

NYU International Law Course (Kingsbury)

Unit 3: Customary International Law and the Law of the Sea

User's Guide

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A. Framework

Unit 3 begins by introducing customary international law as part of the traditional theory of sources. The theory of sources is based upon the *positivist* presumption of international law as a product of the will of states; it stems from the idea that the sovereign can precommit itself. (The Law of the Sea—whether the old-fashioned foreign office model or the more modern global governance model— has a number of implications for sovereignty, which will be examined, particularly in the territorial and military aspects of the regulation of the seas.)

Positivist thinkers famously challenged the proposition that international law is actually *law*. John Austin (1790-1859) questioned how international law could be regarded as law without a sovereign, and H.L.A. Hart (1907-1992) claimed that international law is law, but one which is comprised of primary rules.¹ International legal thinkers who sought to answer these challenges often argued that secondary rules of international law have now been developed. Most prominently, the *Rule of Recognition* is often articulated through the theory of sources of international law. These claims are part of the positivist tradition in international legal thought which pushed away, throughout the 19th century, the theories of natural law which dominated the field in the previous centuries (see, e.g. the writings of Alberico Gentili (1552-1608), Hugo Grotius (1583-1645) and Emer de Vattel (1714-1767)).

The theory of Sources under international law is usually analyzed in reference to Article 38 of the ICJ Statute, which includes four main categories: (a) treaties, (b) custom, (c) general principles, and (d) judicial decisions and the teachings of the most highly qualified publicists

¹ Primary rules are those that govern primary conduct; for example, a primary rule might say that government officials cannot torture. Secondary rules are those that govern the remedies and procedures available when a primary rule is violated. For example, the Alien Tort Statute (ATS), which provides a cause of action for torture in U.S. courts, is a secondary rule. A secondary rule can also tell you what law to look to. The rule that in ATS cases one must look to the law of nations to find well-defined norms is a secondary rule.

of the various nations, as subsidiary means for the determination of rules of law. (Treaties are dealt with in further detail in unit 4.)

The discussion of Article 38 focuses on the rise of positivism in international law as parallel to the establishment of the profession of the international lawyer (Martti Koskenniemi's thesis in the *Gentle Civilizer of Nations* (2001)). We discuss the difference between the attitude of its early-twentieth-century drafters (the "Gentle Civilizers") and contemporary views and developments (e.g., the evolving definition of custom, and the increasing importance of judicial bodies in light of their rising numbers and growing influence on states). The discussion sheds light on sources and actors who are missing from the Statute, such as International Organizations Resolutions (SC, GA), the reports of the ILC, NGOs, practices of private corporations, and normative practices of indigenous peoples.

B. Trajectory

The discussion in this unit uses the Law of the Sea materials to provide a deeper familiarity with the doctrine of customary international law and that of the Law of the Sea. First, we engage with the different challenges posed to the legal doctrine of customary international law, such as competing legal sources (e.g. the push towards treaties or the tendency towards broad principles), tensions between North and South, evolving practices, and changing technology and data. Next, the second part of the unit moves beyond customary international law to alternative or additional modalities of governance ("From Custom to Cooperation"). Notwithstanding the importance of the different challenges or the development of alternative sources of law, the analysis suggests the continuing relevance and indeed prevalence of the doctrine of customary international law in this field. As such it provides a case study of an important feature of contemporary international law: the parallel operation and influence of historical and contemporary legal regimes.

Within the Law of the Sea, there are a variety of different topics: delimitation of territory, contested control over various zones, environmental regulation, harvesting of natural resources, regulation of ships on the high seas, and responses to piracy. This blog post gives a diagram of the economic zones and an overview of the law of piracy: [UUUhttp://intlwgrrls.blogspot.com/2009/04/return-of-piracy.html](http://intlwgrrls.blogspot.com/2009/04/return-of-piracy.html). Most important here are not the technicalities of the law, but the various ways in which states assert claims, yield

power to multinational institutions, and protect the state-centric model of territorial governance.

