WEEK 0: DEVELOPMENT, NATURE AND SCOPE OF INTERNATIONAL LAW

- The international system is based on an idea of international morality – problematic
- There is no coherent system of enforcement of the laws and no legislature to keep working on new law – Brierley 1963
- Most nations comply without issue – others need sanctions, negotiations, threats etc. Adjudication is available but enforcement is acute for rogue states etc. – Morgenthau 1985
- The international system reflects a nation state at an earlier stage of development – Fitzmaurice 1956
- Note also the system requires cooperation it would fail if it relied solely on enforcement and threats – Fitzmaurice 1956.
- A concept of a world order was first put into practice with the League of Nations then the UN. Today international law is not only concerned with states (public) but companies too (private).
- Nations cooperate because the system recognizes co-dependency without impacting on self-determination – Henkin 1979.
- The system is in many ways pragmatic (maintain stability) rather than ideological, economic, political – Henkin 1979 (this is debatable of course)

HISTORY

- UN based on "sovereign equality" of states (manifesto)
  → all states equal, so Nauru = China
  → domestic jurisdiction cannot be encroached on (subject to limitations)
- According to the PCIT (pre-ICJ body) the question of whether something is domestic is "relative"

MEDIEVAL HISTORY

- Ancient Roman Catholic Empire – canon law
- Countries move away from Church law, The Reformation, Thirty Years War
- 1648 2 Treaties of Westphalia ends Thirty Years War – rise of the nation state, greater self-determination in Northern Europe
- Peace of Westphalia established the rights of numerous small states to participate directly in international system with only symbolic concessions to the Holy Roman Empire and the Catholic Church

19TH CENTURY

- Congress of Vienna (decides collective security system and codifies laws)
  - Resisted major powers
  - Adopted Westphalian ideas to a modern society
  - 1815: affirmed sovereignty/ independence
  - system spread globally through colonization
- International law broadened to commerce and technology as well as war and peace
- Issues of intellectual property, customs and tax are still contentious

20TH CENTURY

- Permanent Court of Arbitration 1899/ 1907
  - Arbitration tribunal
  - Use of force still legal – WWI/II
- League of Nations
  - Membership open
  - 3 month cooling off period before war
  - PCIJ established

- Unsuccessful, Italy and Ethiopia; Japan and China go to war in Manchuria
- Failure was WWII

- UN
  - Reaction to WWII
  - 50 states signed initially
  - prohibited armed force
  - established ICJ and drove creation of a lot of multilateral treaties
  - agencies governing all parts of everyday life

IS INTERNATIONAL LAW EFFECTIVE?

- There is no system of enforcement – all you can suffer is loss of face
- No superior sovereigns in IL – not vertical but a horizontal system of distribution of power
- Not a moral concept, should be studied as other area of law; it is law, therefore it is law; the fact that the laws are broken often does not mean it isn't law
- Consent theory: obligatory element of IL is based on consent of subjects, what about customary IL, positivist idea
- Enforceable? No effective, centralized mechanism, self-help, countermeasures are effective and can help, the IL is ineffective sometimes but this is rare – invasion of Iraq, North Korea etc. are all outliers
- Reciprocal entitlement theory: dismisses consent, enforcement idea
- Depends on enforcement definition (all relative)
- Typically, legal systems retract entitlements and civil liberties as punishment; IL does this too through trade sanctions, other retractions of privilege etc.
- There is no single satisfactory theory. It is law "habit, interest, conscience, force" – Wright 1925.

  = Not so much a debate about IL but a debate about what makes law, law

SOME CRITIQUES OF IL?

