LAWS1023: PUBLIC INTERNATIONAL LAW

Course Notes

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University of Sydney
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Topic I: Nature, Scope and History of Public International Law

1. Public International Law: An Introduction

1.1 What is Public International Law?

International law is really a description of an entire legal system: the international legal system. It is an international legal system by which legal rules are created in order to structure and organise societies and relationships. It acknowledges the influence of political, economic, social and cultural processes upon the development of legal rules.

Within this international legal system are, for example, constitutional laws, property laws, criminal laws and laws about obligations, although these terms are not normally used.

1.2 Relevance of Public International Law

International law is law and has relevance to our everyday lives. For example, international law enables international telephone calls to be made, overseas mail to be delivered and travel by air, sea and land to occur relatively easy.

1.3 The International Community, International Law and the United Nations

The United Nations system is central to the international community and to international law. While international law lacks a consistently effective centralised system for the determination and enforcement of international law, the United Nations offer the possibility of some centralised action. It has some of the institutional structures – a body comprising some nominal representative of nearly all states (the General Assembly); a body with executive powers (the Security Council); and a court (the International Court of Justice) – but the limitations on the powers of these institutions means that they cannot be considered as an effective equivalent to national institutions.

The General Assembly as the plenary body controls much of the work of the UN. It meets in regular sessions for approximately the last quarter of every year (with sessions spilling over well into the new year), and occasionally holds special or emergency sessions to consider specific issues. In addition, the General Assembly:

- Approves of the budget
- Adopts priorities
- Calls international conferences
- Superintends the operations of the Secretariat and of numerous committees and subsidiary organs
- Debates and adopts resolutions on diverse issues

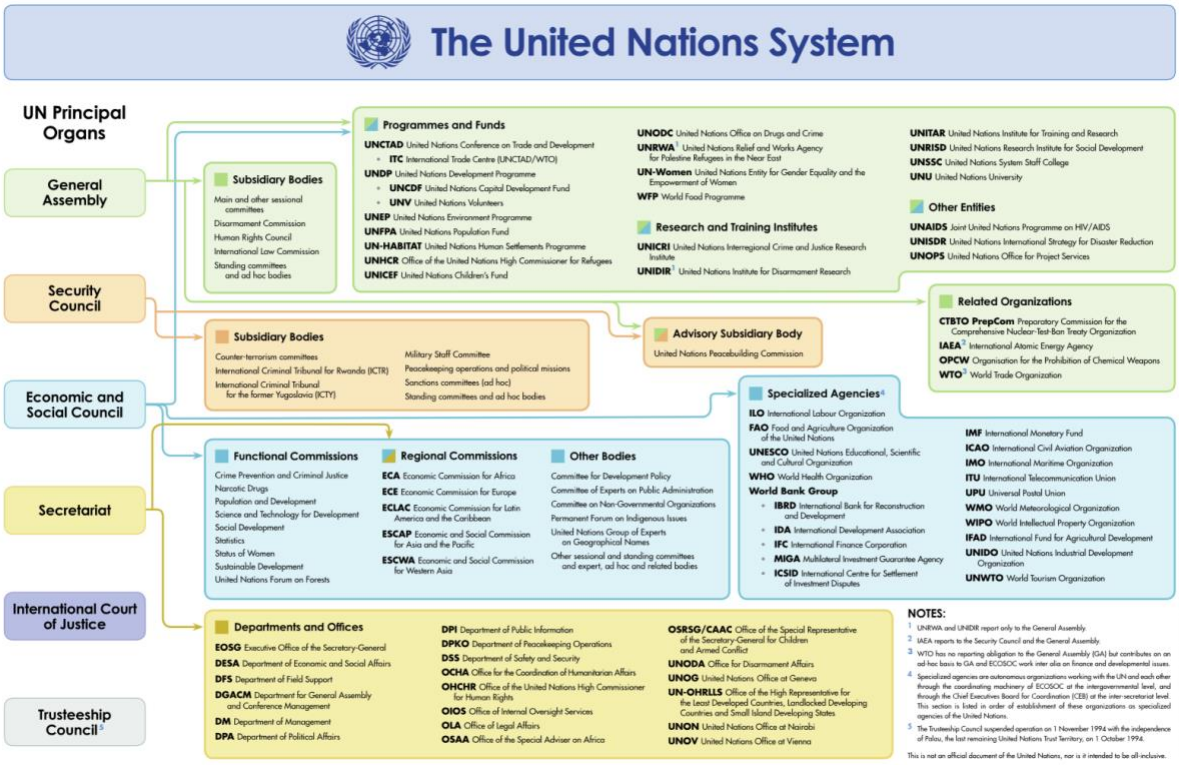
It also played a major role in supervising European decolonisation, and has also become involved in human rights supervision and election-monitoring in independent countries. Many subsidiary bodies were created by the General Assembly:

- UNICEF
- UNHCR
- UNCTAD
- UNDP
- UNEP

Much of the work of the General Assembly is done in permanent or ad hoc committees.

The Security Council has primary responsibility for the maintenance of international peace and security, and unlike the General Assembly is able to take decisions which are supposed to be binding on all members of the UN. The 15-member Security Council is dominated by its 5 Permanent Members (China, France, Russia, the UK and the USA), each of which has the power to veto any draft resolution on substantive matters. The 10 non-permanent members are elected for 2-year periods by the General Assembly.

The 4 other 'principal organs' of the UN, established by the charter are: the Secretariat, the International Court of Justice, the Trusteeship Council, and the Economic and Social Council.



2. Theories of International Law

In order for the principles of international law to be understood fully, it is important for its underlying assumptions to be made clear. **This is particularly necessary with international law as many of the assumptions about who is subject to international law and the rights and obligations arising from international law must be analysed before the substance of international law itself can be determined**.

- **J. Brierly, The Law of Nations (1st edn, 1928)**: Positivist view: the law is merely a sum of the rules by which these state-persons have consented to be bound.
- **H.L.A Hart, The Concept of Law (1961)**: international law lacks legislature, courts with compulsory jurisdictions, and centrally organised sanctions. The absence of these institutions means that the rules for states resemble… social structure, consisting only of primary rules of obligation…
- **Reciprocal entitlement theory**: obligation of states are enforced by a kind of *quid pro quo* idea whereby a breaching state will have their benefits breached. As such, states are compelled to hold their agreements in their own national interests.

3. Critiques of International Law

- Eurocentrism/Post-colonial critiques/ “Third World” critiques
- Human Rights as Favouring the Individual
- Claims to Universality
- Feminist Critiques
- Critical Legal Studies

Topic II: Sources of International Law

1. Statute of the International Court of Justice

1.1 Article 38:

1. 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 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 states**;
    d. Subject to the provisions of Article 59, **judicial decisions and teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Notes

- Article 38(1)(a): for example, treaties (can be bilateral or multilateral)
- Article 38(1)(b): customary international law (law which emerges from the practice and views of states)
- Article 38(1)(c): General principles of law which can be derived from domestic law or in some circumstances the way which international law operates
- Article 38(1)(d): namely decisions of courts; both international and domestic and academic writing
- Article 38(2): this rarely invoked provisions allows the parties to request the Court to reach a decision based not only on strict rules of law, but on general conceptions of fairness, good judgement and equality. This provision could be useful if the parties were bound by a rule of international law (of a non-fundamental nature) that on the particular unusual facts of a case would produce an undesirable solution for both parties. It might then be disapplied by mutual consent.

2. Treaties

Treaties are now the most important source of international law. They offer States a deliberate method by which to create binding international law. The efforts of the International Law Commission (ILC) and the United Nations have produced a number of significant multilateral treaties.

