International Law - Table of Contents

Introduction

- International law is its own legal system distinct from domestic law.
- States universally concede the existence of international law
- Concern of international law is whether something is lititgational? Can it go to court?
- Compared to a political model, which is non-binding instruments, that governments put importance on.
- International law is a means to political end for countries:
    - There is no legislature
    - No real sanctions – enforcement problems
    - Countries that violate international law can largely do so with impunity. Especially larger countries.
- However, when you observe how states interact with each other, they do so as if there is a binding system of rules.
    - Example: universal respect for diplomatic immunity, treaties for air travel.
    - Foreign Ministries all act like they believe in international law
    - International law justifications are given for breaches.
- Breaches of international law tend to be spectacular, whereas compliances are not publicized.
- Reciprocity: Example Goa is taken over by India from Portugal with international justification given. Later China uses the same excuse to steal part of India. States must balance short-term and long-term international legal goals.
- Sanctions:
    - There are situations where the ICJ will hear a dispute between states.
    - Can have sanctions through the UN security counsel.
    - Sanctions don't work particularly well, and are most effective when most states comply
    - Security Counsel can also approve the use of force by one state against another, Korean War, Iraq I.
- There is the right to self-defense, which is from customary international law and not only tied to the UN Charter.
- Disputes:
    - Can be not settled but cold disputes. Ex Canada USA disputes.
    - States accepted that peaceful dispute settlement is dial.
    - Rejection of the idea that the biggest state should always win

Development of International Law

- Modern international law largely began to develop in Europe in the 1800s.
    - The Treaty of Westfalia was in 1668 but development did not take off until the 1800s.
    - Start of the state structure: independence of the state and control over the populations
    - 1899-1907: Hague conferences: try to address international dispute resolution using international law
    - League of Nations was an attempt at a global group to keep the peace and promote international law
- In the 50s the Soviet Union did not want international law rules reaching internally and interfering with state action
    - Western states willing to concede sovereignty for certain ends via treaties.
    - Russia and China remain the biggest sovereigntest states today
- 1960s there were challenges faced in international law with a flood of new states following decolonization.

    - The Eurocentric model of international law didn't fit with the aspirations of previously colonized states.
    - Wanted absolute resource sovereignty
- Global acceptance of equality of states.
- Lots of new treaties in new areas of law in the past 40 years.
    - There is both abundance and scarcity at the same time. Lots of law in some areas and none in others.
    - Areas with little or inadequate law:
        - Refugees: People moving because they have no choice. Canada is lucky not to share a border with a state that is falling apart.
        - Humanitarian law: during failed states there is no right to intervene at international law. Law is possibly shifting here: UK claims int law support for work in Libya
    - Some areas have lots of law but little compliance: torture, human rights abuses
        - States deliberately don't comply with these treaties which is different than being unable to meet international obligations.
    - Can have overlap of regimes: WTO and enviro overlaps cause problems.
    - More avenues for dispute resolution than before
    - Not much development on some big issues: self-defense, use of force, extra-territoriality
    - Be careful reading treaties as they may be entirely aspirational rather than creating legal obligations. Ex. Convention for Biological Diversity.

Subjects of International Law

States and Statehood

Definition

- Criteria for statehood from the Montevideo Convention: Permanent population, defined territory, government, and capacity to enter relations with other states.
    - For permanent population no minimum is given and it can be variable over time
    - Defined territory is essential but only requires actual and effective control not the absence of uncontested boarders.
    - The presence of a government is good evidence but absence isn't determinative. There is more flexibility given here to previously established states
    - Capacity to enter international relations is **required**.
- Bending to the will of another states is not necessarily a loss of independence (Austro German Customs Case). An agreement, which constrained the ability to impose customs did not compromise independence. Must not have a state with full legal authority over another.
- Loss of independence due to invasion does not extinguish the state
- Recognition is required to be a state.
    - Admittance to the UN would be good evidence of recognition but the converse does not hold true.
    - More recognition = more benefits.
    - Now recognition may be withheld until the state meets certain requirements. Example human rights requirements and the former Yugoslavia
- Taiwan – Republic of China
    - Used to hold the UN seat for China, now it is held by the People's Republic of China (Mainland China).
    - Both China's assert authority over the other but fail to exercise much
    - A shift occurred where the world now sees China has having a government centred in Beijing

    - Taiwan is careful about declaring itself an independent state, as opposed to the true government of China.
    - Is recognized by some small south pacific states that receive more money from Taiwan
    - There is a long-term population in Taiwan.
    - Taiwan does not exist in international politics but is an independent member of WTO, and has been given a role in international fishing organizations.
        - One of the top 15 entities for world economic power
        - Stated to strongly enforce fishing laws when given this opportunity.
    - Canada has an embassy in Beijing but a trade office in Taiwan, which is typical of major countries.
- Problem with the Maldives and statehood: the water is rising with the main island barely above sea level currently. What will happen when the land disappears?
    - International law has no way to deal with this, and deals poorly with the movement of people.
    - Likely would continue to be a state with ocean territory.
- Naru in the South Pacific continues to be a state even though most of it's citizens live in Australia.

Rights and Obligations

- The UN Charter gives sovereign equality to all member, and a 1970 Declaration extended this to all states not just member.
- Sovereignty includes power over all individuals living in that territory and power to freely use and dispose of territory, the right to keep other states out of your territory, sovereign immunity, respect of life and property of nationals.
- All states have equal power.
- When a state joins the UN they grant the Security Counsel the right ot violate your sovereignty.
- Interference with another state is not restricted to physical interference.
    - Example: Canada at one point asked the UK high commissioner to leave due to his statements that were seen to interfere with Canada's internal workings.
- Physical interference and the Salomon Jacob Case: A German is kidnapped in Switzerland by Germans acting on behalf of the state. Switzerland demands him back and Mr. Jacob is eventually returned.
- Physical Interference:
    - This is about state or military interference not individuals.
    - Fundamentally not legal.
    - Intervention requires approval from the UN. The Security Counsel authorized the use of force under the UN Charter. However, Ch 7, which allows this, was premised on a UN standing army.
    - Korea and Iraq I were authorized.
    - More problematic for internal conflicts, which begin to bleed across boarders. The UN has done this but Russia and China do not like it.
    - Libya 2011: states can take all necessary measures to protect citizens but may not be a foreign occupying force.
    - The USA, however, will not go under the UN flag and will only act as the US
    - The right of self-defense is clearly recognized under the UN Charter. Shifts are occurring here with the age of nuclear weapons where a state no longer has to wait to be hit: USA likes to use this.
        - Must be proportional
        - Issue of self-defense and terrorism: terrorism isn't usually a government act. However, the UN will authorize the use of force in relation to state sanctioned terrorism
    - Protection of nationals: not strong international legal support but is used by the US. Is a political rather than a legal justification. Consider Russia and Ukraine focus on people of Russian Heritage.

