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Module 1: Introduction

1. Overview

The Introduction covers two main topics:

1. History of the legality and illegality of war: how international law developed from permitting war to restricting and generally prohibiting the use of force.
2. Prohibition on the use of force: the modern framework under the UN Charter, particularly Articles 2(4) and 51.

A central distinction for this subject is between:

- Jus ad bellum: the law governing when a state may lawfully resort to force.
- Jus in bello: the law governing how parties must conduct themselves during armed conflict.

The historical development of restrictions on starting wars provides the background to the modern rules on the use of force.

2. Historical development of the legality of war

2.1 Before 1945: war was generally permitted

Before the modern prohibition on the use of force, international law did not contain a comprehensive, positive prohibition on war.

- War was generally regarded as a legitimate instrument of state policy.
- States could use war to resolve disputes, enforce legal rights and acquire territory.
- The rules governing war developed largely within European international law.
- Although war was legally accepted, states often sought moral or political justifications for resorting to it.

Key point: Historically, the principal question was often whether a state had a justification for war, rather than whether war was prohibited as a general rule.

2.2 Christian just war theories

From approximately the 14th century, Christian just war theories influenced the ways in which war was justified and restrained.

3 requirements for commencing war:

1. Public authority: war had to be initiated by an appropriate public authority.
2. Just cause: there had to be a justified reason for going to war.

3. Right intention: the state had to pursue an appropriate purpose.

Examples of claimed just causes or intentions included:

- Self-defence.
- Recovering property.
- Punishing wrongdoing.
- Responding to colonialism.

These theories introduced ethical, religious, political and social constraints on warfare.

The distinction between the justice of commencing war (*jus ad bellum*) and restraints on conduct during war (*jus in bello*) was important.

Significance: Even when war was legally permitted, moral and political considerations influenced how states justified it. The need to justify war has persisted into the modern period.

2.3 Nineteenth-century positivism and state sovereignty

During the 19th century, legal positivism influenced the development of international law.

Legal positivism emphasised law as law, rather than requiring legal rules to be justified by morality or religion.

This period was also marked by:

- The growth and centralisation of the modern state.
- A shift away from interpersonal, private, religious and local violence towards a system focused on relations between states.
- An emphasis on state sovereignty and non-interference.

Treaties of Westphalia (1648–1649)

The Treaties of Westphalia are associated with the consolidation of state sovereignty. The historical context included the religious wars of the 17th and 18th centuries and the desire for clearer territorial boundaries.

The resulting conception of sovereignty emphasised:

- States as distinct political entities.
- The importance of territorial boundaries.
- Non-interference in the affairs of other states.
- The state's ability to wage war as part of its external relations.

War was treated as a legitimate means of settling disputes in the absence of an effective international court system.

Why states continued to justify war

Although war was generally permitted, states continued to invoke justifications such as:

- Self-defence and self-preservation.
- Enforcement of treaties.
- Protection of vital national interests.
- Injury to national rights, honour or dignity.
- Compensation for loss.
- Humanitarian or collective intervention.

The continued use of these justifications demonstrates the lasting influence of just war thinking.

Important distinction: The existence of a moral or political justification did not, by itself, mean that a use of force was unlawful under the international law of that period.

2.4 Examples of the historical approach

A. Treaty of Versailles 1919

Article 231 of the Treaty of Versailles is described as the moral “war guilt clause”.

- Germany was assigned responsibility for loss and damage resulting from the war.
- The clause provided a basis for reparations.

This illustrates the historical connection between responsibility for war, moral condemnation and financial remedies.

B. The Caroline incident (1841)

The Caroline incident arose from tensions involving the United States, the United Kingdom and Canadian rebels.

- Some Canadians were resisting British control.
- The rebels received assistance from the United States, including supplies transported by the Caroline across a river.
- British soldiers and Canadian loyalists crossed the river, attacked the vessel, set it on fire and sent it over Niagara Falls.
- An American was killed.

The incident was followed by correspondence between the United States and the United Kingdom and was eventually resolved by treaty.

