into rethinking its policies or actions. **Economic sanctions**, which are any actions that either minimize or prevent economic activity that would otherwise occur, can be a particularly effective tool. One example of economic sanctions took place in August 1990, when the UN Security Council declared a **trade boycott** of Iraq because of Iraq's invasion of Kuwait. A trade boycott is a form of protest whereby people abstain from buying or using the goods or services of a particular country or organization in order to pressure it to change its behaviour.

Wealthier countries may withhold foreign aid or they may limit or cease humanitarian programs in offending countries. These wealthier countries may also extend their sanctions to other nations that trade with the offenders. Some countries have also chosen to impose **trade embargoes** on offending nations. Trade embargoes are laws or policies that countries initiate to prohibit or restrict the import or export of goods. These countries may also follow sanctions with military actions, such as naval blockades, to force a country to comply with previous agreements or a request by the United Nations. For example, in 1963, during the Cuban Missile Crisis between the United States and the Soviet Union, an

American blockade successfully stopped Soviet ships from carrying missiles to Cuba.

At other times, countries will sever diplomatic ties with an offending country. By withholding co-operation and communication from the offender, they hope to change the offending country's policy. Some countries may choose the extreme measure of using military action to force a country into submission.

Over the past 60 years, international courts and tribunals have been established. A **tribunal** refers to any governmental body or official group of people engaged in resolving a dispute. The International Court of Justice was formed in 1946 at The Hague in the Netherlands and still exists today. In 2002, the International Criminal Court came into being. During these 60 years, temporary courts known as "ad hoc tribunals" were established. In the Nuremberg Trials, for example, 22 Nazi leaders were tried for crimes against humanity and violations of the rules of war. At the International Criminal Tribunal for the former Yugoslavia, former leaders were tried for war crimes and genocide, the systematic killing of an entire group of human beings based on their ethnicity or religion. These courts and tribunals demonstrate some type of collective will among nations to, if not actually solve disputes, at least offer informed opinions that may lead to dispute resolution. Although critics suggest that, in some cases, these courts' **rulings**, or decisions, are not carried out, this does not mean that these courts have no merit.

In our own courts, if contracts are broken or an offender continues committing crimes in violation of a court order, we do not point to this as evidence that the law is not real. Similarly, we must accept that the difficulty in creating and enforcing international law does not necessarily make it worthless. Surely there is enough evidence of its existence around us to conclude that international law is indeed real law. The commonly accepted definition of **international law** is the customs, rules, and agreements that govern relations between sovereign states.

## The History of International Law

The concept of international law was not developed recently; attempts to solve international problems date back thousands of years. Many earlier civilizations, such as those of ancient Greece and Rome, and Aboriginal and Indigenous nations around the world, had concerns and solutions similar to ones we have today. One of those concerns is the manner in which war is waged. Some solutions include the creation of treaties and the use of **arbitration**, which is an alternative, private process for resolving a dispute that does not resort to litigation. But the roots of modern international law are often traced to the rise after the Middle Ages of **nation-states**, which were societies with defined borders and laws and a centralized government. This era experienced increasing use of the seas and the exchange among countries of **diplomats**, who are official representatives engaged in international activities or negotiations. From these events arose customary rules and practices to govern the use of the seas, as well as rules for diplomats. Rules and practices affecting other interactions among countries soon followed.

The Dutch lawyer and scholar Hugo Grotius, writing in 1625 CE, is considered by many historians to be the founder of international law. His opinions on such subjects as war, sovereignty, and legal equality were widely read and consulted for guidance in settling international disputes. In that same century, a series of treaties known as the *Peace of Westphalia* was signed in Germany, ending the Thirty Years War. In some European countries, numerous peace congresses resulted in the recognition of both internal sovereignty and external sovereignty (to be explored in detail in this chapter) among these nations. Indeed, the seventeenth century heralded a new era in international law—an era in which independent states formalized economic, political, and cultural relationships.

In subsequent centuries, European leaders continued to meet to explore the concepts of

international law. The *Congress of Vienna* (1814–1815) reaffirmed certain principles of international law and added new practices, including the treatment of diplomats. The *Declaration of Paris* (1856) outlined rules for blockades, and the *Geneva Convention* (1864) stipulated that humane treatment must be given to people wounded during conflicts. The end of the nineteenth century brought with it conventions dealing with such issues as protections for prisoners of war, protection of sea and bird life, and the suppression of prostitution. Possibly the most important development in international law prior to World War I was a series of meetings known as The Hague Conferences, held at The Hague in the Netherlands in 1899 and 1907. Although the stated purpose of these conferences was to promote arms limitation, no agreement was reached. One great accomplishment of these conferences, however, was the establishment of

The Hague Tribunal—the first attempt at an international court.

The twentieth century was witness to two world wars, which resulted in many new international concerns. Territories were redrawn, millions of refugees were displaced, and the genocide that occurred during World War II gave rise to a new perspective on war crimes. An international organization known as the League of Nations was created after World War I to seek solutions to international conflict (see Chapter 15). Although the League of Nations was disbanded at the onset of World War II, it laid the groundwork for the United Nations.

The tension known as the Cold War between the two superpowers, the United States and the Soviet Union, dominated the world from 1945 until the Soviet Union was dismantled between 1989 and 1991. The end to this tension raised hopes of a new world order, in which all nations



**FIGURE 14.3** In 1899, The Hague Peace Conference was called by Nicholas II, Czar of Russia. Of 14 draft conventions, 12 specified rules relating to war. Procedures were developed for the peaceful settlement of disputes through mediation and arbitration.

would co-operate to form a new type of international law.

More recently, the United Nations has struggled with questions of when to use military force, when to send peacekeepers, and when to bend to the will of individual nations. The United Nations succeeded in establishing the first International Criminal Court in 2002. Since the early 1990s, despite ongoing inter-

national conflicts, various nations have signed agreements on such topics as environmental protection, trade promotion, and regulation of outer space. In a world made larger by population and smaller by telecommunications and transportation, there is no doubt that international law will grow in complexity and importance throughout the twenty-first century.

### CONFIRM YOUR UNDERSTANDING

1. What is generally required of laws in order for them to be effective?
2. Why do some legal scholars suggest that international law is not real law? What arguments against this view could you offer?
3. Describe the options available for countries that wish to encourage or force other countries to comply with international obligations.
4. Construct a timeline that indicates key events and dates in the development of international law.
5. What was the significance of The Hague Conferences?
6. The dismantling of the Soviet Union between 1989 and 1991 left only one country in the world—the United States—with superpower status. Could this fact alter the way international problems are tackled or solved? Explain your answer.

## Sources of International Law

Just as the law in general has been derived from various sources, so too has international law. These sources include, but are not restricted to, the following four areas: formal agreements, such as treaties and conventions; customary practices; general principles of law; and judicial decisions and teachings.

### Formal Agreements

The most common means of establishing rules internationally is through formal agreements. These agreements might be called *treaties*, *conventions*, *protocols*, *covenants*, or *acts*. Although the terminology used for these agreements varies, the basic substance is the same: they contain the rules that all *signatories* (signers) of the agreement will follow for their mutual benefit. Treaties typically deal with the obligations that will be imposed on the signing nations. A treaty is considered to be *bilateral* if it

has been established between two nations; it is *multilateral* if three or more nations have agreed to it. Two examples of bilateral treaties that Canada has entered into with the United States are the *Pacific Salmon Treaty* (1985) and the *Agreement on Air Quality* (1991). Examples of multilateral treaties are the *North American Free Trade Agreement* (1994) and the *Kyoto Protocol* (1994). Treaties might deal with political actions such as declarations of war, declarations of peace, or the creation of formal alliances. Other types of treaties govern such areas as trade, commerce, and natural resources. Some treaties, such as the treaty to ban land mines, capture public interest and receive international attention, while other treaties go largely unnoticed by the public. Treaties can do one of two things. They can *codify* existing laws and practices, meaning that the laws are organized and assembled in one document, such as the *Convention on the Law of*

the Sea (1994). Treaties can also introduce new legislation, such as in the case of the *Outer Space Treaty of 1967*.