C. *Customary International Law*

(i) Customs, Treaties or General Principles?

The discussion of the North Sea Continental Shelf Cases of *Germany v. Denmark, Netherlands (ICJ, 1969)* focuses on the definition of international custom as comprised of two conditions: the frequency and habitual character of state practice and the subjective element of *opinio juris*; the importance attributed by the Court to *specially affected states* in concluding a rule of custom; the relationship between treaty law and custom is dealt with in the discussion of the status of the rules of the Geneva Conventions (the Court held that the convention wasn't declaratory of a mandatory rule of customary international law in its origins nor did its subsequent effect constitute such a rule). Special attention is given to the Court's decision not to draw the line itself but rather to articulate the *principles and rules* of international law which are applicable to the delimitation. The Court held such delimitation should be governed by *equitable principles* which include the preservation of natural resources and the principle of proportionality. The Court implicitly urged the parties to share the resources rather than divide them. It could be noted that this holding moves towards distributive justice principles which are dramatically different from the traditional posture of international law, which is based upon corrective justice. In addition, the Court didn't base its structure of equitable principles upon practice and *opinio juris*. The dissent of Judge Lachs illuminates the power-relations which seem to govern the establishment of a custom under international law and offers an alternative view that would take into account distributive considerations. In addition, Judge Lachs stressed the importance of flexibility in rulemaking in present day international relations.

Two jurisprudential modalities could be highlighted though this case operating parallel to customary international law in the law of the sea. First, the tendency to move towards codification (see, e.g. the 1958 Geneva Conventions, the 1982 UNCLOS). It is important to note that despite the growing importance of treaties in this field customary international law continues to be a key element in its regulation (see, e.g. the US example). In addition, as the case clearly demonstrates, the move towards codification is also accompanied by adherence

to general principles of equality and environmental protection; such principles become increasingly significant in deciding hard cases in this field as highlighted by different examples in this unit.

A recent case highlights the move away from simple bilateralism. In *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (I.C.J. Feb. 3, 2009), the ICJ found that UNCLOS was the relevant law between the parties, particularly the provisions on the EEZ and the Continental Shelf. They used the equidistance line, holding that the former agreement between Romania and the USSR didn't control the boundary between Romania and the Ukraine. They also examined the equidistance line to make sure no disproportionality had resulted. Despite the movement toward treaties, here a bilateral treaty with intent was rejected in favor of a customary or equitable mode of judging. Nonetheless, this mode of judging was adopted under UNCLOS, a treaty framework which arguably delegates more decisions to international institutions than past regimes.

The different attitudes towards legislation in the global context is further complicated in the case of *UK v. Norway (ICJ, 1951)*. The Court concluded in this case that the United Kingdom's failure to raise timely objections supported Norway's system of delimitation. This case illuminates a tension between a perception of international law as a series of bilateral entitlements (bilateralism) and the idea that all states should be involved equally in crafting the rules. The need for stability in international regulation leads to the establishment of rules based upon the practice of a handful of (usually powerful) states. This seems particularly problematic in the context of either new states or states that lack the capacity to protest. Indeed, the UNCLOS eliminated this system of claims and objections in favor of a general rule that embodies the notion of an international community of states.

Modern practice shows a shift to written law for efficiency and equality's sake—it is both faster than custom and is potentially clearer about who does and does not accept the regime. The cases about the Exclusive Economic Zone also provide a good example of modern state practice and attempt to form custom. Below, we discuss the political considerations behind the institutionalization of the Law of the Sea.

