Development, Nature and Scope of International Law

Development of International Law

- **3000 BC:** archaeologists found treaties between dynasties in ancient Mesopotamia
- **15th - 16th C Europe:** emergence of IL, separation of positive law from natural law
  - Euro centric? Wealthy, sea faring nations
  - Excludes 3rd world and women (interpretations)
- **16th - 17th C Europe:** religious wars, peace came due to 'Peace of Westphalia 1648' *treaty*
  - Settled 30 yr war, recognised legal system of independent states not subject to authority; treaties established rights of states to participate in international system
  - Confirmed modern state's system of an independent, sovereign state
- ***19th C:*** balance of power reinforced notion IL was for European, Christian, and "civilised' states
  - Evolution of customary law and publication of scholarly works on it
  - Scope of IL broadened beyond war and peace to IL cooperation inc
    - Post, starts of IP and copyright
- **20th C:** IL expands
  - Spreads to colonies
  - *1919 WW* - 'Treaty of Versailles'
    - **League of Nations**
      - Revolutionary but ultimately failed, didn't have universal membership (USA)
      - No power to enforce, sanctions
      - Nothing could be done to stop Japan > China, WWII

Schools of Thought

Natural Law: law is discoverable through human intelligence or reasoning, and that reason enables man to order life according to the divine will or objectively correct moral principles (St Thom Aquinus), law is above states

Positive Law: 19th C to present. Laws based on facts, exists between states - depends on **consent.** 19th C to present, less concerned with what 'ought' to do - what actually do

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'System' of IL (James Crawford)

Characteristics of a system:

- Personality
- Sources
- Interpretation
- Responsibility
- Provides a framework within rules can generate, apply, adjudicate

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Is International Law really 'law?'

- Argument: IL is ineffective
- Counter argument: **James Crawford**
  - Relevant question - does the system:

        - Have salience with relevant society
        - Meet its social needs
        - Applied through techniques and methods recognisably legal: sanctions
    - Absence of legislature and enforcement reinforces the voluntarist and cooperative character of IL
- John Finnis: opportunity of furthering the common good
- No single satisfactory general theory

    "International law is sanctioned by habit, interest, conscience and force" - Quincy Wright 1925

The UN

- Peaceful settlements of disputes only
- Principle organs: Security Council, General Assembly, Court of Justice

International Court of Justice

- Can give advisory judgments
- Not legally binding but regarded to set out the law
- Only hears cases between states (as opposed to International Criminal Tribunal**)**

Security Council - UN Charter

- (23) 15 members of UN. China, France, Soviet Union, UK, USA permanent members
- (24) primary responsibility for maintenance of peace and security
- (25) members of UN agree to carry out decisions of Security Council in accordance with Charter
- (27) decision on matters are made by vote

General Assembly

- The only principal organ in which all member nations have equal representation
- The main deliberative, policy-making and representative organ of the UN

International Law Commission

- 34 international lawyers, experts in field.
- *"the promotion of the progressive development of international law and its codification"*

Sources of International Law

Formal Sources of Law: methods for the creation of rules of general application, legally binding on their addressees
Material Sources of Law: provide evidence of existence of rules - when established are binding and of general application

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Article 38(1) Statute of International Court of Justice (1946)

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognised by civilised nations;

d. (subject to the provisions of article 59) Judicial decisions and teachings of those qualified

- *Article 59: decisions have no binding force except between the parties and in respect of that particular case*

I.E:
38(1) Sources of IL

A. **Formal sources of law** (treaties, conventions, agreements between states)
B. **Customary IL, general practice** (unwritten)
C. **General Principles** - applied universally in legal systems (written, i.e. equity, good faith, judge impartiality). Can be found in judgements

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A) International Conventions

- Treaties or agreements between states
- VCLT Definition (2.1.a): *an international agreement, between states, in writing, governed by international law*
- Once in force, legally binding on parties (only binds those parties)
    - Cannot bind a third party (VCLA 34-38)

B) Customary International Law

- *"an international custom, as evidence of a general practice accepted as law"* (SICJ)
- Binds all states (treaties only bind those party)
- Constant and uniform usage, accepted as law ***(Asylum Case (Columbia v Peru) [1950])***
- Two requirements:
    1. **State practice** (material, objective, repeated)

        *'any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations in abstracto (such as GA resolutions), national laws, national judgements and omissions' (**Akehurst 1975)***
    2. **Opinio juris sive necessitis** (9)
    - Subjective element must be accepted as law, not polite or diplomatic
    - Undertaken with a sense of legal right or obligation
    - Opinio Juris is distinguished from mere usage or habit ***(Lotus 1926)***
    - Acquiescence can be sufficient to establish ***(Case Concerning the Land, Island and Maritime Frontier Dispute 1992)***

Evidence of CIL:

International Law Commission's Draft Conclusions:

- executive, legislative, judicial, diplomatic or other (5)
- Includes physical, verbal acts, inaction, diplomatic acts and correspondence, treaty conduct (6)
- State assessed as a whole (7)
- Practice must be general, widespread, consistent (8)
- Opinio Juris sive necessitis (9)

BURDEN OF PROOF

- Lies with state arguing existence of a customary rule
  - ***Asylum Case (1950):*** *the party which relies on a custom of this kind (a regional custom) must prove that this custom is established in such a manner that it has become binding on the other party*
  - ***'Lotus Principle':*** restrictions on the independence of states cannot be presumed. Where a party relies on CIL prohibiting/limiting state behaviour, that party bears BOP

THE PERSISTENT OBJECTOR

Exception to Binding CIL: **The Persistent Objector** ***(Anglo-Norwegian Fisheries Case 1951)***

- ***Crawford*** suggests that owing to increasing communitarian norms, the incidence of the persistent objector rule may be limited.

