Introduction

What is Public International Law?

International law regulates relations between States. International law is based on the consent of States, which are sovereign equals:

UN Charter (1945), Art 2(1): 'The Organization is based on the principle of the **sovereign equality** of all its Members.'

Sovereignty involves an entity that receives the habitual obedience of members of an independent political society, and who does not owe obedience to any other persons (Per **Austin**). Currently, in the international system states hold a monopoly on sovereignty (**Brownlie**).

UNGA Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970): 'All States enjoy sovereign equality. They have **equal rights and duties and are equal members of the international community**, notwithstanding differences of an economic, social, political, or other nature.'

Origins of International Law

Per **Brownlie:** "The law of nations was a system of norms derived from a universally applicable **'natural' morality** or attested by the '**Consent of Nations**.'

Per **Harris** (p 9):

- International law has its origins in the **Europe of the 16th and 17th centuries**. It was the law created to govern the diplomatic, commercial, military and other relations of the **society of Christian states** forming the Europe of that time that provides the basis for the present law.
- International law was first extended beyond Europe at the end of the 18th and beginning of the 19th centuries to the states that succeeded the rebel European colonies of North and South America. Turkey was accepted in the mid 19th century as the first non-Christian subject of international law.
- Creation of the League of Nations in 1920: Membership was open to "any state," making the beginning of the present situation in which international law applies automatically to all states whatever their location or character.

Per **Brierly** (Harris p1):

- When we speak of the "law of nations," we are assuming a **society of nations** exists – is there an international society with a sufficient sense of community to allow us to realistically expect more than a fragmentary system of international law?
- The law of nations had its origin among a few kindred nations of Western Europe, which… had a common background in the Christian religion and the civilization of Greece and Rome. They were in a real sense a society of nations. **The rise of the modern state system undermined the tradition of the unity of Christendom.**
- Some sentiment of **shared responsibility for the conduct of a common life** is a necessary element in any society, and the necessary force behind any system of law; and the strength of any legal system is proportionate to the strength of such sentiment.

Development of International Law

Per **Henkin** (Harris p 11):

- **The explosion of new states has made it more difficult to make new law**. It has long been established that law of universal applicability can be made only by universal agreement or acquiescence, the likelihood of which decreases as the number of nations who must agree increases. Thus, in the current system, new universal customary law may become a rarity… General agreement may ne possible only to codify accepted basic principles and practices, or perhaps to adopt some general, imprecise and ambiguous standards to which time and experience may give some agreed content.
- New nations can, however, have a sharp impact on the existing law by "**collective mass resistance**." Customary law cannot retain validity where a substantial number of states reject it. New nations have also had some success in "creating new law in their image and interest" where they have banded together on certain issues but the matters on which they have been successful have been "limited and special," e.g. virtually ending colonialism and racism, and solidarity on some economic issues.

Per **Harris (**p 9):

- **The demise of Oppenheim's doctrine that "States solely an exclusively are the subject of international law" is evident.** The growth of public international organisations in particular bears witness to this. Inter-state treaties are increasingly concerned with the "transnational" affairs of private individuals and companies.
- Per **Friedmann:** The subject matter of international law had increased to cover "**the international law of cooperation**" – international law concerning the common good and common resources, e.g. human rights, the law of the sea, space, etc.

Per **Henkin** (Harris p 12): ***The effect of the end of the Cold War***

- Towards the end of the 20th century, the configuration of the international system into 3 worlds has vanished. "But surely we are not one world. The political system is fluid and its configuration difficult to describe and to characterise."
- The end of the Cold War – disintegration of the Soviet empire and fragmentation of the Soviet Union, and the demise of communism – changed the world order dramatically.
    - **Revival of the UNSC**: Has made it possible for collaboration on important international issues, e.g. the First Iraq War (1990-1).
    - **Decolonisation of the former USSR**: The international system is no longer characterised by intense bipolarism and we have moved into a field of **more fluid political forces**.
    - This development has been positive for the creation of an international "society" that can collaborate on important matters of common concern (**Harris**).

Is International Law "Law"?