- (ii) Challenges to the Foreign Office Model: Realism and Institutionalism in the context of the Law of the Sea

The Law of the Sea could be envisioned as regulating a multi-player prisoners' dilemma, which Garret Hardin famously called *the tragedy of the commons*:² if everyone is given similar rights in the sea (e.g. complete freedom of passage, navigation and usage) no one would have the incentive to preserve it from over use. In addition, it could lead to a disproportionate burden of costs on the actors who chose to take responsibility. The Tragedy of the Commons proves the problems embedded in a system of common property and asserts the benefits of private property; such a system would allow the state who bears the cost of restraint to enjoy the benefits. This underlying logic informs both the right of states to their territorial waters and the establishment of central elements of the LOS convention such as the *Exclusive Economic Zones* (EEZ) and *Port State Jurisdiction*. Intriguing tensions arise in this context between the coastal state right over its territorial waters and *the Right of Innocent Passage* or the freedom of navigation in the context of international straits. Viewed as a bargaining process, the objections of states like Japan to the establishment of the EEZ (200 nautical miles) show how a state could use the doctrine of *The Persistent Objector* in customary international law as a *bargaining chip*.

The analysis of *the Black Sea episode* (1986) illuminates the decentralized features of governance when it is based upon state practice. In this incident, the United States claim for its *Right of Innocent Passage* is challenged by the Soviet Union claim for a violation of its territorial waters. The open ended language of the LOS Convention suggests some of these problems were intentionally left open (an "incomplete agreement"). Absent a tribunal to resolve the controversy, the Foreign Office model leads state parties to exercise governance independently (assert their position via practice) and seek support for their interpretation. The realist logic suggests this model favors either powerful states (who could afford sending warships) or a balance of power scenario. In a world of one dominant super-power, what options does a weaker state have in reaction to the United States sending a warship to its territorial waters? Why should it react and what kind of reaction should it choose? In a Global Governance model a Tribunal could theoretically fill the interpretive gaps in light of the

² Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE*, 1243 (1968).

object and purpose of the treaty. However, given the *realist* posture of this issue the role of the Tribunal would probably be quite limited.

The transport of hazardous materials through the high seas and through EEZs leads to a growing anxiety amongst states. It led some states to argue for the emergence of a new customary international law which prohibits the passage of these materials in the EEZ and to try and establish a regime for the regulation of this issue that would include notification and agreed upon route. The regulation and governance of this field exposes tensions between states that are interested in the free movement of such materials and those who object it. In the context of the export of waste, the direction is usually from north (richer states) to south (poorer states). *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (1992) is an example for a newly established governance structure which subjects the export to the consent of the receiving state and includes the regulation of how to dissolve waste. Its key principle– Prior Informed Consent (PIC) – embodies a sense of moral and legal responsibility for environmental damage. It moves beyond the institutionalist and realist logics which informed the previous regulatory schemes towards a cosmopolitan sensitivity, which becomes even more prominent as we move to discuss the governance of areas beyond national jurisdiction.

D. Governance of Areas Beyond National Jurisdiction: From Custom to Cooperation

(i) Changing Logics: Realism, Institutionalism and Morals

The discussion on the area beyond the continental shelf, the Deep Sea Bed (DSB), represents the changing trend in international law which originally regulated this issue in favor of powerful states (following the principle '*Terra Nullius*') towards the counter theory of *The Common Heritage of Mankind* which is envisioned in the prohibition on exclusive rights in the UNCLOS. The bargain which is set in The LOS Convention incorporates a balance between the increasing coastal states' jurisdiction and freedom of the high seas and the common heritage of mankind. *An Institutional Analysis* of this 'bargain' would view the coastal states as having a *concentrated interest* as opposed to other states whose interests are *diffused*. A Public Choice theory would thus anticipate a growing power of the coastal states.

Intriguingly, the DSB is an area of law in which we see how an *element of ideology* could operate against this logic by introducing the *common heritage of mankind*.

