

CHAPTER ONE: INTRODUCTION TO INTERNATIONAL LAW

Pages 1-3

A. The Domain of International Law

Reading Assignment: *International Law Anthology*, Chapter One, pp. 3-9.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. In early 1994, the two most recurrent topics of international law were the formation of new states and nuclear proliferation. At the present moment, what area of international law is most prominent in the news?
2. What do you think the most important area of international law will be ten years from now? Fifty years from now?
3. What do you think the most hotly contested issue of international law will be ten years from now?

B. History of the Law of Nations

Reading Assignment: *International Law Anthology*, Chapter Two, pp. 11-36.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. In his first paragraph on p. 11, Professor Schwarzenberger gives two conditions for international law. Were the following historical developments *exceptions* to these conditions:
 - (a) The way the Roman Empire treated foreigners within the empire?
 - (b) The medieval system of "capitulations"?
 - (c) The "most favored nation clause"?
 - (d) Colonial companies, such as the Dutch and English East India Companies?
2. Why would international arbitration develop prior to the development of the Permanent Court of International Justice?
3. What is "prescriptive jurisdiction"? How does this notion help us define what a "state" is?
4. What is "objective territoriality"? How does this notion help us define what a "state" is? Why would the development of antitrust regulation serve to undermine the territorial system?
5. If war is the ultimate option of nations, how do you account for the notion of regulating the conduct of war? Hint: Consider the possibility that the goal of a nation at war is not just winning the war but also winning the subsequent peace.
6. Does the notion of "humanitarian intervention" undermine the idea of the state? Or does it help us to define what a "state" is?
7. What's the difference between "res communis" and "res nullius" in regard to the ocean floor?
8. What's the difference between the ocean floor and the continental shelf?
9. To what extent did the development of human rights form part of the "hard law" of international law? To what extent was its development largely a matter of philosophical speculation?
10. How does the excerpt by Professor Burns Weston on the history of human rights apply to the subsequent section in the Anthology on the intellectual history of the law of nations? Specifically, what classic theorists dealt with human rights? Consider in particular Vitoria's position on the Spanish conquests and Vattel's views on the laws of war. Are these theorists concerned about individual rights?
11. Can we understand law without reference to its purpose? Does it make a difference, in your answer to this question, whether you are referring to domestic law or international law?
12. In the ordinary law of contracts, a party can later claim that she was forced to sign the contract under duress, and hence the contract is not valid. But consider a peace treaty: the nation that has just lost the war is under the most extreme form of duress. Can the losing nation later claim that the peace treaty is invalid because it was signed under duress? Who was the first international lawyer to answer this puzzling question?
13. What was Vitoria's view of "just war"? Did he develop a logically coherent position? If not, what, if anything, could be added to his reasoning to make it logically satisfactory?
14. How did Vattel mediate between natural law and positivism?
15. What role does natural law play in international law according to Vitoria? Grotius? Vattel? Is there

room" for natural law in international law today?

16. What does Vattel regard as the basis of international law? What is the basis of international law from the positivist point of view?

17. What difference in theory did it make that Bentham analogized international law to the law of nations rather than to municipal law? (We will be considering this question in the next set of readings.)

C. Is International Law "Law"?

Reading Assignment: *International Law Anthology*, Chapter Three, pp. 37-48.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. To what extent does Professor Roger Fisher's argument about international law convince you that it is really "law"?

2. To what extent does the "verbal argument" convince you that international law is really "law"?

3. Where does a state's "bundle of entitlements" come from?

4. Do we define a state in terms of its bundle of entitlements, or do we define a bundle of entitlements in terms of our notion of a "state"?

5. In municipal law, what kinds of entitlements can be taken away when a defendant is convicted of a crime? What kinds of entitlements are taken away when a defendant loses a civil lawsuit? Are all these entitlement deprivations *proportional* to the gravity of the defendant's conduct?

6. Is international law enforced by a system of proportional entitlement deprivations?

7. What is "tit-for-a-different-tat"? Does it help explain the enforcement of international rules? Why not just "tit-for-tat"?

8. Surely a tit-for-a-different-tat can be disproportionate. For example, on September 1, 1983 a Soviet SU-15 fighter aircraft shot down Korean Air Lines Flight 007 southwest of Sakhalin Island over the Sea of Japan. Two hundred and sixty-nine civilian passengers (many Americans) and crew members were killed. The commercial airliner had deviated from its assigned course because of an unlikely combination of human errors in programming the inertial navigational system in the craft, and flew over sensitive Soviet territory on its way to Seoul. The Korean airliner was over two hundred miles off course, its pilot did not respond to radio inquiries, and the Soviet air force believed that the plane might have been a military reconnaissance plane disguised as a civilian aircraft. The USSR deliberately shot the plane down. Although the Soviet Union's entitlement to its air space was violated by the plane, the Soviet reaction of shooting the plane down was disproportionate to the trespass. The Soviet action was condemned by a resolution of the International Civil Aviation Organization. One Soviet official apologized, although in an informal meeting; the Soviet Union itself refused to pay compensation to the victims. At no point did the Soviet Union claim that it had a right to shoot down a trespassing civil airplane. On the other hand, no country disputed the Soviet Union's right to shoot down a trespassing military aircraft.

