UNIVERSITY OF OXFORD
FACULTY OF LAW

PUBLIC INTERNATIONAL LAW (2003-2004)

Your tutor will advise on reading material, but the following information may help you. The course is based on the materials reproduced in **D. J. Harris, *Cases & Materials on International Law* (5th ed., 1998)** [=H or Harris], **M. Dixon & R. McCorquodale, *Cases & Materials on International Law* (4th ed., 2003)** [=D&M or Dixon & McCorquodale]. You should buy one or other of those texts (you need neither buy nor read both of them); and as a textbook, **M. Evans (ed.), *International Law* (OUP, 2003)** (=Evans). You should also buy a copy of ***Blackstone's International Law Statutes* (ed. M Evans, 6th ed., 2003**). Concentrate on the relevant sections of those texts; lecture handouts signal the main points that you should derive from them and from the lectures. Other textbooks also help you to find your way around the primary materials. The standard authoritative text is Brownlie, *Principles of Public International Law* (5th ed., 1998). The recent text by A. Cassese, *International Law* (OUP, 2001) is a very helpful introduction to the subject. Among the most popular student texts are those by *Shaw* and by *Dixon*.

For reference purposes, you will find **Jennings & Watts, *Oppenheim's International Law* (9th ed., 1992)**. The main primary materials will be found in ***International Legal Materials*** [=ILM] and the ***International Law Reports*** [=ILR]. State practice is collected and digested in volumes such as the ***British Yearbook of International Law***.

Always look at the leading journals for recent articles and casenotes. Among the more useful are the following:
AJIL -American Journal of International Law
BYIL -British Yearbook of International Law
CLJ -Cambridge Law Journal
EJIL -European Journal of International Law
HR -Recueil des Cours de l'Academie de droit international (The Hague Academy)
ICJ Rep -International Court of Justice Reports
ICLQ -International & Comparative Law Quarterly
ILM -International Legal Materials
ILR -International Law Reports
Iran-USCTR -Iran-US Claims Tribunal Reports
PCIJ -Permanent Court of International Justice Reports
RIAA -UN Reports of International Arbitral Awards
UNRIAA - UN Reports of International Arbitral Awards
VJIL -Virginia Journal of International Law

You may find the following web sites, and links from them, helpful:

http://www.un.org/ [entry into the UN system]
http://www.un.org/law/ [more specific link to UN legal sites]
http://www.libraries.psu.edu/crsweb/docs/intlgate.htm [International Relations links]
http://www.icj-cij.org [International Court of Justice webpage]

http://www.yale.edu/lawweb/avalon/avalon.htm [Access to major treaties and other international texts]

http://www.pict-pcti.org/site_map.html [Access to the websites of international courts and tribunals]

The 'Further Reading' listed on the lecture handouts is not part of the prescribed core. It is an indication of some of the more interesting writing on the subject, should you wish to follow up any particular topic in greater depth.

#1 THE NATURE OF INTERNATIONAL LAW

*Basic reading: Harris, ch. 1*or *Dixon & McCorquodale, ch. 1; Evans, ch. 3.*

MAIN POINTS

1. International law is the basic conceptual framework for the understanding of international relations. It is a routine part of legal practice, applied in diplomatic, commercial, individual, ethnic &c., relations.

2. The key elements of the international legal system differ from those in municipal law. The primary 'persons' are States and international organisations.

3. There is no legislature: law is made by the processes of treaty and customary law formation.

4. There is no compulsory system of courts, though there are many international tribunals (such as the International Court of Justice, the International Criminal Tribunal for Yugoslavia, ICSID, the International Tribunal for the Law of the Sea, and the Iran-US Claims Tribunal, and many *ad hoc* arbitration tribunals), and most judicial applications of international law occur in municipal tribunals.

