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Overview of International Law (IL)

Definition

• IL is a binding regime of principles and rules that regulates the relations between States and other entities having international legal personality (individuals and other non-state entities)

• It does NOT:
  o Regulate private relations between individuals or between individuals and the State (but it may inform regulation of these relations)

• Examples
  o International Phone Calls (Intergovernmental telecommunications union)
  o International mail (International Postal Union)
  o Passport and Visas (Treaties dictate visa requirements)
  o Questions of War
  o Trading Relations (WTO, protectionist measures)
  o International Air Travel
    ▪ Warsaw Convention – Limits liability of airlines
- Air Service Agreements – allows landing arrangements

Consent and Sovereign Equality
- IL is based on the consent of states (due to the absence of an international legislature)
- Charter of the UN, Art 2(1)
  - The UN is based upon 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
  - They have equal rights and duties and are equal members of the international community despite differences of an economic, social, political, or other nature
- Implications of Sovereign Equality
  - No state may compel another to judicial settlement of a dispute between them
  - No state is bound by to a new international rule unless that state has consented
    - Qualification/Exception
      - Jus Cogens - i.e. a rule of international law that is accepted & recognised by the international community of states as a whole as a norm from which no derogation is permitted & which can be modified only by a subsequent norm of general international law having the same character
      - Vienna Convention on the Law of Treaties 1969, arts 53 & 64
        - Eg. fundamental human rights – no slavery, genocide

❖ Exclusive jurisdiction of a State over its territory and the permanent population living there i.e. it is the duty of a State not to intervene in the area of exclusive jurisdiction of other States
- Article 2 (7) –
  - ‘Nothing in the UN Charter shall authorise the UN to intervene in matter essentially within the domestic jurisdiction of a State’

Is International Law…Law?
- Arguments AGAINST IL:
  1. John Austin (1832): international law is ‘positive morality’
- **Test:** Law *can be* and is *in fact* enforced
- Thus, domestic law = law, IL = positive morality (fails test)

2. **HLA Hart** (1961): IL has ‘primary rules’ but lacks ‘secondary rules’.
   - IL lacks unifying law of recognition specifying sources of law and criteria for identifying rules
   - Argues that IL is only a primal mechanism of social organisation
     - No supreme legislature for the creation or amendment of international law
     - No effective machinery for enforcement – there is no international police force, and no court of international law which has compulsory jurisdiction
     - Rules of international law are difficult to ascertain

- **Arguments FOR IL:**
  1. Austin’s focus on the enforceability of laws is flawed and unhelpful
     - Domestic law is often not enforced – Prosecutorial discretion as to whether to prosecute criminals (*However, one would argue that its lack of enforcement does not reduce the validity of the domestic law*)
  2. Even if **Austin/Hart’s definition** is accepted, much of IL meets this definition
     - There are many everyday matters where states comply with IL – Mail, Air travel, diplomatic immunity
     - It is in the State’s own best interests to follow IL in the absence of an effective machinery to enforce the law
       - The conduct of one State adhering to the law creates a reciprocal expectation amongst other States
       - This expectation is diminished if one States breaches IL and often leads to **reciprocal breaches**
  3. States regard international law as binding
     - The behaviour of states tends to suggest that they treat IL law as binding despite an absence of compulsion
     - **Iraq War (2003):** Although challenged as unlawful, Australia justified the use of force as legal according to IL treaties and principles
4. **Courts**: Whilst Hart/Austin is correct in the absence of an IL with compulsory jurisdiction, there are an increasing number of courts/dispute settlement procedures that states have accepted as compulsory:

- International Court of Justice (ICJ)
- International Tribunal for Law of the Sea
- WTO
- Regional Courts for Human Rights
International Legal Persons

- **International Legal Personality** can be thought of as a set of capacities:
  - Capacity to bring claims for breaches of the law
  - Capacity to enter into international treaties
  - Capacity/entitlement to claim privileges and immunities from national jurisdictions
  - Capacity to contribute customary IL by **practice** and **opinion juris**