- Eurocentric & Post Colonial Critiques
- Promotes one view of law
- Created during colonial era- dispute neutrality of law
- Argue it is imperialistic and Christian in origin
- Disputes Human Rights because they are very individualistic
  → for example, Indigenous rights are "collective" beliefs/ values
- Feminist
- IL like other areas of law, favours the patriarchy
- Males essentialise their experience and said the male experience is equal to the human experience
- Definition of torture in torture convention:
  Appears to be gender neutral, can only be recognized in the public sphere e.g. torture exists as a crime only in the public sphere. Feminist critiques argue it exists in the private realm too. Men dominate public sphere so more protection is offered to them.
- Critical Legal Studies
- Highlights paradoxes of IL
- Sovereignty first (utopia) but they have to follow through even when they don't want to

WEEK 1: SOURCES OF INTERNATIONAL LAW

ARTICLE 38 (1) COVENANT OF THE ICJ: SOURCES OF INTERNATIONAL LAW

a) International conventions
b) International custom
c) Principles of law recognized by "civilized" nations
d) Judicial decision/ highly qualified persons

Schwarzenberger 1957

- (a)-(c) deal with the pedigree and validity of the rules of international law, so an international ruling must be shown as a combination of one or more of three exclusive law-making processes: treaties, conventions and legal principle. Not morality and doctrine.
- (d) gives some subsidiary means for determining alleged rules of international law

CUSTOM: TWO FORMATIVE ELEMENTS

If a state is a persistent objector, they are not bound by that custom. This system highlights the inherently volunteerist/ consensual theory of international law.

1) state practice: uniform, general (within region or global), usage by affected states
= objective rule: *who* is actually doing it? No need for absolute rigorous conformity.
→ includes treaties, decisions, domestic law, diplomatic correspondence, Ask:
- How frequently is rule accepted?
- How many states respect rule?
- Which states respect it (number)?
- Over what length of time it has been followed (duration)?

2) *opinion juris sive necessitatis*: acting under belief of obligation under international law
= subjective rule: why are they doing it?
→ onus of proof lies on state arguing custom exists
→ courts take flexible approach to this, but difficult to prove

SS LOTUS (FRANCE V TURKEY) (1927) PCIJ SER A NO 10

Facts: A collision between a French ship and a Turkish one. 8 Turkish civilians die. The captain of the sunken ship and the officer on watch the French ship were charged with manslaughter in Turkey**.** France asks for their national to be released and charged in France.

Issue: Did Turkey violate International Law when it exercised jurisdiction over a crime committed by a French national, outside Turkey? If yes, should Turkey pay compensation to France?

Judgment: PCIJ rules no, Turkey did not violate IL:

- First Lotus Principle: a state can't excuse its jurisdiction outside its territory unless an international treaty or customary law permits it to do so
- Second Lotus Principle: within its territory a state may exercise its jurisdiction on any matter as long as there is no specific international law prohibiting it to do so. States have to only abide by prohibitive rules. They do not have to wait for "permissive rules" and may be given a "wide measure of discretion" – para 46, 47. All that is required of states is that it shouldn't overstep IL limits to its jurisdiction, but within this scope its sovereignty remains.

- Concurrent Jurisdiction – flag state of offending vessel and sunken vessel both have authority. But the sinking of a Turkish ship (Turkish authority) means Turkey has final jurisdiction
- Subjective Territorial Jurisdiction – even if the crime was committed outside its territory as long as a constitutive (essential without which it wouldn't have happened element of the crime) → negligence originated on board the Lotus and ended on the Boz = concurrent jurisdiction

Asylum Case (Colombia v Peru) [1950] ICJ Rep 3

Facts: Colombia granted political asylum to a Peruvian on basis he was being persecuted for making political offence. Was Columbia entitled to grant asylum and was Peru required to provide safe passage to Columbia? Peru refused to grant safe passage. Can Columbia unilaterally grant asylum? Colombia said it was a part of American regional customary law to allow safe passage. Is this correct?

Judgment: The court had to decide whether regional practice could become regional customary international law – "general practice accepted as law" (Art 38 ICJ). Regional custom can exist between a range of states or just two states. Regional custom may supplement or derogate from customary international law. Colombia failed to prove custom.

- No custom. No evidence of opinion juris. These matters have been subject to a lot of conventions and political maneuvering that they are not indicative of constant and uniform state practice. States were providing safe passage but not because they felt they had to, it was for diplomatic reasons and cooperation.
- "State Practice" includes treaties, doctrines, national legislation, diplomatic correspondence, policy statements, press releases and official manuals on legal questions etc.