During the long and frustrating Vietnam War (the longest war in American history), some military leaders voiced the opinion that the United States should use its nuclear weapons in the war and "nuke Hanoi back into the Stone Age." No political leader took this advice seriously. Would you regard that advice as a paradigm case of disproportionality?

9. During World War II, German armies in occupation of other countries, such as France and Yugoslavia, announced policies of "reprisals" that were similar to, though perhaps more draconian than, those that occupying armies had employed in many previous wars. If a German soldier were killed by sniper fire from the local resistance movement, the German occupying army would round up at random fifty innocent civilians and execute them in the town square. The idea was to set a price that was so high--fifty innocent lives for every German soldier killed--that the citizens would withdraw support for the local resistance fighters. Of course, in wartime, notions of legality are strained. In the largest sense, the German occupation was illegal because the initial German aggression was illegal. But on a lesser scale, the German occupation was an attempt to create peaceful conditions ("law and order") and to avoid further bloodshed. On this lesser scale of things, resistance fighters were disrupting the peace; but in the larger picture, they felt justified in taking any action that might hurt the Nazi war effort.

During wartime, Article 50 of the Hague Convention on Land Warfare of 1907, which you will read in Chapter 4 of this Coursebook, applies:

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on

account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Could the Nazis claim that the "population" of the occupied countries was in fact responsible for the acts of the resistance fighters, because the resistance movement would not exist if the population did not actively support it?

It is possible that the notion of "reprisals" can get out of hand even in conditions of international peace. When the Reagan Administration came to the conclusion that Libyan terrorists were responsible for the bombing of a West Berlin disco on April 5, 1986 in which two American soldiers were killed, United States Navy and Air Force carried out a clandestine bombing of residential areas in the Libyan cities of Benghazi and Tripoli during the night of April 15, 1986. Over 200 innocent Libyan civilians, including women and children, were killed or seriously wounded in the raid.¹

In April 1993, former President George Bush visited Kuwait. During the visit, the Kuwaiti government, acting on a tip by Iraqi informants, found 175 pounds of explosives in the body panels of a Toyota Land Cruiser that was smuggled into Kuwait from Iraq. The device was apparently intended to be detonated in downtown Kuwait City while Bush was there accepting an honorary degree at Kuwait University for his leadership in the Persian Gulf War; it had sufficient explosive power to kill him and to destroy four city blocks. There was evidence of Iraqi government complicity in the plot. On June 26, 1993, President Clinton ordered U.S. warships in the Persian Gulf and the Red Sea to fire 23 Tomahawk cruise missiles targeted on the Iraqi intelligence headquarters in Baghdad. Three of the missiles struck a residential neighborhood in Baghdad, killing at least eight civilians and wounding at least twenty.²

Would you say that the United States, in these two incidents, was simply enforcing international law? Or was it acting because it had the power to do so irrespective of legal considerations? If you choose the latter alternative, are the actions of the United States contrary to its long-term interests inasmuch as it is inviting similar "reprisals" by other countries in future situations where the United States may be, temporarily or geographically, vulnerable? More generally, is compliance with international law always a "long-term" proposition? When a nation complies with the law, is it acting against its short-term interests but in support of its long-term interests? Is this the deep meaning of "international law"?

10. The idea of a bundle of entitlements can give us a snapshot of a state in international law. But there are dynamic elements as well: the ways a state changes over time, the ways a new state can succeed to the rights and obligations of an old state, the ways states may sue and be sued in courts of other states, the ways states can be recognized by other states. We next turn to a study of these fascinating issues at the heart of international law.

FOOTNOTES CH. 1

1 West Berlin police officials and the Federal Republic of Germany publicly disputed the U.S. allegation that Libya was responsible for the bombing, and undertook prosecutions of persons with Syrian connections. As of the date of publication of this coursebook, the United States has not released any evidence challenging the position of West Berlin and the Federal Republic. In May 1986 the Pentagon announced that American bombs erroneously and inadvertently hit civilian areas in the raid on Libya. For a discussion of these events and a lawsuit predicated upon them, see Anthony D'Amato, *The Imposition of Attorney Sanctions for Claims Arising From the U.S. Air Raid on Libya*, 84 AMERICAN J. INT'L L. 705 (1990).

2 For a recent discussion, see W. Michael Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 EUROPEAN J. INT'L L. 120 (1994).