

# INTERNATIONAL LAW

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### ***I. Course Overview***

Traditionally, “international law” referred to that body of law that regulates relations among states, and, because there was no central sovereign commanding states to obey, it was frequently dismissed as not really law at all, akin to the prissy rules of etiquette or chivalry. Within law schools, international law was considered a highly specialized and highly speculative course hidden in the softer corners of the curriculum. Today by contrast (and despite the failures of international law that are catalogued daily on the newspapers’ front pages), international law has become an aspect of virtually every field of legal practice and scholarship; indeed, even a partial list of contemporary international concerns -- intellectual property, gender and race discrimination, corporate governance, the sale of goods and services, bankruptcy, labor law, environmental protection, family law, restrictive business practices, telecommunications, civil litigation, the rights of children -- suggests the extent to which the international community has attempted to regulate matters that have historically been within each state’s exclusive domestic jurisdiction.

The fact is that the distinctions that have long given structure to the discipline of international law have become outmoded in the last half-century and, in some cases, outright dysfunctional. Professor Wolfgang Friedmann famously observed that the essential characteristic of international law in our time has been its transformation “from an essentially negative code of rules of abstention to positive rules of cooperation.” In other words, international law, once conceived as a body of law defining states’ respective jurisdiction or their reciprocal immunities, was essentially a collection of rules of mutual separation and forbearance – rules which tended to preserve more state discretion and sovereignty than they constrained. The

transition to “positive rules of cooperation” represented a dramatic expansion in the substantive reach of international standards, as though a law that had primarily been about the “fences” separating states had to be reconceptualized as a matter of “bridges” connecting them. The orthodox distinction between international law and domestic law began to blur. Public and private international organizations proliferated, as did the means of creating and enforcing international norms.

With the attacks of September 11<sup>th</sup>, the wars in Afghanistan and Iraq, the torture of detainees, and the well-known objections of the Bush Administration to certain high-profile treaties, skepticism about international law is fashionable again. It is always relevant to observe that international law hardly “works” all the time, though it is equally true that criminal law does not eliminate crimes, tort law does not eliminate accidents, and antitrust law does not eliminate anticompetitive conduct. No law can prevent its own violation. But this class will steer a middle course between skepticism and naivete, highlighting both (1) the basic principles of international law that have survived because they have long-term value in the global commons and (2) the principles of international law that are emerging now in response to globalization and its discontents.

## **II. Required Texts**

Carter, Trimble, and Weiner, *International Law* (Aspen, 5<sup>th</sup> ed. 2007)

Carter, *International Law: Selected Documents* (2007-08)

Supplement of Cases, Materials, and Problems (available on-line through the law school portal or in hard copy from the Copy Center)

## **III. Class Participation and Examination Information**

Your questions and comments are welcome at all times: by a large margin, I would rather address the questions or concerns you actually have in mind than guess what might be interesting or confusing to you.

This semester, I’ll use a weekly on-deck system for class participation, meaning that students will have advance notice of when they are likely to be called on.

The final grade will be determined primarily by an open-book, three-hour examination based on the lectures, class discussions, and all assigned material, whether discussed in class or not. The examination will be on **Monday, December 10<sup>th</sup>, 2007, at 2:00 p.m.** The exam itself will be in two parts: an essay question, which will resemble the “issue-spotting” exercises included in § IX below, and twenty-five multiple choice questions in various formats, also illustrated in § IX below. The two parts will be of equal value and are designed to be answered in ninety minutes each.

The examination score may be raised or lowered by one grade-step (e.g. B+ to A- or from B to B-) to reflect the quality (not the quantity!) of a student's level of preparation and contribution to class discussion. *Please note that the grade will be dropped automatically by one grade-step if a student (i) without prior explanation and advance approval, is unprepared or absent on a day when s/he is on deck, or (ii) does not sign the seating chart by the end of the Add-Drop period, or (iii) is, in the words of the Law School Bulletin, "deficient in class attendance."* At random times during the semester, I will spotcheck attendance with a sign-in sheet.

If you feel disadvantaged by a grading system that takes class participation into account, I hope you'll feel free to discuss this with me before the end of the Add-Drop period. I would be happy to make other, individualized arrangements, so that you will not be called on in class.

*As a courtesy to other students, please make sure that your cellphones, blackberries, pagers, and gameboys are turned off before you come to class. Please recognize that playing games, checking e-mail, and surfing the net during class are not victimless crimes.*

#### **IV. Office Hours**

My regular office hours this semester will be Thursdays, 3:30-5:00 p.m, and *any time by appointment*. I hope you'll feel free to drop by to discuss the course or just to become better acquainted. Sandwiches after class are always a possibility, and every Thursday at 12:30, at a place to be determined, I'll have an informal brown-bag lunch with everybody who's on deck that week. (If you have a class on thursdays at that hour, I will arrange occasional lunches on other days of the week, which you should feel free to join.)