- **Traditional View** – States have been the only entities that have international legal personality and possessed the above capacities
  - **Oppenheim** (1912) – Stately solely and exclusively are the subjects of international law
  - **ICJ Statute**, Art 34(1) – Only states may be parties in cases before the Court
  - **UN Charter**, Art 4(1) - Membership in the UN is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations
  - This meant that States have acted on the international plane **on behalf** of their nationals by asserting “**diplomatic protection**”
    - **Mavrommatis Palestine Concessions** (PCIJ, 1924)
      - Although an **individual** has suffered a wrong, action by the State resorting to diplomatic action means it becomes an issue of the **State’s own rights** (and **not** that of the individual)
      - See **Contemporary View**

- **Contemporary View** – International law is no longer (if indeed it ever was) concerned solely with States (**Oppenheim’s International Law**, 1992). Different groups are now subjects (and not just objects) of international law
- Framework for Human Rights
- International courts and tribunals before which individuals have standing to bring international claims
- Emergence of a system of individual responsibility for the commission of international crimes
- International organisations may possess objective international legal personality

- **Current International Legal Personality:**
  - a) States
  - b) International/Regional Organisations
  - c) Individual Corporations
  - d) Individuals
  - e) Minority Groups

  - **Important Note:** These other personalities do not have the same degree of international personality as that of States
States

Statehood Criteria

• **Montevideo Convention (1933)** sets out the following criteria for statehood:

  1. Permanent Population
     - No minimum population number required
     - N.B. Microstates (Vatican City) have very small population numbers

  2. Defined Territory
     - Sufficient if a state’s territory possess a “sufficient consistency” even though its boundaries have not yet been accurately delimited - *Deutsche Continental Gas-Gesellschaft v Polish State* Case 1929
     - **NOT** required to have perfectly defined and settled boundaries
     - See “State Sovereignty over Territory” (*below*)

     - Coherent organisation rather than a sophisticated legislature/judiciary
     - No requirement that the government be established according to any particular constitutional pattern (democracy, bureaucracy, dictatorship)
     - Requirement of a government is satisfied when:
       a) Administering authority exercises effective control over a territory(*without the assistance of foreign troops to assert control* – *Aaland Islands Case*)
       b) Not subject to the control of an external power or state
          - Even if reliant on financial aid
     - **Civil War:** Requirement of a “stable political organisation” does not apply during a civil war or where there is a collapse of law and order in an existing state
     - **NOT** strictly applied (and not necessarily a precondition)
• **E.g.** Post-WWII Germany and Japan’s only governing structure was the occupying allied forces – did not preclude Statehood status

4. Capacity to enter into legal relations with other states (due to being **independent**)
   - Political independence – *State is not subject to any other higher State authority other than that imposed by IL*
     - The government must be actually independent of any other State
     - Whilst states may **influence** the policies and conduct of another State, if a State (legally or actually) becomes a ‘satellite’ of another State, it is not independent and not a separate State
   - *Austro-German Customs Union* Case 1931
     - Restrictions on State's liberty from ordinary international law OR contractual obligations do not affect independence AS LONG as do not place State under legal authority of another, therefore remains a State notwithstanding extensive/burdensome obligations
   - **“Puppet State”** Example
     - Although Japan recognised Manchukuo (part of China) as an independent State, it relied on Japanese troops for authority, there were Japanese officials in high power such that it essentially dictated the composition of Government and policies – **“Puppet”**
   - **Note:** Dependent/puppet states are to be distinguished to independent states that, for reasons of convenience, freely choose to delegate sovereign powers to other states
     - **E.g.** Liechtenstein’s foreign relations are conducted by Switzerland

5. **Issue:** Recognition by Other Countries
   - **See below:** ‘Recognition of States’
   - Declaratory v Constitutive Theory
Further Statehood Criteria – ‘Legitimacy’

- **Issue:** Although **NOT** specified in the Montevideo Convention, state practice suggests that it may be unlawful to recognise the statehood of any entity which has been established **unlawfully** or for **unlawful purposes** (illegitimate)

- **New State via Force**
  - Turkish Republic of North Cyprus (TRNC)
    - Used force to establish a State and declared independence from Turkey
    - UNSC resolved declaration of independence was **invalid**