    - Humanitarian intervention, and responsibility to protect. See UK comment on Syria. This is not fully developed to the point of being CIL but there is a strong suggestion the law is moving this way.
    - Responsibility to Protect is a political rather than a legal justification. Canada does not support it. Partially developed in response to Rwanda where the Security Counsel failed to act.
- In response to use of chemical weapons in Syria by the Syrian government, the UK has put forward a statement that they believe there is international law justification for intervention and force to achieve humanitarian goals.
    - Syria has not breached any treaties here as they did not sign them.
    - This would be a limit on Syria's sovereignty.
    - UK states that the requirements are: convincing evidence, serious humanitarian violation, no practical alternatives (here they had been blocked by the Security Counsel), proportional force

Federal States and Sub-State Units

- In unitary states there is a central political authority and one legal system. This is not the case with federal states, which are a union of two of more political units.
- In a federal state the central government may not control all of the sovereign matters.
- The Vienna Conference turned down the ability for constitutive units to sign treaties, which was supported by Canada.
- However the ability of sub-state units to enter international relations is not prohibited under international law.
- I usually comes down to the constitutional structure of the state in question.
    - USSR: some sub-states could
- In Canada the Federal government claims the monopoly on treaty making power.
    - The provinces have some role in foreign affairs. They will enter into discussions and arrangements with states, but not treaties.
    - Based on the black letter law of the constitution it is not clear that only the Federal government has this power.
    - In the 1960s the SCC said that Canada is the sovereign states for international law because other states only recognize Ottawa.
    - Some treaties will have a federal state clause: only binding on provinces which also sign it.
    - Quebec's position: Provinces can make treaties on matters within provincial jurisdiction.
        - Only recognized by France.
    - Umbrella agreements allow Quebec to do things it otherwise would be unable to. Francophonie has seats for Canada, Quebec and New Brunswick.

Self-Determination

- There has been an emergence of "peoples" as separate from states in international law. This is linked to the increase in human rights law.
- It was initially controversial that a non-state could exercise an international legal right but is now accepted, partially due to the work of the UN.
    - It is in the Paris Treaty
- Considerations:
    - Who qualify as a "people"?
    - Under what conditions does the right arise?
    - What are the possible consequences of an exercise of the right?
- International law draws a distinction between external and internal self-determination.
    - UN Declaration on the Rights of Indigenous Peoples states that there is a right to self-determination but this is an internal not external right.
- The assertion by a peoples can make them a subject of international law on their own for some respects. Ex: Palestine has some international legal state but not as state.

- States do not want too open of an understanding of external rights to self-determination, as that would lead to states breaking up.
    - Right to territorial integrity.
    - Internal self-determination is more consistent with this.
    - Concern over outsiders encouraging external self-determination. Example: France is usually very careful to not recognize Quebec as a state.
- Conditions that give rise to self-determination:
    - Has only prevailed so far in cases of colonial or alien subjugation.
    - In theory there is a general external right where a peoples internal right has been denied.
    - In the colonial context it can be seen as affirming the sovereignty that should have never been interfered with.
    - Non-colonial examples (Croatia, Slovenia, Macedonia, Bosnia-Herzegovina) the unilateral succession was not fully recognized until proof of atrocities was seen.
- Israeli Wall Case from ICJ (equivalent of reference case):
    - Found that the people of Palestine had a right to self-determination.
    - Israel has duties to Palestinians and the wall interferes with this.
    - All states are to assist Palestinians in exercising their right to self-determination.
- Quebec Succession Reference: SCC holds that Quebec does not have an international legal right to external self-determination, but that it does exist as an international legal right.
    - Looks at internal versus external self-determination.
    - Internal is minority rights within a country, whereas external is the right to statehood.
    - Internal right gives: right to government, choice and access to political, economic, social, and cultural development within the state.
    - Minorities do not have an automatic right to external self-determination at international law.
    - A state whose government recognizes the whole people and recognizes minority rights has an international legal right to territorial integrity.
    - Court finds a right to external self-determination when the internal right has been denied (so far international law has only found it for colonial and peoples under foreign occupation), but that Quebec does not meet this requirement.
        - Left open for indigenous peoples of Quebec.
- Consequences:
    - Emergence of a sovereign independent state.
    - Free association with an independent state
    - Integration with an independent state
    - The choice of the remedy should be made freely by the people in question.

Indigenous Peoples

- This area has a lot of literature and not a lot of state practice.
- Responsibilities on states with regards to indigenous peoples: issue of human rights and minority rights.
- There are some treaties, which provide for entitlements for indigenous peoples.
    - Creates a special right
    - International Whaling Convention has a category for Indigenous peoples. (Canada not a party)
    - The treaties tend to argue that the rights should be acknowledged internally.
- Indigenous groups have the own seats on the Arctic Counsel
    - However this is not a treaty based body.
    - Indigenous groups are called permanent participants.
- UN Declaration on the Rights of Indigenous Peoples
    - Not a legally binding document, but has political importance
    - 143 states voted in favour, 11 obtained, 4 voted against (Australia, NZ, USA Canada).

    - Largely a human rights declaration about national level rights.
- Problem: it is very challenging for individuals to challenge the non-compliance of states with international legal obligations

International Organizations

- Here international organizations refers to intergovernmental organization that are created by formal treaties by states.
- It is usually the constitutive document that lays out the legal authority of the organization.
- As a rule international organizations can only have power over their member states.
- The UN is the largest international organization.
    - There are also other organizations within the UN family.
    - Each have their own constitutional structure but a related to the UN
- Can also have international organizations unrelated to the UN:
    - WTO, International Whaling Convention, Pacific Salmon Commission
- Organizations are created by their member states and say who can be a party.
    - Found in the constitutive treaty for UN family organizations
    - WTO, NATO require the member to be admitted.
- All have constitutive documents.
    - This will lay out: mandate, membership, decision making (not all have this power)
    - This is also where one looks to determine if the decisions of the organization are binding on its members. Remember non-binding decisions can still serve a political importance.
- Can have MOPs and COPs that make decisions and release documents.
    - Usually based on consensus, which can mean different things in different contexts.
    - Often no legally binding decisions.
- Role of International Organizations in the enviro contexts:
    - Function and powers depend on what is granted by constitutive instrument and subsequent interpretation.
    - Provide a forum for cooperation and coordination between states on international environmental management
    - They formally provide information and do fact finding
    - Contribute to soft-law by developing policy initiatives and standards.
    - Independent mechanism to settle disputes.
- For who can be a party look the constitutive document.
    - Hong Kong and Taiwan are parties to TWO
- EU is not usually a separate party for international organizations but can be
- Can an international organization exceed its power?
    - ICJ case on WHO and nuclear weapons: said that posing a question on nuclear weapons is beyond the capacity of WHO.
- NGOs are not international organizations. They are civil societies that advance a particular interest.
    - As such they have no affiliation to a particular government or state and no international legal personality. They are governed by the domestic laws under the state they are established.
    - Can, however, have a role in shaping international legal landscape, particularly in the humanitarian context. Red Cross has been recognized in treaty implementation.
    - Can serve a fact finding role proving information.
    - NGOs can also be industrial groups, not only humanitarian and enviro and these groups would also have more power if it was granted to NGOs generally.
    - Countries can included NGO members in their delegations for meetings.

Individuals and Corporations

- As a starting point individuals do not exist at international law.
- When they do it is not in a similar capacity to a state.

    - Can have international law for the benefit of individuals but this does not necessarily grant rights.
    - Can have dispute resolution for individuals if specifically granted by treaty and their state has consented. However, the decisions are not usually binding on the state.
    - State espousal of individual claims
    - Individuals as the objects of international law: ICC
- Allowing individuals to bring human rights complaints against states by treaty moves away from the idea that a state's action within its own country cannot reviewed by international law.
    - However, state must have ratified the relevant treaty and the individual must have exhausted local remedies.
    - Do not need to be a national, just that the state has jurisdiction over you.
- There are three main procedures to bring a complaint to a human rights body:
    - Individual communication
    - State-to-state (has never been used)
    - Inquiry
- Individual complaint and inquiry both require the state to have recognized the competency of the committee.
    - Procedures are confidential and the cooperation of the state must be sought throughout.
- The Sandra Lovelace case was brought by a Canadian woman to an international committee in the 1970s.
    - Challenge to taking away status from first nations women who married non first nations men.
    - Committee declared Canada was not compliant with a civil rights treaty
    - Canada instantly changed the law. Here the committee was used to make an unpopular political decision
- However, Canada does not always follow committee decisions.
    - Committee outcomes are not legally binding (which the committee is aware of).
    - Committees are advocates for their treaties and there for their interpretations are not international law.
    - Religious discrimination case on Catholic schools in Ontario ignored as it would require constitutional amendment.
- Ahani Case: ONCA rules that there is no requirement to wait to deport him while the committee on torture investigates.
    - The court rejected an legal importance of the committee in Canadian law
    - The SCC had already found that the deportation proceedings were consistent with procedural fairness and s7 rights.
    - Dissent: The government has held out the right to communicate with the committee.
- Individuals cannot usually bring a claim against a foreign government, unless specifically granted by a treaty. Seen in some investment treaties.
    - Expropriation without compensation is possibility a violation of international law. For this the only recourse is usually espousal of the claim but this then gives the individual no rights in the proceedings.
- Individual responsibility in international law is seen for war crimes and genocide in international criminal cases.
    - In the state has a well functioning system of internal and military justice then the person does not have to go before the ICC
    - Has been largely trying African. A separate tribunal is usually set up for European cases.

Nationality

- There is no international standard to determine the nationality of individuals. It is handled by the domestic law of each state.

- In Canada it is done by place of birth.
- Some countries maintain ethno-cultural requirements for nationality.
- There are also different standards for the revocation of citizenship. Some countries will not recognize any revocation
    - In Canada you can revoke citizenship and also then later get it back. This is the same as the USA.
- Whether a state recognizes your nationality is also a problem.
    - Nottebohm Case: ICJ held that Guatemala could look behind recently acquired Lichtensteinian citizenship acquired to avoid expropriation of property owned by Germans in Guatemala during World War II.
- International law tried to deal with multiple citizenships by looking to the predominant nationality, but this has not been fully developed.
- This area lack international law because states do not want their to be any.
- Corporations are the nationality of where they are registered. However, corporations end up with multiple registrations making this a mess.
    - Shareholder nationality is irrelevant
- Ships, planes and space objects.
    - Based on registration

Creation and Ascertainment of International Law

- There is no international law legislature, so law is created by the states.
- Anyone can have a role in the creation of the content of a treaty but it does not become law unless it is signed by states.
- Article 38 (1) of the Statute of the ICJ states where it looks to find international law.
    - "International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
    - International custom, as evidence of a general practice accepted as law;
    - The general principles of law recognized by civilized nations;
    - Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"
    - Article 38(2) allows the court to retain the power to make decisions based on what is fair and just
- Scholarship and writings are viewed as law-finding not law-making sources.
- It is unclear if there is a hierarchy of sources.
- Sources not listed can also be significant

Customary International Law

- CIL is similar to common law in that it can be difficult to determine what is CIL
    - Has the capacity to evolve and change. Less stuck in time
- For a rule to be CIL it must be manifested by general practice of states. Evidence for this:
    - Material / State Practice: extensiveness, repetition / consistency, duration. Comes down to how many states, which states, over how long and with what consistency
    - Subjective elements: states must believe that it is customary international law
- It is generally not required that a practice be universal.
    - Only requires a sufficient number of states to adhere to it then all states are bound
    - Reasons for this: necessity, acquiescence
    - Ideally the practice will be found in all principle legal systems around the world.

    - Nicaragua Case: a great number or possibly the majority of states, or at least the majority of interested dates.
- Uniformity refers to consistency.
    - Does not requires prefect consistency, substantial is enough (Nicaragua)
    - Inconsistent conduct is viewed as a breach of the rule, not as the creation of a new rule.
- Duration does not require a set amount of time. However, for shorter duration there must be higher generality and uniformity for a rule to have crystallized.
- Opinio Juris (Subjective element): This is required to distinguish practices, which exist for political expediency from CIL.
    - SS Lotus: opinio juris cannot be inferred from state conduct.
- Persistent objectors: the way to not be bound by CIL
    - Requires: state objection from the beginning, consistently maintains the objection, the objection must be express.
    - The requirements minimize how often it can be use
    - Has been expressly recognized by the ICJ
    - This can be seen in Canada's boundary disputes with USA and Denmark. Consistent sending of notes to reaffirm disagreement. If the protest note wasn't sent that would be acquiesce to the other state's claim. Problem here is that this correspondence isn't public
- How to develop and change CIL: assertion – response basis
    - Canada and law of the see in the 1970s: Canada asserts right to control shipping vessels out to 100 nautical miles, which initially was met with protest. Then added to LOS convention and previous objectors have stated they now accept it as CIL
    - Bush II and Iraq II: assertion that preemptive self-defense was justifiable as CIL. Rejected and did not become CIL.
    - Canada arrests Spanish vessel in 1995 outside of 200 n mile zone. Pushes for CIL and widely rejected.
- Treaties can codify CIL or show that states feel a treaty is necessary because there is not CIL in the area.
    - North Sea Continental Self Case: Issue of whether an article of the Geneva Convention is CIL. Germany is not a party to the convention so it would need to be to bind. The ICJ finds that it is not CIL based upon:
        - Article 6 allows for reservations. Shouldn't have the option to opt out of CIL
        - No wide acceptance of the rule to satisfy state practice requirement
        - No indication of any opinio juris. Suggested that here consistent state practice could have satisfied the requirement

Treaties

- Treaties have increasingly become central to international law.
    - Due to the speed and clarity in law creation.
    - They only bind the parties to them.
    - The UN is a treaty based body and the UN Charter is one of the most widely ratified treaties ever.
    - International Law Commission as been at the forefront of codification of international law.
- 1969 Vienna Convention on the Law of Treaties is a treaty on treaties that is now considered to be CIL making it binding on all states.
    - Only 105 states have signed the treaty
- Vienna Convention definition of treaty: international agreement between states in writing government by international law.
    - This is narrower than the CIL definition
- CIL definition of treaty:

    - International agreement: treaties make international law and require more than one party.
    - Between international legal subjects: not restricted to states any more
    - Intent to be bound: ascertainment of intent can be difficult. Look to the circumstances and various evidence. Example of no intent to be bound is the Helsinki Final Act which makes it clear that it does not intend to be binding.
    - Governed by international law: This separates a treaty from a contract. The parties must intend for international law to apply.
- *Pacta sunt servanda* states that international legal undertakings must be performed in good faith.
    - Cannot unilaterally withdraw from a treaty.
    - Both CIL and codified in Vienna Convention Article 26
- A party may not rely on its domestic law as a justification for breaches of international law. (Vienna Convention Article 27)
- Treaties are presumed to bind the entire state. Article 29: ratification applies to the whole country.
    - Not a problem for Canada
    - Can be a problem for colonies. Ex. Denmark has Greenland. The assumption is that colonies are included.
- Presumption against retroactivity
- Successive Treaties:
    - The later treaty may specifically address this.
    - Default: later treaty applies to areas of overlap, but the early treaty still governs states not party to the later one.
    - Rules in Article 30 of the Vienna Convention.
- Treaties and CIL
    - Held in the Nicaragua case that the CIL rule continues to exist behind the treaty whose rule replaces it
    - Creation of CIL in relation to treaties (North Sea Case):
        - Treaty may embody estabilished CIL principles
        - Treaty could crystallize a developing rule of CIL
        - Treaty provisions can be used by non-parties and eventually become CIL
    - Treaties which vary CIL are thought to have intended to do so
    - Problem: CIL develops where there is a treaty: treaty like still applies but uncertainty exists.
- How to make a treaty:
    - Negotiations
    - States sign on to the treaty
    - Ratification – this is required for a treaty to be binding.
- Treaty will have entry into force clauses: sometimes based upon how many states have ratified.
    - Can be based no only on the number of the states but their relation to the subject mater. Ex. Shipping treaties require number of states plus gross registered tonnage.
- Depository: state responsible for that treaty. For all UN treaties that is the UN.

Interpretation

- States interpret treaties and they carefully guard this power
    - Can lead to very different interpretations coming from different states.
- Sometimes ambiguity is left in treaties to encourage more states to become parties
    - Also a problem with UN treaties in 8 languages and none of them are an "official" language
- Courts or tribunals can when asked be an official interpreter of a treaty, but this interpretation will only bind the parties to the arbitration.
- International organizations can sometimes interpret treaties if this power is granted by the treaty
- Can also give an interpretive power to a group of states but this is rare.
- Article 31 and 32 of the Vienna Convention give guidance for interpretation.
- The intention of the parties can be used but this is now usually done off the record.

Treaty Making and the USA

- Each state has its own process for determining whether or not to be party to a treaty
- The president must present the treaty to the senate and a 2/3 majority vote is required for ratification.
    - Any treaty ratified by the USA is a part of their law
- Creates issues: harder for the USA to enter international relations.
    - Wasn't a member of the League of Nations
    - Not a party to the LOTS Convention, but much of it is now CIL and binds the US anyway
    - Kyoto – USA will not ratify environmental treaties.
- This can give the US leverage in international negotiations. Changes to encourage the senate to pass treaties.
- To avoid the senate much of Canada – USA treaties are letters stating "if you don't do this, we won't either." Then it is an executive agreement which senate doesn't have to pass.

Treaty Making and Canada

- The power to determine ratification of treaties and entry into force is a part of the Royal Perogative
- Treaty making in Canada is a federal power entirely in the hands of the executive
    - Negotiations, ratification and coming into force
- For large multilateral treaties the federal government will consult with other groups
- At the stage of implementation is comes down to federal / provincial division of powers.
    - Often Canada won't ratify treaties until the necessary legislation has been put in place
- As of 2008 Federal government will table treaties prior to ratification.
    - However the choice not to ratify isn't tabled
    - Only approximately 3 treaties have actually been discussed in the House
    - Only once has there been a vote in the House. There was a vote not to ratify. The next day the treaty was ratified by the executive.
    - PMO can also grant and exemption to this.
- House of Commons does have a true role when legislation is required for implementation

Dispute Resolution

- Character of international disputes:
    - Can be political rather than legal
    - Can be only over the facts
    - Can be whether a dispute exists.
    - What law is applicable? What is the CIL? What should it be? How to interpret the treaty?
- Settlement options:
    - Unilateral options: force (not allowed under the UN Charter), sanctions (questionable affectivity)
    - Use of the UN as a forum for discussion
    - Bilateral negotiation, can be guided by a treaty body
    - Article 33 of UN Charter on peaceful settlement using a third party: negotiation, mediation, good offices
    - ICJ
- Arbitration: states form their own panel. The arbitrators only make legal determinations. States can agree that the decision will be binding
- Adjudication: bring the case before an existing body
    - ICJ
    - WTO has own adjudication process. Can deliver it's own binding legal resolution.
    - Law of the Sea Convention: gives an obligation to settle disputes using ICJ, arbitration or the LOTS tribunal

- ICJ basics:
  - 15 judges that serve 9 year terms representing all major legal systems and blocks of countries.
  - No two judges can be from the same state
  - Once elected judges are independent of their state
  - Can have more than 15 judges as any country before the court has the right to a national judge for that adjudication.
  - Only states have standing before the court
- How to get to the ICJ:
  - Compulsory jurisdiction – Article 36(2) Statute of the ICJ allows a state party to accept the jurisdiction of the ICJ for all international legal disputes
    - Can also have reservations under this. Canada has one about arresting vessels more than 200 n. miles from shore so long as it's consistent with Canadian law. All reservations apply reciprocally.
  - Treaty – Article 36(1) can have a clause stating that all disputes under the treaty will go to the ICJ
  - Consent – usually via a compamis, but can also have separate unilateral acts of consent.
  - Advisory opinions: Article 65(1) these are requested by the General Assembly or the Security Counsel (Article 96).
    - These are for any legal question; however, a political nature to a question does not deprive it of its legal nature (Kosovo Opinion)
    - ICJ as a UN organ has shown that it believes advisory opinions should not be refused.
- Can have disputes focus around whether the ICJ has jurisdiction over a dispute.
  - The court determines it's own jurisdiction.
  - Can also have states only appear for the jurisdictional determination and not the substantive part (USA for the Nicaragua Case)
- Enforcement of judgments:
  - There is none for advisory opinions
  - ICJ can reach decisions that require enforcement which they turn to the Security Counsel for
  - Usually states just comply with the decisions. When states go to the ICJ they do so intending to accept the decision.
  - When someone is dragged to court there become enforcement problems
  - Can have cases clarifying what the court previously decided (this is not an appeal)
- Can have problems when states don't show up to court.

South China Sea Dispute

- Dispute is between China, Vietnam, Malaysia, Brunei, Philippians
- The islands are tiny rocks in the ocean but there has been the suggestion that they have oil so everyone wants them
- Basis of the claims:
  - China: historical control
  - Vietnam: historical reasons
  - Philippians: Previously a citizen claimed some as an explorer, proximity
  - Brunei: claims one island for no clear reason
  - Malaysia: claims a couple southern islands without stating why
- Legal position for international law of the sea:
  - Not clear. For an island the state would be entitled to 200 n. miles; however rocks do not get this much so it is not clear.
  - Shipping concerns related to control of the area.
- Recently the Philippians have tried to take China to court.
  - The LOTS Convention has compulsory jurisdiction.

- China is refusing to participate in the tribunal arguing that this is a political not legal issue
- The tribunal goes forward regardless, and the decision will be technically binding on China.
- The tribunal will have to decide if it has jurisdiction, which it may not.

Application of International Law in Canada

- How international law interacts with domestic law depends on the rule of the legal system in question
- International law deems that an international legal rule trumps a domestic one, but this has no baring on how the domestic legal system responds to international law.
- Two theoretical approaches to domestic application of international law:
  - Dualism draw a distinction between international and domestic law treating them as two isolated legal systems. Transformation is therefore required for an international rule to become a domestic one
  - Monism holds that there is no distinction between the international and domestic law. International rule have immediate effect domestically.
- In Canada this is dealt with through constitutional law
  - Treaties require transformation
  - CIL applies automatically for restrictive rules

Treaties in Canada

- Treaties must be transformed to be binding law in Canada (*Baker* citing *Francis v The Queen*). Then it is the Canadian legislation implementing the treaty that is the source of domestic law
  - A treaty can not be invoked as a source of law in a Canadian court
- *Hape* held that there is a presumption of compliance with international obligations that applies equally to CIL and treaties.
  - This pulls away from a strict transformative approach allowing treaties to be used as evidence for interpretation of Canadian law
  - This does not however alter legislative power to expressly breach international law
- In *Tibodeau* the court used international law to interpret the Canadian legislation implementing the Montréal Convention.
  - Issue of whether an airline could be sued for a breach of the Official Languages Act on an international flight in light of the Montreal Convention. Held: no suit available.
  - Dissent: Montreal Convention legislation is not a complete code and a restrictive view of commonality should not be used. The Official Languages Act would require alteration to not apply.
- The power to conduct foreign affairs, which includes treaty-making, was traditionally a part of the royal prerogative and is now vested in the executive
  - However only the legislative branch can change domestic law as required for implementation.
  - There is no treaty implementation power found in s 91 or s 92. It has also been held not to be a part of POGG. As such it is up to the relevant head of power to implement the treaty (The *Labour Conventions Case* [1937] – federal government tried to implement legislation clearly within the provincial heads of power to meet treaty obligation. Found ultra vires).
  - Since then the SCC has noted in obiter it could be open to reconsidering this issue
    - *Crown Zellerbach* found marine pollution to be of national concern, with a treaty used as evidence for this.
  - The Australian Court overruled *Labour Conventions* 20 years ago when Tasmania refused to implement environmental legislation
- In practice Division of Powers does not cause a huge problem for treaty implementation.
  - Usually there is consultation

- Could have been a problem with the Federal governments NAFTA legislation but it has not been challenged. Had it been the Federal Government would have argued for *Labour Conventions* to be overturned.

CIL in Canada

- Restrictive rules of CIL apply automatically in Canada; however permissive rules require legislation for implementation (*Hape*).
  - Affirmed in *Kazemi*, which articulated that since there was nothing in the legislation allowing a case a CIL permissive rule would not be sufficient as it would require legislation to be law in Canada.
- The government also retains the capacity to legislate inconsistently with CIL
  - Would need ambiguity to argue against Canadian legislation on the basis of a rule of CIL.
  - Presumption of conformity is a soft presumption
- Do the courts have the capacity to determine what is and is not CIL?
  - The Spray Tech case found "CIL" based on some interesting source: comments by environment minister at an obscure conference
  - The court cannot ask the government what they believe is CIL

Jurisdiction

Land and Sea

- A state requires some territory to exist over which is it sovereign.
- The UN Charter is founded on sovereign equality.
  - Gives the state exclusive rights to regulate activities in the territory subject to international agreements.
- There are four types of territory:
  - Sovereign State Territory: land, inland waters, internal coastal water and territorial sea all coming within full jurisdictional competency of the state
  - Res Communis: Not part of or available to be a part of any state. Open to use and exploitation by all states. High seas and parts of outer space.
  - Res Nullius: Land not under state sovereignty but available for appropriation. Largely of only historically significance now. There is only some left in Antarctica.
  - Common Heritage Humankind: Similar to res communis but resources are not available for unilateral exploitation and are instead reserved for the community of nations as a whole. Deep sea bed, moon, celestial bodies.
    - Resources on the deep sea floor (mineral and microorganisms)
    - The moon treaty
    - In the Law of the Sea Treaty
- The state has sovereignty over land for all purposes; this includes the space and the people
  - Exception: diplomatic immunity (also applies to people and spaces)
  - Can be more confusing when there are boarder disputes. Ex Canada – USA dispute over Machias Seal Island:
    - The legal arguments have never been fully shared but are likely based off of historical maps from 1600/1700s that show royal land grants.
    - Dispute was articulated in the 1970s at which point is crystallized.
    - The time of crystallization is when the evidence as to the claim is examined. Anything that happens afterwards is not considered unless the other state acquiesces
    - Crystallization is to prevent armed conflict. There will be a lot of debate as to when a dispute crystallizes. Any actions taken after are purely political for public perceptions.

- Historically the sea was as free as possible with 3 n. mile territorial sea and the rest as high seas.
- How the ocean is split in to several zones, extending control much further:
    - Internal waters: this is the base line used to determine the other boundaries. Can have straight lines for complex coastlines, otherwise it is based upon the low water mark.
        - Bays, river mouths and other physical anomalies are taken into account and are internal waters.
        - Canada claims huge internal waters which is not fully accepted internationally. (especially in the arctic archipelago)
    - 12 n. mile territorial sea: state has jurisdiction over living and non-living resources and over vessel traffic subject to the right of innocent passage.
        - LOTS Convention s19(2) gives and exhaustive list of what is not innocent, and it is based on activities not the type of vessel. An issue here is arising with regards to nuclear waste, which some states view as non-innocent but is not in the convention.
    - 200 n miles exclusive economic zone: national jurisdiction over living and non-living resources. Non-coastal states have rights in this zone for navigation, over flight, laying submarine cables and pipelines.
    - Where permitted by geography the continental shelf beyond 200 n. miles: national jurisdiction over exploration and exploitation of resources on the continental shelf. Ex sedentary fish species and hydrocarbons
        - Originally only from LOTS Convention. Now CIL.
        - Not entirely clear what this applies to other than fish. Sometimes for environmental pollution. Canadian laws are drafted to apply but no enforcement unless the vessel goes to a Canadian port.
        - USA view is that for navigation this is equivalent to the high seas
        - This gives Canada 480 n. miles of shelf in the Atlantic
    - High seas: are open to all for vessel passage and fishing / resource use.
        - Now there is a split between the seabed and the waters.
- Problem: less than 24 n. miles between land: gives no high seas
    - There are no high seas in the Northwest Passage. Issue: is this an international straight?
        - Was it historically used for navigation? Only 120 vessels per year.
        - Canada argues historical internal waters with no right of passage.
    - Straits of Malacca: also have no high seas but is a huge shipping passage. This makes it and international straight which the LOTS Convention gives a right of passage to.

The Antarctic and Arctic

- Note Antarctica is largely land covered by ice compared to the Arctic which is largely ocean covered by ice.
- Antarctica is an anomaly at international law and is governed by the 1959 Antarctic Treaty
    - Several states have land claims with some land left unclaimed. The treaty froze the claims, and nothing more can be claimed.
    - Is an area of scientific cooperation, with research stations open to all other states.
    - Not all states are members of the treaty (Canada is). It is not clear if the treaty has become CIL but it an understood agreement
    - It is an objective treaty – non-party states may perform research but then they must do so following the terms of the treaty.
    - Has been argued that Antarctica should be common heritage (by Malaysia) but has not happened.
- As the Arctic is water rather than land jurisdiction over it would be less absolute: less control over resources' and passage for foreign vessels.
- The arctic states (Canada, Russia, USA, Norway, Denmark via Greenland) do not have the boundaries worked out.

    - There are two Arctics effectively: European with Norway and part of Russia that has coastal communities and active fisheries, and the NA / Asian Arctic that does not have coast communities.
- The route across the centre of the Arctic is very hard to use due to the ice bellow the surface.
    - Russia has a NE passage that the USA wants to use, which informs their position on Canada and the NW passage. The NE passage is likely to open up first due to frequency of ice breakers and other vessels if there is trouble
- There are overlapping claims to the Arctic continental shelf. The North Pole is well outside of Canada's 200 n. mile zone.
    - Russia's claims uses sectors with the North Pole as the limit of their claim.
    - Canada had previously been going to release claims that would not have included the North Pole, but the government changed their mind last minute (Santa Factor). New claims will encompass the NP even though it is closer to Denmark.
    - Based on the shelf Russia, Canada and Denmark all have claims to the NP.
    - When the Arctic is split up it is unlikely there will be much high seas or common heritage left.

Ships, Aircraft, and Space Objects

- Ships are governed by the state of registration and it is that law that applies there. However, in port the local law also applies.
- Airplanes are the nationality of registration and that state has jurisdiction over acts and offences on board.
    - Must have a substantial connection to the state to benefit as that state under a convention
- Space objects: the launching state maintains jurisdiction and has a duty to maintain a register and furnish certain information to the UN Security General

Individuals

- Jurisdiction is derived from sovereignty; however there is the potential for overlap and conflict in competing jurisdiction.
- Jurisdiction over individuals looks at where a state can enact and enforce legislation.
    - This related to criminal and quasi-criminal jurisdiction.
    - Example: the LOTS Convention allows Canada to make laws over fisheries up to 200 n. miles as per CIL and treaty, which was not the case 200 years ago.
    - Prescriptive versus enforcement jurisdiction: can you make laws versus can you enforce them. This can be very different at international law.
- Enforcement jurisdiction is typically limited to a state being able to enforce national law within their territory: when the individual is in their territory.
- Complications arise with legislation that reaches beyond the national territory.
    - For an act in another state that Canadian law applies to. Clearly cannot enforce it in the other state without their consent.
- SS Lotus Case (has been overturned by treaty and possibly wrongly decided)
    - Issue: Does Turkey have the domestic jurisdiction to prosecute a French National for an action, which occurred in France that had an effect in Turkey?
    - The ship docked in Turkey following the loss so enforcement jurisdiction is not a problem
    - Held: Turkey can do this as France cannot point to a rule, which prohibits it. There was also concurrent jurisdiction with France.
    - Left prescriptive jurisdiction wide open for states
- Approaches to prescriptive jurisdiction:
    - Territorial: Canada uses this largely for criminal law. Applies to land, internal waters, and territorial sea (Interpretation Act), unless the legislation specifically states otherwise. Also applies to flagged vessels.

- SS Lotus used effects felt in the state as the basis for jurisdiction. It is not always clear when and to what extent this applies. USA and EU are increasingly of the view that an effect felt in their state gives them jurisdiction; however the individual must still end up there to be prosecuted.
    - Not supported by CIL
- Extra-territoriality: The effects doctrine gives this.
    - USA likes to use this for anti-trust legislation. Example: Two Canadian companies merge, which is allowed under the Canadian Competition Act. Both have assets and trade in the USA. USA then argues that under their law this is a monopoly and not allowed which would give rise to damages based on the effect the merger has on the USA.
    - Canadian was arrested for breach of American law for interference with American corporate rights for having corporate property in Cuba. Occurred when crossing through the USA flying. Office of the President suspended the legislation.
    - Canada is against this and has even enacted legislation to block the enforcement of such judgments.
    - Canada has E-T legislation on sex crimes against children abroad, but we are very caution with E-T legislation as we do not wan the USA using it against us.
- Nationality: your law follows you anywhere you go. The concurrent jurisdiction here doesn't usually become a problem as only one state has the individual for enforcement. This is used more by civil law states.
- Passive Personality: jurisdiction over individuals who commit crimes against national abroad. Not widely invoked except where supported by multilateral treaty.
    - USA sometimes uses it for anti-terrorism action
    - Probably doesn't exist in CIL
- Protective principle gives jurisdiction over actions with a detrimental effect on the state. Ie espionage or counterfeiting
- Universal jurisdiction gives all states jurisdiction to prosecute the most serious crimes.
    - Widely supported by CIL and treaty for piracy and war crimes
    - Some other crimes covered by multilateral treaty too.
    - Treaty covering universal jurisdiction for aerial highjacking: Parties to the convention must make it a universal crime. However, having a law doesn't guarantee prosecution so the convention includes a provision that a state unwilling to prosecute must extradite to a state that will.