#### **V. Outside Reading**

If you wish to examine in greater detail any of the topics covered in this course, I recommend the following texts and journals. They are entirely optional:

##### **A. Student-Oriented Texts and Treatises**

Bederman, *International Law Frameworks* (2d. ed. 2006)

Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed. 2003)

Buergenthal and Murphy, *International Law in a Nutshell* (3<sup>d</sup> ed. 2002)

von Glahn, *Law Among Nations: An Introduction to Public International Law* (7<sup>th</sup> ed. 1999)

Janis, *An Introduction to International Law* (4<sup>th</sup> ed. 2003)

Malanchuk, *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> ed. 1997)

## B. References and Scholarly Monographs

- American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987)  
Beck *et al.*, *International Rules: Approaches from International Law and International Relations* (1996)  
Becker, *The American Law of Nations: Public International Law in American Courts* (2001)  
Cassese, *International Law* (2001)  
Charlesworth and Chenkin, *The Boundaries of International Law : A Feminist Analysis* (2000)  
Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (2d ed. 2000)  
D'Amato, *The Concept of Custom in International Law* (1971)  
Falk, *Law in an Emerging Global Village : A Post-Westphalian Perspective* (1998)  
Goldsmith & Posner, *The Limits of International Law* (2005)  
Henkin, *Foreign Affairs and the United States Constitution* (1996)  
Henkin, *International Law: Politics and Values* (1995)  
Higgins, *Problems and Process: International Law and How We Use It* (1995)  
Joyner (ed.), *The United Nations and International Law* (1997)  
Low, Norton, & Drory, *International Lawyer's Deskbook* (2d ed. 2003)  
Murphy, *The United States and the Rule of Law in International Affairs* (2004)  
Rogers, *International Law and United States Law* (1999)  
Shelton, *Remedies in International Human Rights Law* (2d ed. 2005)  
Simpson (ed.), *The Nature of International Law* (2001)

## C. English-Language Journals and Services

- American Journal of International Law  
International and Comparative Law Quarterly  
British Yearbook of International Law  
International Lawyer  
Recueil des Cours (Hague Academy of International Law)  
International Law in Brief (timely, comprehensive online service – subscription information at <http://www.asil.org/ilibsub.htm>)

## D. Career Information

- Janis & Swartz, *Careers in International Law* (2d ed. 2001)  
M. Staunton (ed.), *Careers in International Law: A Guide to Paths and Internships in International Law* (2003-2004)  
Researching careers in international law: [www.lib.uchicago.edu/~llou/careers.html](http://www.lib.uchicago.edu/~llou/careers.html)

## VI. Recommended Websites

Research Guide to International Law on the Internet:

<http://www2.spfo.unibo.it/spolfo/ILMAIN.htm>

Guide to Foreign and International Legal Databases:

[http://www.law.nyu.edu/library/foreign\\_intl/](http://www.law.nyu.edu/library/foreign_intl/)

United Nations:

United Nations Treaty Database: [untreaty.un.org](http://untreaty.un.org)

The International Court of Justice: [www.icj-cij.org](http://www.icj-cij.org)

International Criminal Tribunals

for the Former Yugoslavia: [www.un.org/icty](http://www.un.org/icty)

For Rwanda: [www.icttr.org](http://www.icttr.org)

UN Mission in Sierra Leone: [www.un.org/Depts/dpko/unamsil/body\\_unamsil.htm](http://www.un.org/Depts/dpko/unamsil/body_unamsil.htm)

Scholars' Workstation: [www.library.yale.edu/un/index.html](http://www.library.yale.edu/un/index.html)

Intergovernmental Organizations:

International Labour Organisation: [www.ilo.org](http://www.ilo.org)

International Monetary Fund: [www.imf.org](http://www.imf.org)

International Telecommunications Union: [www.itu.int](http://www.itu.int)

World Health Organization: [www.who.int/home-page/](http://www.who.int/home-page/)

Organization for Economic Cooperation and Development: [www.oecdwash.org](http://www.oecdwash.org)

UNCITRAL: [www.uncitral.org](http://www.uncitral.org)

World Bank: [www.worldbank.org](http://www.worldbank.org)

World Trade Organization: [www.wto.org](http://www.wto.org)

Regional Intergovernmental Organizations

Africa: African Union: <http://www.africa-union.org/>

Americas: Organization of American States: [www.oas.org](http://www.oas.org)

NAFTA: <http://www.nafta-sec-alena.org/>

Mercosur: [www.mercosur.int/msweb/](http://www.mercosur.int/msweb/)

Asia: Asia-Pacific Economic Cooperation: [www.apec.org](http://www.apec.org)

ASEAN: [www.aseansec.org](http://www.aseansec.org)

Europe: Council of Europe: [www.coe.int](http://www.coe.int)

European Union: [europa.eu.int](http://europa.eu.int)

or [www.lib.berkeley.edu/GSSI/eu.html](http://www.lib.berkeley.edu/GSSI/eu.html)

OSCE: [www.osce.org](http://www.osce.org)

U.S. Department of State: [www.state.gov](http://www.state.gov)

American Society for International Law: [www.asil.org](http://www.asil.org) (Students who are especially

interested in international law should consider joining the ASIL, which sharply reduces membership fees for students. There is no better way to stay current in the field.)

Section of International Law and Practice, ABA: [www.abanet.org/intlaw/home.html](http://www.abanet.org/intlaw/home.html)

### **VIII. Syllabus**

In the following syllabus, “CTW” refers to Carter, Trimble, and Weiner, *International Law* (Aspen, 5<sup>th</sup> ed. 2007), “C Sel. Doc.” refers to Carter, *International Law: Selected Documents 2007-08*, and “Supplement” refers to the supplement of cases, materials, and problems available through the Law School web portal or from the Copy Center. *When the textbook refers to an item that is in the Selected Documents, please read that material in its entirety even if it is not separately assigned in this syllabus.*

Each class assignment is designed to be completed in 60-90 minutes of concentrated reading. Please let me know if that estimate turns out to be unrealistically low, so that I can make the necessary adjustments.