(ii) Change in Structure: from Custom and Bilateralism to Global Governance

The discussion highlights a few important features and challenges in the move towards Global Governance:

- a. States reluctance to surrender their sovereignty to compulsory dispute settlement regimes: As we move beyond the Foreign Office model and customary international law to institutions we are confronted with the challenge of institutional design. The compulsory dispute settlement regime which was decided upon as part of the design of the LOS regime led, for instance, the United States, to stay outside of the treaty. The American opposition to the treaty claimed it involves the danger of surrendering too much of the American sovereignty.
- b. Global Administrative Law challenges: The Commission on the Limits of the Continental Shelf is designed to prevent powerful coastal states, who have concentrated interest, from controlling the governance of this issue. Most states lack the capacity to protest and need an institutional framework to address 'claimant protest'. The operation of the Commission is mainly secret; its members are experts but are politicized to some extent. Amongst the various challenges posed to the operation of the Commission is the question whether further adherence *to Global Administrative Law* rules (GAL) would allow greater protection for less powerful states or is the lack of transparency important to facilitate independent decision making? Does the lack of transparency protect other states because where there is no opportunity to object, they cannot impliedly consent? Note again that it is hard for less wealthy countries to monitor the proceedings closely.
- c. The Coexistence of Old and New modalities of governance: The competition amongst states over sovereign entitlements in the Arctic (the issue of ridges, article 76(6) of UNCLOS) is a reminder of the co-existence of legal claims and practices in the world of international relations (see *the Economist article*). The reality of the melting ice in the arctic lead states to engage in very old practices to establish their entitlements (e.g. flag planting, issuing fishing licenses and birth certificates). The importance and

relevance of *protest* in order to prevent the creation of a new rule is clearly manifested in this case.

- d. Tensions between Domestic and International Regulation: in *Humane Society International Inc. v. Kyodo Senpaku Kaisha (2008)* the Australian Judge is confronted with the challenge of issuing an order he cannot enforce. Japan could have argued it was issued a permit by the International Whaling Commission. How could we reconcile between a right based upon a national license, which derives its authority from an international treaty and a contradictory claim of a domestic court that the exercise of this right contradicts its laws and claim for jurisdiction?
- e. New regimes of littoral state consent: The piracy regime in Somalia, which requires consent from the transitional government within the territorial sea, and the Non-Proliferation Security Initiative highlight the newly globalized mechanisms of state consent. Where a state cannot actually stop another from boarding, there is an incentive to issue a statement consenting to that boarding so that no state practice of boarding ships without consent is established. Even powerful states are wary about breaching sovereignty within the territorial sea or the sovereignty of the flag ships. For this reason, the NPSI is arising under bilateral treaties rather than through custom or claims of self-defense. States like Australia also try to expand the territorial basis of control by refusing to admit ships that do not follow certain procedures, such as filing lists of passengers with their destination, while they are on the high seas. Communication technology has played a role in both these developments.

(iii) The Protection of Resources beyond National Jurisdiction: Balancing Economic Interests and Environmental Concerns

The challenges in this area are to balance between the potentially important biological and genetic materials and the growing concern to protect the seabed from environmental damage. Countries with vested interests in these resources would try to stir international attempts to regulate the issue while others, who might be more favorable to the environmental concern, lack jurisdiction to influence the issue outside an international regulation scheme. The Biodiversity Convention of 1992 pushes towards a distributive justice approach. While states, like India, that control such resources cannot realistically prevent their outside exploitation, they seek compensation for internalizing the externalities

and providing this service to the world. The Convention thus embodies a compromise based upon the way these resources are allocated in the world. Could this bargain be transposed to the deep oceans? The environmental concern in favor of an agreement could be articulated in consequentialist terms (that the overall damage outweighs the profit) or ontologically (the common heritage of mankind should lead to the establishment of a distributive regime). Conversely, the backdrop could be no territorial claim but a 'res nullius' structure – something that belongs to no one and thus anyone could take. This discussion could thus be reframed as introducing a tension between a "res nullum" approach and a "res comunus" one.

