

LAWS2270 COMPREHENSIVE NOTES

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LAW IN THE GLOBAL CONTEXT

Assessment

- class participation 10% performance
- legal research & Writing Assessment 20% (LWGMoodle Page)
- Mid-assessment exercise (Op-Ed) 20%
 - 1200 words limit
- Final Take-home Exam 50%

Outlines

- Public International Law
- Private International Law
 - **conflicts of interests**: govern the different political and legal nations
- Comparative Law
 - Examples: Taiwan, Fish Island;

Four Dominant Cases Study

- Methodology
 - **Focus on** identifying relevant system of law and understanding the interactions between them, rather applying the rules one particular legal system.
 - Analysis needs to be attentive/alternative concerns; such as political perspective
- Reasons for Learning this course
 - Many transactions/events/issues are governed by multiple over-lapping legal systems;
 - Australian laws are influenced by, reflect or implement international law and international forms of regulation;

INTRODUCTION

PUBLIC INTERNATIONAL LAW

States are the primary subject of international

- A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims
- Other entities may become subjects of international law, but this is generally through their creation/recognition by states
 - i.e. states created the United Nations, which is recognized as a subject of international law;

Principle of sovereign equality

- states are legally equal with one another

Principle of territorial sovereignty

- as a general proposition, states conduct within their own territory is not regulated by international law

The rules of international law are primarily established through states consent

GLOBALISATION

The era of globalization is precisely that period in which a sense of living in the midst of unprecedented change has dominated social and personal sensibilities. Long-term globalization depicts the world as a complex field of mutually constitutive homogenization and fragmentation.

History

- Early globalization
 - Have challenged the Eurocentric histories → part of accounts of contemporary globalization.
 - Price convergence → evidence demonstrates that local economies are being subsumed into a global system.
 - Dynamic forces of change → opposite to the bounded units that may block flows
- Middle Ages
 - The Catholic Church in Europe → natural law developed under Catholic doctrine
 - Grotius (Hugo Grotius)
 - Foundations of international law are ultimately religious, but ...
 - In practice, the context of international law derived from two related sources
 - Middle position between the naturalists and positivists

- View international law politics as taking place within an international society in which states are bound not only by rules of prudence or expediency but also by imperatives of morality and law;
- The classical Age of international law
 - Peace of Westphalia (1648) → an important moment in establishing the principle that states have territorial sovereignty
 - Treaties settle a range of territorial boundaries between states
 - Expressly place religious matters in the sphere of states domestic sovereignty
 - But states agree to allow citizens to voluntarily practice of some non-official Christian denominations in private.
 - Emmerich de Vattel (1714-67) → states equality
 - Legal positivism in the 19th Century
 - Content of law does not derive its validity from divine or moral sources but from criteria internal to the legal system itself
 - 1985 → international law has no alternative but to accept war...
 - the political positivism in the 19th C
- the halting institutionalisation of international law in the 20th Century
 - WWI and the league of Nations 1919
 - Permanent Court of International Justice 1921
 - International Labour organisation

International Law

- Public international law – a body of law that was developed (primarily by states) to regulate relations between states and maintain or defend their autonomy as such.
- International law currently is a state-centred system but not one concerned only with states.
 - Other subjects of international law
 - International and/or intergovernmental organizations
 - Individuals
 - Quasi –subjects
 - Minority groups (treaties)
 - Regional organizations/superannuation's bodies (EU)
 - Multinational corporations
 - Non-governmental organizations (NGOs)
- Regulating Aspects → international law can deal with are diverse
 - International trade
 - Human rights
 - International criminal law (war)
 - Environment/climate
 - Oceans/seas
 - IP
 - Migration
 - Refugee
 - Nuclear

- Army control
- Cultural property
- Health/diseases (WHO)
- Tax
- Borders
- Space
- Causes, effects and implications of different policies and flows
 - World Bank: the globalization facilitates economic growth and generates economic convergence across nations; Deglobalization leads to stagnation and economic divergence.
 - Globalization: 1900-1913 + 1950 – now
 - Deglobalization: 1914 -1950 (two World wars and the great depressions)
 - The shape of global inequality
- Conceptions
 - Communication and data: education;
 - Trade: consumption; production; migration of people; mutual recognition (Bureaucratic)
 - Culture: rule of law; food; practices; human rights; religion; environment

The consequence of globalization for the law and legal participants

- Ancient societies lived in isolation from each other, separated by geographical factors and racial considerations. Besides, common international interests of the modern type did not exist in the past to unify them.
- International legal doctrine was heavily protective of the colonial prerogatives of European nations, of freedom of navigation and commerce, and the unfettered ability of colonial powers to project force against recalcitrant indigenous peoples.
- “empire” → political control

Law

- A system of rules that are created and enforced through social or governmental institutions to regulate behaviour.
 - System of rules → generality
 - Formality
 - Regulate behaviours
 - Creation and enforcement by social and governmental institutions.
 - Legitimacy
- A system that regulates and ensures that individuals or a community adhere to the will of the state.
 - Organizing functions
 - Legitimacy

- Common characteristics of national legal systems
 - Rules/principles that define the individuals, groups and institutions that are the subjects of that legal system
 - Rules specifying conduct that is and is not permissible
 - Rules allocating functions, powers to certain individuals/institutions
 - Rules about how rules are made, amended and extinguished
 - Institutions that police/investigate compliance with rules
 - Institutions that determine whether rules have been breached backed by concrete power to enforce remedies/punishments
 - Actors within the system recognise it as law

Global

- (disambiguation) a globe is a three-dimensional scale model of Earth or other astronomical body.

Context

- (language use), the relevant constraints of the communicative situation that influence language use, language variation, and discourse summary.

International

- International community
 - Modern world considers the natural conditions of life in our society to be the state of peace.
 - Ancient world considers the natural attitude of one state towards another was that of potential and actual enmity.

Transnational

- Global governance
- Social phenomenon: interconnectivity between people and the receding economic and social significance of boundaries among nation.
- A new way of thinking about relationships between cultures;
- An economic process involves the global reorganization for the production process.

INTERNATIONAL LAW, GLOBALIZATION AND EVERYDAY LIFE

How international law affect your everyday activities

How have international law's credentials as law been called into questions, how have they been defended, and what is at stake in this debate? (why do people care?)

INTERNATIONAL LAW AS LAW

- Three distinct questions
 - What type of legal system international law is?
 - Whether international law can even qualify as law properly so called?
 - Is international law so changeable that it lacks the minimum stability a legal order should have?
- Characteristics → legal order
 - Differences from domestic law
 - it operates between equal and sovereign collectivises.
 - It is a law of states rather than individuals;
 - Anarchical structure
 - └ Even the most forceful international organisations are poor candidates for superiority given that they exercise their usually quite limited powers only at the behest and tolerance of states.
 - International legal project is largely procedural rather than purposive.
 - Coordination → a system aiming at protecting coexistence rather than some common substantive goal.
 - International law has successfully abstracted itself from ethical to the point where a law does not cease to be law even is all were to agree that it was immoral.
 - International legal positivism
 - Observable from the practice and custom of states;
 - International lawyer → treaty interpreters
 - Contractual rather than legislative → voluntary
 - An exchange of reciprocal promise;
- International law is a law that seemingly cannot much rely on habitual obedience nor do without the constant invocation of arguments as to why it should be respected.
 - Legitimacy of the international legal order
 - The primacy of the local over the global.

“international law consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.”

“the law of nations, under which nations are regarded as individual members of a common polity, bound by a common rule of agreement or custom; opposite to municipal law, the rules binding in local jurisdictions.”

