

Introduction to International Law

What is international law?

- The law governing the relations between States as independent entities (but also, increasingly certain other actors)
- A law created by States for States

History

- International law was said to have emerged symbolically following the Peace of Westphalia treaty in 1648
- There was a need to live in conjunction with each independent territorial unit, so international law was posited and created by the States to create rules to regulate their relations.
 - Contrast natural law: pre-existing law that is to be discovered e.g. God's law, causation in nature, reason
- This meant that the law was 'of coordination'
 - States were trying to live apart peacefully and 'coordinate' their existence.
 - The rules were characterised by rules of prohibition e.g. 'thou shalt not interfere in my domestic affairs'
 - Each state was able to regulate their own domestic affairs.
- After the period of globalisation at the end of the 19th century, common problems arose, so the laws became 'of cooperation'
 - Communication – rise of telegraph, postal services and railways
 - Spread of disease -epidemics
 - Environmental problems
- They cooperated through creating international organisations
 - This meant that international law is no longer just State-centred and there were other entities at the focus of international law, with many more subject matters being governed by international law.
 - There was an emergence of human rights in the late 20th century, for example, when the individual started to derive rights by virtue of the international legal order (they always had rights by virtue of natural law, and some by virtue of domestic law)
 - Thus, in 1990, it was often said that the Westphalian System of international law was either dying or dead, because that system was State-centred.
- They also changed the nature of the law from rules of prohibition to an obligation of means (best efforts)
 - E.g. States shall strive to reduce their carbon emission, using their best efforts and in the light of their level of development
 - They do not have to achieve the end, because it is not an obligation of result, but an obligation of means

How to prove the existence of international law?

Inductive approach (Louie Hemkin)

- Most States, most of the time, respect most rules of international law.
 - E.g. most States have an office of international law in their Attorney General's Department, or something equivalent. It was law created by them, and for them, so they believe it exists.
- Even though there are breaches of international law when national interests are stake, if you did not have murder, you would not need prohibition on murder.

Sociological approach

- Where you have society, you have law.
 - As soon as you have two States that co-exist, rules are going to emerge to regulate their co-existence, even if at a minimum (such as the law of coordination)
- Not all legal system look the same
 - Even the mafia, or a queue in the post office can be a legal order where rules emerge to regulate the relations between the subjects of that order.
 - The international legal order and the domestic legal order, for instance, are not the same type of legal system.

Differences between international legal order and the domestic legal order

Sources of law – the means of creation of law

- States themselves create the law which they're subject to

The international legal system is horizontal, whilst the domestic system is vertical

- There is no centralised legislator in the international legal order.
- If the State considers that one of its rights have been infringed, it must in the first instance have recourse to self-help.
- There is an attempt at centralisation with the creation of UN and the security council, but it is very partial.
- Contrast domestically, a victim of assault can call the police to enforce the law.

The interaction between international law and domestic law

From the perspective of international law, domestic law is a mere fact

- Authority: Certain German Interest in Polish Upper Silesia 1927 Permanent Court of Justice decision
- It is not completely irrelevant, because it is still State practice, but it is not law that will be applied internationally as international law.
- Different to jurisdiction (when can domestic law apply to nationals and things abroad as domestic law)
- From the perspective of international law, international law takes priority over domestic law.
 - Note that different domestic law systems may think differently e.g. Australia thinks domestic law triumphs over international law
- Unlike domestic law, we do not necessarily need to dwell upon the facts because analogy is not a source of law internationally – no principle of stare decisis

Features of the international legal system

The pillars of the international legal system are a body of rules relative to the subjects of a legal order

- Subjects – who are the relevant actors in the legal order?
- Body of rules on how to create the law – sources
- Body of rules on how to settle disputes -dispute settlement
- Consequences of a breach of rule in the system – state responsibility

Subjects

Defining Subjects and Distinguishing Objects

Subject of international law – addressee of rights and obligations with the capacity to exercise those rights

- Contrast a mere object or actor of international law – the whale is an addressee of rights, protected by certain rules of international law, but it does not have the capacity to exercise those rights so it is not a subject.
- Legal personality – benefit from protection by virtue of international law.

What does capacity mean?

