International Law

I. Nature of International Law
   a. 3 Issues:
      i. How is international law created?
      ii. Where do you look for sources of international law?
      iii. How do you enforce these laws?
   b. *Golder* (Britain’s prisoner was not allowed correspondence)
      i. Britain is subject to the European Court of Human Rights because it signed a treaty. By ratifying this treaty, there was a clear and explicit acceptance of jurisdiction. Express laws can be enforced and counties will obey them.
      ii. A sovereign state may exercise its sovereignty not only by making domestic law but also by making international law. A country exercises its sovereignty when it signs an international law, but is also limits its sovereignty.
   c. *Filartiga* (US tries Paraguian official through Alien Tort Act)
      i. Torture is a violation of established norms, and therefore, the law of nations. The Alien Tort Act encompasses the law of nations.
      ii. The prohibition against torture has become part of customary law. But, it is still widely used in practice. Should practice or pronouncement bind?
   d. *Norms, Custom, and State Practice* → In light of these two cases, we treat international law as not necessarily binding. There is a difference b/t state practice, custom, and norms. Norms are basic human nature, while custom is based on gov’t policy. State practice can differ, while custom is the same among all states. Custom must be general practice and accepted as law. Although each country has different customs, there must be a fundamental norm that torture is wrong.
      i. In Golder, there are objective and established rules of law, with an approved venue. In Filartiga, there are subjective rules with no real venue. The lawyer must convince the judge that a norm exists. This is a treaty vs. fundamental norms/custom.

II. International Law Sources
   a. ICJ Statute, Article 38 → Convention (Treaties), Custom, General Principles (Fundamental Norms) of Civilized Nations, Judicial Decisions & Academic Teachings
      i. When talking about civilized nations, the treaty is talking about legal systems that are developed enough to be capable of handling complicated legal issues. This is a very Eurocentric view.
      ii. The last provision of Article 38 allows a court to decide what is equal and good (ex aequo et bono), of the parties agree. No one has ever agreed to ex aequo et bono b/c this will happen anyway. The judges of the ICJ are very sensitive to principles of equity, justice, and fairness.
      iii. This list is not exhaustive. There are also resolutions that are abided by, but no listed and resolutions b/t unofficial organizations. This list is also only addressed to the ICJ. Other courts are not bound by this although most tribunals do make some reference.
   b. Article 13 encourages the progressive development of int’l law.
      i. Intertemporal Problem → It is hard to understand how to interpret yesterday’s custom under today’s law. Answer → You must define the terms of the treaty fro the particular facts given. You apply modern law,
but with one eye on the rights and goals of the parties at the time. This is subjective objectivity.

c. Kinds of Sources:
   i. Consensual → agreements, custom (assumed)
   ii. Non-consensual → principals not based on any kind of consent (fundamental norms)

d. Treaties are generally recognized as the best source of int’l law. If there is no treaty addressing an issue, then you move to the other sources. Treaties established once and for all that there is int’l law.
   i. Some treaties eventually become custom (like the law of treaties). Declarations over time become state practice. When aided by opinio juris, this tends to become law.

III. Consensual Sources → Treaties

a. “An agreement b/t states that has some kind of legal character (in written form and governed by international law).” This definition has now been expanded. International organizations are also parties to treaties. Under the UN Charter, treaties must also be published. There must also be consent.
   i. Signing → as a representative of a country, you recognize the treaty as an official document (If you do not sign the treaty, you cannot invoke it before a UN Tribunal)
   ii. Ratifying → Taking the document to the country’s parliament for approval
   iii. Dualism → Dual system of gov’t; municipal and int’l law; the president can enter into a treaty even if it is in violation of municipal law
   iv. Why do treaties have to be in writing? To make perfectly clear what the commitments are.
   v. Why do treaties have to be published? To ensure that both parties are acting in good faith and have equal bargaining power.
   vi. There can also be negative consent. By not objecting to conduct, you are in essence consenting to it (other countries and the current situation w/ Iraq).

