LAWS1023 – Introduction Notes

Topic 1: Development, Nature and Scope of International Law

What is International Law?

- "*The Law of Nations or International Law… is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other*" (Oppenheim, 1905)
- "*international law comprises a system of rules and principles that govern the international relations. Between sovereign states and other institutional subjects of international law*" (Dixon, 2007)
- International Law is based on the sovereignty of states (and sovereign equality of states – that all states are equal regardless of their size)
  - The United Nations Charter states fundamental principles of international law that all UN members must abide by in Article 2
    - Paragraph 1: The UN is based on the principle of the sovereign equality of all its members
      - Sovereignty imports the idea of independence that international law relies on
      - This is known as a horizontal system of sovereignty
    - Paragraph 7: Nothing in the charter allows the UN to intervene in matters that is within the domestic jurisdiction of member states – subject to Human Rights laws, Use of Force laws
  - Sovereignty = states can implement internal domestic laws without encroachment or interference of UN or other states (but this is not absolute, it is relative)
    - 1923: Permanent Court of International Justice (PCIJ) recognised that the concept of domestic jurisdiction is partial and not absolute
    - Huber J, (Island of Palmas, 1928): sovereignty signifies independence, excludes other states for the function of the state
  - Sovereignty = exclusive, or near-exclusive domestic jurisdiction and the right to have one's sovereign powers respected by states (Western / euro-centric approach)
- Modern international law developed from practices of European states

How, Where and Why International Law developed?

- 3000BC: archaeologists have found treaties between kings of city-states in ancient Mesopotamia dating from around 3000BC
- Medieval Europe: feudal kingdoms, principalities and duchies (not states in modern sense – usually no sovereign exercising undisputed authority – but instead was a class of sovereignty (feudal princes shared power with aristocrats) → ecclesiastical law applied to all Europe (e.g. rules evolved governing warfare and idea that treaties are binding on the parties; commercial and maritime law emerged with growth in international trade)
  - Political authority often conflicted in medieval Europe, absolute sovereignty was only held either by catholic church or Holy Roman Empire (it was an era of centralised authority)
  - Eusientium (Law of Nations or Common Law of Mankind) – roots in Roman & Natural Law – law derived from universal reason (scientific based) and theoretical or cannon law (religious)
- 15th and 16th centuries: rise of the nation state → some powerful states emerged (Spain, Portugal, England, France, Netherlands, Sweden) in which internal authority became more centralised; especially in northern Europe where Protestant revolution (The Reformation) most influential, these states refused to accept political authority of entities beyond themselves (rejected authority from the Catholic Church)
  - Removal of influence from catholic church, and emerged an acceptance of political authority for themselves
- 16th and 17th centuries: modern international law (IL) emerged from turmoil of Europe's religious wars of 16th and 17th centuries
  - Breakdown of centralised authority, partially due to European religious wars (The Reformation) and partly due to rise of powerful states

- **Article 2(c) – "full powers"** means a document emanating from the competent authority of a State designating a person(s) to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty

> ***Case Concerning Armed Activities on the Territory of the Congo (DRC v Rwanda)* (2002) ICJ**
> (Cases, pg. 63)
> **Full Powers exemption for Ministers of Justice**

Facts

- Minister of Justice of Rwanda (Ms Mukabagwiza) made a statement before the UN Commission on Human Rights regarding the proposed withdrawal of Rwandan reservations to various human rights treaties, including the Genocide Convention.
- Rwanda argued that it cannot be legally bound by Minister's statement as it was not made by a Foreign Minister or Head of State/Government 'with automatic authority to bind the State' [46]

Issue:

- ICJ considered the legal effect of the Minister of Justice's statement – could a Minister of the relevant department (whom is not Head of State/Govt, or Foreign Minister) bind a State?