- Being able to bring a claim internationally and conclude a treaty
- Authority: Reparations for Injury Advisory Opinion
- Contrast: an Australian national may benefit from certain human rights protection by virtue of the international legal order, making them an object benefiting from a degree of legal personality, but they cannot bring a claim by virtue of the international legal order (no European Court of human rights, maybe some UN quasi-judicial bodies)

States as the Primary Subjects of International Law

Range of actors in the legal system

- The State has full capacity as a subject
 - It can do anything and everything in international law such as conclude a treaty on any other topic it wants
 - Rationale: international law exists by virtue of the existence of two or more States
 - If you got rid of the States, you would not have international law (note: if you got rid of IO, you would still have international law)
 - Created by them, because of them, for them.
- Other subjects, who have sufficient capacity to exercise their rights, are still limited in their capacity and more limited in their legal personality – they can do some things, but not others.

- E.g. international organisations (NOTE: intergovernmental organisations NOT non-governmental organisations which are a product of domestic law) can conclude treaties with States such as headquarter agreements, and bring certain claims (but not all, so they don't benefit from the same extensive degree of personality as the State) – authority: Reparations for Injury Advisory Opinion
- Entities who are not subjects but have a degree of legal personality
 - e.g. the individual who can bring claims in some parts of the world, like the European Court of Human Rights, have more capacity and legal personality than those in Australia, but they cannot conclude a treaty.
 - E.g. the “investor” benefits from certain rights – protections against sovereign, non-commercial risk when they invest in another state- and in some circumstances they can bring claims (investor state dispute settlement)
 - E.g. the belligerent can conclude certain treaties, such as cease fire agreements (NOTE that it can be found to be a domestic law instrument – e.g. ABIA case)

Reparations for Injury Case (advisory opinion of the International Court of Justice)

Facts:

- Court Bernadot was from Sweden, who was an agent for the UN and on a mission in Palestine.
- He was killed whilst on mission for the UN

Issue:

- Who could bring a claim for reparation of the injury suffered by him and his family? Was it the UN, because he was an agent and worked for the UN, or only the States of nationality (Sweden)?
- For the UN to bring a claim, they must have a degree of personality. Otherwise, if only the States could bring a claim, the UN would not have a distinct legal personality.

Held: International organisations, more specifically the UN, are subjects of international law so the UN could bring a claim

- However, the court noted that the subjects of international law are not equal – the State is the full and primary subject of international law, but the IO is only a secondary subject and thus not benefit from the same degree of legal personality as the state
 - Rationale: International law is created for the regulation of relations between the States, whereas the IO is created by states through treaties between the states.
- How is the extent of the legal personality of the IO determined?
 - Through an exercise of interpretation of the treaty that creates it – the treaty is its constitutive instrument, and it is interpreted like a Constitution
 - The IO will have those powers explicitly conferred, but there are also powers that can be implied from the Constitution
- The IO can bring a claim, conclude treaties (IO-state treaties and IO-IO treaties)

Defining the State: Constitutive Elements of the State (The Montevideo Convention criteria and the Badinter Commission's Contribution)

Why is it important to determine whether an entity is a State?

- They are a full subject of the international legal order.

What is a State?

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

(1934) 165 LNTS 19

Article 1

The State as a person of international law should possess the following qualifications:

- permanent population
- A defined territory
- A government; and
- Capacity to enter into relations with the other states

- Regional treaty that relates to the Western Hemisphere (Americas), and not applicable to Australia. HOWEVER, it is a convenient location to find enumerated the conditions of statehood
- Fairly modern definition (beforehand, effectivity or power and recognition defined the State)

Opinion n°1

Arbitration Commission, EC Conference on Yugoslavia (Badinter Commission)

29 November 1991

1. b) ... the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterised by sovereignty.

- Context: break up of the former Yugoslavia of the European community in the 1990s, so the EC and US set up the Bandinter Commission in their conference to hand down a number of opinions of law in relation to the break up
- Not applicable to Australia, but we refer to it as an authoritative statement as to the constitutive elements
- A much more simply definition, as it picks up the first criteria of the Montevideo Convention
- ‘characterised by sovereignty’ – sovereignty or independence flows from the existence of the first three criteria (territory, population and a government in effective control)
- Recognition can comfort the existence of a State, but it is not a condition. It is merely declaratory, but it can nudge a State over the edge into existence.

Territory for the purposes of the law, including extent of territory, State boundaries, and changes in territory (means of acquisition of territory; State succession and uti possidetis noted). In re Duchy of Sealand, Deutsche Continental Gas Gesellschaft, Nicaragua Case, North Sea Continental Shelf Cases; Sovereign Order of Malta.