b. According to Article 103 of the UN Charter, the Charter trumps all other treaties for UN members. But, what about for non-UN members? Article 2-6 of the Charter says that non-members of the UN will act in accordance w/ the principles of the UN. Members will ensure this.

c. There are many ways in which treaties can be formed, formally and informally (Hull-Lothian Agreements, Eastern Greenland Case). In addition, there are several ways to become a party to a treaty, ratification or accession (if not an original member).

d. Types of Treaties:
   i. Contractual – contract to do something in the future [Cession of Alaska, Hull-Lothian Agreements].
   ii. Statutory – like legislation, creating a regime for future conduct (It is harder to write a treaty which predicts future behavior and guides future conduct – ask why some work while others don’t?) [Peace of Westphalia, Kellogg-Briand Compact, Law of the Seas].

e. Reservations – Belilos Case (Swiss gave prisoner partial tribunal)
   i. Reservations to a treaty can be made, but only on specific issues, not reservations of a general character.
ii. If other parties do not object to a reservation, they may be bound by it.

iii. There is a distinction b/t reservations and interpretive declarations. Only reservations may formally limit the scope of a state’s acceptance.

f. Interpretation – *Eastern Airlines v. Floyd* (US Court’s interpretation of French term for bodily injury)
   i. The absence of any kind of central authority for interpretation is bound to cause conflicts.
   ii. Most treaties are going to be interpreted by domestic courts and domestic courts are going to be influenced by the jurisprudence that prevails in that country).

g. Termination – *Hungary/Slovakia Case* (dispute b/t two countries concerning the construction of a dam on their borders)
   i. Just b/c one party does not fulfill their obligation under a treaty; this does not take the responsibility from the other party. If this were held, it would set a disturbing precedent.
   ii. Doctrine of necessity → There must be objective circumstances of grave danger in order to invoke the doctrine of necessity. Necessity does not terminate the treaty, although it may exonerate a party from responsibility. The treaty will just be dormant during the time of necessity; the treaty must be terminated by mutual agreement.
   iii. Impossibility of performance → Article 61 of the Law of Treaties (Vienna Convention) says that there must be a disappearance of the primary objective of the treaty.
   iv. Fundamental change of circumstances (rebus sic stantibus) → Article 62 of the Vienna Convention has stringent requirements for this. It says that the change must be in regard to circumstances that existed at the time of the treaty AND were not foreseen by the parties. This is true UNLESS the existence of the circumstances was an essential basis for the treaty AND the effect of the change is to radically transform the obligations under the treaty. The change may not be grounds for termination if the treaty establishes a border OR the change is a result of the breach of the party invoking the change. The fundamental change can be grounds for terminating the treaty or suspending the treaty.
      1. This article can only be applied in exceptional circumstances.
      2. This principal has to be reconciled w/ Article 26, which says that treaties are binding and must be performed in good faith.

v. Other Issues:
   1. Municipal Law (Article 27, 46) → A party may not invoke its internal laws to justify its failure to perform a treaty. A state cannot invoke a municipal law to show lack of consent to a treaty UNLESS the violation was manifest AND this concerned a municipal rule of fundamental importance.
   2. Preemptive Norms (Article 64) → If a new preemptory norm in international law emerges which is in conflict w/ a treaty, the treaty becomes void and terminates.

vi. One disadvantage of a treaty is that there is no way to get out of it. The courts have such stringent requirements for termination because they are concerned about maintaining the contracts. These contracts reflect the sanctity of treaties.

