

JURD7270: Law in the Global Context

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1. Introduction to LGC: Globalisation

OVERVIEW

Three main fields of the course

1. Public international law,
2. Private international law, and
3. Comparative law.

Overview of case studies

Case Study	Topics covered
Case Study 1: Whaling	International institutions; law of the sea; international and national dispute resolution and their interface
Case Study 2: Julian Assange	Comparative law; extradition; diplomatic protection; asylum
Case Study 3: Castel Electronics v TCL Air conditioner case	Private international law; exercise of extraterritorial jurisdiction by Australian courts; international arbitration and recognition and enforcement of arbitral awards
Case Study 4: International child abduction	Private international law (family); relationship between domestic and international law; intersection treaty frameworks

Methodology

- Problems/questions arise in an unstructured domain lacking any single consistent, commonly held framework of knowledge.
- Analysis needs to be attentive/responsive to audience needs and changing situations
- Focus on *how* to approach a question as to *what* to say.

GLOBALISATION AND AUSTRALIA

DEFINITION

- An increase of transnational actors with political negotiation power, global threats, challenges beyond the capacity of states to regulate, and far-reaching changes in societal and political integration, Stephan Hobe 'The Era of Globalization as a Challenge to International Law' (2002) 40 *Duquesne Law Review* 655
- Signifies 'a social condition characterized by the existence of global economic, political, cultural, and environmental interconnections and flows that make many of the currently existing borders and boundaries irrelevant', Manfred Steger, *Globalization – A Very Short Introduction* (Oxford University Press, 2003) 7

What does Globalisation mean?

- Increasing in interactions / economics / trade.
- Movement of capital and people (labour).
- It is pervasive.
- Dynamic? Is globalisation ever-increasing?
- Language; global terrorism.
- Globalisation is more complicated than merely stating that borders are porous. It is the de-territorialisation of social, political, economic and cultural life.

Is contemporary life more globalised than previously?

- Instantaneous nature of electronic communications.
- The ease of mass communication.
- The dissemination of news on global events is real-time and instantaneous.

Dimensions of Globalisation

- Increased movement, dispersal or interconnectedness of:
 - People;

- Things;
- Migration of other species;
- Ideas;
- Structures of private and public governance
- Data
- Our ecosystems

Insights from the readings

- David Bederman describes the three periods of imperial globalisation
 - 500 BCE to 500 CE – Classical antiquity
 - 1500-2880 – The age of exploration and colonization
 - 1850-1914 – Age of imperialism
 - He argues that 'the primary impulse for globalisation in the ancient world was the thrust for empire, but that the demise of the German, Austro-Hungarian, Russian and Ottoman empires in the early 20th century marked the end of this aspiration.
- Adam KcKeown observes that 'over the nineteenth century... the cult of newness slowly replaced millenarian visions and enlightenment dreams, entrenching itself as a description of the secular present.

2. International law as 'law'

PUBLIC INTERNATIONAL LAW VS. PRIVATE INTERNATIONAL LAW

OVERVIEW

- Public international law is interaction between states.
- Private international law is a body of law that private entities use to regulate contracts/transactions between themselves.
- Many areas of law are influenced by, reflect or implement international law or international forms of regulation.
- The objective is to understand how international law interacts with the domestic Australian system.

DEFINITIONS

No	Term	Definition
1.	International	Designating or relating to relations between two or more nations or organisations made up of nations; agreed, recognised, carried on between, or constituted by national or national govts.
2.	Transnational	Extending or having interest extending beyond national bounds or frontiers; multinational
3.	Global	Relating to or encompassing the whole of anything or any group of things, categories etc; comprehensive, universal, total, overall. Of, relating to, or involving the whole world, worldwide; (also in later use) of or relating to the world considered in a planetary context.

Question: How would international law, transnational and global law differ?

Eg. World Anti-Doping Association – WADA is a hybrid of half states and half sports associations and administered by ASADA. WADA is bolstered by government international law to provide policy which is implemented through transnational law. Law which binds most athletes in relation to the WADA code is contract law.

PUBLIC INTERNATIONAL LAW VS PRIVATE INTERNATIONAL LAW

What is public international law?

- **Public international law:** international law that was developed to regulate, primarily, the conduct of national states and maintain or defend their autonomy as such.
- Examples of issues:
 - When is it lawful for one nation state to use force against another nation state?
 - Eg. Nuclear proliferation – UN Security Council
 - Over what territory does a national government exercise primary authority (to the exclusion of another national government) and how should a national government conduct itself beyond the reach of that territory (eg on the high seas)
 - Eg South china sea – freedom of navigation exercises; border disputes – Palestine and Israel
 - What legal restrictions apply to a nation state's treatment of foreign nationals within its own territory (in particular, say, foreign diplomats and/or persons seeking asylum)
 - Eg. International Court of Justice
 - What legal consequences may flow from one nation taking action within its own borders that has a negative or damaging effect beyond those borders
 - Eg. Trans-national environmental pollution, human rights abuses that are internationally condemned
 - What is the effect of a state breaching a treaty agreed with another state?

