Public International Law in Practice
Legal Foundations/Sources of Public International Law

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Structure of the class

- History of international law
- Subjects of international law
- Sources of international law
- The law of treaties
- The law of state responsibility
- National vs. international law
- International dispute resolution
The roots of international law

- Modern international law - can be traced back 400 years
- Establishing norms, which regulate relations between states goes back thousands of years
- Around 2100 BC - a treaty between the rulers of Lagash and Umma in Mesopotamia. It was inscribed on a stone block and concerned the establishment of a defined boundary to be respected by both sides under threat of alienating certain goods.
- 1269 BC - Rameses II of Egypt and the king of the Hittites for the establishment of eternal peace and brotherhood.
- In Israel, the Prophet Isaiah declared that sworn agreements, even where made with the enemy, must be performed. Peace and social justice were the keys to man’s existence, not power.
Ancient treaties

Vase of King Gishakidu
2400 BC

The Egyptian–Hittite peace treaty 1259 BC
From Greek & Roman times to the Middle Ages

Classical Greece

- numerous treaties linked the city-states
- rights granted to the citizens of the states in each other’s territories, protection of diplomatic envoys developed.

Roman law

- The early Roman law (the *jus civile*) applied only to Roman citizens, subsequently (*jus gentium*) applied to foreigners as well
- Corpus Juris Civilis.

Middle Ages

- Holy Roman Empire and the supranational character of canon law
- Commercial and maritime law developed as the law of merchants (*lex mercatoria*)
Modern international law

- Christian and Natural Law ideas shaped the world or European philosophers, the most important of those was Hugo Grotius, who is often celebrated as the father of international law

- Philosophical foundations crystalized into what we know as international law only in the 20th century

- 1919 Treaty of Versailles provided which ended the 1st World War established the the League of Nations and the International Labour Organisation

- The Permanent Court of International Justice was set up in 1921

- The United Nations Organization and the International Court of Justice established in 1946.
Group exercise 1

What are the potential international legal issues that might arise for the coastal States and for the companies involved?
Sources of international law (video)

https://www.youtube.com/watch?v=0ViSYjt-wGw
Sources of international law (Article 38 of the ICJ Statute)

**Formal Sources**

- Treaties
- International custom
- General principles of law recognised by civilised nations

**Subsidiary means of determining the rules of international law**

- Judicial decisions
- Teachings of scholars
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’

- Nomenclature not vital e.g. covenant, protocol, convention
- Legally binding: *pacta sunt servanda* – VCLT, Article 26: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’

**Key Issues**

- Treaty terms paramount
- Ratified/acceded = State party
- Reservations: if allowed; objections;
  is it lawful (object and purpose of treaty)
- Derogations: state of emergency;
  procedure
- In force: territory covered; termination; invalidity
Reservations

- Definition: Article 2 VCLT: “Reservation” means unilateral statement, however phrased or named, made by State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify legal effect of certain provisions of the treaty in their application to that State
- Name: substantive effect is more relevant: Belilos v. Switzerland (1988) ECtHR
- Rationale: inclusivity v uniformity
- Only applicable to multilateral treaties, if at all
- Treaty provisions prevail
If Reservation is permissible then it is still opposable:

- Other States can accept reservation and so give full effect to the treaty with reservation as part of the treaty
- Other States can reject reservation but not reject treaty - treaty between two parties less provision affected by reservation
- Other States can reject reservation and reject treaty - reserving State not a party to treaty vis-à-vis objecting State
- If no objection then within 12 months is bound by reservation (possibly)
- If Reservation is impermissible if:
  - Not allowed by treaty
  - Is against the object and purpose of a treaty
  - If impermissible then States can object to it but probably not required to do so
Group Exercise 2: Reservations

- Trinidad and Tobago party to the International Covenant on Civil and Political Rights (ICCPR)
- Ratified the Optional Protocol to the ICCPR (allows individual complaints to UN Human Rights Committee) and then denounced it (i.e. withdrew) after a series of cases against it, especially on use of the death penalty.
- Re-acceded to the Optional Protocol in 1998 with a reservation: ‘[T]he Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith’.

- Why did the Human Rights Committee consider that the reservation is against the objects and purposes of the Optional Protocol?
- Who decides: parties or treaty monitoring body?
"I used a standard obscure diplomatic code word, but perhaps it wasn’t obscure enough."
Article 31: General Rule of Interpretation

1. A treaty shall be interpreted in **good faith** in accordance with the **ordinary meaning** to be given to the terms of the treaty **in their context** and in the light of its **object and purpose**.

2. The **context** for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be **taken into account** together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the **preparatory work** [travaux préparatoires] of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.
Customary International Law

Definitions
• State practice
• Acceptance that is law (opinio juris)
• Legally binding on all states

State Practice
**Nicaragua Case** ICJ 1986, para 186: ‘In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with these rules, and that the instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indicators of the recognition of a new rule. If a State acts in a way **prima facie** incompatible with a recognised rule, but **defends its conduct by appealing to exceptions** or justifications contained within the rule itself, then whether or not the States’ conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule’
Customary International Law

Key Issues

• Uniform, consistent, over time
• Contrary action treated as a breach of international law
• States specially affected
• Evidence: statements, laws, court decisions, treaties….
Customary International Law

Opinio Juris

ICRC, Customary International Law Study 2005: ‘it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction…. When there is sufficiently dense practice, an opinio juris is generally contained within that practice and, as a result, it is usually not necessary to demonstrate separately the existence of an opinio juris.