IV. Consensual Sources → Custom (any habitual practice or course of action that is repeated under like circumstances)
a. *The Paquete Habana* (fishing vessel captured in act of war) – weighed evidence of state practice to find custom
   i. With custom, it depends on which court is deciding the case. The decision maker has a lot more latitude and has a lot more discretion than someone interpreting a treaty.
   ii. There must be two things in order for custom to exist: state practice and *opinio juris*.
      1. *opinio juris* → the belief that states act in a certain way b/c they are legally bound to do so
      2. *state practice* → for this to exist, there must be consent
b. *Asylum Case* (Peruvian convict seeking asylum in Columbia) → A party which relies on a local or regional custom must prove that the custom is established in such a manner that is binding on the other party.
c. *Lotus Case* (Turkey took jurisdiction over French seaman in Turkish waters) →
   In this case, custom reverses a treaty that is no longer practiced
   i. Absent a permissive rule to the contrary, a state may not exercise its power in any form in the territory of another state. But, nothing in international law prohibits a state from exercising jurisdiction in its own territory.
d. *Texaco/Libya Arbitration* (Texaco was not compensated when Libya nationalized their already purchased oil)
   i. Notions w/in the Charter are considered normative. But, UN resolutions are only recommendations, not normative. When considering one resolution over the other, must look to custom, which has a wider base of countries.
   ii. The principle of performance in good faith applies to all matters governed by the UN Charter, even in resolutions.

V. Non-Consensual Sources → General Principles (erga omnes) – the obligations of a state toward the int’l community as a whole
a. *AM&S Case* (attorney asked to turn over legal documents relating to confidential communications w/ his client) – examined comparative municipal law rules to find a general principle
   i. There is a potential problem of judges interjecting themselves too much in determining whether a general principle exists. Once you move beyond consensual law (treaty & custom), there is a greater role of gap-filling by judges. The gap problem is a means of discovering unwritten principles of community law.

VI. Non-Consensual Sources → Natural Law (jus cogens) – compelling norms; replaced natural law; offense against the universal law of society
a. *US v. Smith* (American sailor took over Spanish vessel [piracy]) → It is not always necessary to look at state practice. A consensus can be deduced from other sources. You can have opinio juris w/out state practice.
b. *Verdross on Forbidden Treaties* → There is some kind of ethical minimum w/ treaties.
   i. There are certain things that are unconscionable or “contra bonos mores.” A treaty is void if it is contra bonos mores.
   ii. A treaty is contra bonos mores if it prevents the universally recognized tasks of a civilized state. These are: (1) maintenance of public order, (2) defense of state against external attacks, (3) care of bodily and spiritual welfare of citizens at home, and (4) protections of nationals abroad.
c. South West Africa (Liberia/Ethiopia sue S. Africa for League of Nations violations) → A claim has to have more than simply a moral or humanitarian ideal; it must have legal principle. Humanitarian concerns are not sufficient to generate legal rights and obligations.
   i. The court holds that in order to find a fundamental principle, there must be some kind of social need. A state must have applied these moral principles before a court does so.
   ii. There is a common theme underlying this fold: genocide, slavery, racism, and interstate aggression. Anything degrading human dignity. Things that are so egregious that they offend our sense of what is right, the ethical minimum.
   iii. You cannot construct natural law. It is something that is just there. But, natural law is going to change w/ changes in society.

d. Distinguishing erga omnes from jus cogens → Jus cogens develops over time; erga omnes is more variable. Erga omnes is a procedure for the international community (it can trump treaty or custom); jus cogens is a higher rule that binds. The better distinction may be that jus cogens is a rule of substance. Structurally, jus cogens is a subset of erga omnes. Jus cogens is a rule of substance; these rules are so fundamental, that you cannot delegate from them. Jus cogens trumps erga omnes.

