**LAWS1023: Public International Law**

(1) **THE NATURE OF PUBLIC INTERNATIONAL LAW (Chapters 1, 4 and 5)**

**Defining International Law (HA Chapter 1)**

- International Law is a binding regime of principles and rules that regulates the relations among states, and individuals and other non-state entities.

- Corollaries of principle of ‘sovereign equality of states’ as in the UNC Art 2(1) are:
  - No state may compel another to submit to judicial settlement of a dispute; &
  - No state is bound by a new int'l rule unless that state has consented to it.

- The extent of a state’s domestic jurisdiction changes with the development of custom and with the treaty obligations it undertakes.

- Natural law is both the historical basis of PIL and remains an essential element.

- Positivism from the 17th century is, as opposed to natural law, highly empirical, and champions sovereignty and the idea that states are hermetically sealed.
  - It emphasises the notion of explicit and tacit consent in international law.

- The law relating to the use of force is *jus ad bellum*, and the law relating to the extent of that force or the rules of combat is *jus in bello*.

**Is International Law really Law? (HA Chapter 1)**

- The principle of ‘self-help’ dictates that the enforcement function is left to the individuals injured by illegality but this is frowned upon yet has no replacement.

- A *countermeasure* is 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 that is intended to induce compliance.
• Sanctions, national courts and pressure of NGOs are enforcement measures.

**International Legal Persons**

• The entities with capacity in international law are States, international or inter-governmental organisations, trans-national corporations, individuals and NGOs.
• There has been an expansion in intl legal personality in the UN Charter era.
• Personality is not an absolute concept and as such there is a spectrum of persons.

**States (Chapter 4)**

• States are the dominant persons in intl law as article 34(1) of the Statute of the ICJ says that ‘only States may be parties in contentious cases before the Court’.
• Emily Crawford has been suggested that island states which lose their territory may no longer be considered states as they lack the key Montevideo criterion.

**1933 Montevideo Convention on the Rights and Duties of States (HA pp. 91-104):**

- Article 1 says a State must possess a permanent population, a defined territory, government and capacity to enter into inter-state relations.
- These four criteria have been accepted into customary international law.
- It is not necessary for an entity to have exactly defined or undisputed borders, either at the time it comes into being or subsequently.
- Government must have effective control over the territory it claims.
- Capacity to enter into relations with other states requires independence in law from the authority of any other state.
- Protected or dependent states ‘freely’ choose to devolve certain sovereign powers to other states by entering into a treaty of protection.

**State Sovereignty over Territory, Maritime Zones, and Airspace (HA Chapter 5)**

• As per the Tribunal in *Eritrea v Yemen*, notions of natural unity are never in themselves roots of title, but rather may in certain circumstances raise
a presumption about the extent and scope of a title otherwise established (p. 169).

- Acquiring title to new territory requires cession, occupation or prescription.
  - Prescription is taking control of the territory of another to cement title.
  - At the beginning of PIL, mere discovery of territory allowed for ownership.
  - It has been held that discovery only gives inchoate title and as such sovereignty needs to be manifest such as through the act of occupation.
  - As it is unlawful under Art 2(4) of the UN Charter to use force (unless for self-defence or authorised by Security Council), acquisition by conquest is illegal.

- States can have their territory expanded through accretion and taken by avulsion.
- “An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty”, p. 167.
- Low tide elevations aren’t territory that can be appropriated by a State according to *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.
- As per the *Eastern Greenland Case*, a claim to sovereignty based upon continued display of authority involves two elements, each of which must exist:
  - The intention and will to act as sovereign; and
  - Some actual exercise or display of such peaceful authority (p. 177).

*Island of Palmas Case* (Netherlands v US) (1928) 2 RIAA 829 (HA p. 163):

  - “It must also be shown that the territorial sovereignty has continued to exist and did exist at the moment for which the decision of the dispute must be considered as critical.”

  - The question arose as to whether sovereignty existed at the critical date which was held as the moment the Treaty of Paris entered force.