Treaties are negotiated by government representatives who have the necessary expertise in the required subject matter. After a treaty is drafted and signed, it is **ratified**, or formally approved and authorized, by each nation according to a procedure set by its government. In Canada, once a treaty is signed, it might be necessary to actually revise some aspect of domestic law in order to carry out the treaty's obligations. As with any contract, a treaty can be designed to end on a certain date. The treaty might specify that it can be terminated by mutual consent. If there is a disagreement between two nations regarding the interpretation of a treaty between them, or if one of the parties fails to

measure up to its obligations, either nation can request that the International Court at The Hague act as an intermediary. However, unlike the judgments of a domestic court, those of the International Court at The Hague do not have the weight of enforcement behind them.

### *Treaties in Action: Antarctica*

Antarctica is a cold, windy continent that covers nearly a fifth of the world's surface. It has no native population. Most of the land is covered with ice, under which lay mineral deposits, including coal and gas, and perhaps oil and precious metals as well. As a "sovereignless land," Antarctica has been the subject of disputes among numerous nations, each of which has claimed some interest in the region. Beyond these nations, some other groups in society have



**FIGURE 14.4** Although many countries would like to claim all or part of Antarctica as their own, this continent is not governed or possessed by anyone. Since 1959, treaties have attempted to promote co-operation and conservation in Antarctica.

claimed interest as well. These groups can be divided into four categories: companies that have a commercial interest in minerals, the fishing and tourism industries, scientists who wish to study the landform and its plant and animal life, and conservationists interested in protecting what has been called the “last frontier.”

By the 1950s, it was increasingly clear to many nations that it was time to take international action on the issue of ownership. In 1959, 11 countries signed the *Antarctic Treaty*. These countries—Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Soviet Union, Great Britain, and the United States—saw the treaty come into being two years later. The *Antarctic Treaty* provides for usage consistent with peaceful purposes, bans nuclear waste and the disposal of radioactive waste, and promotes cooperation in scientific investigations. The treaty calls for regular meetings to take place among participants. At these meetings, binding recommendations are established. Today more than 40 countries are signatories of the *Antarctic Treaty*.

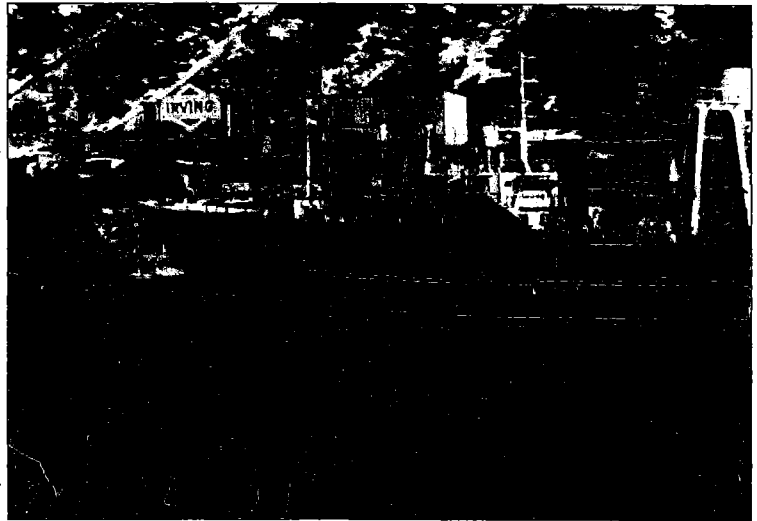
Since 1961, further agreements have been signed that protect plant life, animals such as seals, and mineral resources. Agreements such as the *Madrid Protocol* of 1991 underscore the importance of preserving the ecosystem. This protocol was a broad agreement that combined existing international agreements related to the environmental protection of the Antarctic, such as the *Agreed Measures for the Conservation of Flora and Fauna*. The *Madrid Protocol* established Antarctica as a “natural reserve, devoted to peace and science,” and it prohibited mining for commercial purposes. In 1996, the United States Congress passed a legislative act known as the *Antarctic Science, Tourism and Conservation Act of 1996*, which dictates which environmental regulations American tour operators must follow.

### *Treaties in Action: The Seas*

By 1400 CE, a distinction had been made between the so-called “high seas,” which are the open seas at a distance from shorelines, and coastal waters, such as ports, harbours, and closed-in bays. As

countries became more concerned about defending themselves and as their trade with other nations increased, their interest in dominating the high seas rose. At the end of the fifteenth century, some countries began claiming sovereignty over the high seas. In 1609 CE, the Dutch lawyer and scholar Hugo Grotius wrote that the high seas should be free of sovereignty. His views took hold, partly due to the impracticality of having nations police disputed territorial waters. By the early nineteenth century, customary rules in international law recognized two points regarding sovereignty of the seas. On the one hand, a nation could claim that “a belt of land” fell under its jurisdiction; some sovereign states, including Great Britain, suggested defining “a belt of land” as the water that extends three nautical miles (5.6 km) outward from the shoreline. On the other hand, no state could claim jurisdiction over the high seas.

By the early twentieth century, an increasing number of nations began actively claiming



**FIGURE 14.5** In March 1995, Canadian authorities boarded a Spanish fishing trawler and brought it to the port in St. John's, Newfoundland. They charged the captain with using illegal fishing nets and violating rules on fish quotas, contravening the 1994 Northwest Atlantic Fisheries Organization's limits on turbot. Some European countries considered these quotas unfair. Spain, believing that Canada had no right to interfere with fishing outside Canada's coastal waters, complained to the International Court of Justice (ICJ). The ICJ ruled that Canada's actions were reasonable.

jurisdiction over their coastal waters. In 1958, the first UN Conference on the Law of the Sea was convened, followed by a second conference in 1960 and a third in 1973. In 1994, 20 nations ratified and enacted the *Convention on the Law of the Sea*. An increasing number of nations came on board until, by 2003, 138 nations, including every country in the European Union, had become signatories. Today, territorial waters are limited to 12 nautical miles (22.2 km). Every nation has exclusive rights to oil and gas contained within 200 nautical miles (370.4 km) offshore, as well as to the fish and other marine life in these waters. Perhaps the largest stumbling block to ratification of the agreement was the topic of mining rights on the ocean floor. Developing nations argued that the wealth of the deep seabed should be shared. Wealthy mining countries, such as the United States, argued that sharing the resources would deter exploration and the discovery of minerals. Compromises were made by the opposing sides, and the agreement was signed.

### *Treaties in Action: The Stars*

Just as no country can claim sovereignty over the high seas, no country can claim ownership of outer space. Nevertheless, both territories require protection and regulation. Space law can be defined as the body of law that applies to outer space and governs space-related activities. The United Nations Office for Outer Space Affairs says that space law addresses a variety of diverse matters, such as "military activities in outer space, preservation of the space and earth environment, liability for damages caused by space objects, settlement of disputes, protection of national interests, rescue of astronauts, sharing of information about potential dangers in outer space, use of space-related technologies and international co-operation."