Lotus Case [1926]	**Opinio Juris** Usage/habit not sufficient to establish opinio juris. Require consciousness of duty **Burden of Proof** Where a party relies on CIL prohibiting/limiting state behaviour, that party bears the burden of proof.	**FACTS:** French & Turkish vessel collided on high seas. T charged F officer on watch of Lotus of manslaughter. F gvt protested, demanded release or transfer case to F, no CIL to be prosecuted in flag state **ISSUE:** Whether states have freedom to act unless there is a law stopping them **HELD:** F couldn't prove there was a prohibition. PCIJ held that T, by instituting criminal proceedings, did not violate international law Offence committed against T vessel, T criminal law applies - even in regard to offences committed by foreigners
Asylum Case (Columbia v Peru) [1950]	ICL ***'constant and uniform usage, accepted as law'***	Unsuccessful rebellion in Peru 1948 - warrant for leader Haya de la Torre. Granted asylum by C in P Embassy. P denied C's appeal to allow Haya out of the country **ISSUE:** Whether there was CIL permitting state granting asylum (Columbia) the sole right to characterise the refugee's offence as political or not **HELD:** C could not prove CIL providing right to characterise offence

Germany v Italy [2012]	**State practice** is found in judgments of national courts **Opinio Juris** is reflected in assertion by states **burden of proof:** whichever state argues existence of rule holds burden of proof	Germany brought proceedings against Italy for allowing proceedings before Italian courts- damages of atrocities of Germany in WWII. G claimed It failed to respect immunity from jurisdiction. General assumption of **'foreign state immunity**' - italy claimed exception where case involves international crime. **ISSUE:** was this a new CIL? **HELD:** Italy violated foreign state immunity. To determine if CIL - court focused on state practice and opinio juris,
Anglo-Norwegian Fisheries Case (UK v Norway) [1951]	**Persistent Objector** A state may exempt itself from the application of a new customary rule by persistent objection during the norm's formation	Norway claimed 4nm, most claimed 3nm. Norway departed from alleged rules, other states had acquiesced to the practice **ISSUE:** was N's persistent objection of rule, and UKs acquiescence, sufficient to exclude application of CIL? **HELD:** UK failed to protest N's use of straight baseline, N had consistently objected to any limit on length of baseline

Relationship Between Customary International Law and Treaties

- 3 ways of interaction:
    1. Treaty is declaratory of existing custom
    2. Treaty crystallises custom
    3. Custom comes to be accepted and followed after treaty signed
- For treaty provision to become CIL ***(North Sea Continental Shelf Cases 1969)***
    - Must be of '**fundamentally norm-creating character**'
    - Widespread and representative participation
    - Short period of time not a bar, but practice should have been extensive and uniform (decreased time = increased use and uniformity)
    - General recognition of a rule/legal obligation (ie **opinio juris**)
    - Dissenting opinion of Tanaka J: significance of ratification/practice varies: **more weight given to *interested* states** (ie coastlines/landlocked)

North Sea Continental Shelf Cases (FRG v Denmark) (FRG v Netherlands) [1969]	**Possible for treaty provisions to become CIL** binding on all, including those not party to the treaty (specific circumstances) Must be of a 'fundamentally norm creating character'	1958 Geneva Convention on the Continental Shelf - Denmark and NE sought to invoke customary rule as art (6.2) (principle of equidistance) against Germany, who signed but didn't ratify **ISSUE:** What extent was Germany bound by provision it had signed but not ratified **HELD**: (6) not of a '**fundamentally norm creating character'**
Military and Paramilitary Activities (Nicaragua v USA) [1986]	**Treaty rules** (GA resolutions) can be evidence of **state practice and opinio juris**	Court relied on GA resolutions as evidence of state practice and opinio juris **HELD:** Conduct neednt be "absolutely rigorous conformity" but "generally consistent"
Nuclear Weapons Advisory Opinion [1996]	**Weigh evidence** of CIL for and against legality of nuclear weapons **lotus principle:** sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition	HELD: ICJ gave an advisory opinion stating that there is no **source of law, customary or treaty,** that explicitly prohibits the possession or even use of nuclear weapons
Ure v The Commonwealth of Australia [2016]	**Single example of State Practice insufficient to prove CIL**	Went to full federal court Island off of QLD coast - Cth claimed title. Ure claimed terra nullius. Tried to prove title with sources of IL: ICJ Article 38(1)B+C+D (state practice, opinio juris, teachings) **HELD:** He had succeeded in showing only a single example of state practice backed by opinio juris (the decision in Jacobsen), but this was not enough to prove a rule of customary international law. Similarly, he could not prove any general principle of international law.