Breach of a treaty is a violation of international law and gives rise to consequences. Wronged states are enabled to countermeasures such as taking away reciprocated benefits or rights.

Treaties only bind the parties to the treaty – as opposed to customary international law as will be discussed. Can be multilateral (involving multiple States) or bilateral (involving 2 states).

Only the Geneva Convention of 1949 binds every state regarding the treatment of prisoners of war.

3. Customary International Law

Customary international law derives from the practice of States. In particular, State practice may give rise to customary international law when that practice is **uniform, consistent and general**, and if it is coupled with a **belief that the practice is obligatory** rather than habitual (the ***opinio juris***).

There is, in addition, some debate as to why State practice can give rise to binding international law at all and as to whether a State's continued objection to an emerging rule can absolve it from the scope of the rule (the '**persistent objector**').

3.1 State Practice

M. Akehurst, 'Custom as a Source of International Law':[1]

[1] *47 British Yearbook of International Law 53* (1974-75).

- State practice means any act or statement by a State from which views about customary law can be inferred; it includes **physical acts, claims, declarations *in abstracto*** (such as General Assembly resolutions), **national laws, national judgments and omissions**. Customary international law can also be created by the practice of international organisations and (in theory, at least) by the practice of individuals.
- As regards the quantity of practice needed to create customary rule, **the number of States participating is more important than the frequency or duration of the practice**. Even a practice followed by a few states, on a few occasions for a short period of time, can create a customary rule, provided that there is no practice which conflicts the rule (**uniform and consistent),** and provided that other things are equal…
- **Major inconsistencies in State practice can prevent the creation of a customary rule**; such inconsistencies cannot be explained away by saying that one type of practice is more important than another or that the practice of some States is more important than the practice of others.

Note that state practice does not need to be 'perfect': *Nicaragua Case* below.

When establishing a new custom, the practice of states who are most affected by the new law carries more weight than a state to which is not as affected.[2]

International Law Commission's Non-Exhaustive List (1950):

- Treaties
- Decisions of international or national courts
- National legislation
- Diplomatic correspondence
- Opinions of national legal advisers
- The practice of international organisations

3.2 *Opinio Juris* (belief that the practice is obligatory)

[2] *North Sea Continental Shelf Case.*

- State practice, in order to create customary rule, must be accompanied by (or consist of) statements that certain conduct is **permitted, required or forbidden by international law** (a claim that conduct is permitted can be inferred from the mere existence of such conduct, but **claims that a conduct is required or forbidden need to be stated expressly**).[3]
- It is not necessary that the state making such statements believes them to be true; what is necessary is that the statements are **not challenged by other states**.[4]
    - Note that this final point contradicts what is said in the *North Sea Continental Shelf Case* as shown below.

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; FTG v The Netherlands) ICJ Rep 1969 3, International Court of Justice

- **Facts**: By two Special Agreements, the FRG and Demark, and the FRG and The Netherlands, submitted a dispute over the delimitation of their shared Continental Shelf to the International Court of Justice.
- **Issue**: One of the Court's tasks was to identify the rules which bound these States. The ICJ found that the delimitation of the continental shelf between these States (and hence giving access to the valuable oil deposits beneath them) had to be decided according to customary international law because the relevant treaty (the Continental Shelf Convention 1958) had not entered into force for all parties to the dispute.
- **Held**: not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence of a **belief** that his practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. The States must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.