*Special assignments or changes in this syllabus may be announced in class from time to time.*

### **A. INTRODUCTION TO THE TYPES AND SOURCES OF INTERNATIONAL LAW**

8/27/07 CTW 1-32 (up to the break in the text on p. 32)

#### **1. Rules of Customary International Law and “General Principles”**

8/28/07 and 8/29/07: Introduction to Custom and General Principles

CTW 123-137; 151-156

Supplement (at CTW 129, before Notes and Questions): The *Lotus* Case

Supplement (at CTW 135, before ¶ 3): The TOPCO Arbitration

8/30/07: Supplement: Problem: State Behavior and the Emergence of Custom: *The Temple of Preah Vihear Case* and *The Norwegian Fisheries Case*

9/3/07: Labor Day Recess

9/4/07: Supplement: Problem: The Relationship between Customary Law and Treaties: *The North Sea Continental Shelf Cases* and the *Nuclear Weapons Case*

9/5/07: Customary International Law in Domestic Courts

CTW 239-252

9/6/07: CTW 252-269

Supplement: *Doe v. Unocal*

9/10/07: Supplement: Problem: Post-*Sosa* Developments in ATS Litigation against Multinational Corporations: Separating the Wheat from the Chaff  
*Presbyterian Church of Sudan v. Talisman Energy, Inc., In re South African Apartheid Cases*, and *Bowoto et al. v. Chevron*

## 2. Rules of Conventional International Law

### a. U.S. Practices and Constitutional Principles Governing Treaties

9/11/07: CTW 159-177 (up to ¶ b)

C Sel. Doc.: Constitution of the United States (please highlight the powers related to foreign affairs)

9/12/07: Reservations, Understandings, and Declarations; the Last-In-Time Rule  
CTW 177 (¶ b)-189

9/13/07: The Recurring Problem of Treaty Interpretation

Supplement: *United States v. Alvarez-Machain (Alvarez-Machain I)* and *United States v. Palestine Liberation Organization*

9/17/07: Presidential Power and International Agreements

CTW 189-219 (please skim *Curtiss-Wright* and *Youngstown Sheet & Tube*, pp. 191-201)

9/18/07: Presidential Powers and the “Global War on Terrorism”

CTW 219-238

9/19/07: Reconciling Federalism with International Legal Obligations

CTW 269-284

### b. International Principles Governing Treaties

9/20/07 and 9/24/07 (*continued below*): CTW 93-107 (up to ¶ 4); 113-123

C Sel. Doc.: The Vienna Convention on the Law of Treaties (please note especially Arts. 18-23, 26-27, 31-38, 52, 53, 60, 62, 64)

9/25/07 and 9/26/07: Reservations

CTW 107-112

Supplement: The Reservations Regime of the VCLT and the Convention on the Elimination of All Forms of Discrimination against Women

C Sel. Doc.: (i) Convention on the Prevention and Punishment of the Crime of Genocide; (ii) Convention on the Elimination of All Forms of Discrimination Against Women

## **B. DISPUTE SETTLEMENT AND THE ENFORCEMENT OF RULES IN EXEMPLARY INTERNATIONAL SETTINGS**

### **1. Negotiation, Mediation, and Conciliation**

9/27/07 (continued below): CTW 285-291; 291-298 (optional)

### **2. The International Court of Justice**

9/27/07: CTW 298-313 (up to ¶ d)

C Sel. Doc.: U.N. Charter, arts. 92-96; I.C.J. Statute (especially articles 34-38)

10/01/07: CTW 313-323 (up to ¶ e); 335-339

10/02/07: Supplement: *Yugoslavia v. United States* and *Avena and other Mexican Nationals (Mexico v. United States)* and Note on the Domestic Aftermath of *Avena*

### **3. Regional and Specialized Courts**

10/03/07: CTW 339-357

Supplement (at CTW 357): The Inter-American Court of Human Rights: *Velásquez-Rodríguez v. Honduras*

### **4. International Arbitration**

10/04/07: The Fundamentals of Arbitral Practice

CTW 357-358 (up to ¶ 1), 364-376 (skim)

Supplement: Exhaustion of Local Remedies, Waiver, and Espousal (class discussion will focus on the cases in the Supplement)

10/08/07: Supplement: “Public” Arbitration: *Trail Smelter* and *Rainbow Warrior*

10/09/07: Mid-Course Correction Day #1

## **C. THE CONCEPT, CONSEQUENCES, AND LIMITATIONS OF STATEHOOD**

### **1. Statehood’s Prerequisites**

10/10/07 and 10/11/07: CTW 443-462 (up to ¶ 6) (please skim the materials on Taiwan, pp. 457-462)

10/15/07: CTW 462 (¶ 6)-474; Supplement: *Tinoco Claims Arbitration* and *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*

### **2. Statehood’s Perquisites (and How they Morph)**

10/16/07: Supplement: The Right to Grant and Withhold Nationality: *Nottebohm*

### **3. Allocation of Authority Among States**

- a. Jurisdiction to Prescribe: The Application of U.S. Law to Acts Committed Abroad  
10/17/07: CTW 657-670; 685-686 (up to the excerpt from Lowenfeld)

10/18/07: CTW 695-702 (Helms-Burton); 703 (¶ 3) and 706 (¶ 4) (Restatement provisions and commentary only); 713-722

- b. Jurisdiction to Enforce and Adjudicate

10/22/07: CTW 722-725 (up to *Alvarez-Machain I*); 737-742

### **4. Jurisdictional and Prudential Limitations**

- a. Foreign Sovereign Immunity

10/23/07: CTW 559-568 (up to *Verlinden*);