Arguments against International law being "law:"

- The continuing reluctance of states to surrender their sovereign powers is potentially damaging to the international legal order (**De Visscher**).
- International law depends on the consent of subjects for its existence.
- There is no supreme legislature for the creation or amendment of international law.
- There is no effective machinery for enforcement –there is no international police force, and there is no supreme court of international law that has compulsory jurisdiction.
- The rules of international law are difficult to ascertain.
- States do not comply with international law.
  – **Positivism**: Only positive law – that is, law that has in some way been enacted or made by authority – can be considered true law.

– **John Austin (1832):** International law is **'positive morality'** set by general opinion. There is **no sovereign** (a person that receives the habitual obedience of members of an independent political society, and who does not owe obedience to any other persons) who commands that international law be enforced on members of the international community. Thus international law is not "law."
– **HLA Hart (1961):** international law has 'primary rules', but **lacks 'secondary rules'** for change and adjudication necessary for ensuring that rules are complied with, e.g.

- Legislature
- Compulsory jurisdiction
- Sanctions

Arguments that International Law is "Law:"

- The definition of law as "positive morality" is flawed and unhelpful.
  - **Brownlie:** According to this definition, much domestic law fails to qualify as 'law' – if what is law boils down to what is enforced, we see that domestic law is broken all the time without any enforcement or consequences. Furthermore, even if this definition were accepted, most international law qualifies.
- **States regard international law as binding** – states do not act as though international law is merely positive morality:
  - **Brierly**: In terms of the number, rather than the political importance, of the occasions on which international law is complied with, it is more honoured in observance than in breach.
  - **Jessup:** The vast majority of international law obligations are continuously, honestly and regularly observed even under adverse conditions. This proves that there is a "**law habit**" in international relations.
  - **Morgenthau**: The great majority of the rules of international law are generally observed without compulsion, as it is generally in the interests of all states to do so. A state may stand to lose more than it would gain by not complying with international law – might become isolated. Thus, the great majority of rules of international law are **generally unaffected by the weakness of its system of enforcement**, for voluntary compliance prevents the problem of enforcement from arising altogether.
  - **Simma and Paulus:** According to the 'Lotus Principle,' states are only bound by their express consent. This seems to be gradually giving way to a more communitarian, highly institutionalised international law, in which states 'channel' the pursuit of most of their interests through multilateral institutions.
  - **Brownlie:** The basis of obligation under international law is that its rules, traditions and institutions enjoy some salience within the international community, meet the social needs of the members of the system and are applied through recognizably legal methods.
  - **Finnis:** The opportunity of furthering the common good of the international community by solving otherwise insoluble interaction and coordination problems is the root of all legal authority. It is not the authority of a ruler that matters, but the authority of the rules.
- **Methods of enforcement are different in the international legal order** (e.g. self-help, UN sanctions etc.)
  - **Self-help** – if a state owes an obligation (e.g. to a corporation, an entity) under a treaty, and it breaches this obligation, that party has the option of adopting a *proportionate* countermeasure, which is a lawful response which would otherwise be unlawful, done with the intention of encouraging that state to come within its obligations.
  - At the multilateral level, can go to the UNSC or GA, which could impose **sanctions** on the country not complying with international law. But per **Friedmann**, for sanctions to be effective, the national interest of the defaulting state in continued

participation in the international system must be at least as great as that in the course of action that caused it to default.

- There is an increasing number of international courts with compulsory jurisdiction
    - Human rights courts in Europe
    - Intra-American Human rights court
    - WTO dispute resolution bodies

Per **Brierly** (Harris p 1):

