FACULTY OF LAW

LAWS5005
PUBLIC LAW
EXTENDED SUMMARIES

TOPICS:

• Development, nature and scope of international law
• Sources of International Law
• Relationship between international law & domestic law
• Personality, statehood, recognition
• Title to territory
• The law of treaties
• State jurisdiction
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Development, nature and scope of International Law

Public international law – law that regulates relationships between sovereign states and other subjects of international law.

Private international law – body of domestic law regulating dealings by persons and corporations across borders.

(I) NATURE AND SCOPE OF PUBLIC INTERNATIONAL LAW

- International law is based on the consent of States, which are sovereign equals:
  - UN Charter (1945), Art 2(1): ‘The Organization is based on the principle of the sovereign equality of all its Members.
  - UNGA Declaration on Principles of International Law concerning Friendly Relations (1970): “All states enjoy sovereign equality...”
- Traditionally public international law was about the use of force, the exchange of diplomats, navigational rights on the seas.
- Increasingly public international law is concerned with additional new areas of human international relations such as trade (e.g. WTO), environmental matters (e.g. protections of oceans, fisheries) and human rights (United Nations charter 1945, Universal declaration of human rights)
  - ‘International law is a system of rules, principles and concepts that governs relations among states and, increasingly, international organizations, individuals and other actors in world politics. International law has grown and expanded at a rapid rate since World War II to encompass a diverse range of issues and topics, including the preservation of the...environment, the right to use force against another state, territorial rights in Antarctica, the use of outer space, and the rights of children. There is now no aspect of world politics than can be fully understood without some knowledge of international law and an awareness of how it operates as an integral component of global affairs.’
- Public International Law: The interrelationship between the way states govern their citizens, the way they try to resolve disputes with each other, and the way they try to solve issues such as immunity.
  - In large measure implicated when we look at conducts of the states.
  - An area of law that was largely based on ‘practice of the states’ - customary law.
  - Before the proliferation of treaties, there was a body of law which had developed because of the conduct of the states.
    - Looking at what is the practice of the states.
    - Whether in fact they are doing these things because they are legally compelled, or other reasons.
- The use of force showed that nation states even though they were asserting their sovereignty, they could not behave any way they wanted - certain rules that they had agreed upon which they had to observe.
- Development of mechanisms that has allowed for UN bodies to be able to receive complaints which are called ‘communications’ from individuals - new and novel development - did not exist in the 19th century - very much a construct of the 20th century.
  - A system which has created agreements around human rights conventions. These conventions have set the scene for a ‘complaint mechanism’.
    - An example of how individuals have developed a ‘legal standing’.
- Public international works in a variety of ways on trying to encourage nation states to co-operate with one another and not to violate international law.
  - One mechanism to this effect - ‘name and shame’.
  - Punitive measures do not play a great role.
  - Consensual agreement.
- State jurisdiction - states have the capacity to prescribe law.
  - One form of state jurisdiction is prescriptive jurisdiction.
  - Anther type is enforcement
- Universal jurisdiction - One of the basis for the exercise of criminal jurisdiction in Public International Law: allows any nation that is part of a particular human rights framework to assert jurisdiction.
Erga omnes - ‘for the good of humanity’ - underlies a number of important developments in PIL.

- Immunity from jurisdiction - Not that there is ‘impunity’ - rather that there is a ‘shield’ to the exercise of jurisdiction. Jurisdiction exists but is ‘barred’.
  - Diplomatic immunity
  - Foreign state immunity - on some level it interacts with diplomatic immunity.

- State responsibility - dealing with particular disputes that have arisen between nation states and the genesis of that dispute could be because a citizen has been mis-treated by another country.

- Use of force in international law - generally prohibited.

## (II) INTERNATIONAL LAW AS LAW

- Normative system of international law is derived from four sources, enumerated in Article 38(1) of the Statute of the International Court of Justice:
  1. Treaties;
  2. Customary International law;
  3. General Principles of law;
  4. ‘Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

### (a) Is International law ‘law’?

- John Austin - defined laws ‘properly so-called’ as commands and ‘positive law’, which he regarded as the ‘appropriate matter of jurisprudence’, as the commands of a sovereign.
  - A sovereign he defined as a person who received the habitual obedience of the members of an independent political society and who, in turn, did not owe such obedience to any other person.
    - Rules of international law did not qualify as rules of ‘positive law’ by this test → categorised as laws ‘improperly so-called’.