Acquiescing

Right of Passage (Portugal v India) (1960)

P were able to transit through India historically due to British presence and this was local regional custom. India allowed for 30 years after decolonisation and then chose to protest. They should have protested as soon as they gained independence – by now they have acquiesced.

Anglo-Norwegian Fisheries Case (1951) ICJ

Although a dissenting state may not by itself prevent a rule from coming into being, a state will not be bound by the rule it is maintains its dissent throughout its formative period, otherwise they could be seen to have acquiesced. The court emphasised the importance of coastal States asserting sovereignty actively in their territorial waters, suggesting the only convincing evidence of state practice is "seizures where the coastal state asserts sovereignty over the water in question by arresting a foreign ship and maintaining its position in the course of diplomatic negotiation". This emphasises the importance of action rather than words in disputes.

Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) (1951) ICJ

Acquiescing can lead other state to assume they have customary international right. If state does something you don't like you protest regularly and often. Passing of time and no protest will make it okay.

NON-USE AS CUSTOM

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 14

In this case there wasn't a "constant and uniform" non-use resulting from opinion juris on the part of states generally. Just because hadn't been used in 50 years doesn't mean they are no longer illegal – many states still reserved the right to use nuclear weapons.

TREATY AS CUSTOM: LIMITATIONS

R (Council of Al-Saadoon) v Secretary of Defence

Is it custom for EU states to not return individuals to a state with the death penalty? Regional European custom? Court didn't agree – some of cited materials were not law. Must prove acts were separate to previous treaty. There is no free standing custom as a right separate from treaty.

CUSTOM: FORMING FROM TREATIES??

Treaties are:

1. capable of **codifying** current customary international law
2. material **source** of custom, capable of indicating state practice and acting as a material source of customary international law binding on parties and non-parties alike

Ius Cogens status of some customary rules: treaty law **cannot** fundamentally contradict customary international law. That said, states constantly violating customary law does not invalidate it, they just can't treaty against it.

NORTH SEA CONTINENTAL SHELF CASES (FRG V DENMARK) (FRG V NETHERLANDS) [1969] ICJ REP 3

Facts: Art. 6(2) Geneva Convention 1962 says unless parties agreed on something else, the equidistant principle would apply - would disadvantage Germany. Court had to determine if equidistant principle was customary law.

Issue: Can a treaty rule be binding as custom upon a non-party to the treaty?

Judgment: A TREATY Provision may result in the formation of custom in one of three ways –

1) it may **codify** existing custom at the time the provision was adopted
2) it may **crystallize** custom as states agree during the drafting process
3) it may **come to be accepted and followed** by states as custom after the treaty's adoption

Here, the 3rd option was explored and whether it can be binding on parties and non-parties alike, its requirements were:

1) **Widespread and representative practice**
   - Only 39 states ratify and not adequate representation of coastal states that would be affected
   - But other states that did not ratify used this principle too
   - Need widespread and representative participation by States who are specially affected – landlocked states ratifying is hardly sufficient because their interests are not impacted
   - Note there is no lower limit for when customary international law can come into force
2) **Virtually uniform practice (consistent and uniform)**
3) **General recognition of the rule of law or legal obligation (opinion juris)**

- Even if some states prefer the equidistant model not enough appeared to defend the idea that they were acting under the impression that it is obligatory (opinion juris).
- Some were motivated by convenience, cooperation and courtesy – not legal duty
- The requirement of both opinion juris (subjective) and state practice (objective) differentiates custom from comity (recurring behavior without sense of legal duty).

Nicaragua (Merits) Case (Nicaragua v US) (1986) ICJ Rep 3

Facts: Nicaragua claims the US used armed force to intervene in its domestic affairs in contradiction of international law. Can provisions in treaties which both states are party to be seen as customary law rules? The US accepted the jurisdiction of the ICJ only if they pay no attention to multilateral treaties.

Issue: Can UN Charter and treaties that act in parallel to customary laws about armed force and intervention override the US reservation? Yes, only if they have the same content. Here, the treaties were seen to be "reflecting or crystallising…emergent rules of customary international law". They work in parallel as two organs **verifying** one another's competence.