    - The ‘critical date’ is the date on which the location of territorial sovereignty (‘dominium’ rather than ‘imperium’) is decisive.
ii) The state that can show such a ‘display of State authority’ in the period leading up to the critical date can defeat any other claim.

iii) Actions undertaken after the critical date for the purpose of improving the legal position of a party cannot be considered.

o It was held that discovery alone, without any subsequent act, cannot, at the present time, suffice to provide sovereignty over the Island.

i) Mere disembarkation upon any portion of the region or even extended penetration or exploration was not sufficient (p. 168).

o It is possible that a group of islands may be regarded as a unit in law and so the fate of the principal part may involve the rest.

o There are no precedents holding that islands outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size) (p. 165).

o The title of contiguity has no foundation in international law (p. 167).

o Spain’s original title was inchoate and was not followed up by a subsequent act of authority and thus the US received this same title.

o This case holds that a State which exercises continuous and peaceful governmental possession has a title by way of occupation if the territory was previously a *terra nullius* and by way of prescription if it was not.

i) The continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.

o Sovereignty in relation to territory means ‘the right to exercise therein, to the exclusion of any other State, the functions of a State’.

o The judge noted that a somewhat lesser standard of occupation applies in remote territories.

- Morocco and Mauritania made claims based on ‘historic title’ for Western Sahara which remained a colony of Spain until 1976.
- The Court claimed that integration requires the wishes of the territory’s people expressed through informed democratic processes, impartially conducted and based on universal adult suffrage (p. 107).
- The Court accepted that the principle of self-determination is a part of customary international law and recognised its *erga omnes* character.
- The Court held that personal allegiance owed by Saharan tribes to Morocco is not the same as political authority associated with sovereignty.
- A territory needs to be *terra nullius* to claim sovereignty by occupation.
- The Court held that there was no acquisition by prescription because there was no *intention* and/or *will* to act as sovereign as well as a lack of actual exercise and display of authority.

Clipperton Island Case (France v Mexico) (1932) 26 AJIL 390:

- A Lieutenant of the French Navy declared that the sovereignty of the Clipperton Island belonged to the Emperor Napoleon III from 17/11/1858.
  - i) This is a case of obtaining title to *res/terra nullius* by occupation.
- No positive and apparent act of sovereignty could be recalled either on the part of France or on the part of other Powers.
- The fact that France had not exercised her authority on the island in a positive manner does not imply the forfeiture of its acquisition.


- This 1982 Convention is likely to represent customary international law.
o It establishes various maritime zones including territorial sea, contiguous zone, EEZ, high seas, continental shelf, and the deep seabed.

o Custom, fiscal, sanitary and immigration laws can be enforced in both a nation’s territorial sea and contiguous zone even though a state does not own or have sovereignty over the contiguous zone.

o A state does not possess sovereignty over EEZ but can exploit its resources.

o As per art. 87(1), all states enjoy all the benefits of the high seas, and as in art. 136, the deep seabed is considered the common heritage of mankind.

o The method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV of the Convention.

o Article 90 of the Convention contains the right of land-locked states to have ships flying their flag.

o Islands have a continental shelf unless they are just ‘rocks which cannot sustain human habitation or economic life of their own’ (p. 403).

1944 Chicago Convention on International Civil Aviation (HA pp. 205-7):

o States have exclusive sovereignty over the airspace above their territory.

o Other than in the case of entry in distress, international trespass by military aircraft (with the exception of military transport aircraft) may be met by the use of force without warning (p. 207).

o The need for public confidence in the safety of civil aviation precipitated a new consensus favouring the stricter formulation in art. 3 bis.

Contemporary Principles and Ideas: Common Heritage, Joint Management of Resources, and Sustainable Development

o Outer space isn’t subject to national appropriation by claim of sovereignty.

o Article 8 gives the state of registry jurisdiction over space objects and persons on board, but does not indicate the extent of exclusivity.

o There is an obligation to negotiate in good faith to establish an international regime for exploitation of the ‘common heritage of mankind’ but there is no moratorium imposed upon unilateral exploitation (p. 215).

1959 Antarctic Treaty (HA pp. 198-200):

o Antarctica can only be used peacefully and for scientific purposes.

o Article 4 freezes claims to Antarctica, and it neither endorses nor rejects existing claims to Antarctic territory made by countries.

Self-determination: Unilateral Declarations of Independence (HA p. 104-110)

• The right of self-determination is the right of all peoples to determine freely their political status, and freely pursue their economic, social and cultural progression.

• Judge Anzilotti in the Austro-German Customs Union Case of 1931 said a State is independent unless restrictions on its liberty place it under the legal authority of another State (p. 97).

