**Week 1 - Framework and Concepts**

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1. **Framework**
   1. **Energy**
      1. What types of resources/activities?
   2. **Law**
      1. What is law?
      2. National or International?
   3. **Ethics**
      1. Definition

‘Ethics, also called moral philosophy, is the discipline concerned with what is morally good and bad, right and wrong. The term is also applied to any system or theory of moral values or principles.’ (*Peter Singer*)

* + 1. Questions

This triggers a set of questions such as:

‘[I]s it right to be dishonest in a good cause? Can we justify living in opulence while elsewhere in the world people are starving? Is going to war justified in cases where it is likely that innocent people will be killed? […] What are our obligations, if any, to the generations of humans who will come after us and to the nonhuman animals with whom we share the planet?’ (*Peter Singer*)

‘Ethics deals with such questions at all levels. Its subject consists of the fundamental issues of practical decision making, and its major concerns include the nature of ultimate value and the standards by which human actions can be judged right or wrong.’ (*Peter Singer*)

* + 1. Relation with **law** and **justice**

‘An eye for an eye, a tooth for a tooth.’ (*Hammurabi Code*)

‘It is the way of the Dao … to recompense injury with kindness.’ (*Laozi*)

‘What you do not want done to yourself, do not do to others.’ (*Confucius*)

‘[Socrates] thought that anyone who knows what virtue is will necessarily act virtuously. Those who act badly, therefore, do so only because they are ignorant of, or mistaken about, the real nature of virtue […] In ancient Greece, the distinction between virtue and self-interest was not made – at least not in the clear-cut manner that it is today.’ (*Peter Singer on Socrates*)

‘Suppose a person obtained the legendary ring of Gyges, which has the magical property of rendering the wearer invisible. Would that person still have any reason to behave justly? Behind this challenge lies the suggestion, made by the Sophists and still heard today, that the only reason for acting justly is that one cannot get away with acting unjustly.

[…]

But even if one could know what goodness or justice is, why should one act justly if one could profit by doing the opposite? This is the remaining part of the challenge posed by the tale of the ring of Gyges, and is it still to be answered. For even if one accepts that goodness is something objective, it does not follow that one has sufficient reason to so what is good. One would have such a reason if it could be shown from that goodness or justice leads, at least in the long run, happiness.’ (*Peter Singer on Plato*)

[Comment: ‘A characteristic of Greek ethics [is that it] … refused to recognise that there could be an irresolvable conflict between the interest of the individual and the good of the community – Not until the 18th century did [Kant] forcefully assert the importance of doing what is right simply because it is right, quite apart from self-interested motivation’ (*Peter Singer*)

‘Aristotle’s discussion of the virtue of justice has been the starting point of almost all Western accounts. He distinguishes between justice in the distribution of wealth or other goods and justice in reparation, as, for example, in punishing someone for a wrong he has done. The key element of justice, according to Aristotle, is treating like cases alike – an idea that set for later thinkers the task of working out which kinds of similarities (eg. need …) should be relevant.’ (*Peter Singer on Aristotle*)

1. **Concepts**
   1. **Sovereignty**

Sovereignty is a fundamental concept in international law. The notion of statehood is grounded on sovereignty.

The concept of sovereignty is ‘shorthand for legal personality of […] statehood’ and can be translated into the ‘plenitude of a State’s competences over a territory’ . The competences that a State can exercise over its territory are a bundle of rights and duties attributed to it under international law and are, thus, not unlimited. In other words, States’ sovereignty is not absolute.

The non-absolute nature of sovereignty is the premise for the peaceful coexistence among several co-sovereigns. Indeed, attributes such as sovereign equality, territorial integrity and independence from external interference are meaningful only insofar as each State does not encroach upon another co-sovereign’s competences and acts within the boundaries of the rights and duties attributed to it.

* 1. **Sovereign rights**

The distinction between ‘sovereignty’ and ‘sovereign rights’ can be better understood by reference to the concept of a ‘bundle of rights and duties’ used in connection with the notion of sovereignty.

Sovereignty embraces ‘a collection of legal rights, powers, liabilities, and duties’ and relates to ‘all three dimensions of land, sea and atmosphere’.

The notion of ‘sovereign rights’, instead, exclusively covers the rights attributed to a State under conventional or customary international law (e.g. right to explore and exploit the resource of the continental shelf).

* 1. **Energy trilemma**

The World Energy Council’s definition of energy sustainability is based on three core dimensions:

* + - * 1. Energy security
        2. Energy equity (accessibility and affordability)
        3. Environmental sustainability

1. **Basic principles**
   1. **No-harm principle, prevention principle, obligation to conduct EIA**

The classic formulation of the no harm principle in an environmental context appears in the *Trail Smelter Case* (*United States* v. *Canada*):

‘[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.’ (p. 1965)

The ICJ confirmed the customary nature of this principle in 1949, in the *Corfu Channel Case* (*United Kingdom* v. *Albania*):

‘[E]very State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’ (p. 22)

Obligation of due diligence (*obligation of conduct*) triggered by the risk of *significant harm* to the environment of other States or areas beyond the limits of national jurisdiction.

