INTERNATIONAL LAW SUMMARY

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1. Nature of International Law

1.1 WHAT IS INTERNATIONAL LAW

International Law (IL) can be defined as a body of rules and principles that regulates relations:

- between States and public international organisations inter se;
- among States and individuals in the field of international human rights law; and
- between the international society and individuals who have committed international crimes.

Prior to WW1, the concept of IL was regarded as a system of legally binding rules and principles that regulated relations solely among sovereign States. These States were considered to be the only subjects of IL and the only entities possessing legal personality at an international level.

1.2 EVOLUTION AND EXTENT OF INTERNATIONAL LAW

IL goes as far back as the period of antiquity. A summary of the development of IL is considered below:

- Archaeologists have discovered treaties between kings of city – states in ancient Mesopotamia, dating from around 3000 BC. Treaty relations among rulers.
- The use of treaties among rulers remained a key attribute of political life throughout antiquity in areas of the Middle East and the Mediterranean. During this period, most civilisations acknowledged the binding force of treaties and respected persons of diplomatic ambassadors.
- Medieval Europe enjoyed a more intricate form of IL, though the structure of feudal realms was not well suited to the emergence of a distinctly separate legal system for the regulation of relations among monarchs. Power was shared internally between an aristocratic class and federal princes who upheld their own vassals, which regularly owed political allegiance to external authorities such as the Holy Roman Emperor or the Church.
- During the course of the 15th and 16th centuries, several authoritative States surfaced (England, France, Sweden, Netherlands, Spain and Portugal). Such States declined to follow political authority beyond their own jurisdictional rule. This prepared the way for the modern system of IL.

- At the start, the contemporary system of IL was concerned almost wholly with regulating relations among States as armed actors on the European stage.
- Rising from the chaos of Europe's religious wars in the 16th and 17th centuries, modern IL was long subjugated by norms regulating the behavior of war and illuminating matters about which disagreements might lead to conflict.
- The agreements concluding the Peace of Westphalia at the end of the Thirty Years War (1618 – 1648) confirmed the contemporary State system and feudal ideas of international order were quenched as a potent force animating intra – European relations.
- The peace treaties confirmed the authority of States based on differing versions of Christianity, recognised that no political authority or influence existed over States, and protected the principle of religious tolerance for minorities in several parts of Europe.
- In 1815, the Final Act of the Congress of Vienna (FACV) and related international agreements sought to adopt the Westphalian State system to considerably novel state of affairs.
- The main European powers established a formal arrangement of collective security against revolutionary and radical disorder everywhere within Europe, which was effectively invoked on several occasions.
- The FACV's official denunciation of the slave trade was also an important development in IL, and made another vital theoretical link between human rights concerns and the continuation of international tranquility.
- In 1864, the Geneva Convention gave legal protection to the injured in global military conflicts and to those seeking to help the wounded.
- 10 years later in 1874, the Brussels Conference and the Hague Peace Conferences (HPC) of 1899 – 1907 prepared and settled upon rules protecting non – combatant civilians, and the treatment of prisoners of war, in the area of international armed conflicts.
- The HPC of 1899 also established the Permanent Court of Arbitration in an effort to give a standing mechanism for the diplomatic and peaceful resolution of international disputes.
- Numerous authors have argued that the first immense age of globalisation transpired in the late 19th and very early 20th centuries. This era of IL began to evolve further beyond matters of war and peace, focusing on the facilitation of international cooperation in a range of areas. Noteworthy accomplishments during this period include:
    1. the Paris Convention establishing the International Telegraph Union (1865);
    2. the Berne Convention establishing the General Postal Union (1874);

3. the Paris Convention for the Protection of Industrial Property (1883); and
4. the Berne Convention for the Protection of Literary and Artistic Works (1886).