The launching of satellites and the beginning of the space age in 1957 led to the *Outer Space Treaty of 1967*. One urgent concern among many nations was the need for co-operation in ensuring that space was used for peaceful

purposes. This treaty stated that no nation could make claims of sovereignty over outer space, the moon, or other celestial bodies. Further treaties dealt with the rescue and return of astronauts, liability for damages to earth caused by objects launched into outer space, and the regulation of activities on the moon and other celestial bodies. (As with the *Convention on the Law of the Sea*, commercial mining rights became a controversial issue in the *Moon Treaty* of 1979, because minerals are a potential source of great wealth.) One stipulation of the treaty was that every nation was to bear responsibility for actions carried out within its borders by governmental agencies, non-governmental agencies, and individuals. By 2003, space law included the following: five international treaties; five sets of principles; national laws, rules, and regulations; executive and administrative orders; and judicial decisions.

To this day, some individuals choose to ignore the terms of space treaties. Dennis Hope, an American who claims to represent the "Lunar Embassy," is the self-described "leader in extra-terrestrial real estate," having sold parcels of the moon to thousands of people worldwide. He has chosen to interpret the silence of the United Nations as acceptance of his claim. A Scot named Virgiliu Pop claimed ownership of the sun when he was a Ph.D. candidate at Glasgow University, in an attempt to poke fun at the claims of those who register property claims to the sun, the moon, or the stars.

### **Customary Practices**

Countries may choose, in the absence of any formal written agreements, to engage in practices that they feel ethically bound to follow. For example, nations extended diplomatic immunity, which is the right to be shielded from being charged with a crime or sued, to the members of embassy staff long before this practice was codified in the *Vienna Convention*. Nations may also engage with other nations in practices that they feel legally bound to follow based on their domestic laws. The most



challenging question that springs from these types of scenarios is the following: When does a practice between nations occur for long enough and with such consistency that it becomes law? Some legal scholars suggest that there is a distinction to be made between practices that are followed as a courtesy and those that are followed with the intent to create legally binding obligations. The United States Supreme Court stated in 1900 that "...what originally may have rested in custom, courtesy or concession may grow, by the general assent of civilized nations, into a settled rule of law."

### General Principles of Law

Article 38 of the Statute of the International Court of Justice lists "general principles of law" recognized by "civilized nations" as a third source of international law. However, it is very difficult to achieve international consensus on either the interpretation of the term "civilized" or the scope of these general principles. Would these principles be derived from domestic or international

law? Would they include principles of justice or natural law or equity or all of these?

### Judicial Decisions and Teachings

Decisions made by the International Court of Justice and domestic courts are considered to be of **persuasive value**, which means that, while these decisions can be consulted, they have no binding force. These decisions are not used to influence or determine outcomes in the same way that precedent is used in common law. While these decisions may help shape international custom and practice, they are not legally binding.

The teachings and writings of legal scholars are also sources of international law. The analysis and interpretation provided by learned legal experts can contribute to the understanding of current practices. They can also pinpoint or highlight new approaches to, or principles of, international law.

### CONFIRM YOUR UNDERSTANDING

1. Identify four groups that have an interest in Antarctica. How might a series of treaties help to reconcile the interests of these four groups?
2. Explain the advantages and disadvantages of having a territory governed by a series of treaties rather than by one nation.
3. Prior to the signing of the *Antarctic Treaty* in 1959, sovereignty over the region was claimed by seven countries: Argentina, Australia, Chile, France, New Zealand, Norway, and Great Britain. Why do you think that the international community rejected plans by specific countries that would split the continent into sectors and award each sector to a different nation?
4. Thousands of tourists now visit Antarctica each year, the majority arriving by ship. Some of the consequences of increased tourism include an increased need for airstrips and tourist accommodations, trails of garbage and graffiti, and accidental oil spills that kill sea life.
  - a) **Ecotourism** can be defined as travel to a relatively undisturbed natural area for the purpose of understanding its natural history and culture without altering its ecosystem. Research ecotourism. Explain some of the risks associated with ecotourism.
  - b) What laws are necessary to protect the continent of Antarctica? What laws provide environmental safeguards for the continent? Identify some of the problems associated with enforcing these laws.
5. How do you think the international community would respond if valuable resources

## CONFIRM YOUR UNDERSTANDING (continued)

- were discovered under the sea or on the moon? What new agreements would be needed?
6. Nations have rights to natural resources up to 200 nautical miles (370.4 km) from their shoreline. What difficulties might this practice cause among nations?
  7. What factors have led to the growth of space law?
  8. Imagine you are a lawyer hired by Dennis Hope or Virgiliu Pop. What historical and legal arguments could you make to defend your client's claims?
  9. Identify and explain four different sources of international law.
  10. For individual countries, what would be the advantage of taking existing customs and formalizing them in a treaty or agreement?
  11. Explain the significance of judicial decisions and teachings to international law.

## Concepts in International Law

### Sovereignty

There is no concept more important to our understanding of international law than sovereignty. The origins of the term and of the concept itself lie within the notion of a sovereign or ruler—a king, queen, or prince—exercising power over his or her subjects. Originally, a ruling sovereign had supreme power over subjects living within his or her state. This power, which includes the right to make laws, is often referred to as **internal sovereignty**. A result of this power is the right, again unhampered by outside influences, to engage in relationships with foreign states. This right or power can be exercised by forging a trade agreement with another state or sharing responsibility, such as joint jurisdiction over a shared waterway. This type of sovereignty has been called **external sovereignty**, and it recognizes that, in theory, independent states are free to either enter or not enter into relationships with other states.

*If we cannot end our differences, at least we can make the world safe for diversity.*

—John F. Kennedy  
(1917–1963),  
former president  
of the United States

The concept of sovereignty has been well ingrained across cultures for centuries. However, since World War II, there has been a definite shift away from the notion that individual states should be free from external interference in their internal matters. Globally, there has been an increasing awareness of the ways in which countries' inter-

dependence requires international co-operation. Legal writers now discuss the erosion of sovereignty, suggesting that initiatives in international law will increasingly affect our traditional view of sovereignty. Politics, economics, and technology have caused this **globalization**, which can be defined as the increase in worldwide social interconnectedness, in which local happenings are shaped by events occurring far away.

An excellent example of the need for global co-operation is the need to safeguard the environment. Pollution does not respect political boundaries. This means that effective and reasonable management of resources must involve all nations that either use these resources or are affected by them.

The protection of human rights raises a second challenge to traditional ideas of sovereignty. The *Universal Declaration of Human Rights* (1948) codified a number of human rights that, according to the declaration, should be considered universal. Such a declaration raises the following questions: Are these universally recognized human rights so important that one nation or one organization has the right to interfere in the internal affairs of another nation? Are these rights reflective of the diversity of values we see around the world? Do some countries' rights

carry more weight in the international community? As we wrestle with emerging concerns, it is likely that the world community will be

forced to re-examine its long-cherished sense of entitlement regarding sovereignty.

## SHIFTING PERSPECTIVES: Sovereignty versus Globalization

Historically, human beings have considered marine life and the oceans to be a limitless resource. In the last century, the global community became aware that certain species were endangered. It took steps to remedy some species' endangerment. An interesting example is the practice of whaling. The Japanese have eaten whale meat for hundreds of years. Commercial whaling was the mainstay of some of Japan's coastal villages. Should Japan be allowed to continue with whaling in some limited form? Do global agencies and treaties overrule Japan's right to pursue economic activity as it sees fit?

A hundred years ago, whale hunting was a major commercial industry. In the mid-twentieth century, protection and conservation of whales became a focal point of international concern. Whale hunting practices became increasingly controversial. Whaling nations recognized the importance of international cooperation, and, in 1946, 14 countries signed the *Whaling Convention*. The intent of the convention was to regulate the whaling industry in order to ensure the "proper and effective conservation and development of whale stocks." In 1986, it became clear that some species of whales were on the brink of extinction. The convention therefore issued a **moratorium** on commercial whaling, meaning that it decreed a total ban on all whaling until such time as it was considered safe. At such a point, the convention would lift the moratorium, meaning that they would reverse the ban.