This new conception embracing both areas within and beyond national jurisdiction only became part of positive international law in the 1990s, when the ICJ recognised, in its *Advisory Opinion on the Legality of Nuclear Weapons*, that Principle 21 of the Stockholm Declaration codified customary international law.

Principle 21 – later transposed in the Rio Declaration, Principle 2 – shifts the focus from the protection of the interests of other States to the protection of the environment *per se*. In this sense, it clarifies the difference between ‘*no harm*’ and ‘*actual prevention*’.

When a proposed activity is likely to have such significant adverse impact on the environment of another State or area beyond national jurisdiction, the prevention principle triggers a procedural obligation to conduct an *environmental impact assessment* (*EIA*). These obligations have been clearly spelled out by the ICJ in the Costa Rica c. Nicaragua and Nicaragua c Costa Rica cases (2015):

‘[T]o fulfil its obligation to exercise *due diligence in preventing* significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a *risk of significant transboundary harm*, which would trigger the requirement to carry out an *environmental impact assessment* [ … ] If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.’ (para. 104)

* 1. **Polluter-pays principle**

It can be understood in different ways.

Content: the one that pollutes pays. At first sight, it would appear as a mere version of the *duty to repair the damage* caused to others as applied in an environmental context. However, such duty is well-established in CIL through both the harm and the prevention principles.

It has a sufficiently distinct content. It arose in the context of industrial operations carried out before the emergence of environmental protection considerations. It can understood by reference to the *theory of ‘externalities’* = impact of a transaction or economic activity on third parties that do not participate in it. When this impact is *negative* and is not compensated, one can speak of a ‘*negative externality*’ (eg the pollution of rivers by the normal or ‘accidental’ operation of a company imposes a cost on society).

The key factor is that while the benefits arising from the activity are individually appropriated the costs are spread across society. The key question then arises of *who should pay the cost*:

1. members of society at large (who simply bear the burden without individually profiting from the activity) would probably pay if:
   * 1. nothing is done
     2. the authorities intervene to treat polluted water (eg the cost would be borne by tax-payers)
2. ‘cost internalisation’ (the idea that the cost of measures adopted by the authorities to fight pollution has to be reflected in the cost of goods and services which cause pollution in production and/or consumption) by:
3. the company (i.e. the entity that receives the benefits) pays
4. consumers (who both receive the benefit of consuming the product of their choice and bare, as part of society, the cost arising from the activity) pay

Codification: cost internationalisation was formulated in the OECD Council Recommendation in 1972 and in Principle 16 of the Rio Declaration:

‘[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.’

* 1. **Common but differentiated responsibilities**

Aim: to distribute the effort required to manage environmental problems of a global nature (eg the fight against climate change) among States, and on the basis of two key criteria

* + - * 1. namely historical (and on-going) responsibilities
        2. respective capabilities (financial and technical)

Function

1. conciliation function: reconciles potentially conflicting interests b/w
   * 1. developing countries: see it as a way to gain recognition for their development needs, their reduced ability to contribute to the management of environmental problems and their lower contribution of their creation
     2. developed countries: consider it a tool to ensure participation of developing countries in the management of global environmental problems and to ensure that the development process takes place within certain environmental bounds
2. interpretive function

Codification

* 1. Principle 7 of the Rio Declaration

‘States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit for sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.’

* 1. Principle 7 of the Rio Declaration shows
     1. the common dimension of the principle of CBDR (duty to cooperate ‘in a spirit of global partnership’ to protect the environment) [community of interests]
     2. the differential dimension (the recognition by developed countries of their primary responsibility for environmental degradation and their increased ability to deal with its consequences) [differential treatment]
  2. **Inter-generational equity**

Aim: to distribute the quality and availability of natural resources and the necessary efforts for their conservation between present and future generations.

Codification:

* 1. 1972 Stockholm Conference
  2. Principle 3 of the Rio Declaration

‘[T]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’

Case law:

1. International case law:
   * 1. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*

‘It is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come’ (para 36)

* + 1. *Gabčíkovo-Nagymaros Project* case

‘Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades.’ (para 140)

1. Domestic case law
2. *Minors Oposa* case

‘This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned […] Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.’ (para. 22)

This principle provided the basis for the admissibility of a collective action initiated by a group of Philippine children representing their interests as well as the interests of future generations). It was used to give voice to future generations: the minors claim that ‘they represent their generation as well as generations yet unborn.’

Reference

Dupuy-Viñuales, *International Environmental Law* (Cambridge: CUP, 2018) [**Chapter 3**]