LAWS5005 – INTERNATIONAL LAW

INTRODUCTION TO PUBLIC INTERNATIONAL LAW

DEVELOPMENT, NATURE AND SCOPE OF PUBLIC INTERNATIONAL LAW

What is International Law?

- Public international law is the law that regulates relations between states
- Otherwise known as the 'law of nations' it is the name of the body of customary (treaty rules) and conventional rules which are considered legally binding on civilised States in their intercourse with one another – Oppenheim (1905)
- Comprises a system of rules and principles that govern international relations between sovereign states and other institutional subjects of international law

History

- Archaeologists have found treaties between kings of city states in ancient Mesopotamia dating back to **3000BC**
- **Medieval Europe**
    - Feudal kingdoms and entities, not states in a modern sense
    - Usually no sovereign exercising undisputed authority, but law applied to all Europe
    - Rules evolved governing warfare and ideas that treaties are binding on the parties
- **Roman Empire** – law of *ius gentium*
    - Religion always played a role in who had power
- **15th & 16th C** – rise of the nation-state
    - Powerful States emerged (Spain, Portugal, England, France, Netherlands, Sweden
    - Internal authority became more centralised
- **16th & 17th C** – modern international law emerged from the turmoil of Europe's religious wars
- **Treaty of Westphalia 1648** – settled 30 years of war
    - Recognised a legal system of independent states
    - Established rights of numerous small states to participate directly in international system
    - Charactertised by: equality, independence, and control over matters within their jurisdiction
    - 'The right to exercise therein, to the exclusion of any other State, the functions of a State…the exclusive competence of the State in regard to its own territory' – Judge Huber in *Island of Palmas* arbitration (1928)
    - Start of shift towards a more positive approach to international law
- **19th C** – growth in international law and subject matter
    - International law adopted a 'laissez faire' approach – states could do anything they wanted provided there was no contrary law
    - Still had an overriding focus on law of war and peace
    - Broadened to include cooperation in commercial and technical areas (communications, intellectual propery, trade marks, customs)
- **20th Century International Law**
    - 1899: Permanent Court of Arbitration
    - 1919 Treaty of Versailles establishes the League of Nations (did not have universal membership)
    - 1945 United Nations established
    - International Court of Justice and other courts and tribunals
        - First international court – states could now refer their disputes to the ICJ
        - Any decisions contribute to the development of international law
    - Many more multilateral treaties
    - International criminal courts

PRINCIPLES OF CONSENT AND SOVEREIGN EQUALITY OF STATES

Consent

- Traditionally, 'the Law of Nations was considered to be based on the common consent of individual states' (*Lotus case*)
    - States are only bound by their express consent
    - "Restrictions on the independence of States cannot be presumed
    - "Rules binding upon States emanate from their own free will as expressed in conventions (treaties) or by usages generally accepted as expressing principles of law (customary international law)"
- Sources of international law – primary source: consent of states, manifested primarily in treaties and custom
- Oppenheim: customary rules grew up by common, tacit consent of states (states needed some rules of international conduct)
    - Single uses over time gradually became obligatory as a feeling of legal requirement to oblige grew
    - "Wherever and as soon as a certain frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law"
- General principles of law are considered to be a manifestation of State consent
- Aligns with the natural law theory of international law
    - Grotius depicted international law as the gradual development of universal principles of justice which could be deciphered through human agency (independent of received religion)
    - The law of nations was a system of norms whether derived from a universally applicable, 'natural' morality or attested by the 'Consent of Nations'

Sovereign Equality of States

- In the international legal system, the States are not subject to any greater sovereign power. In that sense, there is an implication of equality among all States
    - International law not above states, but between states
- This idea is supported by the fact that in the UN General Assembly, where all States are represented equally and entitled to 1 vote

<u>Imposing Rules Without Consent</u>

- Imposing rules on states without their consent creates the risk that the rules will be ignored
- A rule made without consent of affected states faces legitimacy problems that speak to the desirability and practicability of non-consensual rules
- Though consent has an important role to play, and still plays a fundamental role, we cannot address the world's greatest problems unless we are prepared to overcome the problem it creates
    - Namely that, only changes that benefit every single affected state can be adopted, creating a cumbersome status quo bias
    - If a State feels that a proposed changed to international law does not serve its interests, it can avoid that change by withholding its agreement
        - Not ratifying a treaty
        - Entering into a treaty subject to reservations
        - Persistent objector to an emerging rule of customary law

<u>Instances where Consent Not Required</u>

- Customary International Law
    - A State may be deemed to be bound by a rule of customary international law if it is deemed that there is sufficient State practice
        - In this sense, to say without consent international law cannot bind a state would go too far
    - Persistent objector: relatively high threshold
        - If you've objected to an emerging rule of custom since the beginning of its emergence, that rule will not apply to you because you will be characterised as a persistent objector: *Anglo-Norwegian Fisheries Case (UK v Norway*) [1951] ICJ Rep 116
- Reservations to treaties may be deemed impermissible

IS INTERNATIONAL LAW REALLY LAW?

"Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" – Louis Henkin, *How Nations Behave* (1979)

- International law is fundamentally different to any domestic legal system
    - No international legislature
    - No courts with compulsory jurisdiction
    - No centrally organised sanctions
- NB: many examples of public order systems which lack an identifiable sovereign but manage to function

John Austin

- Law could only be law if the consequence of its breach was some kind of sanction from the sovereign
- International law is not law, but rather, a system of morality or ethics
- Fundamental to any legal system is a sovereign power that is legitimised by authority gained from the members of society
    - Laws issued by the sovereign → enforced by sanctions → obedience by the majority to the sovereign

HLA Hart

- Whilst it may be law, it is not a 'legal system' – it is a primitive legal order
    - Primitive nature does not deprive it of its legality, but rather is legitimacy as a legal system
- Public international law not only lacks the secondary rules of change (by which primary rules may be created, altered or deleted) and adjudication (determining any violations and appropriate remedies), but also those that specify sources of law and the criteria they are to be identified by

Dworkin

- Interpretivism is a school of thought that opposes this positivist notion of Austin and Hart
- It claims that law is not subject to a physical set of facts or conventions, but rather it is constructed through practice, with a sensitive attitude to societal virtues
- International law is treated as obligatory by states when conducting their international relations
- It is in the bests interests of states to abide by international law – possible violations may bring about undesirable outcomes
- Even when states find that violation outweights observance, they still attempt to justify their actions by law
- Overarching reach of the international legal system into state policy decisions

Theories Explaining International Law

Natural Law

- Natural law as a school of thought emerged from the philosophical traditions of Roman law and the Roman Church
    - Natural law was universal
- Grotius depicted international law as the gradual development of universal principles of justice which could be deciphered through human agency (independent of received religion)
- The law of nations was a system of norms whether derived from a universally applicable, 'natural' morality or attested by the 'Consent of Nations'

Positive Law

- Laws are based on objective, ascertainable, scientific facts
- Positivism saw the law as a creation of power, a command of a sovereign enforced by a sanction
    - International law was not above states, but between states
- International law was enforceable by way of moral opprobrium or by reciprocal denial of benefits

THE UNITED NATIONS

League of Nations

- Established in the aftermath of WW1 to prevent recurrence of war
- Key features
    - Open to any state (Art 1 of the Covenant)
    - US never became a member – although Wilson played a key part in its establishment
    - Did not prohibit war per se, but limited circumstances in which recourse to war would be legal
    - Collective action in response to wrongful recourse to war (required unanimity or qualified unanimity within League Council)
    - Permanent Court of International Justice established (precursor to ICJ)
    - Ultimately unsuccessful (failed to censure Italy for aggression against Ethiopia, and Japan for aggression against China, failed to prevent WWII)

United Nations

- Established in the aftermath of WWII, again to prevent recurrence of war, but established separate from peace treaties
- Established by the UN Charter – now more than 190 States are members
    - Likened to an "international constitution"
    - Article 1 – purposes
    - Article 2 – key is to outlaw unilateral use of force (war) and replace with a system of collective security
    - Establishes an international organisation made up of several organs
- Article 1 of the UN Charter – the UN's 4 basic purposes
    - Maintain international peace and security
    - Develop friendly relations among nations
    - Cooperate in solving international problems and in promoting respect for human rights
    - To be a center for harmonizing the actions of nations

<u>The UN Charter</u>

- Constituting instrument of the organisation, setting out the rights and obligations of member states and establishing the UN organs and procedures
- International treaty, sets out basic principles of international relations between member states
- When states become members they agree to accept the provisions in the UN Charter
- Article 103 – Supremacy of Charter in international law

UN Basic Principles

1. Sovereign equality of all its members
2. All members are to fulfil Charter obligations in good faith
3. Members are to settle their international disputes by peaceful means and without endangering international peace and security
4. They are to refrain from the threat or use of force against any other state
5. They are to give the UN every assistance in any action it takes in accordance with the Charter, and shall not assist States against which the UN is taking preventative or enforcement action
6. Nothing in the Charter is to authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any member State

<u>International Court of Justice</u>

- Article 92 of Charter – principal judicial organ of the UN
- Statute of the ICJ annexed to the UN Charter; based on the Statute of the Permanent Court of International Justice
- Article 96: hears cases between states, and Advisory Opinions requested by UN organs
- Article 36: jurisdiction set out – States can make declarations accepting the Court's jurisdiction as compulsory