- It is both practically inconvenient and also contrary to the best juristic thought to deny the legal character of international law.
    - It is inconvenient because if international law is nothing but international morality, it is certainly not the whole of international morality and it is difficult to see how we are to distinguish it from those other admittedly moral standards which we apply in forming our judgments on the conduct of states.
- **Sir Frederick Pollock:** The only essential conditions for the existence of law are the existence of a political community and the recognition by its members of settled rules binding upon them in that capacity. International law seems on the whole to satisfy these conditions.
- The best view is that international law in in fact a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure of "conventional" or treaty-made law.
- The law is normally observed because the demands it makes on states are generally not exacting, and on the whole, states find it convenient to observe it. The imperative character of law is felt so strongly and obedience to its has become so much a matter of habit within a highly civilised states, that national law has developed a machinery of enforcement which generally works smoothly.
- However, the "spiritual cohesion" of international law is weak, and as long as that is so, the weakness will inevitably be reflected in a weak and primitive system of law. Among the most serious shortcomings of the present system are the rudimentary character of the institutions that exist for the making and the application of the law, and the narrow restrictions on its range. There is no legislature to keep the law abreast of the new needs in international society; no executive power to enforce the law; and although certain administrative bodies have been created, these, though important in themselves, are far from being adequate for the mass of business that ought to be treated today as of international concern. There exist also convenient machinery for the arbitration of international disputes and a standing court of justice, but the range of action of these is limited because resort to them is not compulsory.
- The restricted range of international law is the counterpart of the wide freedom of independent action which states claim in virtue of their sovereignty. Law will never play a really effective part in international relations until it can annex to its own sphere some of the matter that at present lie within the domestic jurisdictions of the several states. However, the difference between international law and the law of a state in this respect is one of degree and not of kind – and it tends to be reduced as the practice of referring to international courts, which are able to work out the detailed practical implication of general principles, becomes more common.
- Conclusion: International law has not failed to serve the purposes for which states have chosen to use it. International law is performing a useful and necessary function in international life by enabling states to carry on their day-to-day intercourse along orderly and predictable lines. That is the role for which states have chosen to use it, and to that end it has proven a serviceable instrument.

Problems with Enforcement:

Per **Fitzmaurice** (Harris p 7):

- **Oppenheim**: Law is "a body of rules for human conduct within a community which, by common consent of its members, shall be enforced by an external power."
- **Kelsen:** "Law is a coercive order. It provides for socially organised sanctions… It is a specific social technique that consists in the attempt to bring about the desired social conduct of men through the threat of coercion which is to be taken in case of legally wrong conduct."
- As a result of the prohibition of the use of force, war has been divested of its former basic legitimacy. **The result of this is that international law is now less enforceable than it ever has been throughout its history – for nothing certain or definite has replaced the use of force as a means of settlement.**
- The real foundation of the authority of international law resides in the fact that the states making up the international society recognise it as binding upon them, and, moreover, as a system that ipso facto binds them as members of the society, irrespective of their own individual wills.

Differences Between the UN and League of Nations per ***Brownlie*** (p 14)

- **UN More Flexible –** Whereas under the League there was a close connection between commitment and sanction ("automaticity of sanctions" was a requirement), the UNSC has broad discretionary powers.
- **Use of Force –** Where the League overtly attempted to guarantee international law, backed by a system of collective security, the UN outlawed the unilateral use of force outright save in defined and limited circumstances (Art 2(4) and 51).
- **Requirement of Unanimity of Decisions –** League required consultation and unanimity in the decision-making process, whereas the UN withdrew the right of veto from all but 5 permanent members of the UNSC

Principles of International Law

- **Customary International Law** is binding, in itself, *as law*.
- **Treaties** create binding obligations between parties (if they have been both signed and ratified). Law-making treaties create general norms that are not necessarily limited to the conduct of the parties directly involved – if enough states act in accordance with a law-making treaty (and this is accompanied by the necessary opinio juris), its principle may come to be accepted as customary international law.
- **General principles of law** are the principles recognised by "civilised nations" in their municipal systems. These principles add to the body of law (mostly made up of customary international law) that can be applied by the courts. They are binding as sources of law, but are less frequently used than CIL principles.
- **Judicial decisions** and **academic writings** are a subsidiary means of determining law. Neither is binding, but they can be an important source of evidence of the law. Judicial decisions carry more weight, because, although there is no binding system of precedent in international law, courts will tend to follow their own jurisprudence.
- **Unilateral acts by states** can have legally binding effect in certain circumstances – unilateral statements made by a representative of the state in clear and specific terms with intent to be bound.
- **UNGA Resolutions** are not binding as sources of law, but can indicate both state practice and opinio juris, which goes towards both the statement of existing custom, and the formation of new custom.

SOURCES OF INTERNATIONAL LAW

Important: where does the power come from? Authority, weight, who it applies to, where it applies -> all linked to who has the power.