C Sel. Doc.(at CTW 568): Foreign Sovereign Immunities Act  
Supplement: *Argentine Republic v. Amerada Hess Shipping Corp.*

10/24/07: CTW 584 (¶ 4)-602 (up to ¶ 9)

10/25/07: CTW 602 (¶ 9)-615 (up to ¶ 13)

10/29/07: The FSIA in Overview

Supplement: *Siderman v. Republic of Argentina*

- b. Diplomatic, Consular, and Head-of-State Immunity

10/30/07: CTW 620 (¶ 14)-628

C Sel. Doc.: Vienna Convention on Diplomatic Relations (Arts. 2, 4, 5, 23, 26, 27, 31, 33, 35, 41, 43, 45)

- c. The Act of State Doctrine

10/31/07: CTW 628-642 (up to ¶ 3)

11/01/07 and 11/05/07: CTW 642 (¶ 3)-653

11/06/07: The Act of State Doctrine in Overview

Supplement: *Suing Ferdinand Marcos*

11/07/07: Mid-Course Correction Day #2

## **D. APPLYING THE RULES IN CRITICAL SETTINGS**

### **1. The United Nations and the International Law Governing Resort to Force**

- a. Generally
  - 11/07/07: 969-993 (up to ¶ 5)
  - C Sel. Doc.: U.N. Charter, Arts. 23-32 and 39-51
- b. The U.N, Security Council and the Legality of the Wars in Iraq
  - 11/08/07: CTW 1038-1039; 1046-1069 (up to ¶ 3)
  - Supplement: The (UK) Attorney General’s Advice to Prime Minister Blair on the Legality of Military Action against Iraq
- c. The “Responsibility to Protect”
  - 11/12/07: Supplement: A Renaissance for Humanitarian Intervention?

**2. International Property Law and the Transition from Rules of Abstention to Rules of Cooperation**

- a. The International Regime Governing the Seas
  - 11/13/07 and 11/14/07: CTW 847-851; 872–894; 898-902 (up to ¶ G)
- b. The International Regime Governing Airspace and Outer Space
  - 11/15/07 and 11/19/07: Supplement: The Bogota Declaration and the Common Heritage Principle

11/20/07: Constructive Friday: class will not meet

11/21/07-11/23/07: Happy Thanksgiving!

- c. The Transition Exemplified #1: International Environmental Law
  - 11/26/07 and 11/27/07: CTW 923-924 (up to *Trail Smelter*); 927 (Stockholm Declaration)-942
  - C Sel. Doc.: Stockholm Declaration
  - Supplement (at CTW 924): Contemporary International Environmental Law
- d. The Transition Exemplified #2: Corporate Transactions, Human Rights, and the New *Lex Mercatoria*
  - 11/28/07: Supplement: Four Regimes of Corporate Responsibility

**E. “FINE. BUT IF IT’S NOT ON THE BAR EXAM, IT’S NOT REALLY LAW, IS IT?”**

11/29/07: CTW 48 (¶ D)-63 (up to “Bibliography”)

## VIII. Glossary of Foreign Phrases

Not surprisingly, foreign phrases recur in international law cases, arbitral awards, diplomatic exchanges, and similar materials. These can be an irritating distraction the first time you encounter them, but the sad truth is that they aren't showy ornaments: they're a convenient shorthand for some basic concepts and doctrines. I hope that you'll find the following glossary useful when you come across these phrases:

***compromis***: an agreement or stipulation among states under which they jointly submit a particular dispute to the International Court of Justice for resolution. See the Statute of the International Court of Justice, Article 36(1).

***erga omnes***: the obligations of a State toward the international community as a whole, including the proscription of aggression, genocide, slavery, and racial discrimination. See the *Barcelona Traction Case*, 1970 I.C.J. 3, at para. 33, 34.

***ex aequo et bono***: out of equity or fairness. See the Statute of the International Court of Justice, Article 38(2).

***ipso facto***: by the fact (or act) itself.

***jus (or ius) ad bellum***: law governing nations' resort to force. Contrast *jus in bello*.

***jus (or ius) civile***: the system of law peculiar to one state or people, *i.e.* the law created within each country. Contrast *jus gentium*.

***jus (or ius) cogens***: peremptory norms of international law from which no derogation by treaty is permitted. See Vienna Convention on the Law of Treaties, articles 53 and 64.

***jus (or ius) gentium***: law established among all people by natural reason, now frequently understood to refer to the law of nations. Contrast *jus civile*.

***jure (or iure) gestionis***: acts that are commercial by nature. Under U.S. law, foreign governments forego immunity for their intrinsically commercial acts. See the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2). Contrast *jure imperii*.

***jure (or iure) imperii***: acts that are governmental (or sovereign) by nature. Under U.S. law, foreign governments retain immunity for their intrinsically governmental acts. See the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2). Contrast *jure gestionis*.

***jus (or ius) in bello***: law governing the conduct of warfare, sometimes referred to as humanitarian law or the law of war. Contrast *jus ad bellum*.

***jus (or ius) sanguinis***: the right of "blood," meaning the principle that a person's citizenship

is determined by the citizenship of the parents (or one of them). Contrast *jus (or ius) soli*.