STYLIZED POSITIONS

Denialists

- Lack of enforcement
- i.e. Iraq

Idealists

- International law is law
- Law is linked to morality
- International law reflects universal values, such as slavery, biological weapon;
- Incorporation of refugee laws;
 - Strong States for maintaining the refugees → depends on the S attitudes
 - Critics → shift wars; values; it is better than no law at all;
 - Important treaties about refugee arrangement → it is proper to look to be more like to a domestic system
 - Soft enforcement → DIBP discretionary powers to decide whether to receive refugees;

Apologists

- No clear answer for whether the international law is law
- Soft enforcement
- Each country has its own logic
- i.e. passport or UN security council as the justify is not permanent
 - Critics → it depends on the wings of power of the immigration department of the Countries; impartiality for the passport holder
 - Reformist → system of manage, should make it freedom to individual to let people go where they would like to go, sort of like EU policy for their citizens;
 - Dentist → safety; borders

Reformists

- international law should be more like national law
- shared values
- reject some of the state-centralized
- i.e. world government (EU)

Critics

- don't care if international law is law
- quality of law beyond states → not particularly relevant to logic in S control
- i.e. UN security council → would be better to go apologists;

INTERNATIONAL LAW AND ITS SOURCES

1. Where can we find evidence of public international law? What are the sources of public international law?
2. Who enforces international law?
3. Why do states follow international law?
4. Who are the actors who participate in the international legal order and in what ways do they do so?

CLASS NOTES

Australian Legal system

- Constitution → statute
- Common law → case law
- Custom → perhaps, such as indigenous
- International law is not a basic source of law in Australia → separated interpreting orders but only merely incorporate sort of international law in certain way, such as Parliament give its validity to the treaties; 1

Fundamental Features of the UN Charter

- Sovereignty equity of states (Art. 2(1)) → 1945
- Restrictions on the unilateral use of force and establishment of a system of collective security (UN Charter, especially Chapter VII)
- Right of self-determination of peoples (Art 1(1))
- Obligations to seek peaceful settlement of disputes (Art 2(3))
- Obligations under the Charter to prevail over obligations under other treaties (Art 103)

Structure of the UN

- Principal organs of the UN (Art 7)
 - General Assembly (Chapter 4)
 - All members of the UN are members of the GA with equal voting powers;
 - Has power to adopt resolution and make recommendations on any matter with the scope of the UN Charter (Arts 10 -22)
 - └ Some exception relating to security council
 - GA resolutions as such do not generally bind the members as a matter of international law, though they may contribute to the formation, or represent a codification, of customary international law;
 - Security Council (Chapter 5)
 - Comprises five permanent members: US, UK, France, Russia and China → with power of veto;

- Plus 10 non-permanent members elected by the GA for two years' term and not immediately re-electable;
- Has primary responsibility for the maintenance of international peace and security
- Power to make non-binding recommendations under Chapter VI and binding decisions under Chapter VII
- o Economic and Social Council (Chapter 10)
- o Trusteeship Council
- o International court OF Justice (Chapter 14)
 - It does not have the compulsory character as same as the domestic legal system;
 - The jurisdiction of hearing any particular cases depends on the consent to the States;
 - International disputes → structured mediation/negotiation instead of using legal system necessarily;
 - Statutes ICJ → Art 38
 - └ Sources of the law;
 - Composition
 - └ 15 judges elected to 9-year terms by the GA and the Security Council (plus one or more ad hoc judges in contentious cases)
 - └ two main forms of jurisdiction
 - advisory jurisdiction → where an organ of the UN authorized to do so request an advisory opinion from the Court;
 - contentious jurisdiction → only States may be parties before the ICJ in a contentious case, individuals, non-governmental organizations, international organization do not have standing to bring cases before the court;
 - exercise of the jurisdiction is based on consent of all S parties to the dispute which is sought to be brought before the Court, such as states can avoid the ICJ if it did not consent to anyway;
 - binding only on the parties to the case before the Court → formally they do not have precedential effect, though in practice, the Court generally tries to follow its earlier judgments, and the Court's judgments are very influential.
- Other international courts and tribunals
 - └ International Tribunal (T) on the law of the Sea
 - └ International arbitral Y established under multilateral or bilateral investment agreements (ICSID, FTAs, BITs)
 - └ European, inter-American and African Courts of Human Rights;
 - └ World Trade Organisation Dispute Settlement Bodies
 - └ UN human rights treaty bodies → decisions are in formal terms non-binding);
 - └ International criminal tribunals (ICC, ICTY)
- o Secretariat (Chapter 15)

International Law as a Decentralized System