Lecture 1: Introduction to International Law

The diversity of international actors, different forms of government and non-government organisations need regulation within the international community. The Westphalia treaty 1648 highlights how smaller states felt the need for peaceful coexistence and orderly governance so they could compete and exist alongside bigger states in a more equal way. This created principles, norms, rules and practices for the Interplay of law, politics, relations and diplomacy. Consequentially, this environment and balance of power to ensure that international law included smaller states when shaping the legal system and its law.

International law – definition and notion

- Unlike domestic law, international is dynamic, and is constantly changing in response to the new world. This is seen when you compare the political landscape of the 21st century to that of pre world war II, where only states were international actors and we have since expanded this to individuals, the need to include human rights etc. this development is crucial for the survival of international law and ensures that it maintains its relevance. However the slow rate of change compared to domestic law is great criticism of its effectiveness.

Reasons for change include:

- Emergence of New state and non-state entities Scientific
- Technological advancement
- Extra-territorial new issues and concerns such as the environment, and terrorism
- The need for greater regulation as Nationalism is breaking down into globalisation and Independence is changing to interdependence.

Defining international law: Art 38(1) of ICJ Statute

IL says this article is the be all and end all source. If it passes this test, it's IL.
Generally regarded as operative source of IL.

Nature and Features of international Law

International law has Distinct and unique system, not religious, not civil, not common law. Common law system is minority. Not Austinian/top down positivism - no king or queen says what is law. International law deals with independent and sovereign subjects. There is a horizontal not vertical application of international law, which is Self-disciplining and self-limiting system by consensus-based collectively and democracy. Its operation is decentralised based on coordination and cooperation, not subordination and subjection

Normative Standards

International Law Attempts to achieve the most amount of acceptance and thus tends to be to the subject of state will. Although it has been criticised as Eurocentric, this is slowly changing, however as evidenced in the notes below, these changes have occurred due to great criticism for the current system.

The objectives of international law include:

- *Regulation of international affairs*
- *Harmony and justice*
- *Peaceful settlement of disputes*
- *Educational forum - self disciplining tool*
- *Unity among diversity*

Existence and Relevance

- International law Exists as a matter of practical necessity, it legitimises sates, in return states adhere to IL domestically. As No state claims the non-existence of IL, (sans George Bush), they may possibly take another stance or violate it, but they accept its existence. International law exists to deal with the pressing global issues of its time as a result of past violations.

Enforcement mechanisms

- Security Council - has Persuasive power (ch 6 art 33-38) attempts to defuse tension and avoid conflict. It also has Coercive power (art 39-51) but is Notoriously politicised as seen in the veto powers and the roles of America and Russia.
- ICJ
- General Assembly
- ICC and ad hoc international crimes tribunals
- Specialised dispute resolutions LOS/WTO
- NGOS and Media: vigilante justice
- Multiple others (international public opinion - v important) - e.g. apartheid

Reasons for Compliance

- IL represents consensus of states of legal conviction
- Loss of trade, foreign aid, retaliation, sanctions etc.
- Loss of reputation etc.

Reasons for Non-Compliance

- Supremacy interest - national self-interest at any cost
- Short term political, economic and geo-strategic expediency
- Propensity of powerful states to dominate IR
- Lack of certainty and institutions
- Decentralised nature of IL

Is IL really a "Law"?

- Law and Enforcement - separate and related.
- Law can be there, but not strong - if we all speed, we should be accountable, not the law. It was the same before and after violation.
- LAW DOESN'T BECOME BINDING THROUGH COMPLIANCE

- Effectiveness
  - States have drifted from initial agreement to ratify IL.
  - Unfair to expect to perform beyond its capacity
  - Routinely followed and taken for granted
  - Not violated more frequently than national law - only high profile IL violations attract the media
  - We should attack states not on the system - the states are disobeying a good system - not perfect

Topic 2 International Law – Modern international law-making process

Sources of the ICJ statue: Art 38(1)

When the ICJ statue was drafted in 1945, the provision of the PCIJ (permanent court of international justice) on the applicable IL was considered to be the most authoritative enumeration of the sources of IL, thus it was adopted and embodied in Art 38(1) of the ICJ statute; these sources are

1. International conventions, wether general or particular, establishing rules expressly recognised by the contracting states
2. International customs as evidenced by general practice are accepted as laws
3. The general principles of law as accepted by civilised nations
4. Judicial decisions and the teaching of the most highly qualifies publicists….. as subsidiary means for the determination of rules of law

This list is keystone to IL and the ICJ use this when settling interstate disputes

Every rule that wants to be a part of IL must first comply under that test of Art 38(1)

Sources of IL may be classified into three groups Formal, Material and evidentiary

1. Formal → A formal source creates law through direct process, where the states expressly consent for a certain law to be made (different from merely obligation creating). As if a law was being made formally through the legislature.
2. Material → Material sources are law identifying decisions, juristic writings and obligation-creating treaties from which the existence of a given rule of IL can be identified and verified.
3. Evidentiary→ These sources also identify the content and extent of legally binding obligations through state practice, diplomatic correspondence, government policy statement, and state rep positions at international forums.

Due to the absence of any law making body for IL, Art 38(1) is necessary for determining legal sources, however it being a product of 1920s political and legal it is somewhat inadequate in circumstances yet it is the only accepted system we have that can validate sources of IL and is a substitute for a body which creates international law.

3.2.1 International Conventions

These conventions create nullify or modify rules of international law.

Treaties – Law creating and Obligation creating

There are two types of treaties, law creating treaties occur when a large number of parties lay down vast general rules which most states adhere to even if they aren't a part of the treaty. They are like broad general rules/laws. The Genocide convention 1948 and the Vienna convention on Diplomatic relations 1961 are examples of this law making process. These law creating treaties usually begin as accepted practice by states which then becomes law under the ICJ an example would include exclusive economic zones (EEZ)

Obligation creating treaties are special obligations usually relevant to only a few parties, these are similar to agreements made in a contractual nature and since these treaties are voluntary acts of interested parties they provide evidence of special customary rules of IL.

3.2.2 International customs and customary international law

Custom is a primary source of IL, law is created through the acceptance of general customs by states. Rules of customary law are created by a given factual practice followed by enough states for a certain period of time with a conviction of its legal necessity.

State practice includes state conduct displayed by official acts, statements made in international forums, diplomatic exchanges, legislative measures, positions taken in an international dimension and even inaction.

In international politics states usually say one thing and do the other, this is known as the words v action problem. Thus in the Anglo- Norwegian fisheries case between the UK and Norway, Judge Read emphasised on actions rather than words of states as evidence of customary rules.

For a customary law to be created, the practice by states must persist uniformly and continuously over the years without any strong and consistent objections by other states.

Opinio Juris (legal conviction)

Opinio Juris is the idea that certain behaviours of states are legally necessary, it is the idea that certain practices are needed and must be included in the law. It is not a practice due to courtesy, friendship, morality or as a result of being under duress. Opinio Juris represents a sense of legal obligation on the part of the state, it distinguishes usages from customs, and habitual conducts from the law.

Opinio Juris is needed in the creation of customary International Law.