3 Ibid.
4 Ibid.

3.3 Treaties and Customary International Law

- Treaties are part of State practice and can create customary rules if the requirements of *opinio juris* are met, e.g. if the treaty or its *travaux preparatoires* contain a claim that the treaty is declaratory of pre-existing customary law.[5]
- Sometimes a treaty which is not accompanied by *opinio juris* may nevertheless be imitated in subsequent practice; but in such cases **it is the subsequent practice (accompanied by *opinio juris*), and not the treaty, which creates customary rules**.[6]

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) Merits, ICK Rep 1986 14, International Court of Justice

- Facts: In 1984, Nicaragua brought a claim against the US alleging certain unlawful and paramilitary activities against Nicaraguan territory, including laying mines of Nicaraguan ports and support for the Nicaraguan rebels, the Contras.
- Issues: The US claimed that the Court had no jurisdiction because, inter alia, they had entered a reservation to the jurisdiction of the ICJ excluding a matter from the Court if the dispute concerned the application of a multilateral treaty. The relevant treaty here was the UN Charter itself, particularly Article 2(4) on the non-use of force. Nicaragua argued, however, that the Court had jurisdiction because its claim against the US was also based on rules of customary international law, which although similar in content to the law of the UN Charter, had not been superseded by it.
- Held:
    - ICJ held that norms relied upon by Nicaragua (prohibition on use of force and of intervention in other states) was part of customary international law, and that UN Charter and custom had a separate applicability. (Court looked at the customary aspects of the UN Charter).

5 Ibid.
6 Ibid; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) *Merits, ICK Rep 1986 14, International Court of Justice*.

- Prohibitions of use of force and of intervention supported by UN Charter and extensive opinio juris, including from US itself → emergence of customary international law.
- The Court also to some degree, lowered the bar on state practice, compared to the North Sea Continental Shelf case… state practice need not be perfect… in general, conduct that is consistent with such rules is sufficient and the instances where State conduct is inconsistent, they are treated as breaches of the rule instead of an indication of a new rule.

3.4 Regional/Local Custom

Asylum Case (Colombia v Peru) ICJ Rep 1950 266, International Court of Justice

- Facts: following an unsuccessful coup in Peru in 1948, the leader of the rebel movement sought refuge and 'diplomatic asylum' in the Colombian embassy in Lima, the Peruvian capital. The Peruvian government subsequently refused safe conduct for the rebel leader and the dispute was referred by agreement to the ICJ.
- Issue: whether 'local custom' existed in Latin America permitting one State to grant political asylum and thereby offer consequential protection to the asylum seeker.
- Held: the Court found against the existence of local customary international law due to a lack of evidence.
    - However, the possibility that local customary international law could exist in in an appropriate case was confirmed in the *Rights of Passage over Indian Territory Case*, ICJ Rep 1960 6.

3.5 Acquiescence & Persistent Objectors

- Customary international law binds all states who are acquiesce. Customary international law may develop even if only a small number of states practice; which cause all other states who may not necessarily be party to creation, to be bound through acquiesce. Only states which openly object to the law from the very beginning are exempt.

- In addition, a new State is bound by rules which were well established before it became independent.[7]

Costa Rica v Nicaragua 2009

- Facts: Dispute regarding navigational and related rights. Costa Rica had been doing subsistence farming for a long time while Nicaragua knew and had no protest. One day Nicaragua starts to impose charges on subsistence fishing vessels. Costa Rica takes it to ICJ, imposing on the right to fishing on San Juan River by charging and requiring visas.
- Held: ICJ held that due to the time to which Nicaragua knew about the farming and a lack of protest, a customary right had been formed.

One exception to the persistent objector doctrine is *jus cogens* - peremptory norms to which derivation is not permitted ("a body of supreme or constitutional principles"). Originated in treaty law: a treaty provision that violated a *jus cogens* norm is void. No definitive list but includes:

- Prohibition of aggression (use of threat of force),
- slavery,
- genocide,
- apartheid – racial segregation,
- torture,
- piracy, and
- the right to self-determination

4. Other Sources

4.1 General Principles of Law: Art 38(1)(c)

There are many different interpretations of Article 38(1)(c) of the ICJ Statute. Certainly, however, 'general principles' have been referred to by the ICJ on a number of occasions,

[7] *47 British Yearbook of International Law 53 (1974-75).*

both as a source of substantive rules and as the reason why considerations of 'equity' may be used in the determination of disputes involving questions of international law.