- Jessup - ‘law habit’ - In terms of the number, as opposed to the political importance, of the occasions on which international law is complied with, it is more honored in the observance than in the breach:
  - “The superficial observer has not noted the steady observance of such treaties as that under which letters are carried all over the world at rates fixed by the Universal Postal Union. He ignores the fact that there is scarcely an instance in two hundred years in which an ambassador has been subjected to suit in courts of the country where he is stationed...

- Depends on what we mean by ‘law’
- If we mean 3 arms of government, with legislation, judge made law, then no, international law is not law. There is no executive, parliament (UN General Assembly is a forum but not a law making body per se), no world court to enforce its decision (international court of justice but its jurisdiction is based on the consent of states and only 61 have consented to its jurisdiction)
- H.L.A Hart: If law derives its strength from acceptance by society that its rules are binding, not from its enforceability, then international law is law.
- Mundane point of view: international law is all too real for those who have to deal with it daily.

Not Law, but a Code of International Ethics

(i) Not enforceable:
- International law notoriously fails to constrain the behaviour of States, especially where important national interests are at stake.
- There is said to be no effective and centralized enforcement mechanism of such a kind as to provide the required element of compulsion. [Stephen Hall, International Law (2nd ed, 2006 19-21)]
- Granted it is more difficult to enforce (no world police) but there are modes of pressure which can ensure international law is complied with effectively e.g. operation of the WTO - when you sign up, you agree to be bound by obligations which limit your capacity to free trade if in breach. If you breach the WTO then you will be subject to a case brought within the dispute settlement body. Countries can start taking sanctions against the defaulting state e.g. suspend certain rights or privileges you have under the agreements in order to ensure that you comply with provisions in other part of the agreement. Basically a system which is
enforced through reciprocity. Furthermore, states comply because they want to ensure that their own diplomats are treated also in accordance with international law.

- Enforcement mechanisms in international law do exist, although overwhelmingly decentralised in character and much more dependent upon self-help than is the case with mature domestic legal orders.

(ii) Breached frequently e.g. invasion of Iraq in 2003:

- The Iraq case is a spectacular but unusual case. Most international law is much more mundane, regulating things like telecommunications, international post, exchange of diplomats and are followed
- The language of international law is used to justify or attack what states/governments do. Thus most governments seek to justify their actions in accordance with the Security Council thus validating international law


- Law can only exist in a society, and there can be no society without a system of law to regulate the relations of its members with one another.

- “If, as Sir Frederick Pollock writes...the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity, international law seems on the whole to satisfy these conditions...”
- The best view is that international law is in fact just a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure of ‘conventional’ or treaty-made law...
- Violations of law are rare in all customary systems, and they are so in international law...For the law is normally observed because, ...the demands that it makes on states are generally not exacting, and on the whole states find it convenient to observe it...

Weakness of international law

- The weakness of international law lies deeper than any mere question of sanctions. It is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organized.
- The imperative character of law is felt so strongly and obedience to it has become so much a matter of habit within a highly civilized state that national law has developed a machinery of enforcement which generally works smoothly...
- Paradox of international law: Whist on the material side it is far from primitive, and therefore needs a strong and fairly elaborate system of law for the regulation of the clashes to which the material interdependence of different states is constantly giving rise, its spiritual cohesion is...weak, and as long as that is so the weakness will inevitably be reflected in a weak and primitive system of law.
- Shortcoming - the rudimentary character of the institutions which exist for the making and the application of the law, and the narrow restrictions on its range.
  - No legislature to keep the law abreast of new needs in the international society
  - No executive power to enforce the law
  - And although certain administrative bodies have been created, these, though important in themselves, are far from adequate for the mass of business which ought to be treated today as of international concern.
  - Resort to standing court of justice and machinery for the arbitration of disputes not compulsory → restricted range.