• “Where a State illegally intervenes in and foments the secession of part of a metropolitan State, other States are under the same duty of non-recognition as in the case of illegal annexation of territory”, p. 103.

• Political self-determination says the future of an area should be determined by the wishes of its inhabitants within the limits of uti posseditis (p. 104).

• In the case of Gibraltar, Spain and the UK agreed on joint sovereignty but a 2009 referendum by the Gibraltar Government favoured remaining British.

- A Special Committee and the General Assembly have taken the view that the wishes of the current population should not be paramount in Gibraltar’s case.
- This is because it is an imported, colonial population which replaced the earlier, largely Spanish, population which left the territory when captured.

- **Jus Cogens** describes a foundational norm from which no derogation is permitted such as the Prohibition on Genocide and the right to self-determination.

- **Erga omnes** describes obligations that are owed to all states and peoples.

- Self-determination does not necessarily lead to a defined outcome like secession.

**Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), ICJ, 22 July 2010:**

- The Court agreed that a state’s people, through their parliament, can declare themselves independent from another state.

- However, a new state is not necessarily created which means that New South Wales could not necessarily secede from the Commonwealth.

- There has developed a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation.

- Participants endorsed ‘remedial secession’ in the case of Kosovo.

- The Court considered the *lex specialis* created by the SC in Res 1244 (1999)

- In this case, the international community had set up an interim regime by means of the UNSC, but the declaration of independence was still upheld.

**East Timor (Portugal v Australia) [1995] ICJ Rep 90:**

- The majority recognised that the right to self-determination, as it evolved from UN practice, has an *erga omnes* character, and is irreproachable.
The Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State (Indonesia) which is not a party to the case.

Recognition of States and Governments: Recognition of Foreign Governments (HA p. 130-62)

- The ‘constitutive’ theory claims through recognition only and exclusively a state becomes an international person and a subject of international law.
  - This theory gains its plausibility from the lack of intl centralised institutions.

- The ‘declaratory’ theory claims a state may exist without being recognised, and if it does exist in fact, then, whether or not it has been formally recognised by other states, it has a right to be treated by them as a state.
  - In most cases the declaratory theory rings true which holds that, provided the Montevideo criteria are met, recognition by other states is irrelevant.

- Participation in an international conference with a state or government will not indicate recognition if it is made clear that it is not intended to have this effect.

- The Stimson doctrine of non-recognition holds that establishment of a new state or acquisition of territory occurring unlawfully will not be recognised.

- Recognition of government is domestic policy in that the state still exists but choosing to recognise an alternative government is each state’s prerogative.
  - The courts now determine issues of recognition in order to apply the law.

- The FRY (Serbia and Montenegro) was not allowed to ipso facto enjoy the recognition enjoyed by the SFRY as the ‘new’ state was constituted differently.

- From 1980, the UK abandoned expressly recognising revolutionary governments.

- Recognition of an entity before it has become effective is ‘precipitate’ and is intervention in a state’s affairs contrary to international law (p. 141).
- The Hang Samrin Government which overthrew the Pol Pot Government was refused recognition by the UK because it was supported by Vietnam’s army.

• In the *Tinoco Arbitration*, Taft CJ held that recognition by other Powers is an important evidential factor in establishing proof of the existence of a government.

• The question of whether a regime qualifies to be treated as a Government will be left to be inferred from the nature of the dealings which the UK may have with it.

• Lord Reid in the *Carl Zeiss* case said the laws of a Government not granted *de facto* recognition cannot be recognised by the courts of Britain (p. 153).

- Lord Wilberforce said in obiter that the courts may be prepared to recognise and enforce an unrecognised government’s acts “where private rights, or acts of everyday occurrence, or perfunctory acts are concerned” (p. 156).

*Luther Co v Sagor & Co* [1921] 3 KB 532 (HA p. 150-2):

- The plaintiff argued that the nationalisation decree given by the new Soviet Government should not be recognised by an English Court as the new Soviet Government had not been recognised by the UK.

- This case established that recognition, once given, was retroactive in effect from the time that the recognised government established itself.

- UK courts would not recognise or enforce laws of an unrecognised govt.

  i) An unrecognised govt lacks *locus standi* to bring a suit in Britain.