Examples

- General rules for the fair settlement of disputes
- *River Meuse Case (Netherlands v Belgium)* (1937) PCIJ per Hudson J – 'the Court has some freedom to consider principles of equity as part of the international law which it must apply'
- *Frontier Dispute Case (Burkina Faso v Mali)* (1985) ICJ – limited application of equity in territorial boundary delimitation (equity *infra legem* (adapting law to facts), but not equity *praeter legem* (to fill gaps in law) or equity *contra legem* (equity in place of law))

4.2 Judicial Decisions and the Writings of Publicists

1. Article 38 describes judicial decisions as 'a subsidiary means' for the determination of rules of law and Article 59 attempts to deny a system of precedent. However, the Court itself frequently uses its previous decisions as authority in later cases. Cases such as the *North Sea Continental Shelf Cases* show how the Court can contribute significantly to the development of customary law. It has been suggested that, 'in connection with the jurisprudence of the Court on maritime delimitation...that the tendency of the Court to follow and apply earlier decisions rather than to investigate the practice of States supposedly creative of custom had led to a situation in which it might be said that maritime delimitation law was judge-made law rather than customary law' (*Thirlway, British Yearbook of International Law* 116 (2005), p. 116). In other areas, Thirlway suggests that there are signs that the Court prefers to cite its own previous decisions in support of findings of customary international law than to refer to the State practice. The Court has also relied on its own previous decisions (and those of the PCIJ) when considering questions of interpretation of a treaty with similar, but not identical, provisions: *Certain Property (Lichtenstein v Germany)* ICJ Rep 6 2005.

2. The impact of decisions of national courts on the content and role of international law should not be underestimated. The series of Pinochet cases in the United Kingdom continue to exert considerable influence over the way in which human rights obligations

and principles of sovereign immunity interact (see further Chapter 9). Even if the *Pinochet* cases do not establish as a matter of international law the primacy of human rights law over principles of sovereign immunity, there is no doubt that the judgments have been used as a source of principles for the determination of this pressing and difficult issue in similar cases, see for example the reference to these cases by the ICJ in the Case concerning the *Arrest Warrant of 11 April 2000* (2002) ICJ Rep 22, para. 58), albeit as part of a study of relevant State practice. National courts, in applying international law, affect not only the law within the State but, as national court decisions form part of 'State practice', they can also affect the direction of customary international law more generally.

3. The impact of writers on the corpus of international law is, of course, never capable of scientific analysis. For example, the degree to which judges of the ICJ rely on published works (other than their own!) is rarely made clear, as the practice of the Court is not to cite the views of scholars in decisions, although legal representatives before the Court frequently refer to publicists in their arguments. Greater reference to legal publicists is made in national courts when considering international law, as in the *Paquete Habana case*, and, it appears, in the international criminal tribunals.

4.3 United Nations General Assembly Resolutions

- UNGA Resolutions recommendatory and not legally binding with limited exceptions (admission, suspension, UN budget)
- Early practice and attitude of Western States when UN established (e.g., Genocide Resolution); change in composition of the UNGA and efforts by developing states to influence international law
- UNGA may be more responsive than traditional case-by-case process of customary international law
- UNGA Resolutions may influence international law in three main ways:
    - Interpretation of UN Charter
    - Affirmation of recognised customary norms
    - Influence the creation of new customary norms
- Legality of the Threat or Use of Nuclear Weapons (1996) ICJ

- UNGA resolutions may 'sometimes have normative value'.
- They can provide 'evidence important for the establishing the existence of a rule or the emergence of an opinio juris.'
- In this case 'although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an opinion juris on the illegality of the use of such weapons'.