Compliance with International Law & Problem of Enforcement

[Morgenthau, Politics among Nations; (6th edn, 1985), pp. 312-313]

- The great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honor their obligations under international law.
- A nation will hesitate to infringe upon the rights of foreign diplomats residing in its capital; for it has an interest...in the universal observance of the rules of international law which extend to their
protection to its own diplomatic representatives in foreign capitals as well as to the foreign diplomats in its own capital.

- Most rules of international law formulate in legal terms such identical or complementary interests.
  - It is for this reason that they generally enforce themselves...and there is generally no need for a specific enforcement action.
- The great majority of rules of international law are generally unaffected by the weakness of its system of enforcement, for voluntary compliance prevents the problem of enforcement from arising altogether.
  - The problem of enforcement becomes acute, in that minority of important and generally spectacular cases...in which compliance with international law and its enforcement have a direct bearing upon the relative power of the nations concerned...”

Fitzmaurice, The Foundations of the Authority of International Law and the Problem of Enforcement; (1956) 19 M.L.R. 1

- Enforceability considered to be a necessary characteristic of any system of law.
- Enforceability of international law depends on the how law is defined:
  - Oppenheim: *A body of rules for human conduct within a community which, by common consent of this community, shall be enforced by external power”*
  - Kelsen: “...law is a coercive order. It provides for socially organised sanctions, and these can be clearly distinguished from a religious order on the one hand and a merely moral order on the other hand. As a coercive order, the law is that specific social technique which consists in the attempt to bring about the desired social conduct of men through the threat of a measure of coercion which is to be taken in case of...legally wrong conduct.”
  - International law is true law because...it provides sanctions, such as the adoption of reprisals, war, and the use of force generally, and makes the employment of these sanctions lawful as a counter measure against a legal wrong...
- Up to a comparatively recent date, war, and the use of force generally, did constitute in some sense a recognised method of enforcing international law; or, more accurately, a means whereby in the last resort a dispute between States as to their rights could be settled.
- Now: Although the international order may have made some attempt at progress in repressing or countering that type of illegality that consists in armed aggression or breach of the peace, it has not yet made much progress in the enforcement of international rights and obligations generally, or of international law as such.
- *The real foundation of the authority of international law resides similarly in the fact that the States making up the international society recognise it as binding upon them, and, moreover, a a system that ipso facto binds them as members of the society, irrespective of their individual wills.*

- Self Help: The general absence of compulsory judicial or arbitral remedies and the decentralised nature of the international community inevitably mean that ‘self-help’ is the option that is most likely to be available to a state when faced with a breach of an international obligation owed to it by another state.
  - Self-help may take the form of countermeasures or acts or retorsion.
  - Countermeasure: an act not involving the use of armed force that is contrary to international law but that is rendered lawful as a proportionate response to a prior illegal act by another state and that is intended to induce compliance with its international law obligations by that state.
- An effective way of enforcing international law is through national courts, whose judgments are backed by the power of the state.
(b) Natural Law Origins

- The early development of international law saw its gradual separation from natural law.
  - Natural law emerged from the philosophical traditions of Roman law and the Roman Church.
    ‣ Contributed to the separation of the *ius gentium* from the *ius naturale* and its modulation into a *law of nations*, which applied specifically to the rulers of states.
    ‣ Grotius: “But as the laws of each State respect the Benefit of that State; so amongst all or most States there might be, and in Fact there are, some Laws agreed on by common Consent, which respect the Advantage not of one Body in particular, but of all in general. And this is what is called the Law of Nations, when used in Distinction to the Law of Nature...”
- The law of nations was a system of norms whether derived from a universally applicable, ‘natural’ morality or attested by ‘the Consent of Nations’.
- Wolf: attempted description of the *ius gentium* according to scientific principles:
  ‣ Argued that collective society could not be promoted unless states formed a universal political entity, a ‘supreme state’ from which would proceed the law of nations.
    ‣ The beginning of this conceptualisation that states could operate as entities in the international sphere.
  ‣ “All the nations scattered throughout the whole world cannot assemble together, as is self-evident, that must be taken to be the will of all nations which they are bound to agree upon, if following the leadership of nature they use right reason...what has been approved by the more civilized nations is the law of nations”.
- Immanuel Kant sought to re-characterize the binding character of international law, proposing an international federation of republican state (*foedus pacificum*).
  ‣ “There is only one rational way in which states co-existing with other states can emerge from the lawless condition of pure warfare...they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an ‘international state (ciu tas gentium), which would necessarily continue to grow until it embraced all the peoples of the earth..."