***jus (or ius) soli***: the law of the soil or place of one's birth as the basis for citizenship.

***lex ferenda (or de lege ferenda)***: norms in the process of ripening into law. Contrast *lex lata*.

***lex lata (or de lege lata)***: law that is binding and well-established. Contrast *lex ferenda*.

***lex mercatoria***: the law merchant or commercial law, frequently referring to market customs that became binding law in all commercial nations.

***male captus, bene detentus***: the doctrine that a state may try persons brought to its courts through irregular means, even by means of abduction from another state in violation of international law, in the absence of protest by the other state.

***opinio juris sive necessitatis***: the conviction that a behavior is required by law (as distinct from behaviors motivated by other concerns, such as humanitarianism or habit). A requirement before any norm can be considered customary law. See the Statute of the International Court of Justice, Article 38 (1)(b).

***pacta sunt servanda***: the doctrine that all international agreements must be observed in good faith. See Vienna Convention on the Law of Treaties, Article 26.

***persona non grata***: an undesirable person, generally referring to the ground for expelling or rejecting a diplomat.

***rebus sic stantibus***: "at this point of affairs:" the change-in-circumstances doctrine, defining when a fundamental change in the underlying assumptions and conditions of a treaty allows its termination or suspension. See Vienna Convention on the Law of Treaties, Article 62.

***Sic utere***: short form of the Roman doctrine *sic utere tuo ut alienum non laedas*, meaning "so use your own as not to injure another's property."

***terra (or res) nullius***: land (or thing) belonging to no one.

***travaux préparatoires***: the legislative history (or preparatory work) of a treaty, sometimes used in the interpretation of the treaty. See Vienna Convention on the Law of Treaties, Article 32.

***uti possidetis***: the principle that states emerging from decolonization presumptively inherit the colonial administrative boundaries that they held at the time of independence.

## IX. Prior Examination Questions

The following questions will give you some idea of the format and coverage of the final examination in this course.

Please note that a statutory annex was attached to every question included below but is not included in this problem set. The annex included various jurisdictional statutes, including 28 U.S.C. §§ 1330 (the Foreign Sovereign Immunities Act), 1331 (federal question jurisdiction), and 1350 (the Alien Tort Claims Act).

### A. Essay Questions

#### ILLUSTRATIVE QUESTION 1

Ms. Kathi Lee Glitz is another one of those relentlessly perky TV personalities who just happens to own multi-million dollar manufacturing operations in foreign countries, especially in the garment industry. One of those companies -- Glitz Alert! -- makes overpriced clothes for American teenagers with too much disposable income. Glitz Alert! operates in Hoffland, a fictional country which, until August 2001, had been ruled by a repressive military regime. Glitz -- a citizen of the United States -- had made Glitz Alert! very profitable by paying wages at the poverty level and physically intimidating the workers (with the overly zealous assistance of Hoffland's police forces).

In August 2001, after many years of civil war, the Revolutionary Coalition (RC), under the leadership of Zelda Bratwurst, came to power. Six nations in the region recognized the new regime immediately (more out of fear than respect), but the United States did not. In fact, two weeks after the civil war ended, six U.S. embassies in Africa and South America were attacked simultaneously, and the United States -- believing (correctly) that the RC was behind those attacks -- broke off diplomatic relations altogether.

The day after her victorious march into Hoffland's capital city, Zelda issued Revolutionary Proclamation #1, declaring herself "First Citizen" (with executive powers) and assuring the public that a "self-determination assembly" would be convened before the end of the year. That plan turned out to be unrealistic, and the RC has continued to rule by executive proclamation, without a constitution or an election, for over two years. Human Rights Watch, a respected advocacy group devoted to the protection of human rights around the world, has just issued a report declaring that "life for the masses under RC rule has meant little more than a change in the repressors' names and the color of their uniforms."

**Hoffland's Treaty Relations.** In Revolutionary Proclamation #1, Zelda declared that Hoffland would terminate all bilateral treaties with the United States, effective immediately, citing national security and "America's criminal history of supporting the sinister junta in our homeland." Among the treaties she terminated was a 1950 bilateral Friendship, Commerce, and Navigation (FCN) Treaty. Other treaties, particularly the U.N. Charter and the Vienna Convention on the Law of Treaties, would remain in effect for Hoffland as they had for decades.

The 1950 FCN Treaty contained one provision which was identical to the treaty in *Asakura v. Seattle*:

¶ 2: *Non-Discrimination*. The citizens of each Contracting Party shall have liberty ... to carry on trade ... upon the same terms as native citizens, submitting themselves to the laws and regulations there established. The citizens of each [Contracting Party] ... shall receive in the territories of the other, the most constant protection and security for their persons and property.

Other potentially relevant provisions of the 1950 Treaty included the following:

¶ 8: *Sovereign Immunity*. Each of the Contracting Parties shall enjoy absolute sovereign immunity in the courts of the other, notwithstanding any other provision of domestic law or process....

¶ 12: *Dispute Resolution*. All disputes arising under this Treaty which cannot be resolved through diplomacy shall be resolved by the International Court of Justice at the Hague.

**Expropriation and Sale of the Factory.** In addition to terminating the 1950 FCN Treaty in Revolutionary Proclamation #1, the RC expropriated some large industrial holdings. Among the properties seized after the civil war was the Glitz Alert! factory. Compensation took the form of long-term RC government bonds paying interest at the market rate.