- **New State for Apartheid**
  - Rhodesia (1965) - UNSC called upon all States to refrain from recognising Rhodesia as a State after it declared independence from UK in order to preserve white minority rule
  - Transkei (1976): SA established Transkei as separate State for Xhosa people (*was not recognised by the international community*)

- **Exception to Legitimacy Criteria**
  - Non-recognition rule does **not** apply to existing States that implement apartheid policy, only ‘States’ that are created for this purpose

**Failed States**

- **Thuerer:** The “failed State” is one which, although it retains its legal capacity, has for all practical purposes lost the ability to exercise it

- Most examples of failed states (*Somalia, Sierra Leone*) have continued to be recognised as states during their “failure”

- Common aspects of a “Failed State”

  a) **Geographical and Territorial Aspect**
    - Usually associated with internal problems even though these may incidentally have cross-border impacts (*implosion*)

  b) **Political Aspect**
- Internal collapse of law and order
- **Total** or near total breakdown of law and order structures rather than the fragmentation of State authority evident in civil wars

c) **Functional Aspect**
- Absence of bodies capable of representing the State at an international level and incapable of being influenced by the outside world
**State Sovereignty over TERRITORY**

- Five modes of acquisition of title to territory:
  1. Occupation
  2. Acquisitive Prescription
  3. Cession
  4. Accretion or Avulsion
  5. Conquest

- IMPORTANT: Occupation v Prescription
  - **Prescription** is the acquisition of territory which belonged to another State (or where are tribes with an organized social and political structure)
  - **Occupation** is acquisition of territory which is *terra nullius*
    - Belongs to nobody or abandoned (Rare: requires an intention to abandon)
  - Both require *intention and will* to act as sovereign and *effective control*
    - However, the effective control for prescription probably needs to last for a longer period of time compared to occupation (but *critical date*)

**Discovery**

- *Island of Palmas* – Mere discovery, even if accompanied by a symbolic act of taking, was not enough to secure a conclusive title for the discovering State (*Cf inhospitable*)

- **Inchoate Title**: Discovery confers “inchoate title: - option to occupy which has to be exercised within a reasonable period of time
  - However, if not exercised in reasonable time, territory reverts to “terra nullius”

1) Occupation

- **Criteria**:
  a) Territory must be “*terra nullius*” (*nobody or abandoned*)
  b) Occupation must be by a State (or acting with State authority)
    - It *cannot* be by a private individual acting without State authority
  c) There must be an *intention and will* to acts as sovereign over the area
    - Possession with intent to control to the *exclusion* of others
d) Occupation must be “effective” (surrounding the **critical date**)
   - *Animus occupandi* – Actual exercise display of sovereign authority
   - Less strict when the territory is inhospitable – *Eastern Greenland*

• **Western Sahara** [1975] ICJ Rep

• **Issue 1:** Was Western Sahara terra nullius at the time of Spain colonization?
  - Spain did **NOT** acquire West Sahara by occupation
  - Territory inhabited by nomadic tribes/people with a **social** and **political**
    organisation is **NOT** considered ‘terra nullius’
    - Facts – The nomadic peoples were organized into tribes and under chiefs
      competent to represent them

• **Issue 2:** Agreements with the Local Rulers (“Cession”?)
  - Acquisition of sovereignty through agreements conducted through local rulers
  - The case leaves open whether such agreements constitute “cession” according to
    the legal definition under IL, but states that they are derivative roots of title (but
    not original titles obtained by occupation of terra nullius)

• **Issue 3:** What were the legal ties between Western Sahara and Morocco?
  - Alleged a “continued display of authority” (See *Eastern Greenland*)
    - **Distinguished to Eastern Greenland** - Although the Western Sahara was
      thinly populated, socially and politically organized tribes were in constant
      movement and where armed incidents b/w tribes were frequent
    - Lack of evidence showing “continued display of authority”
  - **Relevant Consideration** – Court rejected the claim that Morocco’s sovereignty
    over Western Sahara had been recognised by the international community
  - **Important:** “Critical Date”
    - *Focus of the enquiry should be evidence directly relating to the effective
display of authority at the time of Spain colonization and in the period
immediately preceding that time*