

Week 1 – NATURE OF PUBLIC INTERNATIONAL LAW

(a) United Nations

United Nations Charter

Fundamental principles of international law are stated in **article 2**:

- International law is founded upon the **principle of the sovereign equality of all states**.
- A logical corollary of this is that **no state may compel another to submit to judicial settlement of a dispute** between them and **no state is bound by an international rule unless it has first consented**.
 - Renders the international legal system horizontal in nature.
 - While natural law exists above states, positivism considers international law as existing between states – comes with a *laissez faire* approach to state behaviour.

Purpose of UN: Art. 1

Article 1 UN Charter

The **Purposes** of the **United Nations** are:

1. To **maintain international peace and security**: to take effective **collective measures for the prevention and removal of threats to the peace**, and for the **suppression of acts of aggression** or other **breaches of the peace**, and to **bring about by peaceful means**, and in **conformity with the principles of justice and international law, adjustment or settlement of international disputes** or situations which might lead to a breach of the peace;
2. To **develop friendly relations among nations** based on respect for the **principle of equal rights and self-determination of peoples**, and to take other appropriate measures to **strengthen universal peace**;
3. To **achieve international cooperation in solving international problems** of an **economic, social, cultural, or humanitarian character**, and in **promoting and encouraging respect for human rights** and for fundamental freedoms for all **without distinction as to race, sex, language, or religion**; and
4. To be a **center for harmonizing the actions of nations** in the **attainment of these common ends**.

Principles of UN: Art 2.

Art 2 UN Charter

The Organization and its Members, in pursuit of the Purposes stated in Article 1, **shall** act in accordance with the following Principles.

1. The **Organization** is **based** on the **principle** of the **sovereign equality** of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall **fulfil in good faith the obligations** assumed by them in accordance with the present Charter.
3. All Members shall **settle** their **international disputes** by **peaceful means** in such a manner that **international peace and security**, and **justice**, are **not endangered**.
4. All Members shall **refrain** in their international relations from the **threat or use of force against the territorial integrity** or political independence of any state, or in any other **manner inconsistent** with the Purposes of the **United Nations**.

UN Organs

General assembly

- All states have equal vote (reflection of **article 2(1)**). Decisions require a two thirds majority.
- Where action is required it must be referred to the SC.

Security council

- 5 permanent members, 15 members overall. Decisions require 9 votes including those of the permanent members.
- Vote may still go ahead if permanent member abstains.
- **Analysis** - often trying to squeeze modern situations (more technological etc.) into rules that were designed for traditional warfare.

International Court of Justice (ICJ)

- Principal judicial organ. All members of the UN are ipso facto parties to the Statute of the Court.

(b) Is International Law, law?

Lacks the mechanisms of domestic law:

- No legislature – no democratic election;
- No compulsory court jurisdiction;
- New laws aren't binding without state consent;
- No police force;
- Horizontal rather than vertical or hierarchical.

Is it law because states treat it as such?

They **abide partly** because it is **mutually advantageous to do so** and partly because of the need for **effective stable international relations**.

- International law is normally observed as part of a **law of habit**, but “receives little notice because the interest of most people in international law is... in the occasions, rare but generally sensational, on which it is flagrantly broken”;

- Even where actors decide that the advantages of violation outweigh those of observance, they invariably attempt to justify their actions on the ground that they are consistent with international law e.g. invasion of Iraq justified on the basis of an old Security Council resolution.
- Issues of self-defence are the most common break down of international law.

(c) International Legal Persons

Persons of international law are those **states, individuals and entities** with the **capacity to act** in the **international sphere** (individuals, governments, NGOs, trade/lobby groups, humanitarian groups, TNCs etc.)

The question of personality does not arise in the abstract, but only once an entity attempts to make a claim for breach of its rights.

States (4 characteristics of a State)

Montevideo Convention on the Rights and Duties of States (1933)

A 'person' under international law should possess:

- **Permanent population**
- **Defined territory**
- **Government**
- **Capacity to enter into relations with other states**

Agreement between 20 states. Appeared so sensible that other states came to accept – treaty that has helped to articulate current position.

1. Population

No minimum number of inhabitants.

- Fails to take into account nomadic tribes or the international movement of people. (*Western Sahara (Advisory Opinion)* case recognised the capacity of the Saharwi people to have a social and political organisation in the territory they inhabit).

2. Territory

“Respect for territorial sovereignty is an essential foundation of international relations”: *Corfu Channel (United Kingdom v Albania)*.

It is not crucial that the borders should be defined or undisputed as long as the territory has sufficient consistency e.g. Israel (*North Sea Continental Shelf (Germany v Denmark; Germany v Netherland)*)

- Doesn't matter that borders are disputed.

3. Government

Greater emphasis on the **form and constitutional validity** of the **government** than its effectiveness. Very flexible e.g. Somalia 1991-2001.

4. Capacity to enter into relations with other states

Interpreted to mean that the **state must be independent of other states**, with **no authority over it** apart from international law: *Customs Regime Between Germany and Austria (Advisory Opinion)*.

The dependency of states under formal protection does not deny statehood. A contract is entered whereby one state exercises certain sovereign powers in the name and on behalf of the other state: *Rights of Nationals of the United States of America in Morocco*.

- Independence of states is not only required - it is an attribute of a state – *lotus* presumption.

There is a **strong political dimension** to the **capacity of a state to act**.

- *Montevideo convention* criteria fail to take into account protection of human rights, observance of international law and 'democratic legitimacy'.

Self determination

Self-determination is a right *erga omnes* (obligation owed to all states): *East Timor*.

International community has **regularly denied recognition** of the **status of statehood** where the **principle of self-determination has not been satisfied**. Conversely, if a state arises from self-determination weaker standards of effective government often apply.

- *Uti possidetis* – 'The right of self-determination must not involve changes to existing frontiers at the time of independence.' This is maintained in the interest of peace and stability but denies minorities the right to self-determination and privileges the colonial powers.

Self-determination allows **limited recognition** of **national liberation movements** – in some cases this may limit the capacity of the state to alienate its resources or conclude treaties in respect of territory.

- The **principle of permanent sovereignty of peoples over their natural resources** would **deny colonial powers** any **right to determine territorial delimitations**: *Guinea-Bissau v Senegal*.

East Timor (Portugal v Australia) 1995

Facts

Indonesian military occupation of East Timor since 1975.

Held

Although **East Timor was a 'non-self-governing territory'**, it still had **rights to self-determination** as a **contemporary principle of IL**.

- People of East Timor had **right to self-determination**.

However, because Indonesia (occupying East Timor) was not a party to the proceedings, the Court did not have jurisdiction.

Principle

Principle of self-determination has developed into a **right** in IL - almost as a General Principle: **art. 38(1)(c) SICJ**.

Minority groups

Limited international personality.

Minority rights recognised in the *Minorities Treaty 1919-20* and the *International Covenant on Civil and Political Rights 1966 Art 27* (freedom to express culture) – establishes international jurisprudence of ‘group rights’.

- However, they **do not** have the **separate right to self-determination beyond** that of the **peoples of the whole territory** – minorities do not have the right to secede from the territory (*Reference re Succession of Quebec*)