In October 2001, two months after the expropriation, the factory and its inventory, worth in excess of US \$80 million, was sold by the RC government to the Bonzhoff Corporation, a multinational corporation, incorporated in Switzerland, owned 50% by the Swiss government and 50% by private individuals around the world. Kathi Lee Glitz, suspecting that she'd never get a fair hearing in Hoffland, did nothing to block this sale or seek damages, and she has never accepted the compensation package. Bonzhoff Corporation has run the operation successfully for over two years.

**Human Rights Abuses.** Conditions for the factory workers have not improved, and one particularly troublesome employee, Carmina Burana, a long-time labor activist who had quickly become disillusioned by the revolution, "disappeared" after work one day last spring and was presumably executed by pro-RC death squads. The top managers of Bonzhoff Corporation were fully aware of Burana's activities and were not particularly surprised or disappointed by her fate. The government closed the case after a one-week investigation, declaring it "tragic but unsolvable." Burana's sister, Luz, who was also employed at the factory, has escaped to the United States and been granted political asylum but not U.S. citizenship.

**U.S. Congressional Response.** In January 2002, the Congress of the United States, acting on the evidence that the attacks on U.S. embassies had been sponsored by the Revolutionary Coalition, declared that the situation in Hoffland was "the moral equivalent of war" and passed the Hoffland Democracy Restoration Act ("HDRA"), which provides *inter alia* as follows:

Sec. 101: The courts of the United States shall have original jurisdiction for all claims brought by citizens of the United States against the government of Hoffland or the nationals of any other state, including foreign corporations, for trafficking in property confiscated by the government of Hoffland in violation of the law of nations or a treaty of the United States.

Sec. 103: Hoffland is hereby designated 'a state sponsor of terrorism' for all purposes of American law.

There is no indication that Congress was aware of any international law on these issues, though there are favorable references in the legislative history to *Filartiga* and its progeny. The President vetoed the HDRA as an invasion of executive prerogative in foreign affairs, but Congress overrode his veto, and the Act is now the law of the land.

**Questions.** Two lawsuits have been filed in the federal courts of the United States:

1. *Luz Burana v. Hoffland and Bonzhoff Corporation* for damages arising out of Carmina Burana's alleged summary execution and the continuing conditions in the factory, and

2. *Kathi Lee Glitz v. Hoffland and Bonzhoff Corporation* for damages and restitution of the factory.

Please identify the issues that are likely to arise in these lawsuits and discuss the likely disposition of them. (If you think that there are common issues likely to arise in both cases, feel free to discuss them once and incorporate your discussion by reference.)

## ILLUSTRATIVE QUESTION 2

Sharaq is a Middle Eastern state bordering the Persian Gulf. It is poorly developed and maintains one of the most repressive governments in the world. As part of its development effort, it has induced Western companies to invest capital and technology in local ventures. As a result of these incentives, Leviathan Industries -- an American company which builds and operates nuclear power plants -- built a facility in Sharaq for the production of electric power. The facility employed several people who were also employees of the Sharaqi Ministry of Development, including the plant manager, Mustafa al-Rhami.

When the project was announced, the Sharaqí crown prince described it as "the centerpiece of our national security."

Sharaq abides by the Calvo Doctrine. Specifically, under the Sharaqí Constitution of 1965, "foreign nationals present in the Kingdom of Sharaq shall enjoy only the rights of Sharaqí citizens." Similarly, under the contract between the Sharaqí Development Ministry and Leviathan, the latter waived "any and all rights Leviathan has or may have as an alien. For these purposes, Leviathan shall be considered, and shall consider itself, a national of Sharaq." The only other relevant provision of the contract provided that all disputes arising under it, and not resolved by diplomacy, would be resolved by arbitration under the laws of Switzerland.

Last April, an accident occurred at Leviathan's nuclear plant in Sharaq, in part as the result of Mustafa al-Rhami's negligence. The Sharaqí government maintained absolute silence about the accident, but neighboring countries, especially Jordan and Bessarabia detected massive amounts of highly radioactive dust and ash settling on their territories. Within weeks, people and livestock died from radiation poisoning, and vast tracts of land were rendered useless for cultivation or habitation. The radiation cloud eventually drifted toward North America where it interfered with telecommunications and navigation in the United States.

In statements to the press, Sharaq has denied responsibility for the accident and has indicated that it will not and cannot compensate the foreign victims of this act of God.

The group most affected by the radiation was a nomadic tribe known as the Rashidi, who wander the Arabian deserts in search of grazing lands for their livestock. The Rashidi typically cross national boundaries in their migrations, spending roughly half the year in Sharaq and half in Bessarabia. Fiercely independent, the Rashidi bear allegiance to no particular state, and most tribal members have resisted all efforts to bring them into the political culture of any one nation. In recent years, their marriages, births, and deaths have been recorded by the Bessarabian Census Bureau, and Bessarabia has made territorial claims against other Arabian states on the basis of Rashidi migration patterns. Some ethnic Rashidi have previously enlisted in the Bessarabian army.