Held

- ICJ held that Minister's statement did bind Rwanda
- [48] "In principle…a Minister of Justice may, under certain circumstances, bind the State he or she represents by his or her statements"
  - Minister's statement is "in respect of matters falling within their purview" → the protection of human rights which were the subject of that statement fall within the purview of a Minister of Justice
  - Minister had the capacity/authority to speak in the specific circumstances → Ms Mukabagwiza spoke before the UN Commission on Human Rights in her capacity as Minister of Justice of Rwanda
  - Language of the statement → Rwandan Minister indicated that she was making her statement 'on behalf of the Rwandan people'

Courts' explanations:

- [46] It is well- established (customary) rule of international law that Head of State, Head of Government and Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions – their unilateral acts have force of international commitment → in the matter of the conclusion of treaties, this rule of customary law is expressed in Article 7 of VCLT
- [47] Due to increasing international relations, other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview → e.g., ministers exercising powers in their field of competence in the area of foreign relations

- **Article 8 –** If a treaty is concluded by a person who does not fulfil the requirements of Article 7, the conclusion of the treaty does not have legal effect, unless afterwards confirmed by that State.
- **Article 9 –** Text of the treaty is "adopted" by consent of all negotiating States, unless it is adopted at an international conference, where it is adopted by two thirds of the State present and voting (or another formula may be agreed)

How does a treaty enter into force?

- Treaty can come into force on its own terms (VCLT – Art 24 - 25).
- States expressing consent to be bound by a treaty:
  - Signature (Arts 11, 12);
  - Exchange of instruments constituting a treaty (Arts 11, 13);
  - Ratification (Arts, 14);
  - Accession (Arts 11, 15, 16); or

- Occupation is the exercise of sovereignty (often initially by discovery) over previously unclaimed territory (*terra nullius*).
- Two elements required to be shown (***Legal Status of Eastern Greenland*** at [45]):
  1) Possession: Formal act of intention (intention to act as sovereign), and
  2) Administration: Demonstration of effective control/authority → i.e. actual exercise or display of authority

- **Prescription** (adverse title – title adverse to the original owner)
  - Prescription is the peaceful exercise of sovereignty for a reasonable period without objection by another State (contrast this with Occupation)
  - Acquisition of title to territory, formerly occupied by another state through peaceful exercise of sovereignty, over lengthy period of time
- **Cession**
  - Intentional (voluntary) transfer of sovereignty over territory from one state to another, usually by means of a treaty
  - Voluntary transfer of territory between states where the title transferred is as good as what the original state had attained – ***Island of Palmas* (1928)**
  - The date on which title changes will normally be the date on which the treaty comes into force: an unratified treaty does not confer sovereignty (***Territorial Dispute (Libya/Chad), ICJ 1994***).
  - The State which cedes territory must have title over it – ***Island of Palmas* (1928)**
  - Limitations to Cession:
    - Prohibition of the use of force – cession of territory post-war, is void (**VCLT article 52, 53**)
    - The right to self-determination requires that the inhabitants of the ceded territory be consulted (***Western Sahara***)
- **Accretion (and avulsion)**
  - Gain (or loss) of physical territory through natural processes
  - **Accretion** = slow process, slowly gained additional territory through the build of territory i.e. Build-up of soil through movement of a river bed.
    - Historically used to be that national borders were rivers.
    - Form of effective occupation/prescription or acquiescence but not a root of title in itself.
  - **Avulsion** = more sudden process (i.e. volcano explosion creating new islands)
    - If change is sudden the boundary will not change: ***Charmizal Arbitration (US v Mexico) 1911***
- **Conquest**
  - Forceful acquisition of territory → by the use of force
  - Now unlawful (**UN Charter, Art 2(4)**), e.g., Russia's annexation of Crimea
  - Unlawful due to the doctrine of intertemporal laws – ***Island of Palmas* (1928)** → after the signing of the UN Charter, the use of force has been prohibited
  - Doctrine of intertemporal law → requires sovereignty to be considered in the light of the rules of international law that prevailed at the time at which the claim of sovereignty is based and not the rules of international law prevailing at the time the dispute is being adjudicated

EFFECTIVE OCCUPATION (Occupation + Prescription + other forms)

1. *Occupation*

- Territory may be acquired through occupation if it is *terra nullius* (i.e., territory had no population, or the territory was abandoned)
- Two elements required to be shown for Occupation (***Legal Status of Eastern Greenland*** at [45]):
  1) Possession: Formal act of intention (intention to act as sovereign), and
  2) Administration: Demonstration of effective control/authority → i.e. actual exercise or display of authority

***Legal Status of Eastern Greenland (Norway v Denmark)* (1933) PCIJ.** (Cases, p.258-9)
Occupation Requirements + Authority for remote / inhospitable / thinly populated territories

Facts

- Germany could not have 'universal' jurisdiction to investigate or prosecute Donald Rumsfeld → there was no 'linkage' between Germany and Rumsfeld → the linkage would have been custody of Rumsfeld, but was absent here
  - Different to the South African case on State Torture
- 'To justify German jurisdiction to prosecute crimes committed by foreigners against foreigners outside the country...a legitimizing domestic linkage is necessary...That is lacking here.'