5. There is no executive and no routinely effective centralised system for the determination of violations and imposition of sanctions. But international law permits and regulates the use of certain 'self-help' remedies against breaches of the law; and some centralised action is possible, through the UN, regional agencies such as NATO, and otherwise; and unilateral "sanctions" can be effective. [*Air Services Agreement* case, H, 11-16]

6. Why should States, which have markedly different political and economic interests, comply with international law? Historically, the explanation has moved from natural law and the will of God, to positivism and the will of States, to the necessities of interdependence and the fact of international society. [H, 1-11; D&M, ch. 1; *Evans*, ch. 1]

7. International law is an optional language or discourse system. States opt in and out -by a process similar to what is known "illocution" in linguistics. In extreme cases choice of law shifts power in a conflict by narrowing the issue to a legal dispute, and aligning legal rules and other members of the community with one party; in practice the law is often less clear, or in conflict with moral norms.

8. International law derives its strength from its consensual nature: States are unlikely to agree to rules that they reject. Some argue this leads to a dilemma, in which international law is seen either as a body of rules inferred from what States choose to do, and consequently lacking the ability to be an external constrain on their behaviour

(the "Apologist" position) or as a body of rules which are not derived solely from the consent of States and which do purport to constrain behaviour but are disregarded in practice (the "Utopian" position) [Koskenniemi, *From Apology to Utopia*]. Both positions are overstated.

Further reading:
I. Brownlie, *The Rule of Law in International Affairs* (1998)
M. Koskenniemi, *From Apology to Utopia* (1989)
F. Kratochwil, *Rules, norms and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs* (1989)

#2 SOURCES OF INTERNATIONAL LAW: CUSTOM

Basic reading: Harris, pp. 21-47 or D&M ch. 2; Evans, chs 4, 5.

Aim to understand how rules of customary law emerge and change and how the adoption of different positions by States, including "persistent objectors", is accommodated. Aim also to understand how treaties pass into custom, and especially the role of *opinio juris*. Concentrate on the *North Sea Continental Shelf* and *Nicaragua* cases.

MAIN POINTS

Introduction

1. Sources of international law as generally understood are set out in article 38(1) of the Statute of the ICJ [H, 1075; D&M, 24]. Note order in which sources are listed, reflecting the relationship of general and specific rules, and consensual nature of international law. But order not rigid: peremptory rules of customary law (*jus cogens*) override treaties. The writings of jurists ("publicists") may be evidence of the law, but not a source of law. [H, 56-58]

State practice

2. A general (widespread and representative) practice of States is required to establish a rule of customary law. "General practice" has no precise meaning: but it should include the practice of the major States whose interests are specially affected in the particular context; and there should be no substantial body of practice incompatible with the putative rule. There is no set time for which a practice must be followed. [*North Sea Continental Shelf* cases, H, 27]

Opinio juris

3. Even consistent State practice will not generate a rule of law in the absence of *opinio juris*. *Opinio juris* may, however, be inferred: consider the analogy of the inference of an intention to create legal relations. [*North Sea Continental Shelf* cases; H, 27; *Lotus* case, H, 267 at 275; *Nicaragua* case, D&M, 40]

4. Acquiescence (tacit consent) in foreign claims, or protest against them, can provide clear evidence of *opinio juris*. [H, 43-44]

5. If disputing States have consented to be bound by rule of customary law, and applied it in practice, that will bind them whether or not other States have consented to it. Customary law may be "local" or "regional". [*Asylum* case, H, 24, D&M, 33; *Right of Passage* case, H, 257, D&M, 34; *Nicaragua* case, D&M, 30, 40]

6. If a State has persistently objected to a rule since the genesis of the rule, it seems that the rule will not be binding upon it. [H, 42-43, D&M 34-37; *Asylum* case, H, 24; *Anglo-Norwegian Fisheries* case, H, 375; D&M, 37]. In practice, the pressure to conform is usually irresistible in the long run.

7. The consent of a State is both necessary and sufficient for it to be bound by a rule of customary law. "General practice" is useful to establish a presumption of consent where a State has not taken a position. Note that persistent objection and "local" custom can result in several co-existing sets of customary law obligations, in which case it is an oversimplification to speak of "the" rule of customary law. Customary law can change as the balance in States adhering to different positions changes.

The role of customary international law

8. Within limits, customary law-making procedures favour older States with real-world power, whereas multilateral treaty-making favours States in a majority (and most States are relatively new and lacking in real-world power).