Key Issues

• Need be more than political ideas or policies
• Evidence: statements, UN General Assembly voting, resolutions of international organisations, scholars…. 
• Persistent objector and creation of new rules
• VCLT, Article 38: ‘Nothing…precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such.’
• Codifying; crystallising; creating/generating
R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWHC 2010 (High Ct), Lloyd Jones LJ:

‘This survey of State practice, judicial decisions and the views of academic commentators leads us to the firm conclusion that there has emerged a clear rule of customary international law which requires a State which has agreed to receive a special mission to secure inviolability and immunity from criminal jurisdiction of the members of the mission during its currency.’

It seems preferable to regard customary international law not as a part but as a source of the common law on which national judges may draw. … As part of this process they will have to consider whether any impediments or bars giving effect to customary international law may exist as a result of domestic constitutional principles…

[I]t appears that judges in this jurisdiction may face a policy issue as to whether to recognise and enforce a rule of customary international law. However, given the generally beneficent character of international law the presumption should be in favour of its application…. The case for giving effect to customary international law will normally be the more compelling where, as here, the national court is concerned with a rule which requires the grant of immunity and where a failure to give effect to that rule would result in the United Kingdom being in breach of its international obligations.’
**Jus Cogens**

- VCLT, Article 53: *jus cogens* is ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.

- Examples: waging aggressive war, crimes against humanity, war crimes, genocide, maritime piracy, apartheid, slavery, torture

- *Barcelona Traction Case* ICJ 1970, paras 33-4: ‘[The obligations of a State towards the international community as a whole… derive, for example in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basis rights of the human person, including protection from slavery and racial discrimination.’

- Hard to find (so rely on scholars) and rarely accepted by courts
Relationship of customary international and treaty law

- Customary international law and treaty law have equal authority
- If both exist regarding the disputed issue treaty law takes precedence
- A treaty law will not be given precedence over *jus cogens*

**Peremptory norms (jus cogens)**

- Fundamental principles of international law from which no derogation is ever permitted
- A treaty provision contrary to *ius cogens* is void
- Apply *erga omnes*, accepted and recognised by the international community and may be found either in treaty or custom
General Principles of Law Recognised by Civilised Nations

- Actual rules of international law which are of so broad a description that they can be called principles

- Maxims of universal application in domestic law which ought to apply in the international sphere also.

- Equity: to give flexibility, to fill gaps and to apply justice

- General principles common to systems of national law fall into the same category and are, in fact, often difficult to distinguish from customs as a source of international law.

- Examples: restitutio in integrum, pacta sunt servanda, prohibition from benefiting from one’s own fraud, unjust enrichment.
Other Sources

Judicial Decisions and Writings of Scholars

• International and national decisions
• Scholars!

Soft Law

• Resolutions, General Principles, etc, as evidence of evolving law

Non-State Actors

• International organisations
• Corporations, armed groups, NGOs
Write down three key takeaways about the sources of international law and paste them into the chat box (3 min)
Subjects of International Law (video)

https://www.youtube.com/watch?v=Qrim5NkBbW0
Subjects of international law

Traditional subjects of international law

• States
• Entities legally proximate to states
• Entities recognized as belligerents
• International administration of territories prior to independence
• International organizations

Subjects with some capacity under international law

• Individuals
• Corporations
States as subjects of international law

Characteristics of statehood

- Permanent population
- Defined territory
- Effective government
- The ability to enter into relations with other States

The territory of a state includes:

- the land mass, subsoil, the water enclosed therein, the land under that water, the sea coast to a certain limit, the airspace over the land mass and the territorial sea
International organisations

- Established by agreement and has states as its members
- The key to determining international legal personality – the organisation's constituent document
- Legal personality of international organisations is distinct from the personality enjoyed by states – can have its own rights and obligations under international law
Jurisdiction of States (video)

https://www.youtube.com/watch?v=j4Qegb36SWE
The Law of State Responsibility

- Codified in the International Law Commission’s Articles on State Responsibility (adopted by the UN General Assembly in 2002)

- Article 1 Responsibility of a State for its internationally wrongful acts

  Every internationally wrongful act of a State entails the international responsibility of that State.
The Law of State Responsibility (continued)

• **Article 2 Elements of an internationally wrongful act of a State**

  There is an internationally wrongful act of a State when conduct consisting of an action or omission:

  (a) Is attributable to the State under international law; and

  (b) Constitutes a breach of an international obligation of the State.

• **Article 3 Characterization of an act of a State as internationally wrongful**

  The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.
Attribution of conduct to a State

Article 4 Conduct of organs of a State

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

Article 5 Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.
Write down three key takeaways about the subjects of international law and paste them into the chat box (3 min)
Effectiveness of international law
Enforcement

UN Charter, Article 2: ‘All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered’

Non-Judicial Settlement – e.g. negotiation, Security Council

Compliance
- Committees of experts, specialised international organisations
- Domestic courts
- Non-legal pressures
- Rule of law
Dispute resolution

Specialised courts and tribunals
  • Criminal, economic, human rights, sea, trade

International Court of Justice
  • Advisory jurisdiction
  • Contentious jurisdiction
    ➢ Optional clause (giving jurisdiction in advance)
    ➢ Special agreement; provision in another treaty

Arbitration
Group exercise 3

• Prepare a list of matters which are not clear in the today’s class

• Discuss how the international system and the regional system are relevant to your professional activities;

• Discuss what could be done to increase the impact of the universal and regional systems on domestic law and practice; and

• Explain the relationship between national constitutions and laws and international norms and what happens in case of conflict.
Questions and answers