- In 1919, the Versailles Peace Conference established the League of Nations (LON). This led to the establishment of the Permanent Court of International Justice (PCIJ) by the LON in 1921. Although the PCIJ only lasted until 1945, it made lasting contributions to the expansion of IL in a variety of fields. By the time the PCIJ had finished, it had handed down 32 judgments in contentious cases between States, and 27 advisory opinions at the request institutions related to the LON.
- Significantly, the International Court of Justice (ICJ) replaced the PCIJ in 1945 upon the establishment of the United Nations (UN).
- On 26 June 1945, the UN Charter was opened for signature while the war against Japan was still continuing. By 24 October 1945, the UN Charter had entered into force and the International Military Tribunal for the Punishment of War Criminals had held its first session in Germany.
- Notably, the trial and conviction of numerous Nazi leaders for offenses against the peace, crimes against humanity and war crimes, was of immense importance in demonstrating that accountability for the most serious offence against IL could attach to political and military leaders and not merely to the State whose dealings they directed.
- In relation to human rights protection, IL's traditional connection with the preservation of international peace was recognised in numerous international instruments:
    1. the Preambles to the Universal Declaration of Human Rights (1948);
    2. the European Convention on Human Rights (1950);
    3. the International Covenant on Civil and Political Rights (1966) (ICCPR); and
    4. the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR).
- The social order of IL has since the Peace of Westphalia and the transmission of the European State system to the rest the world, been under the political authority of the society of States. The actions of these States produce the treaties and customs that represent positive IL.

1.3 ARRANGEMENT OF THE INTERNATIONAL SYSTEM

1.3.1 Legal norms

In IL, it is not possible to point to institutions endowed with readily particular legislative and executive functions. In this sense, there is no international government or system of international legislation. Consider two prominent exceptions:

1. Some resolutions adopted by the UN Security Council will enforce legally binding obligations on all States; and
2. The European Union's legislative organs may adopt laws which are binding on member States in such a way that they may be directly relied upon by litigants in domestic courts or tribunals.

Generally, IL is primarily a system of customary law, progressively complemented by rules and principles that are agreed upon in treaties among States.

There is no doctrine of *stare decisis* in IL. Consequently, international courts and tribunals are not bound by earlier judicial decisions.

1.3.2 Organisations and international institutions

According to J L Brierly, a State:

> *"…is an institution, that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on."*[1]

Presently, there are no institutions other than States that exercise comprehensive political authority. Nonetheless, States are not the only institutions in IL.
States themselves have created hundreds of bilateral, regional or universal organisations with the rationale of promoting the common good of their peoples in areas where unilateral State action would be less effective than international co – ordination or co – operation (ie, the Channel Tunnel Safety Authority established by the governments of France and the United Kingdom exercise certain technical functions regarding the undersea tunnel linking the two countries).

Most notably, however, the UN is the one international organisation that is almost universal in its membership (189 States) and whose functions extend to regulating most matters that give rise to international concern.

[1] Brierly, J.L., *The Laws of Nations*, 6th ed, Oxford University Press, New York, 1963 at 126.

Art 1 of the UN Charter sets out the scope of the organisation's purpose:

1. to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and IL, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. to develop friendly relations among nations based on respect for the principle of equal rights and self – determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. to achieve international co – operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion; and
4. to be a center for harmonising the actions in the attainment of these common ends.

Article 103 of the UN Charter makes a claim to international constitutional supremacy:

> *"In the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."*

Art 7(1) of the UN Charter outlines that the UN consists of ***six principal organs***:

1. the General Assembly (GA) – the only organ in which all UN members are represented. Art 9 – 11 of the UN Charter makes clear that the GA is able to 'consider', 'discuss' and 'make recommendations' in relation to any matter within the Charter's scope, including the maintenance of international peace and security;
2. the Security Council (SC) – consists of 15 members, five of whom are permanent members (China, France, Russia, the United Kingdom and the United States), all of which have a power of veto on all but procedural matters: Art 27 (UN Charter);
3. the Economic and Social Council (ECOSOC) – consists of 54 members who are elected for three – year terms by the GA. ECOSOC is authorised to 'make or initiate studies and reports', make recommendations', prepare draft conventions' and call international conferences: Art 62 of UN Charter;
4. the Trusteeship Council (TC) – established under Chapter XII of the UN Charter. The TC's main role was to oversee the management by various member States of certain

non – independent territories, known as 'trust territories', which had been placed under their control pursuant to Art 77 of the UN Charter;