VII. Non-Consensual Sources → Equity
a. Cayuga Indians (Canadian Cayuga’s want claim to part of American’s settlement) → The tribe has no international status. There is a dependent legal relationship. They cannot do anything w/out the guardianship of some sovereign. In situations like this, generally recognized principles of justice must be applied. This is a principle of equity and fair dealing.
   i. Compared to S.W. Africa, this case uses a non-legal standard. This judge says that “the elementary principle of justice requires us to look at the substance and not stick in the bark of legal form.

b. Most courts have some kind of room for equity and it should be applied on the basis of general principles. Every tribunal has the power to decide a case on the basis of fairness.

c. Types of Equity:
   i. Intra legem → equity w/in the rules of international law
   ii. Praeter legem → equity in the place of the rules of international law [limiting the harshness of international law; the rules of justice]
   “substance over form”
   iii. Contra legem → equity against the law [goes into when a court should be permitted to apply non-legal sources in order to be equitable]

d. Meuse Case (locks b/t Belgium and the Netherlands) → It is an important principle of equity what where two parties have assumed an identical or reciprocal obligation, one party which is engaged in continuing non-performance of an obligation should not be permitted to take advantage of similar non-performance of that the obligation by the other party.

e. North Sea Continental Shelf Cases (dividing coastline b/t Denmark, Germany, and the Netherlands) → Rather than giving the principle of equidistance a fundamental norm-creating character, article 6 makes the obligation to use the equidistance method a secondary one, which comes into play only in the absence of an agreement b/t the parties.
i. In this case, the court rejects arguments based upon natural law and necessity b/c if these principles were applied, it would be inequitable or unfair.

f. There is an inherent power for the court to make decisions based on what is fair and right. This is found in the form of ex aequo et bono. [In all agreements, there is inherent equity. When you enter into an agreement, you try to get the best possible compromise from your standpoint. No party is going to enter into an agreement that is against its own interests.]

VIII. International Law and Municipal Law

a. Treaties in Municipal Law

i. Self-executing treaties

1. *Foster & Elam v. Neilson* (treaty b/t France and Spain over LA) $\rightarrow$ Treaty operates of itself w/out the aid of legislation (is self-executing) unless the terms of the treaty require a legislative act. In that case, the treaty cannot be considered law until the legislature ratifies and confirms the terms.

2. *Missouri v. Holland* (Migratory Bird Act) $\rightarrow$ A treaty is normally self-executing if a reasonable reading of the treaty provides rights directly.

a. If the treaty involves a change in domestic law or legislation, or involves appropriations, it must be implemented or ratified.

b. If there are rights provided for in the treaty, this does not require ratification.

ii. US treaty cannot be rendered nugatory by municipal or state law (*Asakura*); The UN Charter is not self-executing b/c it lacks the quality and definitiveness to create justiciable rights (*Sei Fujii*).

iii. The last-in-time rule

1. *Whitney v. Robertson* (duties on products from San Domingo and Hawaii) $\rightarrow$ When there is a conflict b/t a federal statute and treaty that relate to the same subject, the courts will always endeavor to construe them as to give effect to both; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation that the treaty is self-executing (a treaty is not repealed by a later inconsistent state; there is still an int’l obligation, but it may not be enforceable).

b. Who controls international policy? The federal government has complete power in the conduct of int’l affairs and states cannot curtail or interfere with that power (*Belmont*). This power went from Britain to Congress to the Executive; this is an element of sovereignty. (*Curtiss-Wright*). The executive branch has the authority to carry out foreign affairs w/out authorization from Congress (*Dames & Moore, Breard*). Congress has the power to preempt state law, but when the President is acting w/ the authority of Congress, his power is much greater (*Crosby*).

c. Jurisdiction – The Alien Tort Statute does not confer jurisdiction over foreign states. The statute confers jurisdiction in district courts over suits brought by aliens in tort for violations of int’l law or US treaties (*Amerada Hess v. Argentine Republic*).