Overview

There are 3 main sources of PIL:

- **Treaty Law** – a binding agreement between 2 or more independent states (not binding on states who are not a party to the treaty).
- **Customary International Law** (CIL)- is created and sustained by the constant and uniform practice of states in circumstances that give rise to the legitimate expectation of similar conduct in the future (unlike Treaty Law it is binding on all states).
- **General Principles of Law** - universal principles of law common throughout the world

In addition to these 3 main sources of PIL, judicial decisions and juristic writings are considered to be a subsidiary source of PIL. (Art 38 ICJ Statute).

Sources of Law

- Identifying the sources of applicable law is more complicated in PIL than it is in domestic law.
  - No single supranational authority that enacts PIL
- Other factors that prevent straightforward analysis include:
  - Issues of observance
  - Issues of enforcement
  - Interplay between the law and politics.
- Sources of law really needs to examine:
  - How did the law commence ?
  - Where did the law come from ?
  - What is its authority ?
- ***Underpinning principle of sources of PIL is consent of nation states.

Formal Versus Material Sources of Law

Formal: Methods for the creation of rules of general application that are legally binding. Formal sources hardly exist in international law – the main instruments of international law (UNGA resolutions, treaties, etc.) help to codify or develop rules of international law, but customary international law is the only thing that creates rules of general application.

- Various sources of PIL are recognised and utilised.
- Art 38 Statute of the International Court of Justice sets out the conventionally recognised formal sources

Art 38(1)

'The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognised by civilised nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

Material: Provide evidence of the existence of rules, which, when established, are binding and of general application. Treaties and UNGA resolutions give evidence of the attitude of state actors towards different issues.

ICJ Statute Art 38(1)

Per Art 38(1) ICJ Statute (regarded as reflecting customary international law):
The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. **International conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
b. **International custom**, as evidence of a general practice accepted as law;
c. **The general principles of law** recognized by civilized nations;
d. Subject to the provisions of Article 59, **judicial decisions and the teachings of the most highly qualified publicists of the various nations**, as subsidiary means for the determination of rules of law.

Per Art 59, "The decision of the Court has no binding force except between the parties and in respect of that particular case.

Is there a Hierarchy Between Sources of Law?

There is no hierarchy between the different sources of law, except in the case of a **JUS COGENS.** A jus cogens is a peremptory norm of international law recognised by the international community of states as a rule binding on all states from which no derogation is permitted. Examples:

- Prohibition of the use of force
- Of aggression
- Of slavery
- Of genocide
- Etc.

LEX SPECIALIS: A more specific rule will trump a general rule, e.g. Rule found in a treaty will generally trump a rule of customary international law.

CUSTOMARY INTERNATIONAL LAW

Two Principal elements, per ***Legality of Nuclear Weapons Case***:

1. ***Common and continuing State Practice***, objective element
2. ***There has been acceptance by practising states that shows behaviour is obligatory 'Opinio Juris'***, subjective element; do states act in accordance with this rule because they think they are bound to do so?

State Practice:

- State practice needs to imply regularity and consistency
  - 'state practice must be common, consistent and concordant '(Fisheries Jurisdiction case)
- State practice need not encompass all states but there needs to be a degree of participation from the states who are most likely to be affected by the establishment of the rule (North Sea Continental Shelf case) –should also an absence of substantial dissent (Nicaragua case).

- Threshold for state practice has been described as 'the general tolerance of the international community in relation to the custom / practice in question' (Anglo-Norwegian Fisheries case)

Fisheries Jurisdiction (UK v Iceland):
Facts: The ICJ held that the extension of a fishery zone up to a 12nm limit "appears now to be generally accepted."

Rule: A rule that is generally accepted is capable of constituting customary international law. **Universal acceptance is not required**.

North Sea Continental Shelf
Facts: Arose out of a dispute b/w Germany and Denmark on the one hand, and Germany and the Netherlands on the other. Disputes concerned delimitation on maritime boundary b/w the 3 countries in the North Sea. Germany argued a treaty between D and N supporting the application of an "equidistance rule," which Germany wasn't a party to, left Germany with a substantially smaller continental shelf.

Issue: Whether the equidistance rule needed to be applied by the court. Germany argued the court couldn't apply the rule b/c G wasn't a party to the treaty and thus couldn't be bound by it; also equidistance rule is not a principle of customary international law.