A. Several Leviathan employees were killed or injured in the accident, and there was massive property damage. Leviathan attempted to sue the Development Ministry in Sharaqí courts, but the magistrate refused to allow Leviathan's counsel to obtain discovery, and the entire trial of the case took an afternoon. All of Leviathan's claims (and those of its employees) were dismissed. Under preexisting Sharaqí law, Leviathan was then fined ten million dollars for negligent operation of the utility. Leviathan's assets were seized and nationalized in satisfaction of the penalty. Leviathan then brought suit in federal district court in the United States against Sharaq and Mustafa al-Rhami, who was in the United States for medical treatment. Three days later, the Foreign Ministry of Sharaq named Mustafa al-Rhami "Ambassador Extraordinary." Please identify the issues likely to arise in this lawsuit and discuss the likely disposition of them. (35 points)

B. Bessarabia sues Sharaq in the International Court of Justice on the basis of the injuries to the Rashidi, and the United States sues Sharaq on the basis of injuries to Leviathan Industries. What obstacles to justiciability are likely to arise and how should the ICJ resolve them? (15 points)

### ILLUSTRATIVE QUESTION 3

On February 26, 1986, the government of Ferdinand Marcos was overthrown and replaced by the government of Corazon Aquino. The new regime formed the Presidential Commission on Good Government ("Commission"), an executive agency charged with the responsibility to recover "ill-gotten wealth" accumulated by Marcos and his associates anywhere in the world. Under paragraph 3 of the executive order creating the Commission, that body was specifically authorized "[t]o enjoin or restrain any actual or threatened commission of acts by any person or entity that may render moot and academic, or frustrate, or otherwise make ineffectual the efforts of the Commission...."

Florentina Daza was a duly appointed member of the Commission. On February 28, 1986, acting pursuant to ¶ 3, Daza instructed the Central Bank of the Philippines ("Bank"), a government instrumentality, to stop payment on a check issued to one Vincente Chu, a Philippine businessman living in California, who had had strong ties to Marcos. The check, issued in the amount of five hundred thousand dollars and dated February 24, 1986, was in settlement of a lawsuit that had been filed in California several years earlier by the Bank against Chu for defaulting on certain loans. According to Daza, the Commission suspected that Marcos and Chu, in the final days of the Marcos regime, had entered into a fraudulent and collusive settlement of the California litigation and that Chu was being paid off for not revealing the president's partial ownership of Chu's businesses. Marcos in turn had allegedly compelled the directors of the Bank to drop their suit in California and issue the check in question. The Commission intended to investigate the arrangement, and Daza's stop payment order preserved the affected assets.

Chu has sued the Bank and Daza in federal district court in Los Angeles, alleging among other things a taking of property, wrongful dishonor of the check, and tortious interference with contract.

A. Please identify the issues likely to arise in Chu's suit against the Bank and Daza and discuss the likely disposition of them. Please ignore the legal effect of the plaintiffs' delay in filing these claims (i.e. ignore issues arising out of laches or the expiration of some limitations period). Feel free to specify matters of fact that you would like to know before offering a complete legal opinion, but be sure to indicate why those facts are important. (Potentially relevant sections of the U.S. Code are laid out in the annex to this examination for your convenience. In the annex are (I) the Hickenlooper Amendment, (ii) potentially relevant sections of the Foreign Sovereign Immunities Act, and (iii) various jurisdictional provisions of the U.S. Code. Your discussion need not be limited to these statutes.) (40 points)

B. Discuss how your analysis would be affected if it could be proven that Daza was motivated wholly or partially by a long-standing personal vendetta against Chu. (10 points)

#### ILLUSTRATIVE QUESTION 4

Resolution 940 of the United Nations Security Council (31 July 1994) provides in part:

The Security Council,

\* \* \*

Determining that the situation in Haiti continues to constitute a threat to peace and security in the region,

\* \* \*

2. Recognizes the unique character of the present situation in Haiti and its deteriorating, complex and extraordinary nature, requiring an exceptional response;

\* \* \*

4. Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States;

\* \* \*

15. Demands strict respect for the persons and premises of the United Nations, the Organization of American States, other international and humanitarian organizations and diplomatic missions in Haiti, and that no acts of intimidation or violence be directed against personnel engaged in humanitarian or peace-keeping work;

16. Emphasizes the necessity that, inter alia:

(a) All appropriate steps be taken to ensure the security and safety of the operations and personnel engaged in such operations; and

- (b) The security and safety arrangements undertaken extend to all persons engaged in the operations;  
\* \* \*

Soon after taking up positions within Haiti, the U.S. forces began to operate in effect as a local police force. On October 30, 1994, in the city of Cap-Haitien, for example, U.S. soldiers arrested and detained one Jean Malveau, a U.S. citizen who had returned to his native Haiti in opposition to President Aristide's policies. The U.S. field officer considered Malveau a security threat to the operation generally, and she directed that he be held pending charge. To this date, no charges have been filed. One Haitian citizen, Collette Bernardin, was detained on similar suspicions. Both Malveau and Bernardin have been held incommunicado since their arrest, and they have been unable to communicate with their families or to retain counsel. Confessions that would not have passed muster in U.S. proceedings under Miranda were obtained within hours of the arrests.

Human rights activists have challenged the detention of these and other "political prisoners," alleging that the action of the United States violates both customary and conventional international law. In particular, they invoke Article 14(3) of the International Covenant on Civil and Political Rights, which provides in part:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; \* \* \*
- (c) To be tried without undue delay;
- (d) \* \* \* to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; \* \* \*
- (g) Not to be compelled to testify against himself or to confess guilt.

Assume that the United States has signed and ratified the International Covenant on Civil and Political Rights with the following declaration:

The United States declares that the provisions of Article [14] of the Covenant are not self-executing.

The United States government has defended its actions on the grounds that they are within the "all necessary means" permission of Security Council Resolution 940. It has also asserted that the Covenant can create no enforceable rights because of the Declaration. The government has also stressed its legal obligation to treat U.S. citizens and non-U.S. citizens identically. Please assess the legal strengths and weaknesses of the U.S. positions.