Scientific evidence suggests that continued increases in atmospheric concentrations of selected greenhouse gases due to human activities will lead to an enhanced 'greenhouse effect' and global climatic change. As noted by Rajamani, The UN Framework Convention on Climate Change (1992 Climate Change Convention) and the Kyoto Protocol endorse the value of targets and timetables and require industrialized countries to take the lead in assuming and meeting the targets of these agreements. Both these premises of the international climate regime have remained contentious since their inception. The formula adopted in the Kyoto Protocol to address the problem of climate change is considered its main achievement. Annex I contains the commitment of parties to quantified emission reduction targets and a timetable for their achievement. By 2005, each Annex I party is required to 'have made demonstrable progress in achieving its commitments under [the] protocol' (Article 3 (2) of the Kyoto Protocol). Economies in transition could use a base year other than 1990. The protocol contains a list of policies and measures which parties may implement in order to achieve their targets 'in accordance with its national circumstances.' The most innovative aspect of the Kyoto protocol is that it allows parties to participate in emissions trading for the purpose of fulfilling their commitments. Indeed, such trading must be supplemental to other domestic actions taken to achieve emissions reductions. Parties could also authorize private legal entities, under their responsibility, to participate in actions leading to emission reductions. The Clean Development Mechanism (CDM) defined by Article 12 provides further means to gain emission reduction credits. The Protocol includes detailed reporting obligations and a review process.³

³ This concise (and partial) overview is, inter alia, based upon the discussion in PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 368-376 (2nd ed., 2003).

The Kyoto Protocol introduces an alternative regulatory approach as it uses *markets* to reduce carbon production. By creating a market for carbon emissions the regime sought to create incentives to reduce emissions. In addition, the regime creates greater obligations to industrialist countries and some countries in transition. Because of the economic growth of countries that aren't subject to the regime's restrictions – like China and India – the overall objective would probably be defeated. Countries from the global South argue, in turn, that the North should take responsibility for its past exploitation of the world's resources. The poor conditions of living in the south justify their quest for further development, despite the environmental damage it entails. In the Bali Roadmap of 2007 the US refusal to any international commitment led to national commitments to seek appropriate mitigation measures. The CDM regime used in India to nationally regulate sustainable development is an example for such national commitment. Lavanya Rajamani's article which concludes this unit criticizes it for failing to meet its environmental objectives.

E. Questions to Consider

The Sources of International Law

What theory of law is embedded in Article 38 of the ICJ statute? In what way is it a feature of the foreign office model? What actors in the international field are empowered by it? What contemporary features of international law today (the Global Governance model) challenge the hierarchical relations between the sources?

Customary International Law

What is your general reaction to the idea of *customary* international law? How closely does it accord with the basic rule of traditional international law as a law that depends on state consent? What are the ramifications of customary international law for countries that haven't been around long enough to contribute to the customary practice? Is the doctrine of

customary rule a residual element of a previous era or is it still significant in the world of international law today?

In *Germany v. Denmark, The Netherlands* what is the Court's approach to specially affected states? How could a rule which was conventional in its origin become binding on parties outside the treaty? What policy implications, especially for developing countries, emanate from Judge Lachs' opinion when contrasted with the majority's articulation of the standard for custom? If his view prevails, what would it mean in the grand scheme of international relations? In *UK v. Norway*, how does opposability give a first mover advantage? What would the result have been if France first showed concern about Norway's baselines? Is customary international law a way for the global community to get around the fact that there is no global legislature? Should 'majority' rule be the driving principle behind recognizing custom? What are the implications of a strict persistent objector requirement on weaker states? Could a poor, yet interested, state send a ship into seas which are distant from its territory? Should it matter that the state cannot, at least this day, object via practice? More generally, the case illuminates how the formation of customary rules poses a challenge to the administration of power in international relations. How does the Court address this challenge? How does the *LOS Convention Sea Claims Structure* (Chart 9-1 in the materials) balance the tensions between the principle of sovereignty and other principles such as freedom of navigation, fishing or the principle of the rule of law? How do these tensions play out in the context of *international straits*; how were they dealt in the *Black Sea Affair*? How does the centrality of *the principle of reciprocity* influence the form of regulation chosen by states in this field? How does the rationale of the EEZ address the *tragedy of the commons*? How does the persistent objector become a bargaining chip in the context of the controversy between Japan and New Zealand?