A controversy surrounding whaling practices, however, arose because one article of the *Whaling Convention* does permit whaling for the "purposes of scientific research." This controversy continues to this day. Many conservationists throughout the world, as well as a number of countries including the United States and Australia, allege that Japan is violating international whaling regulations and environmental norms. Since 1994, Japan has conducted a research whaling program, which it maintains is consistent with provisions of the *Whaling Convention* that allow for research. Japan claims that the consumption of fish by whales has led to an imbalance in the marine ecosystem and that this concern provides grounds for expanding its research program.

Critics of Japan's whale research say that whales are, in fact, being killed for parts to be sold as food in restaurants and as jewellery in boutiques. The Japanese Whaling Association



**FIGURE 14.6** Japanese whalers hoisting a whale head near the Japanese coastline. When this photo was taken, around 1902, whale hunting was a major commercial activity. Today the protection and conservation of whales is a major international concern.

argues that the ban on commercial whaling deprives Japan of an important part of its culture and tradition, because whale meat is a prized delicacy. Any trade sanctions imposed by the United States could then be called an example of **cultural imperialism**, a complex concept meaning the imposition of one society's values, behaviours, institutions, and identity onto another society. Japan could view any restrictions on its whaling as an attack on its sovereignty.

SOURCE: Ackerman, Reuben. "Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of 'Scientific Research,' Culture, and Tradition." *Boston College International Law Journal* 25.2 (2002): 323–342.

### Your Perspective

1. In chart form, list both sides of the argument for whether or not the international community should exert pressure on Japan to change its whaling practices. Which side do you feel is more compelling? Support your opinion.
2. Japan maintains that if the United States imposed trade sanctions, the United States would in fact be in breach of existing trade agreements. Should the need to uphold trade agreements supersede the concerns of conservationists? Explain.
3. Research the term "cultural imperialism." Apply the concept of cultural imperialism to an issue other than whaling practices that arises in international law.
4. Explain the conflict between the principles of sovereignty and globalization.

### Extradition

When a crime is committed in Canada and the suspect is captured and detained in Canada, Canada clearly has the jurisdiction to investigate the crime, arrest and charge the suspect, and commit him or her to trial in a Canadian courtroom. If convicted, the accused would serve the sentence in Canada. The accused need not be a Canadian citizen or what is known legally as an "ordinary resident" in order for this criminal process to occur. However, this process is hampered if the suspect flees to another country. If the suspect is apprehended, the country of flight has no jurisdiction to prosecute the suspect. At the same time, Canada has no jurisdiction to send law enforcement agents into another country to bring the suspect back to Canada. Unless a suspect willingly returns to Canada, the only solution is **extradition**, which is the legal surrender or delivery of a fugitive to the jurisdiction of another state, country, or government to face trial. The term "extradition"

comes from Latin, with *ex* meaning "out" and *traditio* meaning "handing over."

Most extradition treaties contain principles and rules that must be complied with in order for an extradition to occur. First, the **double-criminality rule** states that a crime must be a crime in both nations. Second, the principle of **reciprocity** suggests that if Country A extradites a person to Country B, then Country B will reciprocate in the future. Third, it is not enough that a country requests extradition; evidence of guilt must be provided. Fourth, the principle of **speciality** suggests that an accused will be charged only with the crime that is specified in the request for extradition. This principle stops a country from engaging in **subterfuge**, or deception, by providing one crime as a reason for extradition when its intent is, in fact, to prosecute a different one.

There are many reasons why an extradition request might be denied. Some countries will refuse to extradite a "national," meaning one of

their own citizens. Historically, Canada has generally been willing to extradite Canadian citizens who have committed crimes in other countries to those countries. Extradition could be denied if the accused has already been convicted and served a penalty, if the accused has been acquitted, or if there is a concern about the fairness of the trial that the accused would face. Countries may distinguish between criminal offences and political offences. An example of a criminal offence would be the charge of murder or of trafficking in narcotics. A political offence could include criticizing the existing government in a newspaper editorial or practising a religion that has been outlawed by the state. Humanitarian grounds may be taken into account; for example, the health or age of the accused may make extradition seem unreasonable and uncompassionate. Sometimes, the controversial issue of the death penalty affects the decision. Some countries will not extradite if the death penalty might be used in sentencing. This issue may be avoided if the requesting country gives assurances that the death penalty will not be sought. Canada's Supreme Court was forced to rule on this issue in the case of Charles Ng in 1991 (see p. 464) and, more recently, in the case of Burns and Rafay in 2000 (see p. 446).

It is well established within international law that no right to extradition exists without a treaty. The first recorded extradition treaties date back to ancient Egypt, suggesting that respect for jurisdiction has existed for thousands of years. By 2003, Canada was a party to 49 bilateral treaties and 8 multilateral conventions that contain extradition provisions with other countries. In 1999,

Canada had created the *Extradition Act*, replacing two earlier acts that were each over a hundred years old. The new legislation works hand in hand with amendments to other acts in order to streamline the extradition process and bring Canada closer in line with its international obligations.

These changes to legislation included the following:

- Allowances have been made for incorporating new extraditable offences, such as a computer crime or a **transnational crime** (a crime that crosses national boundaries).
- Allowances have been made for Canada to extradite people not just to other nations but to international criminal courts and tribunals as well.
- More flexibility exists around rules of evidence; no longer must evidence be admissible under Canadian rules of evidence.
- More flexibility exists around the practice of extraditing without a treaty.
- Provisions have been made for the temporary surrender of a person in a criminal case; for example, a person imprisoned in Canada can temporarily return to a foreign country for prosecution, then be sent back to Canada to finish his or her sentence.
- Once a fugitive is informed of his or her rights, the fugitive may waive the right to an extradition hearing, reducing the legal system's workload and cost.
- Provisions have been made for changes to other Canadian statutes, including allowing, for the first time, the use of video- and audio-link technology to gather evidence.

### CONFIRM YOUR UNDERSTANDING

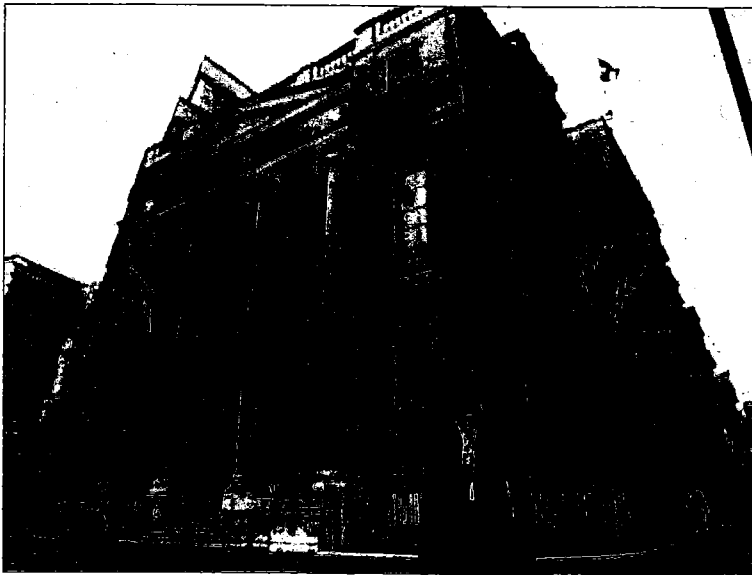
1. Distinguish between internal and external sovereignty.
2. What international forces are contributing to the erosion of sovereignty?
3. The European Union (EU) is an organization formed by numerous European countries in

1993; by the spring of 2004, it had 25 member countries. Its member states have set up common institutions to which they delegate some of their sovereignty, so that decisions on specific matters of interest can be made for Europe as a whole. Why do you

## Diplomatic Immunity

The governments of most countries have a branch that provides foreign service, carried out by an entity that is often called a **diplomatic corps**. It consists of a staff of trained officials whose function is to assist in implementing their country's policy in foreign countries. They work at locations called embassies and consulates. In Canada, the federal Department of Foreign Affairs and International Trade (which was called the Department of External Affairs until 1993) oversees this role. Embassies in foreign countries are headed by **ambassadors**, who are either career civil servants or political appointees. In the case of Commonwealth countries, heads of embassies are called high commissioners. The ambassador is assisted by other diplomats and attachés who often carry out specific roles related to such areas as trade or the military. The Canadian embassy provides help to Canadians travelling or working abroad and to foreign nationals who wish to travel or work in Canada.

