WEEK 0 LECTURE: NATURE, SCOPE AND HISTORY/DEVELOPMENT OF *PIL*

- PIL was considered the "law of nations". "IL is the name for the body of customary and conventional rules which are considered legally binding by civilised states in their intercourse with each other" (Oppenheim, 1905)
  - Idea of civilised states is now a relic, but fundamental idea is still the same
  - IL is treaty law AND customary law
- "IL comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law" (Dixon, 2007)
  - It's what governs sovereign states (independence); "state defines sovereignty"
  - Sovereignty is 1 of, if not the, guiding principle of PIL and 1 of the requirements of statehood
  - Article 2 Paragraphs 1 and 7 of UN charter: Para 1 provides that the UN is based on the principle of sovereign equality of all members, this is reinforced by Para 7 which provides that nothing in the charter allows the UN to intervene in anything that is within the domestic jurisdiction of member states
  - The principle of sovereign equality means that a country like Nauru has 1 vote and that is the same with a country like China, despite the extreme population difference: 1 state = 1 vote
  - Sovereignty, at least as the UN defines it, means that states can implement laws that cannot be encroached upon by the UN or other member states, subject to a few limitations (discussed later): every state is free to determine its own domestic political structure and domestic legal rules; if Australia wants to pass a law on road or criminal laws etc. that is within its domestic purview, no other state or the UN is entitled to question that or to intervene in its domestic affairs, BUT this is all technically speaking: as early as 1923, it was recognised that domestic jurisdiction was relative and was not absolute, it was put forward by the permanent court of international justice (the PCIJ, which was the precursor to the current ICJ), that this presumption was dependant on the current development of international relations and was relative not absolute. Some instances of purely domestic issues can attract international attention and concern, example of Australia's policy on asylum seekers – primarily domestic but since Aus is party to conventions on refugees and human rights, can attract international concern (limitations on sovereignty discussed later)
  - Sovereignty in PIL imports idea of independence of states, put forward by judge Huber in 1928 case
- Basically, PIL governs relations between sovereign (and therefore independent) states: most things of domestic nature are fully within domestic/national/municipal jurisdiction, and others are within jurisdiction of PIL
- Modern IL is developed and currently a system based on European and Euro-centric values; no value judgment placed, this is just a statement of fact. The way IL is currently structured and works is influenced strongly by (western) historical developments
- As much as we talk about "modern" IL, it actually has historical antecedent. The development of IL:
  - 3000 BC (5000 years ago): archaeologists have found treaties between kings of city-states in ancient Mesopotamia. Understood as a body of norms that regulated relations between rulers – satisfactory for the time due to less political entities dealing with 1 another and lower population sizes
  - Medieval Europe: feudal kingdoms, principalities and duchies; not states in modern sense, usually no 1 sovereign exercising undisputed authority (feudal princes often shared power with an aristocratic class that maintained their own armies and legal systems – they themselves usually owed political allegiance to an external entity such as the catholic church or the holy roman emperor. Often there were overlapping claims of legal jurisdiction and political allegiance in different regions), but ecclesiastical law applied to all Europe eg. Rules evolved governing warfare and idea that treaties are binding on the parties; commercial and maritime law emerged with growth in international trade
  - 15th and 16th centuries: rise of the nation-state (proto-states before emergence of sovereign states) and the emergence of some powerful states e.g. Spain, Portugal, England, France, Netherlands, Sweden, in which internal authority became more centralised (move away from external authority of catholic church or holy roman empire), especially in northern Europe where Protestant revolution most influential, these states refused to accept political authority of entities beyond themselves – prepared the ground for the modern autonomous system of IL. If middle ages was era of centralised authority, it was the 16th and 17th centuries that saw a breakdown of this authority, partially because of the Reformation and rise of powerful states. This change was driven by European political wars in the 16th and 17th centuries: duchies and principalities that marked the 14/15th centuries tended to invade each other if they disagreed with each other's religions (e.g. 30 years war began when holy roman empire tried to impose religious uniformity on all of its domains –

WEEK 13: INTERNATIONAL DISPUTE SETTLEMENT

Basic principles:

- The UN's role in resolving disputes is articulated in key provisions of the UN Charter:
  - Art. 2(3): "All members shall settle their int. disputes by peaceful means in such a manner that int. peace and security and justice are not endangered"
  - Art. 2(4): "All members shall refrain in their int. relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN"
  - Art. 33(1): "The parties to any dispute, the continuance of which is likely to endanger the maintenance of int. peace and security, shall, first, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" (note how these methods are on a spectrum from least to most formalised and structured). This is established in customary law by *Nicaragua*.
- Role of the UN organs (established by Charter Ch VI; arts. 14, 34-38)
  - General Assembly: any member/non-member may bring dispute that may threaten peace and security to UNGA, but the GA may not make recommendations if UNSC is already seised of matter
  - Security Council: SC may investigate disputes, especially ones liable to endanger peace and security, and make recommendations for a resolution: it may act under Ch VII (including authorising the use of force) if dispute is a threat or breach of peace
  - ICJ: the principle judicial organ of the UN; may determine legal disputes with consent of parties, or provide advisory opinions at request of authorised UN bodies
  - Note that there is a very rough separation of powers on display – legislature (GA), executive (SC) and judiciary (ICJ)

- It is a principle of IL that states "shall settle their int. disputes by peaceful means" and not by resort to force (UN charter art. 2(3)). This principle is reinforced by art. 33 of the UN charter (which also refers to a range of dispute settlement mechanisms) and the 1982 Manila Declaration on the Peaceful Settlement of International Disputes.
- In practice, most disputes are settled through negotiation between the parties or by third-party assistance in the form of good offices, mediation, conciliation or the conduct of fact-finding inquiries.
- As in municipal law, in IL, litigation is a last resort. This is because of the possible worsening of relations by unilateral recourse to law, uncertainty of outcomes of legal proceedings, and possible embarrassment and finality of an adverse ruling by a body beyond one's control. Further, since the settlement of disputes at the int. level is based on consent, the absence of compulsory jurisdiction is another deterrent for complainants (and benefit for defendants).
- 1982 Manila Declaration: "recourse to judicial settlement of legal disputes, particularly referral to the ICJ, should not be considered an unfriendly act between states."

Methods of dispute settlement:

- Negotiation: diplomatic; involving only parties themselves
- Mediation and "good offices": diplomatic; involving third party (e.g. UN S-G)
- Conciliation: quasi-legal (may lead to non-binding conciliation report); involving third party
- Inquiry/fact-finding: independent inquiry into facts behind dispute
- Arbitration (inter-state) (along with judicial settlement, most serious and legally binding of all):
  - Legal form of dispute settlement
  - Ad hoc (to resolve specific dispute)
  - Institutional (e.g. under 1982 UN Convention on Law of the Sea)
  - Parties choose applicable laws (domestic/international or a mix), procedures, and select arbitrators (can't do this in domestic courts) by agreement
  - Binding decisions

ICJ jurisdiction; reservations; reciprocity (from textbook reading):

- See ICJ statute art. 36 generally for a comprehensive account of ICJ jurisdiction.
- (Explicitly) per art. 36(1), disputing states traditionally accepted ICJ jurisdiction by special agreement between themselves (*compromis*). Also, a *compromissory clause* in a bilateral/multilateral treaty in force (between the 2 parties) that confers jurisdiction to the ICJ in the event of disputes, will also suffice.
- (Implicitly) per art. 36(1), states can refer cases to the court through *forum prorogatum* (established by *Djibouti v France* aka *Mutual Assistance* case). The court has jurisdiction where the parties give their consent by separate acts expressly or impliedly accepting it. Note that this is distinct from the explicit special agreement or compromissory clause arrangements.
  - *Mutual Assistance* case: Djibouti unilaterally filed an application against France per ICJ statute art. 40(1) and France expressly agreed to the court's jurisdiction by a letter to the court. Note that, in forum prorogatum, there is no express agreement of any sort between the 2 parties – consider it implied by their separate actions. This is reinforced by similar circumstances between Albania and the UK in *Corfu Channel*. Furthermore, it was held that Poland cannot deny ICJ jurisdiction after first already having argued the merits of its case under ICJ jurisdiction: if you proceed to plead on your merits, there is no going back and denying ICJ jurisdiction afterwards, even if you never expressly consented to ICJ jurisdiction – your actions impliedly infer it (*Rights of Minorities in Polish Upper Silesia* case). By contrast, note that, if you appear before the ICJ and plead solely just to challenge the ICJ's jurisdiction, forum proragatum may not be established (the DRC in *Armed Activities* case).
  - Art. 38(5) (as indicated in *Mutual Assistance*), was established to prevent states from "fishing" for jurisdiction via forum proragatum and waiting to see how the other party reacted to its unilateral application. Thanks to this clause, a case is not entered on the court's list unless the respondent party reacts positively.
  - *Monetary Gold* case: the respondent can take the initiative to establish forum proragatum. France, UK and US issued the Washington Statement indicating willingness to accept ICJ jurisdiction and to be brought before the court by Italy/Albania. Italy, after filing an application, attempted to challenge jurisdiction – court rejected this on basis that all parties conferred jurisdiction by their separate actions, even if the original complainant (Italy) was not the initiator.
- Art 36(2) of the ICJ statute is known as the "optional clause". A state can make a unilateral declaration that it accepts ICJ jurisdiction in all "legal disputes" with other states that have similarly made such declarations. This "compulsory jurisdiction" is subject to limitations such as reservations that states have made in their declarations or the principle of reciprocity.
  - Many declarations are terminable on notice or on a specific period of notice; others are valid for 5 years before automatic renewal when they expire. Some contain no time limit and no provision for notice.
  - *Nicaragua (Jurisdiction and Admissibility)* case: a declaration for an indefinite period was terminable on "reasonable" notice
  - There is no time requirement between when the declaration is made and becomes actionable by other states. This is to reduce uncertainty in the optional clause system (*Right of Passage over Indian Territory* case).
  - The principle of reciprocity is espoused in wordings such as "in relation to any other state accepting the same obligation" in art. 36(2) and individual states' declarations. The court only has "compulsory" jurisdiction in so far as the disputing states' declarations overlap/coincide – where reservations are made by (both) parties, the court must exclude the subject matter of all those reservations.
    - *Whaling in the Antarctic* case: Japan could not reject ICJ jurisdiction by relying on a reservation in Australia's declaration which excluded "any dispute concerning the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or concerning the exploitation of any disputed area of or adjacent to any maritime zone pending its delimitation", since the subject matter of whaling was beyond the reservation's focus on maritime delimitation.