Governance of Areas beyond National Jurisdiction: From Custom to Coordination

The establishment of the Commission on the Limits of the Continental Shelf under the LOS convention (hereinafter: the Commission) was aimed to facilitate its implementation. While relying upon the criteria and methodology defined in the Convention, the work of the Commission requires scientific interpretation and expertise in areas that aren't legal; the scientific and Technical Guidelines adopted in 1999 are of highly technical nature. Review

Arts. 76-77 of the LOS Convention (especially Art. 76; Annex II): who are the members of the Commission? How are they elected? What are the Commission's functions? Who could participate in the decision-making? What are the implications of the Commission's recommendations? To what extent is it transparent? What are the tensions embedded in this regime between the Foreign Office model and the Global Governance model? Could we extend customary international law status to the role and position of the Commission? Could a non-party to the LOS convention utilize the Commission? How do you think article 76(8) should be interpreted: Should the capacity of boundary making be a sole prerogative of the state, in which case the Commission role is to facilitate its decision, or should the Commission be allowed further interference? What does "final and binding" mean?; to whom are its decisions binding?

The Economist article on the Arctic illuminates further the kind of 'bargain' or the political choices made in this regulation. How does the case on the *Humane Society International Inc. v. Kyodo Senpaku Kaisha* problematize some of its conclusions? What are the Japanese claims against the jurisdiction of the Australian Federal Court? How does the discussion over the jurisdiction of the Court illustrate the disaggregated state? Who are the actors involved (Kyodo, a private company incorporated in Japan, the Humane Society International Inc., the Australian and Japanese governments etc.)? What are the procedural and practical challenges the Court faces? Do you find its solutions satisfying? How would you describe the Federal Court's involvement, is it engaging in dispute settlement or adjudication?

While the LOS convention establishes the legal framework for all activities in the oceans it doesn't specifically address issues relating to biodiversity. The discussion between the different bodies that is covered in this subsection captures current attempts at addressing the need to establish a legal framework to engage with this issue. How does the institutionalism logic address the problems of data gathering and other coordination challenges? What would be the realist approach to these issues? What would be the arguments for and against an ex ante v. ex post policy? What are the considerations in favor of a universal framework and why would some actors favor a regional or a sectoral one? Using the logics of institutionalism and realism try to analyze the battle over the regulation of

Genetic Resources between developed and developing countries: Why do developing countries favor an international legally binding regime and why are developed countries opposed to it? What is the industry's position? Which form of global governance (CBD, WTO, WIPO, A regime under UNCLOS, regional regimes etc.) is potentially more favorable to which actor and why? Whose interests seem to be disregarded? How do these different positions play out in the working paper of the EU and India's statement?

How does the reality of *climate change* correspond with the distribution of wealth in the world? Does the Kyoto Protocol address these inequalities? In the discussion on Genetic Resources developing countries prefer an internationally binding regime. Conversely, in the context of climate change, the Indian government chose a voluntary regime to decarbonize its economy. From the realist perspective of an anarchical world, what rational interest based calculation would support its policy choices? Could we analyze India's behavior as part of a greater prisoners' dilemma – why has India abstained from 'locking in' its policies in a global institutionalized regime? How could evaluate the distinctive features of the Indian CDM (The Clean Development Mechanism) experience in light of the realist/institutionalist logics (unilateral, small, voluntary; who are the stakeholders or interests represented in its DNA etc.). Would you refer to the Indian policy choices as based upon the Foreign Office model or the Global Governance one? More generally, the discussion in this section (II) raises difficult questions on how the global governance model allocates power and representation in an international system characterized by extreme imbalances. Are environmental policies an attempt of stronger countries to use international law to shape the world according to their interests? Could the Indian approach be perceived as part of its struggle to maintain relevance in a highly competitive world? What would be the possible critique to this approach?