IX. International Dispute Settlement

a. Arbitration

i. Normally, where the arbitration takes place, that country’s courts have some control over the process (*Dogger Bank*).
ii. What are other alternatives? Diplomatic negotiations, UN Charter – Art. 6, Economic Sanctions (Cuba, Vietnam).

iii. But, many poor countries cannot afford these solutions. How do we ensure justice for both small and large countries? In 1996, a sort of int’l legal aid was established to provide resources for adjudication.

iv. Two questions to be asked:
   1. Why arbitration instead of adjudication?
   2. How do we put together the arbitration?

v. Rainbow Warrior (France gets people from Green Peace ship off New Zealand) → doctrine of necessity; Distress of a situation may require a breach of an obligation
   1. Three conditions have to be present in order to justify such conduct: (1) Very exceptional circumstances of extreme urgency involving medical or other considerations, provided prompt recognition of the circumstances by the country where the detainee is held; (2) Reestablishment of the original situation of compliance; and (3) Good faith effort to obtain the consent of the country where the detainee is held.

b. International Court of Justice – Jurisdiction
   i. Article 36 → The ICJ has jurisdiction over (1) all cases concerning the UN Charter (2) ipso facto jurisdiction over legal disputes concerning (a) interpretation of a treaty, (b) questions of int’l law, (c) breach of int’l obligations, and (d) reparations for a breach.
   ii. Miquers & Echrehos Case (Islands b/t GB & France) → In order for there to be possession, there has to be effective control. This is some kind of administrative control such as gov’t authority, possession, location.
   iii. Diplomatic & Consular Staff Case (Iran hostages) → Rules governing diplomatic relations in its very native falls w/in the jurisdiction of the ICJ.
      1. Non-appearance of one party cannot be an obstacle to jurisdiction. In the absence of an agreement for other means of settlement, either party may unilaterally bring a dispute to the ICJ.

c. Advisory Opinions of the ICJ
   i. Article 65 → ICJ can give advisory opinion on legal question requested by any body authorized by or in accordance w/ in the UN Charter.
   ii. Western Sahara Case (dispute b/t Morocco & Spain over sovereignty of territory) → The competence of the court to give an opinion does not depend on the consent of the parties.

d. Chamber Opinions → Chambers are seated by 3 or 4 judges seated by the court itself. A decision of the chamber is a decision of the ICJ. It is more attractive to the parties b/c there is greater opportunity to influence the judges, like arbitration (ELSI).

X. Individuals and Int’l Law
   a. Nottebohm (German-born living in Guatemala is granted Lichtenstein citizenship) → The exercise of domestic citizenship is not binding on other states. You have to look at whether the person really has connections w/ the country. Real and effective nationality is based on strong factual ties to the state.
      i. Citizenship is the relationship b/t an individual and that state; nationality is the same relationship as seen by int’l law.
b. **Barcelona Traction** (BL sued SP on basis of SP shareholders of CN company) ➔

   The state of shareholders of a corporation has a right of diplomatic protection only when the state whose responsibility is invoked is the national state of the corporation. There has to be a showing that the Δ state has broken an obligataion toward the nat’l state in respect of its nationals.

### XI. States and Int’l Law

a. There is really no absolute sovereignty. It used to be that other states would have to show some kind of approval for your country to be considered a state. This is no longer true. Admission to the UN does not mean recognition as a state. When the UN admits a country, this means that the country has met the requirements (peace-loving country), not that it is a state.

b. Recognition and Succession

   i. **Tinoco Arbitration** (contracts were made w/ British Oil companies by CR while gov’t was in power for 2 years) ➔ A gov’t which maintains a peaceful regime and maintains a de facto administration does not need to be recognized to have the power to form valid contracts. A new gov’t is bound by the legal commitments of the old gov’t even though it does not have to recognize the previous constitution. [The rule of this case is good policy: gov’t should be bound by commitments made on behalf of their country.]

   ii. **Autocephalous Greek Orthodox Church v. Goldberg Fine Arts** (art-buyer purchases stolen goods unknowingly) ➔ There are two kinds of de facto gov’t:

      1. The kind that exists after it has expelled regularly constituted authorities from power and established its own in place as to represent the sovereignty of the nation. In most respects, this kind is treated as possessing rightful authority.