It has long been recognized that a diplomatic corps helps immensely with international affairs.



**FIGURE 14.8** In 1979, Jean Casselman-Wadds, shown here in front of the Canadian Embassy in the Court of St. James, London, was the first Canadian woman to be appointed to the post of high commissioner. In 1961, she had been the first woman to be appointed by the Canadian government as a delegate to the United Nations.

Over 3000 years ago, Egypt engaged in diplomatic negotiations with its neighbours. Diplomacy became more formalized in the twelfth and thirteenth centuries, with Italian city-states taking the lead. These city-states developed rules to govern the appointment and conduct of ambassadors. In the sixteenth century, other European states followed the Italian example. During this era, it also became clear that diplomats working abroad needed protection, especially in hostile territories. The rules regarding the protection of diplomats became more specific in the late sixteenth and seventeenth centuries, and were codified in the *Congress of Vienna* in 1815.

In 1961, the *Vienna Convention on Diplomatic Relations* laid out the laws and the means by which specific people would be protected under the shield of diplomatic immunity. Diplomats in foreign countries are shielded from the laws of the host country in which they reside. The embassy and its grounds are treated as if they belong to the diplomat's home country. Therefore, the embassy staff cannot be charged with any crime nor sued, and the privacy of its correspondence must be protected. These rights, with some limitations, are also extended to the embassy staff's family members. If the host country is unhappy with a diplomat for any reason, the country can declare him or her a *persona non grata*, meaning a person who is undesirable and no longer able to stay in the country. This decision to send a diplomat home, called the **expulsion** of a diplomat, is not taken lightly because it could seriously jeopardize the relationship between the two nations. At times, countries will recall a diplomat because they anticipate that the diplomat is about to be expelled, and they wish to avoid embarrassment.

In dangerous or hostile circumstances, embassies may choose to send family members and non-essential staff home or to neighbouring countries; the embassies continue to operate with only a skeleton staff. Most countries want to do whatever it takes to avoid the drastic step of cutting off formal diplomatic relations, at which

time the embassy is closed and the entire staff is recalled to the country of origin.

Over the last century, modern developments in communication and transportation have changed the role of diplomats in foreign countries. Government representatives can travel the world with relative ease in order to attend top-level meetings, rather than needing to be stationed in particular countries. As well, telecommunications and computers allow for the instant transfer of messages and documents, which facilitates long-distance communication. However, the embassy staff still provide the "eyes" and "ears" in a foreign country, as they influence decisions and promote and protect a country's image and best interests abroad.

### *The Case of Augusto Pinochet*

In Chile in 1973, an army general named Augusto Pinochet came to power as president through a military coup d'état, that is, in a sudden, violent overthrow of the existing government. Pinochet's administration has been described as ruthless. For almost 20 years, thousands of Chileans fled the country for their own safety while dissidents at home were tortured. Other dissidents were "disappeared." This term refers to a particularly cruel form of murder in which victims, who are kidnapped, simply vanish; no bodies are found and no explanations are given, leaving families with few answers. Pinochet left the presidency in 1990 and, due to the provisions of the Chilean constitution, remained commander-in-chief of the army until 1998, when he took a senatorial position for life.

A Spanish judge issued a warrant for Pinochet's arrest for crimes against humanity in late 1998. Pinochet was arrested in London, England, by British police at a clinic where he had undergone back surgery. Spanish authorities requested his extradition to Spain in order to face trial for crimes that included torture, hostage taking, and murder.

London's High Court ruled that Pinochet was immune from arrest because he was the head of state at the time the alleged crimes were

committed. Despite the favourable ruling, Pinochet was held in custody, pending an appeal. The Law Lords, members of the House of Lords qualified to perform its legal work, heard the appeal. In the United Kingdom, the House of Lords had the task of defining the conditions for immunity from arrest and extradition proceedings for a former head of state who committed a crime while in office. The British prosecution contended that a foreign head of state would be immune from arrest or trial regarding alleged charges only if he or she were still head of state. But once he or she ceased to be the head of state, the immunity ended and thus the person could be arrested and prosecuted for such crimes. Senator Pinochet alleged that his immunity came from acts committed while he was head of state and that his immunity should continue even after he ceased to be head of state.

Three groups of Chileans had differing views on the legal issues. One group believed that significant violations of human rights had taken place, and they wanted to see Pinochet prosecuted somewhere in the world. A second group consisted of supporters of Pinochet, who contended that he had saved Chile from the socialist government of Salvador Allende (1970–1973). A third group took the position that it was an internal matter for Chile to sort out and that no third-party interference should occur.

In November 1998, in a majority vote of 3 to 2, the Law Lords ruled that Pinochet was not entitled to immunity. According to this ruling, Pinochet would remain in England, where he would await the outcome of the extradition proceedings. At the conclusion of the hearing, rumours surfaced that one of the lords who ruled on the case was linked to the international human rights organization Amnesty International. The appearance of bias was enough for a second hearing. Again the lords ruled that Pinochet was not entitled to immunity. In October 1999, the British court ruled that Pinochet could be extradited to Spain in order to stand trial on torture charges. One month later, the Chilean government asked the British government

*It's unbelievable that a criminal should escape justice because he is ill or in pain. The pain of my Chilean people is worse than what Pinochet is suffering.*

—Carlos Reyes-Manzo, Chilean photojournalist imprisoned for two years during Pinochet's rule

*Where law ends, tyranny begins.*

—William Pitt (1708–1778), Earl of Chatham



**FIGURE 14.9** Pinochet argued that he should be shielded from prosecution because he was the head of state when his alleged crimes were committed. Do you agree that heads of state should never face criminal prosecution? What are the potential implications of this diplomatic immunity?

to have Pinochet examined to see if he was medically fit to stand trial.

Doctors said Pinochet was in poor health, and, should he be extradited and ordered to stand trial, he would be unable to understand the specifics of the legal proceedings. On humanitarian grounds, the British government decided to allow Pinochet to return to Chile in March 2000.

In August 2000, the Chilean Supreme Court ruled that Pinochet should be stripped of his parliamentary immunity and stand trial. In December 2000, a Chilean judge, Juan Guzman Tapia, indicted Pinochet for crimes against humanity. The Court of Appeals of Santiago de Chile threw out the charges on the grounds that the judge had failed to question Pinochet, a requirement under Chilean law. The Supreme Court of Chile supported the ruling of the Court of Appeals. Next, Judge Guzman questioned Pinochet in January 2001 and re-indicted him.

In July 2002, Chile's highest court supported a lower-court decision, made in July 2001, which found that the 86-year-old general's dementia should halt his prosecution.