5. the ICJ – the following points should be considered:
    - consists of 15 judges who are elected by the GA for renewable terms of nine years: ICJ Statute, Arts 2 and 13;
    - issue judgments in disputes between States: Statute, Art 34 – 36 and 55 – 60; Charter, Art 92;
    - issue or advisory opinions on legal questions at the request of organs or specialised agencies of the UN: Charter Art 96; ICJ Statute, Art 65; and
    - exercises no jurisdiction in contentious cases unless parties to the ICJ have consented: ICJ Statute, Art 36.
6. the Secretariat (TS) – comprises a Secretary – General and such staff as the Organisation may require. Art 97 of the UN Charter outlines that the Secretary – General is appointed by the GA upon the SC's recommendation.

Art 57 of the UN Charter illustrates that in addition to the principal organs of the UN, subsidiary organs play an important role in IL.

Subsidiary organs are bodies that although not created by the UN, are organs in accordance with the UN Charter. Well – known subsidiary organs established pursuant to Art 68 of the UN Charter by ECOSOC include:

- The Commission on Human Rights (COHR);
- The United Nations Children's Fund (UNICEF); and
- The Office of the UN High Commissioner for Refugees (UNHCR).

The International Law Commission (ILC) has often been seen as the most important subsidiary organ in IL. Art 13(1)(a) of the UN Charter authorising the GA to:

> *"initiate studies…. encouraging the progressive development of IL and its codification."*

Art 1 of the ILC Statute provides that the objective of the ILC is the:

> *"promotion of the progressive development of IL and its codification', and that it 'shall concern itself primarily with public IL, but is not precluded from entering the field of private IL"*

Specialised agencies are neither principal organs nor subsidiary organs of the UN. Rather, they are autonomous international organisations affiliated to the UN. Art 57 of the UN requires that:

> *"…..various specialised agencies, established by international agreement and having wide international responsibilities… in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations."*

Examples of specialised agencies include the:

- International Labour Organisation (ILO);
- The International Monetary Fund (IMF); and
- the World Health Organisation (WHO).

1.4 LEGAL NATURE OF INTERNATIONAL LAW

1.4.1 International law and the code of ethics argument

It has been argued that IL is merely a code of international ethics. Two propositions are highlighted to support this position:

1. it has been declared that IL fails to control the conduct of States, specially wherever vital national interests are at risk;
2. there is thought to be no effective and centralised enforcement mechanism of such a kind as to require an element of compulsion upon States.

S Hall outlines a number of important points, all of which appear to counter the argument that IL is merely a code of international ethics: [2]

- It is simply incorrect to claim that IL is ineffective in curtailing lawless behaviour by States. IL continuously exerts a crucial influence on relations between States. Every day, innumerable dealings between States occur which are fully in accordance with IL;
- IL controls various technical matters, such as international telecommunications and air transport;
- Enforcement mechanisms in IL do exist, though it is true that very few of them are centralised in international institutions. The enforcement of IL remains overpoweringly decentralised in character and much more dependent upon self – help than is the case with mature domestic legal orders;

[2] Hall, S., *International Law*, 2nd ed, Sydney, LexisNexis Butterworths, 2006 at 20.

1.4.2 Air Services Agreement Case (France v Unites States)

Air Services Agreement case (France v United States) (1978) 18 RIAA 416:

- If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of IL pertaining to the use of armed force, to affirm its right through counter – measures;
- It is generally agreed that all counter – measures must, in the first instance, have some degree of equivalence with the alleged breach; and
- It is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach.