Topic 0: History, Development, Scope, Nature of PIL

Definition:

- Body of **customary** + conventional rules, **considered** legally binding by States in their intercourse with each other that govern international relations between sovereign states + other institutional subjects
    - **Customary:** obligation, not enforced
    - **Sovereignty:** each state determines own

History/Development:

- 3000BC: Mesopotamia treaties
- Medieval Europe: feudal kingdoms, usually no sovereign but there are war laws
- 17CHugo Grotis: father of IL, first work on war and peace laws
- 1648: Peace of Westphalia + emergence of nation state/break from feudalism
- 19C: European states consolidated at Congress of Vienna 1815, growth of treaties. Mainly RE war, but also trade, economics
- 1919: Treaty of Versailles, LoN
- 1921: Permanent Court of Intl Justice
- 1945: UN – art 2(3-4) outlaws war:
    - Collective enforcement of peace + security
    - ICJ treaties: IL covers individuals, IOs

Essay debate: is IL really "law"?

- **John Austin, Jurisprudence 1832:**
    - IL is not positive law (Set by sovereign to person subject to sov), rather "the duties which it imposes are enforced by moral sanctions: by fear on the part of the nations…of provoking general hostility."
- **Quincy Wright, "The Outlawry of Law"** 19AJL 1 (1925) 96: IL is sanctioned by habit, interest, conscience and force
- **Consent theory**:
    - **PICJ in Lotus:** states have to consent to be bound, but they can still reserve jurisdiction
    - But doesn't account for treaties like abt boundaries, b/c not all states have to agree abt 2 states borders, or CIL
- **Enforceable?**
    - Difficult. Yet states do obey IL everyday, in tiny transactions
    - Is IL just "international code of ethics" that states observe when convenient? E.g US tried to justify getting rid of Saddam Hussein, US left Rwanda during genocide
    - Thus clearly IL doesn't restrain states b/c no **centralised enforcement**
        - Rebuttal: everyday, IL obeyed in tiny transactions like trade, IP. Broken laws a minority
- **May be enforceable via Reciprocal Entitlement Theory:**
    - If state violates IL, other states can remove that states entitlement e.g ambassador remove, revoke trade deals. But how practical is this?
- **Critiques:**
    - Eurocentric bias
    - Human rights favour the individual
    - Claims to universality
    - No single, satisfactory theory

Topic 1: Sources of PIL

- *Art 38(1) of Statute of ICJ:* when deciding disputes, apply:

1. Treaties (gen override CIL/codify/generate CIL) – *North Sea Continental Shelf Case*'s 4 point test for treaties becoming CIl
2. Customary International Law (CIL)
3. General Principles
4. Judicial decisions & teachings (of most highly qualified publicists)

- No hierarchy: #4 subsidiary b/c not law
- **Formal source:** a law-creating source giving obligatory character and validity e.g bill, treaty
- **Material source:** a law-identifying source of substance e.g state practice
- **Principle of state consent:** as general pre-req to being bound (*SS Lotus Case)*

1. Treaties

- Definition: ***Vienna Convention on the Law of Treaties 1969 art 2*** (in force 1980)

1. Intl agreement
2. Btwn states
3. In writing
4. Governed by intl law
5. Whatever its designation (Agreement, covenant)

- Gives rise to obligations and rights btwn parties
- May crystallise/codify/generate CIL e.g so accepted treaty →CIL
- Only binds parties to treaty generally
- **Signatory:** state has signed, not yet ratified
- **State party:** generally, ratified

- Prob Q: even if country bound to treaty, keep looking at CIL: to see if treaty is old/CIL evolved. Or see if treaty can create CIL: not party yet acting as if binded: almost BRD it became CIL, binding non parties

2. Customary International Law (CIL)

- Definition: *Asylum Case (Colombia v Peru)*

1. **Constant & uniform state practice/usage** (objective)
2. **Opinio juris** (subjective) – sense of legal obligation, belief that it is law

A. Constant & uniform practice

- How proved:
  - *ILC Guiding Principles on Unilateral Declarations creating Obligations 2006:*
    - Resolutions, treaties, court decisions, legislations, diplomatic correspondence, advisory opinions, IO practice
  - *Nuclear Test Cases*: unilateral declarations/acts if public→legal undertaking
  - UNGA resolutions as evidence of state practice of opinio juris (soft law):
    - Can be binding. Usually not. *Namibia 1971 advisory opinion*
- *Dispute regarding Navigational & Related Rights* (Costa Rica v Nicaragua) 2009
  - Facts: CR fished for decades in San Juan River. N said they never had rights suddenly. CIL of CR fishing rights developed w/ time + **lack of protest = e.g w/o states consent.**
  - 1. How frequently accepted
  - 2. Repetition

    - 3. By how many states?
    - 4. Duration
- *North Sea Continental Shelf Cases*
    - Facts: For Netherlands & Denmark to succeed, needed to prove equidistance rule was CIL
    - **For a treaty provision/principle to be CIL; provision must be:**
    - 1. Norm-creating character, universal general law
    - 2. Widespread & representative participation
    - 3. Short time no bar if state practice extensive & virtually uniform
    - 4. States specially affected: their practice most relevant e.g landlocked countries don't need equidistance rule
- *Nicaragua (Merits) v USA Case 1986*
    - 1. Don't need "absolute rigorous conformity" of state practice
    - 2. Conduct be generally consistent: inconsistency must be breach of rule, not creation of new rule
    - 3. CIL + treaty rule can co-exist: if identical, they can bind states simultaneously (if dif, treaty overrides) *** LOL THIS WAS RELEVANT TO MIDSEM ESSAY

B. Opinio Juris

- Subjective element hard to prove. Tribunal infers w/ flexibility:
    - 1. Can be presumed if uniform practice proven (*Al-Sadoon v Sec for State of Defence:* must be separate to treaty obgliation)
    - 2. GA resolutions (though not binding)
- Onus on state to prove existence of custom (universal/local/regional)
- *Asylum Case (Colombia v Peru)*
    - Regional custom can be IL if constant & uniform usage, accepted as law
- *Rights of Passage (Portugal v India) + Anglo-Norwegian Fisheries Case*
    - **PERSISTENT OBJECTOR:** may theoretically prevent custom applying to them byb objecting **from first possible moment – but not to rule that already exists/jus cogens** (intl law norm from which no derogation permitted. Treaty violating jus cogens is void eg slavery, genocide
    - E.g UK failed to protest Norway use of base lines cos coast has dips, so water jurisdiction expanded. UK wanted to fish like usual then suddenly Norway said no. ICJ rejected that straight lines can only be used for 10 mile dips

3. General Principles of Law

- ICJ judges can use general + widespread **municipal law** e.g
    - Rules of procedure
    - Res judicata (issue decided not to be reopened)
    - Ex injuria jus non oritur (no benefit allowed from illegal act)
    - Right to receive compensation *Chorzon Factory Case*
    - Equity *Diversion of Water from Meuse case*
    - Estoppel *ARA LIbertod*
    - Legal professional privilege *East Timor v Aus*

4. Judicial & Academic Writings

- Not sources of law but "subsidiary means of determination of rules of law" (art 38(1)(d))
- A. Judicial decisions:
    - Can be of ICJ, other intl courts, tribunals, domestic
    - *ICJ Statute art 59*: ICJ decisions only binding btwn parties. Formally create no precedent but judges tend to use previous decisions as authority + ICJ develops new law eg

- *Reparations Case 49:* UN has intl legal personality
- *Reservations Case 50*: rules on reservations to multilateral treaties
- *Anglo-Norwegian Fisheries Case*

Topic 2: International Legal Personality, Statehood, Recognition, Self-Determination

- **Intl legal personality** = subject of intl law (*Reparations for UN Service Case 1949)*
- **Statehood/some IOs + individual rights + obgliations:**
  - Can make claims b4 intl tribunal
  - Make valid int agreements binding in L
  - Enjoy some/all immunities from jurisdiction of national courts
  - But subject to some/all obgligations in IL

1. State

- Source for the fundamental criteria of statehood, as reflected in CIL (→subject to changes via subsequent state practice, some criteria flexible, only 16 state parties, despite treaty being fixed) *Prob Q: show awareness that MC merely starting point for criteria
  - *Montevideo Convention on Rights & Duties of States 1933, Art 1:*

A. Permanent Population

- No minimum (e.g Vatican City 800, Naura <10k)
- Must be permanent (NOT Antartica b/c transboundary scientists)
- Can be nomadic within state

B. Defined territory (see topic 3)

- No minimum
- Not need fixed boundary (e.g Israel…)

C. Effective government: (more than just effective government)

- "*effective gov exercising control over a defined territory"*
- *Aaland Island Case 1920:*
  - Facts: when Finland became state? After Russian Revolution, civil war. Ended 1918, Only then "stable political organisation"
- Failed states:
  - continue to be recognised as states e.g Somalia
    - Facts: despite gov overthrown in 1991 & fighting ever since, it's still been a UN member since 1991 as a state.
  - Could fail due to loss of ability to control state yet still be legally recognised. Fail b/c
    - 1. Implosion of power structures
    - 2. Political collapse of law + order
    - 3. Lack of functional bodies who can represent state (*Thurer 1999 Journal)*

D. Capacity to enter relations with other states

- =legally independent in law from the authority of any other state + thus have capacity in intl law
- *Austro-German Customs Union Case 1931*
- Special cases:
  - *Bhutan*: protected state by India
  - States delegating functions eg foreign relations (Liechtenstein to Sweden) or defence (San Marino to Italy)
  - NOT puppet states e.g Manchukuo 1932
  - Territories can opt out of statehood e.g Taiwan

Other evidence other than MC Criteria →MC Criteria not definitive

Other evidence:

- 1. Membership in IOs which only admit states, Espesh UN
- 2. Must be created legally
    - not like Transkei 1976 made in prohibition to apartheid
    - or contrary to prohibition of use of force/intervention like Manchukuo, North Cyprus)
    - but unclear b/c Bangladesh
- 3. Widespread recognition by other states:
    - Practical matter: affects their capacity to act as a state.
    - Can be express/implied/retroactive
    - **Legal effect of recognition:** (context: back during revolutions/coup d'etat)
        - **1. Constitutive theory** (defunct) = recognition is precondition to statehood
        - **2. Declaratory theory** (more accepted) = recognition acknowledges a state, not create it.
            - *Brierly 1963, Tinoco Arbitration 1923:*
                - Facts: UK nationals signed contarct w/ Tinoco. When it existed, it was sovereign gov. But **non-recognition doesn't necessarily imply non-existence**
            - *Estrada Doctrine 1930:*
                - Mexico doesn't practice 'recognition' statements. Only maintain relations quietly or not.
                - UK, US, Aus also do now e.g East Timor, Aus just quietly signed treaty
                - Domestic court recognition relevant
            - *Republic of Somalia v Woodhouse Drake 1993*:
                - Facts: HC found money owed to Somalia can't be paid to interim gov

MC Criteria not static:

- Reflects CIL (subject to change in state practice etc despite fixed treaty)
- Only 16 states signed

Potential Essay structures:

Security council issues –

1. Intro:
    a. What is the SC: the SC is the primary UN organ that is to maintain international peace and security, as laid out in UN Charter Ch VIII – Pacific Settlement of Disputes. Its powers include peacekeeping, sanctions (Art 41), authorizing use of force (Art 42), and more.
        i. Art 24: SC has **'primary responsibility** for the maintenance of intl peace and security'
        ii. Art 25: "The members of the United Nations agree to accept and carry out the decisions of the Security Council"
        iii. Art. 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

iv. Art. 33: The parties to any dispute "**likely to endanger the maintenance of international peace and security" must try to settle dispute by peaceful means**; SC can call upon parties to do so
v. Art. 34: SC may investigate any dispute or "situation which might lead to international friction … in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security"
vi. Art. 35: any member can bring a dispute or situation to the attention of the SC or General Assembly (as can S-G under art.99)
vii. Art. 37: if not settled, parties must refer dispute to SC which must recommend either means of settlement or terms of settlement if dispute is likely to endanger maintenance of international peace and security

b. What are its powers:
   i. Art 39: "*if SC determines any existence of any 1. Threat to peace, 2. Breach of peace, 3. Act of aggression, it must A. make recommendations or B. decide what measures to take under art 41/42 to maintain intl peace and security*"
   ii. Art 41: measures not involving force eg sanctions
   iii. Art 42: if art 41 inadequate, it may take 'such action by air, sea or land forces as necessary to maintain or restore intl peace and security'

c. →thus its power relate to mainly:
   i. 1) Its **enforcement power** – it can make **binding** orders under art 25, and thus is the only UN body that can **authorise use of force** contrary to the prohibition under art 2(3). **Responsibility for these actions?**
   ii. 2) Art 39 seems to bestow the UN **unfettered discretion and power** to determine the state of affairs. **Checks and balances e.g could ICJ review SC decisions**?

2. <u>Responsibility for enforcement power –authorizing use of force and making binding orders</u>
   a. **Use of force** is prohibited in UN Charter art 2(3)/CIL (*Nicaragua*). Exceptions: S-D and collective action authorised by SC.
   b. SC: There are not too many power issues of the SC regarding S-D as the requirements require merely to report to the SC under art 51.
   c. Collective Action: **SC has powers to make binding recommendations** which can be triggered under art 39 if there is
      i. Threat to peace
      ii. Breach of peace
      iii. Act of **aggression** (1978 *Resolution on the Definition of Aggression*: invasion, bombardment, attack, sending armed bands etc.)
   d. And **if SC determines the existence of above, it can**
      i. Art 41: enforce sanctions
      ii. Art 42: if art 41 inadequate, SC can take action by 'air, sea or land force as necessary'
         1. **Dangerous issues: UN tows line between classical peacekeeping** and **UNSC using enforcement power**, so issues of bias and responsibility come into play. UN has no jurisdiction over peacekeepers in traditional sense and the **UN is immune from national court jurisdiction** – so <u>who is responsible if use of force involves crimes</u>?

2. History: original Charter envisioned Un army but Cold War intervened. So they got creative and **delegated other states military power by authorising individuals/groups of states to utilise military force on its behalf**.
3. Issues: e.g allegations, investigations and studies of sexual abuse by peacekeepers such as Sri Lankan peacekeepers creating a child sex ring in Haiti in the early 2000s for years. (2017 Associated Press investigation, 1996 UN study "The Impact of Armed Conflict on Children" found rise in child prostitution due to peacekeepers in 6/12 countries" →**many complain UN is not diligent or punishing enough of these issues** but what to do if UN is immune from national court jurisdiction?
4. Issues: e.g Dutchbat peacekeepers forced family to leave compound, killing that Serbian family – in this case Netherlands found to be responsible but still begs question of UN responsibility and potential dangers of its enforcement powers

e. (Note 2 other principles that are emerging/debated/have existed: **humanitarian intervention** and **Responsibility to Protect** both still require SC authorisation to be legal uses of force)

3. <u>Are there any checks and balances on SC's art 39 power, e.g can the ICJ review SC decisions?</u>
   a. **Not yet determined whether ICJ could review SC decisions,** as it's the principal judicial organ of ICJ who determines the legal disputes with party consent.
   b. ICJ not a constitutional court, so it has no general power of review (tho It can review IO decision legality in proceedings)
   c. On one hand: ICJ should be able to review SC decisions b/c
      i. Risk of SC abuse due to unfettered discretion under CH VII (*Namibia Advisory Opinion,* Judge Fitzmaurice dissenting at 294
      ii. Sir Robert Jennings dissenting in Lockerbie cases said UNSC determinations under UN Charter art 39 were to be second-guessed and were non-justiciable (at 105)
      iii. Court cannot substitute for SC discretion under art 39, but SC measures can't infringe *jus cogens*. The SC could just reconsider (Judge Lauterpacht in *Genocide (Bosnia v Serbia)* case 1993)
      iv. ICTY Appeals Chamber in *Tadic* said: art 39 gives 'wide discretion' but its powers not 'unlimited'. The SC is subject to certain constitutional limitations that can't go beyond the UN's jurisdiction, including internal division of powers
   d. On other hand: ICJ shouldn't be able to review SC decisions b/c
      i. Judges don't have same expertise as SC
      ii. Possible limits of SC powers already in place:
         1. SC measures can't infringe *jus cogens* anyway, like unilaterally change territory, national constitutions and interference in HR must be express words, *disarmament impairing self-defence:*
         2. SC argued to be complicit of depriving Muslims ability to protect themselves b/c Council had imposed an arms embargo in *Bosnia v Serbia* applying it to the Bosnian Muslims too. Some argue it complicit in genocide.

Potential Essay Q Structures - midsem

1. *"I am recognised, therefore, I am (an international legal person" – Discuss

<u>Arguments for: recognition leading to being an international legal person:</u>

- Though there are many criteria for becoming an international legal personality (*Reparations for UN Service Case 1949)*, with which come many rights and obligations, these criteria for example for states the MC criteria, are merely a starting point to becoming an ILP + it's CIL anyway so criteria could change. There is the pragmatic issue of widespread recognition that a state is in fact a State by other states and its legal effects.
- Importance of recognition to being ILP has historical roots in revolutions and coup d'etats. States had to choose whether or not to recognise the new governments that arose, and whether or not to engage with them.
- There are 2 major schools of thought abt the legal effect of recognition
    - **Constitutive theory** – (now defunct) recognition a precondition to statehood
    - **Declaratory theory** – (more accepted) recognition acknowledges a state, not create it
        - *Tinoco Arbitration 1923*: non-recognition doesn't necessarily imply non-existence
        - *Estrada Doctrine 1930*: Mexico no longer practices recognition 'statements', it'll either only maintain relations or not. US, UK and Aus also do this e.g East Timor Aus quietly signed treaty. * **Argument against this**: this only allow bilateral activity for the state trying to reach ILP status. It still can't act on UN stage
        - *Somalia v Woodhouse Drake 1993*:
- As much as declaratory theory is now the more accepted school of thought, the pragmatic effects of states needing to be recognised by other states in order to act like a state often does mean that recognition creates states. E.g this constitutive theory can be seen in case of
    - *Kosovo –* recognised by over 100 states since declaring independents in 1990s yes hasn't applied for UN for membership (and thus can't generally be considered to have achieved statehood) because aware Russia would likely veto
    - *Palestine –* tried to be UN observer state but didn't get majority vote and US said would veto anyway →show how recognition is important factor to consider

<u>Arguments against: recognition leading to being an international legal person:</u>

- what if there is no consensus about whether a state will be recognised. Could be dangerous as rights such as, being able to make claims b4 intl tribunal, make valid intl agreements **binding in IL** and enjoying immunities are big rights that can't be lightly given

…the rest of this essay is in the full notes.