### CONFIRM YOUR UNDERSTANDING

1. Why is there a need for countries to send diplomats to foreign countries?
2. In 1961, which document codified diplomatic immunity? Outline key aspects of diplomatic immunity.
3. In 1984, a demonstration took place against Libyan leader Colonel Gaddafi outside the Libyan embassy in London, England. Shots fired from inside the Libyan embassy killed British police officer Yvonne Fletcher. No one was arrested, and at no time did British authorities enter the embassy. Diplomatic ties between Libya and England were severed. Some days later, 30 diplomats left the embassy and were escorted to the airport in order to return to Libya. In 1999, Libya

admitted general responsibility for the killing of the police officer and agreed to pay compensation to the family. Diplomatic relations were resumed later that year. British Home Secretary Leon Brittan said that the government would press for changes to the *Vienna Convention*.

- a) Why didn't the British authorities enter the Libyan embassy and make an arrest?
- b) What are the potential consequences when one country severs diplomatic ties with another?
- c) What changes could be made to the *Vienna Convention* to avoid a situation in which diplomats are shielded from what is referred to legally as "criminal responsibility"?



# What is international law?

"State" is a term used in international law to describe a country or nation considered to be an organized political community under one government. International law is a set of rules and customs that governs the relationships between countries, known as states.

Usually when we think about laws, we think about the system of rules and penalties established and enforced by the government. In a democracy, the "rule of law" applies to everyone in society and is intended to strike a balance between individual freedoms and the needs of the society. If a member of society breaks one of these laws, she or he will be punished by the state after due process is followed. On the other hand, if the government of a state takes unfair or illegal action against a citizen or group, the state's constitution may allow citizens to challenge their governments in local (domestic) courts. If this does not solve the problem, other laws, such as international human rights treaties, will sometimes allow citizens to take their complaints outside their state to international legal bodies.

## The rule of law

The rule of law is a fundamental legal principle that states that the law applies equally to all persons and that no one, neither individual nor government, is above the law. The rule of law means that government officials cannot make up or change the rules without consulting anyone else. It also means that decisions should not be made arbitrarily (without reason or justification).

Every country, or state, has its own set of laws and legal system. The laws of one country will apply to everyone in that country, but generally do not apply outside that country's borders. These laws are called national or domestic laws. Domestic laws are the laws that affect people in their daily lives—usually divided between civil laws, such as employment laws and highway speed limits, and criminal laws against harmful activities such as murder and trafficking illicit drugs. A country's constitution is usually the supreme law of the land, which "trumps" other national or local laws if there is a conflict between them. Each country develops its own system of laws, so there are many different systems of domestic law. For example, countries that are members of the Commonwealth, such as Canada, still generally follow British traditions of common law. However, in Canada, the Province of Quebec follows the French legal traditions of civil law and Canada's national criminal law, set out in the *Criminal Code of Canada*.

## Who is governed by international law?

### States

Under international law, a state is a country that meets the following criteria. A state has:

- a permanent population.
- control over a defined territory.
- a government.
- the ability to enter into relations with other states.

Countries recognized as states have certain rights and responsibilities defined by international law and custom. They have the right of sovereignty, meaning that the state has exclusive power or jurisdiction over its territory and population. This power

can only be legally interfered with when certain requirements of international law are met. There is also formal equality among states, which means that even if one country is not actually equal to another in terms of military strength, economy, or political stature, it will possess the same basic rights and responsibilities as that state or any other.

States also have the right to be free from intervention in their domestic affairs. This means that other countries should not intervene in the legal or political decisions made by another state; however, this does not mean that states cannot try to influence other states. States have certain responsibilities, which include a duty to fulfil their international obligations in good faith and to respect international human rights.

### **International governance organizations**

International governance organizations are organizations that are set up by a legal agreement (treaty) between two or more states. Depending on what the treaty that created the organization says, international law will apply to international governance organizations and they will have certain rights, duties and powers under the law. For example, the United Nations (UN) is the largest and most comprehensive international governance organization with wide-reaching powers. The UN is a parent body, composed of agencies or organs with specific mandates, such as the UN Security Council. The UN Security Council is the only UN agency able to order the use of military force; none of the other agencies (such as the World Health Organization) are able to do so.

### **Non-governmental organizations (NGOs)**

Non-governmental organizations (NGOs) are organizations set up by individuals or groups, not states. Some examples of large international NGOs that influence international law are Amnesty International, Oxfam, Greenpeace, and the Red Cross. NGOs do not typically have rights, duties, or powers under international law; rather, they advocate for certain outcomes based on their founding values (such as social justice) and act as an intermediary between the state-dominated international legal system and individuals.

### **Individuals and corporations**

In general, individuals, and corporations do not have the ability to enter into legal relations (such as treaties) nor do they have legal rights and responsibilities under international law. For example, unlike states, individuals and corporations cannot appoint ambassadors or declare war. Many of the rules of international law exist for the benefit of individual persons and corporations, but that does not necessarily mean that the rules create rights for those individuals and corporations. For the most part, the rights concerning individuals and corporations do not exist directly under international law; rather, states have an obligation to grant domestic law rights to the individuals or companies concerned.

## **How is international law created?**

Unlike with the domestic laws of individual countries, there is no single international government that creates and enforces international law. Consequently, international law has developed as a result of countries agreeing to act, or refrain from acting, in certain ways toward one another. There are two main ways that international laws are developed: through the adoption of customs and the signing of treaties.

### **Customary international law**

Usually when we think about customs, we think about the established habits or behaviours of a community that have developed and become accepted as rules. The international community also has certain customs that have developed and been followed over long periods of time. These customs become international customary law after countries repeatedly behave in a particular way because their leaders believe

they are required to do so. Whether or not countries are actually required by a formal law to act that way doesn't matter, so long as countries believe they must act a particular way and continue to do so over a period of time. Customary law is based on what countries actually do, rather than what they have formally agreed to do—as we shall see, this is how customary international law differs from the signing of treaties.

When enough countries engage in a particular behaviour for long enough, that behaviour will become part of customary international law. For example, the law of diplomatic immunity—which protects diplomats from harm or lawsuits when in a foreign country—began as a custom. There are no rules that set out how many countries must participate in the behaviour or for how long. If certain behaviours become a part of customary international law, then they will be legally binding on all countries.

The strength of customary international law is that all countries can be bound to follow it even if they don't expressly agree to follow a particular behaviour. The weaknesses are that it is slow to change because it is based on continued behaviour over time, and often the laws that result from customary behaviour are unclear and imprecise because of the way they developed. Because these laws may be imprecise, disputes between countries over what is actually part of the law may arise.

## Treaties

The term “treaty” refers to a formal agreement between two or more states that sets out their mutual legal rights and obligations.<sup>2</sup> Treaties are often made with regard to peace, the creation of alliances, commerce and trade, and other international relations. Interestingly, formal agreements between First Nations in Canada and the Crown are termed “treaties.” International treaties may establish general rules of law, such as the protection of human rights, or provide for contract-like obligations between countries, such as treaties dealing with international trade.<sup>3</sup> Treaties may be very specific or quite broad, making them versatile for the creation of law.

### Ratification

For a state to be bound by a treaty, the state must ratify, or officially consent to be bound by that treaty. Signing a treaty is not the same thing as ratifying a treaty. Treaties may be bilateral, meaning that an agreement is formed between two countries, or multilateral, meaning that the agreement is between three or more countries. A multilateral treaty may even include most of the countries in the world.

The advantages of treaties are that they can be created quickly and contain a clear explanation of the law being created. Treaties may also influence the behaviour of countries toward one another and end up affecting other types of international law, such as customary international law. A disadvantage of treaties is that they only bind those countries that agree to be part of the treaty.

International treaties go by many names. Some of these include:

- conventions
- pacts
- charters
- acts
- covenants
- statutes
- protocols
- agreements

Although treaties and custom are the main sources for international law, several other sources exist that can be important for lawyers arguing a case on international law. These sources are the decisions of other courts on matters of international law (jurisprudence), the writings of scholars and academics on international law matters, and general legal principles, such as the rule of law.