5. Soft Law

- Rules that are binding but vague; and 'rules' that are clear but not binding
  - 'a convenient description for a variety of non-legally binding instruments used in contemporary international relations. It encompasses inter alia inter-state conference declarations... UN General Assembly instruments... and resolutions... interpretative guidance adopted by human rights treaty bodies... codes of conduct, guidelines and recommendations of international organisations... and so on. Also, potentially included... are the common international standards adopted by transnational networks of national regulatory bodies, NGOs, and professional and industry associations.' (Boyle and Chinkin)

Topic III: The Law of Treaties

1. Definition of Treaties

Treaties are agreement between States (or international organisations) binding on parties and governed by international law. These instruments are regarded as the most important source of contemporary international law.

The primary reason for determining whether certain agreements, statements or other actions constitutes a treaty, is that rights and obligations may then arise to which the law of treaties is applicable. Most treaties are concluded once the express consent of all the parties has been reached and usually there is little doubt that 'a treaty' has been concluded. However, occasionally it is not clear whether the contact between States has given rise to a treaty and in some circumstances, it seems that even unilateral statements by State representatives may be regarded as being binding on that State in its dealings with other States.

1.1 Vienna Convention on the Law of Treaties 1969 ('VCLT')

- **Article 2(1)(a):**
    - "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
- **Article 3:**
    - This definition does not affect agreements between states and other subjects of international law or between those other subjects
    - This definition does not affect legal force of agreements not in written form (possible to have unwritten agreement: *Legal Status of Eastern Greenland (Den. v Norway)* (1933))

1.2 Elements & Registration of Treaties

- **May be embodied in one or several instruments** (e.g., an exchange of notes) and there are no particular requirements as to form: *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (1994) ICJ
    - What matters is the **intention of the parties**
    - In the above case, an exchange of notes was deemed to be legally binding
- **Unilateral declarations can also have binding effect**
    - 'An undertaking...if given publicly with an intent to be bound, even though not made within the context of international negotiations, is binding': *Nuclear Tests Cases (Australia v France; New Zealand v France)* (1974) ICJ
- **No requirement that a treaty involve 'consideration'** (i.e., a promise, price, detriment or forbearance given as value for a promise) and treaties can be 'one-sided': *Nuclear Tests Cases (Australia v France; New Zealand v France)* (1974) ICJ
- **Only states, international orgs. and other international entities** with capacity to enter into treaties may be parties
- **UN Charter, Article 102 (see also Article 80 of the VCLT):** provides that after a treaty enters into force, the treaty must be registered with the Secretariat of the United Nations. While an 'unregistered' treaty remains legally binding between the parties and fully operative in international law, by virtue of Article 102 of the UN Charter, an unregistered treaty may not be invoked before the ICJ or any UN Organ.
- **VCLT, Article 26**: Every treaty in force is binding upon the parties to it and must be performed by them in good faith' (*pacta sunt servanda*)
- **VCLT, Article 28**: Treaties do not apply retrospectively (unless there is an intention to apply retroactively)

2. Formation and Application of Treaties

2.1 Application of the VCLT

- **Art 1**: only applies to treaties between States
- **Art 2**: only applies to written treaties
- **Art 4**: The VCLT only applies to treaties concluded after the date of entry into the force of the VCLT (1980, or later date if the State Parties to the treaty became

bound by the VCLT after that date) (without prejudice to the application of rules in the Convention which apply independently of the Convention)

- BUT many treaty provisions reflect customary international law…
- Act 6 – every State has the capacity to conclude treaties

A. Aust, Modern Treaty Law and Practice (3rd edn, 2013)

Important to note that when law of treaty questions arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the Vienna Convention, the rules set forth in the Convention are invariably relied upon even when the states are not parties to it…

2.2 Formation

- **Art 7**: A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
  - (a) he produces appropriate full powers [defined in Art 2(1)(c) - "Full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty…];
  - (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) ICJ Rep 2006 6, International Court of Justice (Jurisdiction and Admissibility)

- Facts: The court was required to consider the legal effect of a statement made by the Minister of Justice of Rwanda, regarding the proposed withdrawal of Rwandan reservations to various human rights treaties, including the Genocide Convention.