Holy Sea and Sovereign Order Malta do not have territory, so they are not States, but they have legal personality.

SIZE DOES NOT MATTER

GEOGRAPHIC UNITY IS NOT IMPORTANT

- e.g. Mainland Australia is not attached to Tasmania, but it is the same State

A TERRITORY MUST BE A NATURAL FORMATION

Duchy of Sealand case

Facts:

- German nationals did not want to pay tax in Germany, so they occupied an anti air craft platform that had been abandoned after it was used in WW2 by the British
- At all relevant times, it was at the High Seas, so it was not another State’s territory
- There, they declared the independence of the Duchy of Sealand – distributed passports, conferred nationality
- As a result, they had no obligation to pay German taxes, because there was no dual nationality for Germany (if you took up another nationality, you would lose your German one)

Issue: Was the Duchy of Sealand a State?

Held: No, it was not a natural formation and therefore not a territory for the purposes of a State. They remained German nationals liable to pay their taxes.

Judgement:

The ‘Duchy of Sealand’ fails to satisfy even the first condition [of Statehood - territory] as it does not possess a State territory within the meaning of international law.

The former anti-aircraft platform is not situated on any fixed point of the surface of the earth. Rather, the miniature island has been constructed on concrete pillars. The preponderant view of legal writers is that only a part of the surface of the earth can be regarded as State territory.

[...]

Finally, [the Defence’s] contention that, under international law, territory can be artificially extracted from the sea, does not provide a basis for the designation of the so-called “Duchy of Sealand” as State territory. The formation of land by the erection of dykes or dams and similar structures on the sea- shore or in coastal waters is not comparable to the construction of artificial islands such as “Sealand”. The position of dykes results in the enlargement of existing territory by the acquisition of a new piece of the surface of the earth directly adjacent to existing State territory, which assumes the same status as that territory.

In re Duchy of Sealand, Federal Republic of Germany, Administrative Court of Cologne, 3 May 1978, (1978) 80 ILR 683

ALTHOUGH THE TERRITORY ITSELF MUST BE A NATIONAL FORMATION, YOU CAN ATTENGE TO IT AN ARTIFICIAL EXTENSION

- E.g. Johnston's Atoll (?) or Kalama Alta (in the Indigenous tongue) – the Americans during WW2 build an airstrip to extend the territory, which was originally a tiny island in the middle of South Pacific. It still remains State territory

THE DEFINITION OF AN ISLAND

[35] ... naturally formed areas of land which are above water at high tide.

[37] ... International law defines an island by reference to whether it is "naturally formed" and whether it is above water at high tide, not by reference to its geological composition.

Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, pp. 644, para. 35 & 645, para. 37.

- Refers in [35] to natural formation – if your island is made by guano, it is still a territory for the purposes of international law, because it is a natural formation produced by birds.

WHAT DOES TERRITORY ENCOMPASS?

"The basic legal concept of State sovereignty in customary international law expressed in, *inter alia*, article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory."

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. The United States of America), Merits, ICJ Reports 1986 at 111, para. 212.

Territory includes:

- the landmass – including rivers and lakes
- maritime territory – comprised of:
 - internal waters
 - including a harbour or a port
 - no right of innocent passage through internal waters – a State must seek consent before any of its vessels can enter
 - territorial sea
 - 12 nautical miles from the baseline (the low watermark or the low tide)
 - Any coastal State has a territorial sea
 - The State is sovereign over the territorial sea
- Airspace above the landmass and maritime territory
 - It goes as high as the lowest point at which a satellite can orbit (~60 miles)

Other areas where States have sovereign rights:

- Continental shelf
 - 200 nautical miles from the baseline, beyond the territorial sea
 - The State has sovereign rights, but the State is not sovereign (unless the continental shelf also happens to be within the territorial sea)
 - Sovereign rights: exclusive rights of exploration and exploitation of any resources in the sea bed
 - If you have a natural prolongation, so your continental shelf naturally goes further than the 200nm, you can put in a claim for an extension up to 350nm
 - You do not have to proclaim the continental shelf (which is a sea bed and the subsoil)
 - Even if you do not have it physically as a coastal state, by way of legal fiction you will have a continental shelf
- Exclusive economic zone
 - In the water column above the continental shelf
 - The State must proclaim it
 - Extends 200 nautical miles from the baseline
 - Confers sovereign rights on the coastal state – exclusive rights of exploitation and exploration of resources in the water column e.g. fish
 - It also confers obligations e.g. environmental protection