(c) From Positivism to the Present Day

- Emergence of ‘sovereign’ states from the claims of Empire, secular or religious.
- States emerged as material, independent entities and international law was one of the ways they developed of managing their relations.
- Consent in the formation of legal obligations resolved the apparent paradox of how law could operate between sovereigns.
- International law is highly state-centric, a position reinforced from the early 19th century by the development and subsequent dominance of positivism as an account of law and legal obligation.
  - Positivism was distinguished by the notion that only positive law - that is, law which had in some form been enacted or made by authority - could be considered true law.
  - Positivism saw the law as a creation of power, a command of a sovereign enforced by a sanction.
  - *International law was not law above states, but law between states, enforceable, short of war, by way of moral opprobrium or by reciprocal denial of benefits*.
  - Austin: “The law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjugation to its author...The law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and objected”.
- Positivist legal theory elaborated upon by HLA Hart - distinguished three categories of rules:
  (a) Primary rules, concerning human action and interaction;
(b) Secondary rules (rules of adjudication, enforcement, and change) which underpin and operate in relation to the primary rules;
(c) the master ‘rule of recognition’, which enables the observer to identify the components of the system and to treat them as legal.

**(d) The Basis of Obligation**

- The classification of a system as legal does not predetermine its effectiveness - the question is whether the rules, traditions and institutions of a given system enjoy at least some salience within the relevant society, meet its social needs, and are applied through techniques and methods recognizably legal.
- John Finnis: “Although there are direct ‘moral’ arguments of justice for recognizing customs as authoritative...the general authoritativeness of custom depends upon the fact that custom-formation has been adopted by the international community as an appropriate method of rule creation...recognition of the authoritativeness of particular customs affords all states an opportunity of furthering the common good of the international community...”

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### (III) THE DEVELOPMENT OF INTERNATIONAL LAW

**(a) Generally**

- Developed out of the tradition of the late medieval *ius gentium* ('law of nations').
  - An influential series of writers (Vitoria, Gentili, Grotius, Pufendorf, Wolff, Vattel) theorized about relations between rulers, reflective of custom and practice in such matters as treaty-making, the status of ambassadors, the use of the oceans, and the modalities of warfare.
- The 13th century rediscovery of Roman or civil law by figures such as Thomas Aquinas reinforced the idea that law could structure or at least moderate the relations between kingdoms, principalities, and republics.

**Modern International Law**

- Foundations of modern international law can be traced to the emergence of nation states. Organised political communities with their own identities seeking to enter into relationships with other similar entities
  - European in origin (comprising Europe which extended to the whole Mediterranean to Russia and the Near East).
- Far East: (Siam/Thailand, China, and Japan) survived the colonial onslaught and continued to assert their independence.
  - Mid 19th Century China had been largely cowed by the use of gunboat diplomacy, leading to the Treaties of Beijing in 1860.
  - Japan by contrast engaged in a controlled opening to the west, with British naval advisers and an early translation of Wheaton’s *International Law*.
- Modern international law has its origins in the Europe of the 16th/17th century.
  - The law created to govern the diplomatic, commercial, military and other relations of the society of Christian states forming the Europe of that time that provides the basis for the present law.
- With the emergence of political organisation it became essential to work out rules as to how states would relate to others.
  - ‘Modern structure’ of the law of nations recognizably in place.
    ‣ The system of diplomatic relations, recognition, international organizations, treaties, and customary international law had taken on essentially modern contours.
    ‣ Colonialism had reshaped the world in a Eurocentric image.