- Enforcement jurisdiction remains limited to your own territory unless there is state consent.
- People are moved across boarders via extradition. There is no obligation to extradite outside of treaties, and each extradition treaty is different
    - One requirement may be that it is an offense in both states
    - The treaties may have specific opt outs and often allow for discretion.
    - Canada will not extradite to a death penalty state (USA, China) unless there are assurances that the death penalty will not be sought
- Alternate to extradition: kidnapping
    - USA Supreme Court has said that they do not care how an individual arrives in the USA for trial.
    - Canada is not pleased when they do that here and have had people returned.
- Mutual Legal Assistance treaties address criminal law powers rather than extradition.
    - Seek assistance from another state in dealing with individuals
    - Often these treaties are vaguely worded.
    - Do not have the requirement that something is an offense in both states

- *State of Romania v Cheng*: Canada Extradition Act requires the persons to have committed to offense in the state seeking extradition.
    - Romania had requested extradition for Taiwanese officers who removed Romanian stowaways fro the Taiwanese vessel in the middle of the ocean.
    - The court finds that this was not within Romania's jurisdiction and that Canadian criminal law also did not apply.
    - The captain did go on to be convicted in Taiwan
- *Libman*: found that there was Canadian jurisdiction for a telemarketing scam where only the call took place in Canada.
    - Victims were American and money was sent to Costa Rica.
    - Finds there is a territorial basis for jurisdiction as the calls originated in Windsor
    - Also considers how the USA would react if we took jurisdiction. Here the USA wanted Canada to prosecute.
- *Hape* gives current Canadian law on extraterritoriality: The Charter does not apply to a search done in Turks and Caicos by their police with the involvement of the RCMP. Was consistent with Turks and Caicos law.
    - There cannot be extraterritorial application of Canadian law in a foreign state without consent. Based off of the principles of non-intervention sovereign equality of states.
    - To comply with the Charter the RCMP would have needed a warrant, which is not available under Turks and Caicos law. Cannot expect another state to provide for procedural Canadian law.
    - S. 11(d) right to a fair trial would still apply in Canada so it remains as a check for and egregious breaches regardless of where they occurred.

State Immunities

State Immunity

- Sovereign immunity deals with the immunity of a foreign state from an action in a Canadian court.
- Must keep distinct from diplomatic immunity. Especially as the diplomat may act on behalf of the state making an act protected by state not diplomatic immunity.
- The application of this in Canada is governed by the *State Immunity Act*
    - Deals with civil suits.
    - Exception exists where a state may grant permission to a allow an individual to sue them in a Canadian court
    - There are also other exceptions granted by the legislation but they tend to be narrow
        - Torture is not one of these exceptions
- The narrow nature of the exception is due to the sovereign equality of states, which does not allow the courts of one state to pass judgment on another state's actions.
    - Bilateral aspect of state-state relationships.
- ICJ weighed in on this in 2012 in *Germany v Italy*
    - Upheld state immunity for the actions of Germany during WWII to Italian citizens.
    - Can only hold a state accountable in an international tribunal.
    - Concluded that sovereign immunity applies even to fundamental breaches of human rights based on CIL
        - Evidence: UN Convention on Jurisdictional Immunities (not yet in force) which included exceptions but not one for fundamental breaches of human rights. Also looked at what states have used in their State Immunity Acts.

    - Order made: Italy needs to change their law to prevent their courts from doing this, which Italy does. However, the Italian constitutional court strikes this down stating there must be a remedy.
        - Possible solution: Italy will repay any money paid out by Germany as Italy is in breach of international law.
    - Note: *Kazemi* case is heavily influenced by the international law position on this issue
- Canada *State Immunity Act*:
    - Remember that any exemptions in our act can be stopped by the ICJ as a breach of international law.
    - Section 2 gives a definition of "foreign state" which gives when the act applies
    - Biggest exception is commercial activities. This is possibly CIL although China insists that it is not.
    - Also an exemption for state sanctioned acts of terrorism s6.1
- How to address a state immunity problem:
    - 1. Is it a state actor?
        - Central bank of Nigeria was found to not be a state actor (Trendex). Look to control, accountability, traditional governmental function.
    - 2. Was their waiver of immunity?
        - Must be in the face of the court
        - Coming up in cases out of Argentina. The government sold bonds, which on them state that Argentina has waived its state immunity. USA courts have accepted that it was properly waived. There is no Canadian case on this so it is unclear if this would be sufficient.
    - 3. Is there an exception to the state's immunity?
        - Commercial activity: Leading Canadian case is *USA v PSAC*. Court looked at the nature of the activity but found the context of a US defense base to trump.
        - Section 6 exception for loss or injury in Canada: this is separate from the commercial activity exception. The injury or loss however must originate in Canada not only be continued here (*Bouzari*).
        - Section 6.1 supporting terrorism by states stipulated by Canadian government (currently Iran and Syria). Unstated constraint on this comes from the rule of civil procedure requiring a real and substantial connection between the court and the case. Likely a citizen would meet this but unlikely a non-citizen harmed abroad would.
- *Kazemi Estates*:
    - The family is suing the government of Iran and two actors for torture. IT was argued that the 2 actors should not be able to claim state immunity, as torture cannot have a state support. This was found to be inconsistent with international law and the convention on torture.
        - Result everyone is a state actor
    - Here Iran clearly invoked sovereign immunity. And here it is the Canadian government arguing for immunity on behalf of Iran.
    - The section 6 exception for injuries in Canada requires that they arose here and therefore cannot apply (*Bazouri*)
    - Found that there is no CIL exception for torture. Would require a clear rule of CIL to interfere with the legislation.
    - Article 14 of the torture convention does not require Canada to have a civil remedy for torture anywhere. States interpret treaties and this is not what states believe it to be.

Diplomatic Immunity

- Governed by the Vienna Convention on Diplomatic Relations, which codified the CIL on the issue.
    - Now CIL has moved a little in some areas but this is still the basis of our understanding.

- Diplomatic immunity belongs to the country not the individual.
    - This is because the purpose of diplomatic immunity is to allow them to serve their states
    - The state can waive diplomatic immunity if it chooses
    - Canada has been pretty strict with this expecting other states to waive immunity. Flip side is that Canadian diplomats are also potentially subject to this.
- Always applies to criminal and sometimes to civil jurisdiction.
    - Cannot arrest or detain a diplomat but can hold them to prevent the commission of a crime.
    - Exception business on the side is not covered.
    - Exempt from taxes and duties but the embassy must pay for utilities.
- Diplomat used to be a very dangerous job
- Now there is a duty to protect both the people and the embassy.
    - This also facilitate spying which there is no prohibition on at international law
- Diplomats are exchange reciprocally and with permission of the receiving state.
- Can declare a diplomat persona non grata. They then have to leave the state. Do not need to give a reason.