3. Early attempts to regulate warfare

The development of restrictions on war was gradual. Before the general prohibition on the use of force, international law introduced procedural requirements and mechanisms intended to reduce conflict.

3.1 Hague Convention III 1907: Opening of Hostilities

Hague Convention III was an attempt to regulate the commencement of hostilities. Article 1 required hostilities between the parties not to begin without prior, unequivocal notice. The notice had to take the form of either:

- A declaration of war stating the reasons for it; or
- An ultimatum containing a conditional declaration of war.

A diplomatic note could provide the required notice, but the unilateral termination of diplomatic relations was insufficient.

3.2 Conquest and acquisition of territory

Before 1928, sovereign title to territory could be acquired through conquest followed by effective annexation.

Key point: The historical acceptance of conquest contrasts with the modern rejection of territorial acquisition through unlawful force.

3.3 Consequences of war before 1945

Relations between belligerents

- Commercial relations could be terminated.
- Treaties and diplomatic relations between belligerents could be suspended.

Neutrality

War triggered the law of neutrality for third states and modified their ordinary peacetime obligations.

Neutral states were generally required to:

- Keep their territory protected from the effects of hostilities.
- Avoid supporting a belligerent with arms, equipment or funds, subject to the qualifications.
- Prevent hostile use of their territory, including transit, so far as feasible.
- Apply their obligations impartially to all belligerents.
- Acquiesce in certain belligerent enforcement measures, including against neutral contraband.

The underlying purposes were to prevent escalation, facilitate intermediaries and enable humanitarian relief.

War reparations

Historically, reparations could be imposed on the defeated party on the victor's terms. They could include:

- Payments of money.
- Cession or occupation of territory.
- Ransom of prisoners.
- Transfer of cultural property.

Reparations served compensatory, punitive and deterrent purposes.

4. The movement towards prohibiting war

4.1 Peaceful settlement before the League of Nations

International law gradually developed mechanisms intended to encourage peaceful dispute resolution.

Hague Convention for the Pacific Settlement of International Disputes 1899

Article 1 called for states to use their best efforts to settle international disputes peacefully and to avoid recourse to force as far as possible.

Article 2 referred to good offices and mediation by a friendly power.

The Convention also established the Permanent Court of Arbitration.

Hague Convention respecting the Limitation of the Employment of Force for Recovery of Contract Debts 1907

Article 1 restricted the use of armed force to recover contractual debts.

Significance: These instruments restricted particular uses of force and encouraged peaceful settlement, but they did not establish a comprehensive prohibition on war.

4.2 Covenant of the League of Nations 1919

The League of Nations Covenant introduced a more organised system for addressing disputes and protecting peace.

However, it did not completely prohibit war.

Article 12: Peaceful procedures and delay

Members were required to submit disputes likely to lead to a rupture to one of the following:

- Arbitration.
- Judicial settlement, including by the Permanent Court of International Justice.
- Inquiry by the League Council.

Members were also required to refrain from war for three months after an arbitral award, judicial decision or Council report.

Articles 13–15: Circumstances in which war remained possible

Under Article 15(7), where the Council failed to make a unanimous recommendation, members retained a claimed right to take action they considered necessary to maintain right and justice.

This left significant gaps in the system.

Article 16: Collective sanctions

A member that resorted to war in violation of the Covenant was treated as having committed an act of war against all other League members.

Members were required to impose economic and financial sanctions.

Articles 10 and 11: Territorial integrity and collective concern

Article 10 required members to respect and preserve the territorial integrity and political independence of other members against external aggression.

The Council could advise on how this obligation should be fulfilled, but it lacked effective centralised enforcement power.

Article 11 declared war or the threat of war a matter of concern to the whole League.

This marked a shift away from treating war as a purely private matter between the states involved.

5. The UN Charter and the modern prohibition on force

The United Nations Charter 1945 established the modern framework for the prohibition on the use of force.

5.1 Article 2(4): Prohibition on the use of force

Article 2(4) provides that UN members must refrain, in their international relations, from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

A. Conduct attributable to a state

The prohibition concerns conduct attributable to a state.