GENOCIDE

- Killing and other crimes with intent to destroy, in whole or in part, a national, ethical, racial or religious group
- Genocide attracts universal jurisdiction → well accepted

Attorney-General of the Government of Israel v Eichmann **(Dist Ct Jerusalem, 1961)** (Cases, p. 291)
Universal jurisdiction apply to Genocide

- 'These crimes...are grave offences against the law of nations itself. Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law, in the absence of an International [Criminal] Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and bring the criminals to trial. The jurisdiction to try crimes under international law is universal.'
- **Reasons for universal jurisdiction on genocide:**
  - Very serious crimes
  - At the time, there was no International Criminal Court, so needed judicial and legislative organs to prosecute such grave crime

Nulyarimmav Thompson (FFCA, 1999)
Universal jurisdiction can apply to Genocide – but it depends on the domestic law

- **Wilcox J** → 'Universal jurisdiction conferred by the principles of international law is a component of sovereignty...and the way in which sovereignty is exercised will depend on each common law country's peculiar constitutional arrangements.'

A Duty to Prosecute or Extradite (*aut dedere aut judicare*)

- An obligation to prosecute or extradite arises under several treaties (and potentially at customary international law)
  - States have a positive duty to prosecute certain crimes
  - If State does not wish to do so, then it must extradite the offender to another State who will prosecute

Belgium v Senegal (2012) ICJ
Duty to Prosecute – for Torture

Facts

- Senegal, a party to the **Convention Against Torture (CAT)**, had failed to prosecute or extradite former President of Chad (was in Senegal's territory) for torture
- Belgium had no interest in this case → they simply wanted to uphold the **CAT** → they were exerting their right to complain against breach of the Convention
- **Art 7** a 'mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility'
  - Under **Art 7,** State must submit criminal case to competent criminal authorities, but if request for extradition then may relieve itself of obligation to prosecute by extradition
- Senegal failed in its obligation to prosecute/extradite within reasonable time

International Criminal Jurisdiction

- Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act

REMEDIES → Consequences of Wrongful Act

Factory at Chorzów (Claim for Indemnity) Case (Germany v Poland) (1928)
Three forms of Reparations → Restitution, Compensation and Satisfaction

Facts

- The case arose after the end of WW1, when Upper Silesia, which had previously been German territory, became part of Poland.
- A German corporation had established a nitrate factory at Chorzów in Upper Silesia pursuant to a contract with the German government.
- However, the new Polish government took possession of the factory.
- Germany sought reparation.

Held

- General Principle: once there is a wrongful act, the obligation of reparation is triggered → "...**reparation must, as far as possible, wipe out all the consequences of the illegal act** and **re-establish the situation which would**, in all probability, **have existed if that act had not been committed. Restitution in kind, or**, if this is not possible, **payment of a sum corresponding to the value which a restitution in kind would bear**; the **award**, **if need be, of damages** for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law"
- **Article 31** – responsible state is under an obligation to make dull reparation for the injury caused by the internationally wrongful act
- **Article 34** – full reparation for injury caused by the internationally wrongful act shall take the form of **restitution, compensation and satisfaction**
- **Article 35** – a state responsible for an internationally wrongful act is under an obligation to make **restitution** → to re-establish the situation which existed before the wrongful act was committed provided that restitution is not materially impossible
- **Article 36** – **compensation** insofar as damage caused is not made good by restitution
- **Article 37** – **satisfaction** for injury caused insofar as it cannot be made good by restitution or compensation (non-material remedy → acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality)

Summary

- The law of state responsibility is now largely codified in the Articles on State Responsibility
- Similar principles apply to the responsibility of international organisations (Draft Articles on the Responsibility of International Organisations)
- State responsibility only relevant where there has been a breach of a primary obligation → State responsibility only tells us the consequences of breach, it does not tell us when and if a breach has occurred
- State responsibility rules address
  - The circumstances in which wrongful action may be attributed to a state
  - Which states may invoke the responsibility of the delinquent state
  - Whether the responsible state may rely on any defences (circumstances precluding wrongfulness), and
  - The consequences of a wrongful act