### Quick quiz

True or false:

1. Ratifying a treaty is the same thing as signing it.
2. Laws created by a treaty apply to all countries even if a country has not expressly agreed to be part of the treaty.
3. Treaties are based on established customs between countries.

## The United Nations

The United Nations (UN) is an international governance organization made up of independent states. It was founded in 1945 after the horrors of World War II—including the genocide of Jews, known as the Holocaust—were better known. The founding countries of the UN shared the hope that a new global government would be more successful than the League of Nations that had been founded following World War I, and would be able to prevent tragedies like genocide from happening again.

The main aims of the UN are set out in its charter:

- promoting human rights
- maintaining international peace
- reducing poverty and injustice.

There are currently 192 member countries, called Member States,<sup>4</sup> in the UN—almost every country in the world. Each Member State has one equal vote, regardless of size or economic status. The UN has facilitated the signing of over 500 multi-national treaties on a broad range of issues including: human rights, international crime, refugees, disarmament, trade and commodities, and the oceans. Governance at the UN is seldom easy; since the UN is made up of sovereign states, it depends on the co-operation of its Member States to accept, fund and carry out its decisions. The process of consensus building is complex and incremental, especially when addressing matters of peacekeeping and international politics, and must take into account national sovereignty as well as competing global needs.



The UN was designed to have six main bodies: General Assembly, Security Council, Economic and Social Council, Trusteeship Council (now largely inoperative), International Court of Justice (which only deals with civil law matters referred to it) and Secretariat. The UN has six official languages: English, French, Russian, Spanish, Arabic, and Chinese. The UN main headquarters are in New York City, but several of the larger UN agencies, such as the World Health Organization and the High Commission for Human Rights, are headquartered in Geneva, Switzerland, but all UN land and buildings are international territory.

## UN Charter

The *United Nations Charter*<sup>5</sup> is the treaty that established the United Nations. It was initially signed on June 26, 1945 at the founding meeting of the UN in San Francisco. The *UN Charter* describes the principles, functions, and structures of the United Nations and is legally binding on all Member States of the UN.

The *UN Charter* sets out the four main purposes of the United Nations, which are to:

- keep peace throughout the world.
- develop friendly relations among nations.
- help nations work together to improve the lives of poor people, to conquer hunger, disease and illiteracy, and to encourage respect for each other's rights and freedoms.
- be a centre for harmonizing the actions of nations to achieve these goals.

The *UN Charter* also sets out the main principles of the UN, which include:

- recognition of the sovereignty of all of its members.
- members settling their international disputes by peaceful means.
- members refraining from using or threatening to use armed force against any other state.

## The UN General Assembly

The General Assembly is where most of the discussion, debate, and decision-making among Member States over the world's most pressing problems take place. Every Member State is entitled to representation and one vote in the General Assembly. The decisions made in the General Assembly drive the work of the UN. Decisions are usually not called for until there is broad agreement among Member States. When a vote has to be called on UN priority matters (such as peace, security, budgetary matters or the admission of new members), a two-thirds majority vote is required. All other matters require a simple majority of more than half the votes cast; however, a vote is not usually called until a substantial majority of Member States has indicated support. Although the decisions of the General Assembly cannot force any state to take particular actions, General Assembly Resolutions are considered to be an indication of world opinion.

## The UN Security Council

The mandate of the Security Council<sup>6</sup> is set out in the *UN Charter*, especially in chapters six and seven. The *UN Charter* gives the Security Council primary

responsibility for the maintenance of international peace and security. The Security Council is the only UN body that can order the use of force to implement its decisions. The Security Council is made up of five permanent members and ten non-permanent members. The permanent members of the Security Council are the United States, China, Russia, France, and the United Kingdom. Non-permanent members are Member States elected to the Security Council and serve two-year terms.<sup>7</sup> The last time Canada was a member of the Security Council was in 1999–2000. Canada lost its bid to be voted in to serve on the Security Council in 2010.<sup>8</sup>

Every member of the Security Council has one vote, but not all the votes are of equal weight. For a proposal before the Security Council to pass, it must receive an affirmative vote from at least nine members. However, if one of the permanent members votes against the proposal, the adoption of that proposal will be prevented. This is called the veto or “great power unanimity” and will prevent the adoption of a proposal even if it has received nine affirmative votes. All Member States are required to carry out a decision of the Security Council.

The Security Council may convene at any time, day or night, whenever it determines there is a threat to international peace. The Council may first try to resolve an issue through peaceful means, such as mediation. If a dispute results in fighting, the Security Council may issue ceasefire directives or send peacekeeping forces to the area to reduce tensions. The Security Council may also order economic sanctions, collective military action, or an arms embargo to prohibit commerce and trade in weaponry with the countries involved in the dispute.

### **Case study: The power of the veto**

In 2009, Russia used its veto to end the UN peacekeeping mission in Georgia. This use of the veto was controversial because of Russia’s involvement in the dispute taking place between Georgia and the South Ossetia and Abkhazia regions. How could other countries try to intervene to maintain peace when Russia, one of the countries involved in the dispute, had the power to veto?<sup>9</sup>

## **International Court of Justice**

The International Court of Justice (ICJ) is the primary judicial body of the United Nations. It is a civil court that deals primarily with disputes between Member States and does not have the jurisdiction to prosecute individuals accused of crimes. Criminal matters are dealt with by the International Criminal Court, which is independent from the UN, and will be discussed in a later section.

The International Court of Justice (ICJ) is located at the Peace Palace in The Hague, Netherlands, and is composed of 15 judges from 15 different countries. The ICJ has two main roles: it settles disputes referred to it by Member States and gives opinions on legal questions referred to it by authorized bodies of the UN. When making a decision, the court will apply international law, including: international treaties



and conventions, international custom, general principles of law, existing judicial decisions, and sometimes the writings of international scholars and academics.

Only Member States are able to submit disputes, called “contentious cases,” to the ICJ for hearing. Furthermore, all parties to the dispute must agree that the ICJ has the power to hear the matter and that they will be bound by the decision of the court. If a party to a dispute believes another party has not lived up to their obligations under a decision of the ICJ, it can appeal to the Security Council, which has the power to decide what measures to take to enforce the judgment.

The General Assembly and Security Council, as well as other authorized UN agencies are permitted to ask the court to provide an advisory opinion on legal questions. These opinions are intended to help resolve complicated legal issues arising within the UN system. Advisory opinions are not legally binding, but they are generally influential and well respected.

### Quick quiz

True or false:

1. The *UN Charter* is legally binding on all Member States of the UN.
2. The Security Council has the most members of any organization of the UN.
3. The General Assembly can order the use of military force.
4. The International Court of Justice does not have criminal jurisdiction to prosecute individuals.

## UN treaty-making and monitoring

All treaties must be approved by at least a simple majority of the United Nations General Assembly. This means that at least 50% of the 192 Member States must vote in favour of the treaty. Once a treaty has been approved by the General Assembly, Member States are able to sign on to it. For most treaties, a specified number of states must sign on for the treaty to be “activated.” When the required number of signatures is reached, the treaty enters into force. However, the signing of a treaty alone does not make it binding on states. States must also take further steps to ratify the treaty and officially agree to be bound by its terms. Once ratified, states must take steps to implement the treaty into their domestic law. This typically involves making laws and policies that incorporate the terms of the treaty into the domestic laws of the state.



Many non-governmental organizations (NGOs) with international operations—such as Amnesty International, Human Rights Watch, Equality Now, and the Women's International League for Peace and Freedom (WILPF), which all focus on human rights—monitor how countries are following up on their promises to implement a particular treaty. International NGOs like these issue their independent reports, called alternative, or “shadow” reports, on progress and problems in a country under review, making presentations to the UN body that monitors the treaty as well as to local and international media.