Treaties and customary international law

9. Distinguish three kinds of treaty: 1) bilateral treaties; 2) "fundamentally norm-creating" multilateral treaties; 3) multilateral treaties establishing international regimes. [H 45-47; D&M 25-27, 56-62]

10. Rules contained in a treaty will also be binding as a matter of customary law if, in relation to the rule in question: 1) the treaty is codificatory, or 2) the treaty has crystallized an emergent rule of customary law, or 3) the treaty forms the foundation for the passage of the rule into customary law through the normal processes of practice + *opinio juris*. [*North Sea Continental Shelf* cases, H 27, D&M, 39; *Nicaragua* case, H 40, D&M, 40].

11. To pass in to customary law, treaty norms must be fundamentally norm-creating, and be supported by sufficient practice accompanied by the requisite opinio juris. In such cases, the treaty and customary rules co-exist. [*North Sea Continental Shelf* cases, H 27, D&M 39; *Nicaragua* case, H 40, D&M 40].

12. It is often very difficult to determine the existence of *opinio juris* [H 38-44]

Further reading:
M. Mendelson, 'The Formation of Customary International Law', 272 *HR* 155-410 (1998).

#3 SOURCES OF INTERNATIONAL LAW: RESOLUTIONS, DECLARATIONS AND SOFT LAW

Basic reading: Harris, 58-68 or D&M ch. 2; Evans, ch. 5.

Aim to understand i) how the techniques for analysing customary law may be applied to UN General Assembly resolutions (see particularly the extracts from the *Nicaragua* and *Texaco* cases), and ii) the implications and weaknesses of the ICJ's approach to unilateral declarations.

MAIN POINTS

1. The UN Charter gives binding effect to certain resolutions: see. e.g., arts. 4(2), 5, 6, 17 [for UNGA resolutions], and 25, 39, 41, 42 [for UNSC resolutions].

2. UNGA resolutions may amount to (authoritative) interpretations of UN Charter: see Vienna Convention on the Law of Treaties art. 31.[*Western Sahara*, H 116, D&M 238]

3. UN resolutions have varying weight as evidence of international law. Voting conditions and the provisions of the resolutions must be analyzed. [*Texaco*, H, 574, D&M, 447; *Western Sahara*, H 115, D&M 238]

4. The need for State practice to accompany any *opinio juris* in a resolution in order to constitute a rule of customary law is controversial, and may differ from norm to norm. The process may be staged: declaratory resolutions may create expectations of adherence, and harden into customary law as practice gathers around them. [*Nicaragua*, D&M, 30, 40]

5. "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being henceforth legally required to follow a course of conduct consistent with the declaration" (ICJ, *Nuclear Tests* case (1974). Why? What would be the implications for international relations? For votes in favour of UN resolutions? Note the severe qualifications in the Frontier Dispute case. [*Nuclear Tests* cases, H 774, D&M 59; *Frontier Dispute*, ICJ Rep 1986, 554 at 574; *Eastern Greenland*, H, 772].

6. "Soft law": influence without binding force: [H, 48-54; D&M 51]

Further reading:
B. Sloan, 'General Assembly resolutions revisited', 58 *BYIL* 93 (1987).

#4 SOURCES OF INTERNATIONAL LAW: GENERAL PRINCIPLES; JUS COGENS

Basic reading: Harris, pp. 42, 835-837 or D&M ch. 2 and pp. 91-94; Evans, chs 4, 5.

Aim to understand i) the circumstances in which recourse to general principles might be necessary, the manner in which such principles would be established, and the difficulties attending their use.; and ii) what *jus cogens* is.

MAIN POINTS

1. Distinguish general principles inferred from customary law and general principles of law recognized by "civilised nations". What are "civilized nations"? What distinguishes rules and principles? How are the principles determined? [H 47-53; D&M, 43-51]

2. What is the role of general principles, and of "equity", and of humanitarian principles, in international law? [*River Meuse*, H 50, D&M 44; *North Sea Continental Shelf* H 27, D&M, 364; *Corfu Channel*, H 496]

3. If principles are used to fill in gaps in the law, what is the nature of the gap and how does the gap arise? Why else might principles be used as a basis of decision?