What is private international law?

- **Private international law (or conflict of laws)** – *Australian law* (national, municipal or domestic law) that concerns legal issues or disputes that have a connection with a foreign nation, a foreign territory and/or a foreign system of law. Some private international law is derived from public international law.
- Examples
 - May an NSW-based company be sued in an NSW court for a tort committed in Singapore against a Japanese national?
 - May a US travel company be sued by a US national making a claim in tort arising from injury sustained while the US national was aboard a cruise around Australia and the Pacific Islands?
 - What law should an NSW court apply to a claim by an Australian national against a Saudi Arabian national for breach of contract, when the contract in question states that it is governed by Saudi Arabian law? **Yes**
 - When will a marriage solemnised outside Australian under foreign law be recognised as lawfully valid in Australia? **Yes**
 - Recognition of private rights and marriage status – under international law
 - International corporations state to state – implementing obligations public.

INTERNATIONAL LAW: 100 WAYS IT SHAPES OUR LIVES (ASIL, 2006)

Three examples of how it affects Australians

- Access to the internet – regulated by the ICAAN (Internet Corporation for Assigned Names and Numbers), a private corporation.
- UNESCO – Great Barrier Reef – protection of the coral reef, downgrade of critical ports. Tasmanian Dam case – UNESCO World Heritage Convention framework for GBR monitoring.
- Mail – parcel post by public contractors / private regulated by the Universal Postal Union. Growth of online parcel delivery.
- Aerospace – airlines

Three examples of international laws that are US-based

- Immigration law – use of passports and visa requirements to maintain sovereignty
- Importation and exportation – customs taxes – eg. alcohol and tobacco

Uti posseditis

- Boundaries – colonial administrative boundaries laid down (generally without regard to geographic or demographic groups in the land)
- International law may bring benefits to some but not to others.

INTRODUCTION TO PUBLIC INTERNATIONAL LAW

- System of law without any single, apex legislature, executive or judiciary. Operates among agents (States) that are formally equal in sovereign authority, though in fact unequal in power/resources
- Confers legal rights and obligations on states and international institutions and *in relation to certain types of conduct, norms and forums*, on individual, “peoples” and/or minority groups
- Other entities/agents may be indirectly or effectively bound (eg. by being made subject, via national implementing legislation to norms that reflect international law or by voluntarily accepting international norms).

INTERNATIONAL LAW AS ‘LAW’

“For some “deniers” international law’s weak decentralised features make it less of a legal system; for others [‘idealists’ or ‘apologists’], international law’s decentralised features are irrelevant to its legal character; and yet for others [‘reformists’], these features are a reason to change international law, to turn it into something more resembling domestic law. Finally, there are those [‘idealists’ or ‘apologists’] who believe that we should simply strive to better understand international law as a different type of law, and those [‘critics’] who find the whole debate to be a misguided effort that prevents us from asking the real questions about the ends of international law”

Frederic Megret, ‘International Law as Law’ in James Crawford & Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 64-92, 73.

Standard defences of international law as 'law'

- Much domestic law is effective in conditioning conduct despite not being back by any real threat of sovereign sanctions
- International law is operating everywhere and is generally obeyed. Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time
- Even states that disobey international law seek to rationalise their actions in international legal terms – it is significant... that when a great of international law is alleged by one party to a controversy, the act impugned is practically never defended by claiming the right of private judgment... but always by attempting to prove that no rule has been violated – James Brierly, *The Law of Nations*, (6th ed 1963) 42.

Similarities and differences between international and domestic law

- Similarities
 - Internalise values of the legal system
 - Different understands of law may operate at a domestic and international law level – eg. contract law
- Differences
 - Enforceability –
 - Methods of enforceability internationally include economic sanctions, diplomatic sanctions, self-help. The community can coerce, motivate other states.

Ways of thinking about international law - Megret

- Five categories of responses international law
 - i. Deniers – international law is meaningless because states have a choice of whether to participate; international law's weak decentralised features make it less of a legal system
 - ii. Idealists – higher goals of justice
 - iii. Apologists – norms based, not a great system, but it is a system that works and is a good way of organising things, not a perfect institution. References the amount of international litigation as evidence that there is a working system.
 - iv. Reformist – accepting that there is a system of international law, but there are reasons to change international law. Reforms include separation from state actions, eg. world governance, UN
 - v. Critics – horizontal system of law, what is it actually doing? International law evolved out of Europe and the international law reflects concepts of western European power. Considered what interests, power hierarchy, institutions are embodied. Debate about whether international law is law is a misguided effort that prevents us from asking the real question about the ends of international law.