Although the UN does not officially recognize these NGO reports as part of the treaty monitoring system, they have become important sources of “speaking truth to power.” The independent experts who are members of treaty monitoring bodies often consider these shadow reports to be credible sources of information that they might not otherwise have access to.

As a Canadian example, West Coast LEAF monitors BC's implementation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

### Quick quiz

True or false:

1. UN treaty-monitoring bodies are made up of NGO representatives.
2. Signing a UN treaty is all that is required to make it legally binding on a Member State.
3. To become international law, all UN treaties must be approved by a majority of the 192 members of the UN General Assembly.

## UN peacekeeping

Of all our dreams today there is none more important—or so hard to realize—than that of peace in the world. May we never lose our faith in it or our resolve to do everything that can be done to convert it one day into reality.

—Lester B. Pearson

One of the major operations of the United Nations Security Council is the establishment of peacekeeping missions<sup>10</sup> in countries facing conflict. Peacekeepers are people employed within the UN system to monitor the implementation of a ceasefire and oversee the resolution of conflict. Peacekeepers may assist in the promotion of human security, disarming opponents, repatriating refugees, strengthening the rule of law, delivering humanitarian relief, and training local police forces. Peacekeepers may also be involved in peacemaking activities, such as helping those involved in a conflict settle their differences peacefully by encouraging negotiation rather than

resorting to the use of arms. Peacekeepers may be soldiers, military observers, or civilian police.<sup>11</sup>

Lester B. Pearson, Canada's 14th prime minister, first proposed the idea of peacekeeping during the Suez Canal crisis in the 1950s and received the Nobel Peace Prize as a result.<sup>12</sup> Since then, peacekeeping has been an important part of Canada's participation in the international community.<sup>13</sup> Canadian peacekeepers have served in Rwanda, the Democratic Republic of the Congo, the Middle East, Haiti, Cambodia, and many other countries, but they have not always been successful—for example, during the genocide in Rwanda in 1994. While much has now been written about the world's failure to stop the genocide, the story of Lieutenant-General Romeo Dallaire, a Canadian peacekeeper who commanded the UN Assistance Mission for Rwanda and attempted to stop the genocide, will be most familiar to Canadians.<sup>14</sup>

## How is international law enforced?

Another difference between domestic law and international law is the way in which the laws are enforced. Under domestic law, individuals are required to obey the laws enacted by the government. However, in international law, states have much more say as to which laws are going to apply to them. For example, states are free to decide whether or not they wish to agree to an international treaty. If a state does not ratify the treaty, the terms of the treaty do not apply to that country, and it cannot be sanctioned if that state acts contrary to the terms of the treaty. Remember, however, that in the case of customary international law, all states are bound by customary laws regardless of whether they agreed to those laws or not.

But what happens if a state that is signatory to an international treaty violates the laws of that treaty? Under the UN Charter, Member States are required to settle disputes peacefully, but what counts as a peaceful means of dispute resolution? International law provides a variety of ways that disputes may be settled peacefully. The most common method is through negotiation. Negotiation involves the parties to the dispute initiating talks to attempt to come to a resolution that is agreeable enough to all parties that the dispute does not escalate.

Disputes may also be addressed through mediation or conciliation, in which a neutral third party or committee assists the disputing parties to come to a resolution. Another method for dispute resolution is through the international courts. Where a treaty is administered by the United Nations, states that have signed on to that treaty may appeal to the International Court of Justice if they believe another state is not living up to their obligations under the treaty. If the parties to the dispute agree that the court has power to hear the matter, the International Court of Justice can issue a binding decision on the parties involved. Where disputes cannot be settled through peaceful means, the UN Security Council may become involved to attempt to prevent an armed conflict.

### **Case study: Protecting our own citizens**

Review or hand out the case study to students and assign the discussion questions as an individual assignment or as a group discussion.

In 2002, Omar Khadr, a Canadian citizen, was captured by US forces in Afghanistan and transferred to Guantanamo Bay detention camp in Cuba. He was suspected of being involved in terrorist activities and alleged to have killed an American soldier. At the time, Khadr was just 15 years old—still a child under the *UN Convention on the Rights of the Child*.

Since his apprehension in 2002, Khadr has remained in detention in Guantanamo Bay. While detained, the US government failed to treat him according to international law applicable to child soldiers.<sup>15</sup> He was denied contact with his family, subjected to abusive forms of interrogation, and not given access to any form of education or rehabilitation.

Khadr is the only citizen of a Western country to remain in prison in Guantanamo Bay. The United Kingdom, France, Germany, and Australia all successfully applied to have their citizens repatriated, or returned to their country of citizenship. Despite his requests, Canada has refused to intervene on Omar Khadr's behalf and repatriate him to Canada.

Khadr has brought several notable cases against the Canadian government in an attempt to challenge his detention.<sup>16</sup> In 2008, the Supreme Court of Canada<sup>17</sup> ruled that the United States had violated the human rights of Khadr, and that the Canadian government shared the blame for these violations because Canadian officials had participated in an interrogation process that denied him a right to a fair trial. In 2010, the Supreme Court of Canada (SCC)<sup>18</sup> again

recognized serious breaches of international law, international human rights law, and the *Canadian Charter of Rights and Freedoms* in Khadr's case, but fell short of ordering that Khadr be returned to Canada.<sup>19</sup>

In 2010, the US Military Commission finally brought Khadr to trial. He entered a plea bargain that will see him serve 8 more years in detention. In 2011, he applied to come back to Canada to serve the rest of his sentence.

### Discussion or personal reflection questions

- Are you surprised by Canada's failure to repatriate Omar Khadr even though Canada has been aware of the treatment of prisoners at Guantanamo Bay? Why?
- In its 2010 decision, the Supreme Court of Canada ruled that the decision to repatriate Omar Khadr was a decision best made by the federal government because it was within the scope of foreign affairs. Do you agree with the Supreme Court of Canada that the federal government should determine the best course of action, even though it found that Khadr's rights had been infringed? Why?
- Both Canada and the United States have domestic laws that prevent children charged with crimes from being treated as severely as adults. At age 15, should Omar Khadr have been treated different from adults?
- Khadr and his lawyers have alleged that he was a victim of torture while he was detained in US custody. Do you think that, if you were subjected to severe physical or mental suffering, you might confess to something you did not do in order to stop the punishment?
- The Supreme Court of Canada has found that both national and international laws were violated in this case. Who should have the power to decide how to punish state governments for breaking international law? What kinds of punishments do you think would be appropriate in this case?

### Activity: Construct a group timeline

In groups, ask students to identify and report on key events in the Omar Khadr case. Assign each group a time range, i.e., Group 1 researches 2002–04, Group 2 researches 2005–07, etc. Either provide research materials (newspaper and other media articles) or ask students to conduct independent research and evaluate sources.

Ask students to select newspaper articles, photos, or court decisions that represent key events, and create a logical graphic representation of their time period in poster format. Each group can also prepare a brief write-up explaining their poster. Have each group present, in chronological sequence, their posters as a timeline of events arising from Omar Khadr's detention.

Discussion questions:

1. What does the term "sovereignty" mean?
2. What is "formal equality" among states and why is that an important part of international law?
3. In what circumstances do you think it might be better for the international community to create laws by treaty? When do you think it might be better to rely on customary international law?
4. In 2010, Canada lost the election to be a non-permanent member of the UN Security Council. Do you think it is important for Canada to have a voice on the Security Council? How could Canada make a positive difference as a member?
5. Many things have changed in the world since the appointment of the permanent members of the UN Security Council. Do you think it is still appropriate for those five countries to have permanent seats and a veto power on the Security Council?