Outcome:

ICJ held the equidistance rule didn't reflect customary international law. For a rule in a treaty to become a principle of CIL:

- It must have a **fundamentally norm-creating character** (can't be something that only applies in a bilateral situation);
- There must be **widespread and representative participation**
- **State practice must include states whose interests are specially affected** (e.g. in this case, there would need to be many coastal states as parties to that treaty);
- Practice should be over "**a considerable period of time**." But provided consistency and generality of practice are established, a long practice is not necessary. But during the period in question, state practice should have been "**extensive and virtually uniform**"(in this case, the ICJ wasn't convinced enough time had passed).

N.b. Court also rejected G's approach – the court said that equitable principles were to be applied.

This case if often cited to support the principle that state practice is to be judged on a case-to-case basis; whether or not state practice exists is not a mathematical exercise (Per Tanaka J, dissenting).

Nicaragua Case:
Rule**:** It is not enough to look at the practice of the states in dispute when determining state practice – must look to the practice of other members of the international community.

Asylum Case:
Facts: Columbia granted asylum to a Peruvian refugee at its embassy in Lima. Argued that Peru should let the asylum-seeker leave the country on the basis that "American international law in general" supported such a decision.

Issue: Can regional/local custom form the basis of customary international law?

Outcome: **Local/regional custom** is capable of constituting customary international law. "**Constant and uniform usage, accepted as law**" must be established by the party seeking to prove the existence of customary international law. In this case, this was not established as Peru had repudiated the obligation in question by failing to ratify the Montevideo Convention.

What materials may assist in evidencing state practice?
Per ***International Law Commission*** and ***Brownlie:*** May come in the form of treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisers, the practice of international organisations, policy statement, press releases, official manuals on legal questions, including manuals of military law, executive decisions and practices, and comments by governments on work of the International Law Commission.

Per Read J in ***Anglo-Norwegian Fisheries***, Actions Rather than Words: "The only convincing evidence of state practice is to be found in seizures, where the coastal state asserts its sovereignty over the water in question"

Opinio Juris:

State practice in itself is not sufficient. For a rule to make up customary international law, it must be accompanied by acceptance that it is binding in law – state practice "should have occurred in such a way as to show **a general recognition that a rule of law or legal obligation is involved**" (***North Sea Continental Shelf***). This distinguishes customary international law from mere comity, which is not accompanied by a feeling of legal obligation: ***Nicaragua; Diallo.***

Opinio juris can be difficult to establish (Per Sorensen and Tanaka JJ in ***North Sea Continental Shelf***).

Legality of Nuclear Weapons
Facts: The court declined to follow a rule prohibiting the use of nuclear weapons simply because no recourse had been made to use them in 50 years. Held that many states reserved the right to use them as a part of a deterrence policy, thus their non-use was not conclusive.

Rule: It is necessary to show that this "constant and uniform" non-use resulted from **a feeling of obligation on the part of states generally**. In this case, members of the international community were "profoundly divided" on whether the use of nuclear weapons was legal – thus, although state practice supported that a rule of custom had formed, the necessary opinio juris was not present for the matter.

Issues with Customary International Law

Per ***Cassese***: Post WWII, there were more states forming the recognised international community (from 40 to about 200), and the international community was divided into three "worlds," which were ideologically divided and economically disparate. Thus it has become much more difficult for new rules to receive the support they need.

"Persistent Objector"

A state may exempt itself from the application of a new customary rule by persistent objection during the norm's formation. Evidence of objection must be clear, and there is a rebuttable presumption of acceptance.

Can a group of POs prevent a rule from becoming a rule of customary international law? Per Tanaka J in ***South West Africa***, giving a "right of veto" to those states cannot have been what was foreseen in Art 38(1)(b) of the ICJ statute.

Anglo-Norwegian Fisheries
Facts: Norway pushing out territorial boundaries because of difficulty of measuring its boundaries b/c of geography – low water mark vs. drawing a straight line between outmost rocks. Court agreed that straight baselines are the appropriate method; there had been a general toleration by other states of N's method. Even the UK hadn't contested the method for over 60 years. Because of the prolonged period of silence by the UK, Norway's measuring method was considered warranted.

Outcome: UK claimed to be PO, but ICJ disagreed. Said the UK had gone along with Norway's method for at least 60 years. ICJ said Norway's measuring method was in accordance with customary international law.