### ILLUSTRATIVE QUESTION 5

Please assume that each of the following statements is true factually. Assess and discuss the value of each as evidence of a customary international law norm. At some point in your essay, identify which is the weakest evidence, and defend your choice.

- A. All but twelve states have ratified the 1984 Convention for the Elimination of Age Discrimination. Most of those that have not ratified the convention have explicitly withheld their consent on the ground that the same basic protection is offered by their pre-existing domestic law.
- B. All states faced with mass influxes of refugees from civil wars in neighboring countries have granted at least some form of temporary asylum, saying in each case that they felt compelled to do so by elementary considerations of humanitarianism.
- C. The International Court of Justice has declared by a vote of 10 to 5 that the use of nonforcible measures to disrupt the internal political institutions in another state is a violation of customary international law.

D. Fifteen of the world's leading scholars in international law have filed a brief before the Inter-American Commission on Human Rights, concluding that causing the disappearance of an individual is a violation of customary human rights law.

E. The United Nations General Assembly has adopted a resolution by consensus declaring that the moon and other celestial bodies are not subject to claim or appropriation by states.

F. The International Law Commission has declared that diplomatic immunity is jus cogens.

## B. Multiple Choice Questions

1. Each of the following statements about the Vienna Convention on the Law of Treaties is accurate *except*:

- A. A state that has signed but not ratified a treaty is nonetheless required to respect its object and purpose.
- B. The *rebus sic stantibus* doctrine (or “changed circumstances” doctrine) cannot apply to a boundary treaty, even if the boundary was established inequitably.
- C. The VCLT has little or no relevance to the issue of state succession to treaty obligations.
- D. The VCLT overrides whatever domestic constitutional limitations there may be on treaty-making.
- E. Under the VCLT, *jus cogens* norms – vague as they may be -- nonetheless limit what states can do by treaty.

2. In which of the following cases is the commercial activity exception to the FSIA (Section 1605(a)(2)) *most* likely to apply (thereby establishing jurisdiction in the United States)?

- A. Plaintiff, a Japanese citizen living in New York, purchased bonds from the central bank of Argentina, payable like any garden-variety debt instrument, in U.S. dollars at a New York bank, and the Argentine government defaulted. The bonds had been issued for the express purpose of promoting the stability of Argentina’s exchange rate. Plaintiff sues Argentina.
- B. Plaintiff, a U.S. citizen, sues the Russian government for launching a commercial broadcast satellite which malfunctioned and caused sustained interference in the air control systems in the Dominican Republic, causing the plane in which plaintiff is a passenger to crash in the territorial waters of the Dominican Republic.
- C. Plaintiff was injured by the negligence of an official driver of the French embassy in the United States. The driver was moonlighting for a private delivery service and, while intoxicated, drove through a red light on Pennsylvania Avenue in Washington, D.C. Plaintiff sues France.
- D. Plaintiff, a citizen of Botswana, owned a commercial plantation in Botswana, for the production of rubber. The rubber was sold exclusively in the United States. The farm was expropriated by the government without compensation, and – according to the complaint – the rubber was “diverted” to domestic purchasers in Botswana. Plaintiff sues Botswana.
- E. Plaintiff, a dual citizen of China and the United States who lives in Houston, Texas, sues the government of China for its refusal to give an exit visa to members of plaintiff’s family. The people affected were all members of Falun Gong, and they had wished to travel to the United States for a conference on religious freedom.

3. Consider the following generalizations about the act of state doctrine and the Foreign Sovereign Immunities Act (“FSIA”):

- I. Properly speaking, the act of state doctrine may only be invoked by a foreign state, its agencies, and its instrumentalities.
- II. The Supreme Court has embraced a commercial activity exception to the act of state doctrine, maintaining the symmetry between that doctrine and the FSIA.
- III. A state is not entitled to foreign sovereign immunity under the FSIA if the state violates a treaty or a *jus cogens* norm.

Which of the foregoing statements is/are true?

- A. I and II only.
- B. I and III only.

- C. II and III only.
- D. All three statements are true.
- E. All three statements are false.

4. In which of the following hypothetical situations is international arbitration *most* appropriate?

- A. A U.S. company enters into a joint venture with the government of Sharaq (a hypothetical nation), fully aware that the Sharaqi Civil Code includes a Calvo Clause. In a subsequent dispute under the contract, the company determines – rightly – that local litigation would be futile, and solicits the U.S. government to exercise the right of diplomatic protection and demand binding arbitration with/against Sharaq.
- B. Same facts as in (A), except that the statutory Calvo Clause is adopted immediately *after* the dispute arises.
- C. In a contract dispute with the United States government, litigated in a federal district court, a Melanesian company fails to call one crucial witness and loses its case at the trial level. Instead of exercising its right of appeal, the company solicits the government of Melanesia (a hypothetical nation) to exercise the right of diplomatic protection and demand binding arbitration with/against the United States.
- D. A company incorporated in Delaware, does business in the hypothetical nation of Harmonia, and is owned exclusively by French shareholders. The company’s Harmonian assets are arbitrarily seized by the Harmonian government. Without conceding the illegality of the Harmonian government’s act, the United States chooses for its own reasons to do nothing, and the French shareholders solicit the French government to exercise the right of diplomatic protection and demand binding arbitration with/against Harmonia.
- E. The dispute resolution provision in a services contract between a U.S. company and the government of Balistan (a hypothetical nation) calls for “litigation in the civil court of Balistan, applying the law of Balistan.” A dispute arises under the contract.

**Correct answers: D, A, E, B**