This may include:

- Conduct of state organs.
- Conduct by persons or entities exercising elements of governmental authority.
- Conduct by persons acting on state instructions, or under state direction or control.
- Conduct by persons exercising governmental authority in the absence or default of official authorities.

A central issue is whether the relevant conduct can legally be attributed to the state. This is distinct from the question of whether a state has merely provided some form of assistance to another actor.

B. What constitutes a use of force?

The precise assessment depends on the nature and circumstances of the conduct.

Other conduct requires separate consideration:

- Law enforcement: Generally not classified as a use of force under Article 2(4) where it is based on consent.
- Military interception: Intercepting a foreign aircraft or vessel within a state's territory does not necessarily constitute a use of force, although the nature of the aircraft or vessel and the surrounding circumstances matter.
- Military entry without damage: Entry by military forces into another state's territory without causing damage raises a question about whether the conduct constitutes an armed attack for the purposes of self-defence.

5.2 Indirect use of force

Indirect force may arise where a state supports armed groups operating against another state.

The 1970 Declaration on Friendly Relations is identified as a source of obligations to refrain from organising or encouraging irregular forces for incursions into another state and from participating in certain acts of civil strife or terrorism.

Key distinction: Attribution of another actor's conduct to a state is not the same legal question as whether the state's own assistance constitutes prohibited force or intervention.

5.3 Non-intervention

The principle of non-intervention protects matters that states are entitled to decide freely under the principle of sovereignty. These matters include the choice of political, economic, social and cultural systems and the formulation of foreign policy. The central element is coercion.

Coercion may involve:

- Forcing a state to accept a demand through threats of harm.
- Depriving a state of control over choices it is entitled to make freely.

The principle is reflected in Article 2(1) of the UN Charter, which recognises the sovereign equality of members, and in the 1970 Declaration on Friendly Relations.

6. Article 51: The right of self-defence

Article 51 provides that nothing in the Charter impairs the inherent right of individual or collective self-defence if an armed attack occurs against a UN member, until the Security Council has taken the measures necessary to maintain international peace and security.

The article also requires states exercising this right to report their measures immediately to the Security Council. Such measures do not displace the Council's authority and responsibility to take action to maintain or restore international peace and security.

The principal points for Module 1 are:

- Article 2(4) establishes the general prohibition on the threat or use of force.
- Article 51 recognises an inherent right of individual or collective self-defence where an armed attack occurs.
- The right operates within the UN Charter framework.
- Measures taken in self-defence must be reported immediately to the Security Council.
- The Security Council retains its authority to act.

7. The UN collective security framework

The United Nations developed a stronger collective security framework than the League of Nations, although the Security Council veto remains an important limitation.

7.1 Decolonisation and self-determination

The UN framework contributed to the development of decolonisation, self-determination and trusteeship. They also caution that situations involving territories occupied by force may raise different questions from those involving colonialism in the technical sense.

8. Effects and limitations of the modern framework

8.1 Realist and internationalist explanations

Realist perspective:

States comply with international law to the extent that it aligns with their interests.

Relevant factors include reciprocity, reputation, stability and transaction costs. States may also disregard the law where they believe they can do so without consequences.

Internationalist perspective:

International norms can influence behaviour independently of the immediate threat of sanctions.

8.2 Continuing problems

Despite restrictions on interstate force, internal conflicts have proliferated.

This highlights a tension between the protection of state sovereignty and the broader concerns of self-determination and the consequences of colonial rule.

9. Further consequences of an unlawful use of force

9.1 State responsibility and reparation

A state responsible for an internationally wrongful act may incur responsibility, including an obligation to make reparation.

9.2 Jus cogens

Jus cogens refer to duties on all states to cooperate to bring unlawful situations to an end and not to recognise those situations as lawful.

9.3 Treaty law

Vienna Convention on the Law of Treaties 1969:

- Article 52: A treaty is void if its conclusion was procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter.
- Article 53: Concerns treaties conflicting with a peremptory norm of general international law.