- The Republic of Somalia bought a cargo of rice for delivery by a ship to Mogadishu but it had arrived when Siad Barre’s govt was overthrown.

- The Commercial Court of London allowed the cargo to be sold and the proceeds paid into court.
Following an international conference, Mr. Mahdi was nominated president who then nominated Mr. Qalib as his Prime Minister.

The question for the court was whether the proceeds could be paid to the solicitors acting for Mr. Qalib’s government.

Hobhouse J said “But a loss of control by a constitutional government may not immediately deprive it of its status, whereas an insurgent regime will be required to establish control before it can exist as a government.”

“Membership of an intl organisation does not amount to recognition...”

The Woodhouse Drake case set out four factors to be considered in deciding whether a government exists as the government of a state:

i) Whether it is the constitutional government of the state;

ii) The degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state;

iii) In marginal cases, the extent of intl recognition that it enjoys; and

iv) Whether Her Majesty’s Government has any dealings with it and if so what the nature of those dealings actually is.

As such, indications given by the Foreign Office as to whether “govt to govt” dealings have taken place with a claimant govt are not conclusive.

*Sierra Leone Telecomm Co v Barclays Bank* [1998] 2 All ER 821 (HA p. 149-50):

The new government of Sierra Leone attempted to change its account arrangements to which Barclays Bank sought a declaration to stop this.

The defendant refused to make payments requested by those signatories given to it by the Sierra Leone junta government (p. 149).
The Court had to ask whether the actions of the new government of Sierra Leone should be recognised to which it relied on the *Woodhouse* factors.

The British Foreign Office had consistently condemned the military coup.

The Court decided that the new government did not have extensive control of Sierra Leone so, as a matter of British common law, there is no basis for recognising the new entity.

It was found that the junta had no control outside of the capital, Freetown.

The coup had been condemned by the Commonwealth and other states.

**Recognition of States and Governments: Australian Policy**

*Ministerial Statement, Recognition of Governments - Change in Aus Policy 1988:*

- Australia no longer affords formal recognition to governments, essentially to avoid giving the seal of approval to undemocratic regimes.

- As such, recognition of governments is now to be impliedly discerned from the actual relationship between Australia and the relevant state.

*Foreign Corporations (Application of Laws) Act 1989 (Cth) s 9:*

- The first three Woodhouse principles are now considered judicial criteria for recognition though this legislation does vary the common law position.

- Section 7(2) of the Act says ‘any question relating to whether a body or person has been validly incorporated in a place outside Australia is to be determined by reference to the law applied by the people in that place’.

- Section 9 says it is Parliament’s intention that the Act is not to be affected by the recognition or non-recognition by Australia of a foreign place.

International Organisations (HA Chapter 4, pp. 120-6)

- An international organisation is one established by treaty or other instrument governed by intl law and possessing its own intl legal personality.
• The 1986 Convention on the Law of Treaties between States and IOs or between IOs confirms that IOs have the capacity to enter into treaties in accordance with the rules of the organisation as per its constituent instruments (p. 641).

• The European Commission exercises the right of passive legation and is held to have implied international legal personality which transformed to a treaty basis when the 2007 Treaty of Lisbon entered into force on 1 December 2009 (p. 126).

• Under Chapter IV, the UNGA is charged with considering, discussing and recommending, but is also entitled to consider threats to intl peace and security.


o The Chief UN Truce Negotiator was killed by a private gang of Zionists in 1948 in Jerusalem which was then in the possession of Israel.

o Israel was admitted to the UN on 11 May 1949, shortly after the decision.

o This case was concerned with whether the UN has legal capacity to bring an intl claim against a de jure or de facto government to obtain reparation.

o The organisation enjoys functions and rights which can only be explained by possession of intl personality and the ability to operate internationally.

o “The rights and duties of an entity such as the Organisation must depend upon the purposes and functions as specified or implied in its constituent documents and developed in practice.”

o Competition arises between a State’s right of diplomatic protection for its nationals and an IOs right of functional protection.

o Powers that are commonly implied on this functional basis include:
  i) The power to make treaties including treaties providing for international privileges and immunities for personnel;
  ii) To bring legal proceedings; and
  iii) Generally to act within the remit of the organisation.

o The Court said the UN does have enough legal personality to be a plaintiff.

Responsibility of IOs for Internationally Wrongful Acts?