4. How are general principles, etc, formed, changed and identified? Are they consensual, in the sense that they must express the will of States if they are to be applicable? If they are not consensual, may a tribunal apply them without the consent of States? [see art. 38(2), ICJ Statute; *Frontier Dispute*, D&M 46]

5. What special qualities do equity and general principles possess which might suit them for application in the development of particular areas of international law? Flexibility; ability to take into account a wide (and indeterminate) range of factors in decision-making.

6. *Jus cogens* is said to be a body of peremptory rules of international law, recognised as such by the international community, admitting of no derogation (even by treaty) and which can only be changed by another rule having the same character. Its content is controversial. See arts 53, 64 Vienna Convention on the Law of Treaties. [H 835-837, D&M 91-94]

7. It is unclear what, if any, effect the status of *jus cogens* has outside the treaty context.

Further reading:
P. Weil, 'Towards relative normativity in international law', 77 *AJIL* 413 (1983)
J. A. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', 12 *EJIL* 627-650 (2001).

"Practice almost always has some gleam of innocence about it, whatever it is, but all theory is unclean, don't you think?" (James Hawes, *Rancid Aluminium*, (1977)).

NOTE: MATERIAL SOURCES OF INTERNATIONAL LAW

Think about the material sources of international law, the problems of abstracting legal rules from State practice, and the impact of different styles of diplomacy and of different approaches to publishing legal materials upon State practice.

MAIN POINTS

Collections of State practice

1. Where might evidence of State practice be found? Diplomatic correspondence; Parliamentary Papers; Hansard; UN Official Records; statutes; court decisions; newspapers; collected in UK Materials in International Law (in each *British Yearbook of International Law*); Note the US Digests: *Moore* (1906), *Hackworth* (1940-44), *Whiteman* (1963-74), *Digest of US Practice in International Law* (1973). Other national digests and yearbooks of international law. *UN Legislative Series*, International Law Commission reports. Codification conferences. *ICJ Reports* and pleadings; *UN Reports of International Arbitral Awards*; *International Law Reports*; others, e.g., *Iran-US Claims Tribunal Reports*. Consider the influence of publishing on the development of international law. [H53-58, 65-67; D&M 47-55]

Some questions concerning customary international law

2 What problems accompany reliance upon State legislation as a material source of international law? Can treaties be a material source of law?

3 How is a rule inferred from customary practice? How can it be determined whether the rule is correctly inferred? What is the criterion of correctness? Who is competent to make the determination?

4 Distinguish between sources and evidences of international law. In which category does a decision of a municipal court fall?

5 Why is there no system of *stare decisis* in the ICJ (ICJ Statute, art. 59)?

Treaty collections

6 For treaties, see the *United Nations Treaty Series*, and its predecessors the *League of Nations Treaty Series* and the collections assembled in Parry's *Consolidated Treaty Series*. See also national collections, such as the *United Kingdom Treaty Series*, and subject collections, such as Zamora and Brand, *Basic Documents of International Economic Law*.

Schools of international law

7. The influence of jurists. Major schools: international law in the pre-modern period. Natural law: Vitoria (1480-1546), Suarez (1548-1617), Gentilis (1552-1608). Grotius (1583-1645). Post-Westphalian international law and the rise of positivism: Wolff (1679-1754), Vattel (1714-1767), Bynkershoek (1673-1743). The modern mainstream: Wheaton, Kent, Halleck, Oppenheim, Lauterpacht, Tunkin, Schachter, Brownlie. New perspectives: multi-culturalism, feminism, historicism. Alternative approaches: McDougal, Lasswell, Reisman, the policy oriented approach; the Critical Legal Studies Approach; Kennedy, Koskenniemi, and Allott. International law and International Relations: Anne-Marie Slaughter Burley. New fields, new concepts: economic law, environmental law, development law; liability without breach, inter-generational equity. [D&M 11-18].

Further reading:
H. Charlesworth and C. Chinkin, *The Boundaries of International Law*, 2000.