Topic 11: State Responsibility II

- The **customary principle of non-intervention** involves the right of every sovereign state to conduct its affairs without outside interference
  - Principle of non-intervention forbids states from intervening directly or indirectly in internal/external affairs of others (such as choice of a political, economic, social and cultural system and formulation of foreign policy)
  - **Coercion** is obvious when force is used, but can also be found in intervention involving indirect forms of support for subversive or terrorist armed attacks within another state

Held

- Acts by USA that **did not** constitute a breach of prohibition on the use of force:
  - US military manoeuvres near the Nicaraguan borders → not a threat or use of force contrary to the prohibition
- Acts by USA that **did** constitute a breach of prohibition on the use of force:
  - Laying of mines by the US in Nicaraguan ports, and certain attacks in Nicaraguan ports
  - Assistance of the Contra rebels in Nicaragua through arming and training contras (this was sending armed bands to Nicaragua → but not all support given by US was a breach e.g. mere supply of funds was not a use of force, although it was an act of intervention
- Was the US exercising right of collective self-defence by going to the aid of El Salvador, Honduras or Costa Rica?
  - No, these states were not subject to armed attacks (nor did states at relevant time declare themselves attacked and made requests for assistance), and even if US acting in self-defence, its response was not necessary or proportionate
- Will a failure to report render the action unlawful?
  - The Court held that the failure to report the use of force to the Security Council may be indicative that the State concerned did not consider itself to be acting in self-defence (para. 200)
  - As a general rule, States should and do tend to report action taken in the exercise of the right of self-defence to the Council.

What is the "Use of Force"?

- The use, by one state against another, of armed force (not political or economic pressure) including:
  - **Direct armed force**
    - E.g. invasion, missile attack, laying mines
  - **Indirect armed force**
    - E.g. sending 'armed bands' into another state's territory → **Nicaragua (1986), paras. 195, 247**
    - 'actively extending military, logistic, economic and financial support to irregular forces' → **Armed Activities 2005 (DRC v Uganda) paras. 161-165**
    - Providing weapons, logistical or other support to armed insurgents in another state → **Nicaragua (1986), paras. 195, 205, 247, 251**
      - but not 'mere supply of funds' to irregular forces → **Nicaragua (1986), para. 228**

What is the 'Threat of Force'?

- Where use of force would be illegal, then threat of that use of force is too **– Nuclear Weapons Advisory Opinion (1996) (para. 47)**
- E.g.an **ultimatum** – threat to attack a state if it does not comply with a demand
  - US military manoeuvres near the Nicaraguan border were held not to constitute a threat of force (**Nicaragua case (Merits) para. 227**)
  - But note UK argued Iraqi artillery and tanks aimed at Kuwait 1994 constituted a threat

Exemption 1: Self-Defence

- **UN Charter – Article 51:**
  - 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'
    - '**Inherent right**' = reference to right of self-defence at customary international law

Types of International Courts

1. Inter-governmental claims commissions
   - States agree to set up bodies to resolve disputes between individuals and government
   - E.g. **Iran-US Claims Tribunal** (1981-) → formed in the aftermath of the Iranian Revolution which led to expropriation of US property in Iran (impacted US citizens) and US action of opposing the revolution in USA (impacted Iranian citizens)
   - E.g. **US-Mexico Claims Tribunal**
2. Ad hoc international arbitration
   - Same functions as judicial settlement
   - E.g. **Rainbow Warrior Arbitration** → set up on an ad hoc basis to deal with an individual dispute
3. Inter-state arbitration embedded in international system
   - Arbitration with institutional basis that make it look like judicial settlement → often imbedded in treaty law (e.g. UNCLOS, provides de facto option for arbitration)
   - E.g. **Permanent Court of Arbitration** → provides a forum for arbitration → states with disputes under treaty (e.g. UNCLOS) will go to the PCA
4. Standing international courts
   - E.g. **PCIJ** and **ICJ** (and **ITLOS** → for disputes under UNCLOS)
5. International criminal courts
   - E.g. Nuremberg, Far East, ICTY, ICTR, ICC, hybrid
6. International administrative tribunals
   - E.g. **UN Appeals Tribunal** → disputes that arise between employees of UN and UN organisation itself
7. Regional human rights courts
   - E.g. **European Court of Human Rights**
8. Regional economic integration courts
   - E.g. **Court of Justice of the European Union**
9. WTO dispute settlement system
10. Investment arbitration