      2. The kind where a portion of the inhabitants of a country have separated from the parent state and established an independent gov’t. The validity of this regime’s act depends on the ultimate success of the gov’t. Simple longevity does not establish success.

   iii. **Kadic v. Karadzic** (Serbian war criminal sued by Bosnian victim in US court) ➔ Alien Tort Act can by violated by an individual. The law of nations does not confine its reach to state action. But, when this torture that takes place is not a war crime, it must be committed by a state official or under the color of law to be a violation. But, for this to be under the color of law, there merely has to be the semblance of official authority. A private individual acts under the color of law when he acts w/ state officials or state aid.

   iv. **Croatia v. Girocredit** (When Yugoslavia broke up, the assets of the former state all went to the NFRY) ➔ This is a case of dismembratio, which is the “complete dissolution of the predecessor state and replacement by several successor states.” The Vienna Convention provides for the passage of movable property from the former state to the successor states in “equitable proportions” in the case of dismembratio.

      1. Communio incidens ➔ (Roman Law) as a result of dismembratio, the legal personalities of the former state cease to exist

   c. Self-Determination (Charter Articles 1, 13, 55)

      i. **Aaland Islands Case** (islands b/t Russia and Finland) ➔ This situation cannot be determined by the sovereignty of the state. A de facto situation
caused by transformation does not lead to a basis for territorial sovereignty.

1. Territorial sovereignty is lacking b/c state is not yet fully formed or is undergoing transformation/dissolution. The situation is uncertain from a legal point of view until there is complete and definite situation.

2. Who should determine where a particular group is entitled to self-determination? The power is fully w/in the sovereign nation to decide for itself. But, if nation is in state of transformation, this becomes question of int’l law.

ii. 

   Secession of Quebec ➔ There is a clear right of self-determination, but it should not interfere w/ territorial integrity of the parent state.

   1. The right to self-determination is normally fulfilled through internal self-determination. This is the pursuit of development through the framework of existing law.

   2. The right to external self-determination is very limited. The only groups that have the right are: (1) colonial people breaking away from an imperial power; (2) when people are oppressed; (3) possibly, when there is a right to unilateral secession (but this is being debated).

XII. Use of Force – UN Charter Articles 2(4) and 51

a. There are only two ways that the use of force is permissible: self-defense and enforcement action. Beyond that, there are many questions.

   i. Nautilus Case (reprisal attacking a territory b/c of accidental deaths) ➔ A reprisal is an act of self-help on the part of an injured state, after an unsatisfied demand, responding to an act contrary to the law of nations. It is illegal if the prior act, contrary to the law of nations, had not furnished the reason for it.

      1. This reprisal was not legal b/c (1) the other nation’s authorities did not act contrary to the law of nations; (2) use of force is only justified by necessity and here there was no unsatisfied demand; (3) even if it were proportional, this would still be considered excessive.

   ii. Caroline Dispute (American citizens help Canada fight off GB) ➔ “The inviolable character of the territory of independent states is the most essential foundation of civilization.” This principle can only be violated in the case of self-defense [narrow construction]. Self-defense will justify an invasion of another country only when the danger is so great as to leave no alternative. This doctrine is applicable in the case where you have no choice but to fight back.

      1. The right of self-defense if available only when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of mean, and no moment for deliberation.”

   iii. Nicaragua Case (US defended other parties against Nicaragua w/out being asked) ➔ Collective self-defense cannot justify hostile behavior on the part of a third party unless the aggrieved state requests aid, particularly when the actions of the other state do not constitute an armed attack.

      1. The actions could only justify use of proportionate force by one of the injured countries, not by a third party state.

      2. What constitutes an “armed attack”?
iv. Two schools on use of force:
   1. Henkin is one extreme, requiring absolute provocation. Assistance not involving the use of force seems not to be covered by Article 2(4), although it may violate norms of nonintervention.
   2. Reisman takes a value-based approach. He says 9 categories have emerged in which there is varying support for the use of force. But, a key and constant factor is the need for maintenance of minimum order in a precarious int’l system. Will a particular use of force, whatever the justification, enhance or undermine the world order?