INTERNATIONAL COURT OF JUSTICE (ICJ)

- **Statute of the International Court of Justice**
- **Rules of Court** (as amended)
- Composition of the Court
  - 15 judges (no more than 2 can be nationals from same State) – **Art 3**
  - Judges elected to 9 year terms
  - Independence and impartiality of judges
- **ICJ's Contentious jurisdiction**
  - Only states may be parties – **Statute of the ICJ, Art 34(1)**
  - Decisions binding on only parties (not binding precedent) – **Art 59**
- **Contentious jurisdiction** is based on state consent → consent expressed in **three main ways:**
  1) Special agreement (compromis) – **Art 36(1)**
     - Special treaty between the parties agreeing to bring specific issues to the ICJ
     - The treaty (giving consent) was given after the specific dispute arises
     - Parties bilaterally approach the ICJ to settle a dispute
     - E.g. ***Danube Dam Case***
  2) Jurisdictional clause (compromissory clause) – **Art 36(1)**
     - Clause in a treaty provides for ICJ's jurisdiction if disputes arise under that treaty
     - Consent to jurisdiction is given before a dispute arises → and it applies to a category of disputes
     - This gives a unilateral applicability of the consent → any party can invoke that ability to invoke jurisdiction

- This was a situation which UNSC characterised as a 'threat to international peace and security' → but UNGA also has a legitimate interest in this question
- **Article 10 and 11 of UN Charter** → confers power to UNGA to deal with questions relating to international peace and security → even if this matter had been seized by UNSC AND even if UNGA had very little prior involvement in the situation
- ICJ found that the argument that another UN organ was the more appropriate body to request the opinion is not a **compelling reason** to refuse advisory opinion

- **ICJ power to Review of UNSC decisions?**
  - ICJ has no general power of review (not a constitutional court → ICJ is different to domestic courts like HCA which have ability to review constitutionality of parliament, executives and legislature)
  - ICJ can only review legality of decisions of international organisations including the UN when raised in proceedings
  - ICJ only has incidental jurisdiction to determine legality of UN organ decisions IF raised in proceedings → BUT does not have standalone jurisprudence to hear constitutional matters
  - Not yet determined if ICJ could review decisions of the UNSC: ***Lockerbie Case (Libya v US and the UK)* (1992) ICJ**

***Lockerbie Case (Libya v US and the UK)* (1992) ICJ. (Cases, 683)**
Review of UNSC decisions → not determined

Facts
- Terrorist bombing of American airliner (Pan Am Flight) over the Scottish town of Lockerbie → everyone on board that airliner died and people in the Lockerbie town also died
- USA and UK investigations found it was Libyan terrorists → Libya refused to hand the terrorists over to USA (Libyan law did not allow it to extradite its nationals)
- UNSC passed a resolution urging Libya to extradite → Libya did not → UNSC passed another resolution which imposed sanctions on Libya for non-compliance
- Libya challenged the actions of USA and UK in implementing UNSC decisions
- The case raised arguments about whether UNSC had overstepped its boundary in determining breach of peace and security → these issues were never addressed
- The case concerned whether provisional measures should be granted (to not require extradition) and not on the merits of the case

***US Diplomatic and Consular Staff in Tehran Case (USA v Iran)* (1980) ICJ Rep 3. (Cases, 682)**
Review of UNSC decisions

Facts
- US Embassy in Tehran was occupied by Iraqis whom held Embassy staff as hostages
- Iraq claimed that ICJ had no jurisdiction to decide the case → due to its political nature, as it was before the UNSC, and the UNGA had established a Commission to settle this matter

Held
- UNGA is not allowed to make recommendations on a dispute that is under UNSC → but the ICJ is not constrained by such restraint → ICJ can make decisions on disputes under UNSC

***Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (1993) ICJ Rep 325. (Cases, 684)**
Review of UNSC decisions → not determined

Facts