

CHAPTER 2

INTERNATIONAL LAW AND THE WORLD'S LEGAL SYSTEMS

CASES IN THIS CHAPTER

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The Paquette Habana

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TEACHING SUMMARY

This chapter addresses the global context of cross-border interactions, be they business oriented, political, or criminal in character. By citing the many international covenants, treaties, and uniform rules, a strong case can be made that international law truly does exist, although it differs from the American notions of law found in state and federal codes and cases. The corpus of international law consists of treaties, conventions, customs, generally accepted principles among nations, and learned expositions (such as international tribunals and respected scholars). The increase in the number and influence of international institutions speaks to the growing importance of understanding international law which in many ways reflects its European roots. The chapter also explains the difference between private and public international law, the former referring to rules regulating affairs of private firms, organizations and individuals and the latter referring to regulation of conduct between and among states.

CASE QUESTIONS AND ANSWERS

Ventress v. Japan Airlines

1. What was the purpose of article VIII(1) of the FCN treaty? In what way would this give them greater control of their U.S. operations?

Answer: It allows a company from a foreign country (here Japan) to give preference to its own citizens when hiring executives. The firm could then more easily move their executives around (from California to Hawaii or Korea for example) and have executives with similar cultural and training backgrounds that might not occur if executives were from many different countries.

2. What was the basis of the court's ruling? Does the California whistle blower protection statute "interfere with the employer's ability to hire their fellow citizens"?

Answer: the court found the California law did not interfere with the employer's ability to hire fellow citizens; it allowed employees to report violations of domestic (U.S./ California) laws.

3. In citing *MacNamara v. Korean Airlines*, the court refers to the difference between "citizenship" and "national origin." What is the difference, and why was that important here?

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Answer: The airline can via the treaty discriminate on the basis of citizenship, but not on the basis of national origin. A person born in Japan who becomes a U.S. citizen is a Japanese by national origin, but an American by citizenship.

The Paquette Habana

1. Under what conditions is customary international law a part of U.S. domestic law?

Answer: Customary law is a part of U.S. domestic law where there is no contradictory statute or treaty and the only way to resolve the legal issue is by applying customary norms.

2. Which international custom applies to this dispute?

Answer: That fishing vessels and their cargo are exempt from capture during times of war.

Supplemental Exercise: Have students locate and read the dissent (either in the official reporter or by using Westlaw):

- a) Why would the dissenters have affirmed the seizure under the U.S. Law of Prize?
- b) Why were they not persuaded by customary practices under international law?
- c) Do you find their assertion regarding the power of the president persuasive?

Sosa v. Alvarez-Machain

1. What were the three specific offenses mentioned by Blackstone that were recognized as violations of customary international law at the time the ATS was enacted?

Answer: A violation of safe conduct rules, the infringement of the rights of ambassadors and piracy are the three offenses specifically mentioned.

2. Is the Court willing to expand the ATS beyond these original three offenses? According to Justice Souter, what types of torts would give rise to jurisdiction under the ATS?

Answer: Possibly. If there is a violation of a norm that is accepted by the civilized world and that is well-defined with a specificity comparable to the three mentioned by Blackstone.

3. Do you feel that this decision grants too much or too little power to the federal courts to hear tort claims occurring outside the country?

Answer: It grants very little power to the federal courts, but this is in line with the separation of powers concepts found in our Constitution.

4. What foreign policy implications are involved in a U.S. court hearing a case under the ATS?

Answer: The court's decision could be contrary to the policies being pursued through the foreign policies being followed by our legislative and/or executive branches of government.

5. In what way did the Supreme Court's subsequent decision in *Kiobel* further limit the application of customary international law?

Answer: It said the first two of the three specific offenses, the safe conduct rules and infringement of ambassadorial rights, mentioned by Blackstone could be a basis for applying such law only if they occurred in U.S. territory. If such offenses occurred outside the territory, the customary international law would not be used.

United States v Campbell

1. If Congress did not state in the statute that it applied outside the U.S., how did the court arrive at that conclusion.

Answer: Courts presume Congress intends laws to apply only within U.S. territory.

2. What is meant by the "Bowman Exception?"

Answer: The presumption does not apply regarding crimes that involve fraud against the U.S. or crimes that the U.S. seeks to defend itself from.

Liechtenstein v. Guatemala (Nottebohm Case)

1. May individuals bring an action against a nation at the ICJ?

Answer: No. ICJ jurisdiction is reserved for disputes between states rather than individuals.

2. On what basis did Liechtenstein file this action [if only states are to be parties before the I.C.J.]?

Answer: Liechtenstein filed this action on behalf of Nottebohm because it alleged Guatemala's disregard of Nottebohm's Liechtenstein citizenship was an affront to it as a sovereign state.

3. Although a nation can determine its own criteria for citizenship, must that be recognized by other nations?

Answer: No. If a nation's criteria do not conform with widely accepted principles, other nations need not recognize such grants of citizenship.

4. Do you feel that this judgment interfered with Liechtenstein's sovereignty? Why or why not?

Answer: No. Nottebohm's social ties of attachment to a country were to Guatemala, not to Liechtenstein. Liechtenstein granted him nationality status because of the war with Germany—so he could be considered from a neutral state not from a belligerent state.

5. Would this case be considered one of international public or private law?

Answer: It is public law because it involves whether one state must recognize the nationality decisions made by another state. While it does affect individuals such as Nottebohm, the case involves a dispute between two states and affects their rights and obligations to other states.

Khaki v. Hashim

1. What is riba? Why is riba not permitted pursuant to the Shar'iah?

Answer: Riba is the payment of interest by banks on loans and deposits. The Shar'iah states that lenders should only loan money on humanitarian grounds to achieve a reward in the next life or to save their money through a safer hand. The Shar'iah permits the borrowing of money only in cases of dire need and discourages the practice of incurring debts for living beyond one's means or to grow one's wealth.

2. What would the effect be on Pakistan if the decision were implemented in Islamic banks?

Answer: As such banks have depositors and customers who are not Muslim, the funds of those parties might be withdrawn and potential customers also could decide not to invest in such banks. Consequently, there would be a risk to the economic stability and security of the country.

3. In what other ways have culture and religion influenced modern legal systems?

Answer: The answer to this question calls for opinion, but students may want to explore the relevancy of religious and ethical beliefs with respect to commercial practices in general and international trade and other exchanges in particular.

ANSWERS TO QUESTIONS AND CASE PROBLEMS

1. Answer: Customary international law does not hold a corporation liable for a violation of human rights. The customary law does hold corporations liable for some crimes, but not for human rights violations. Individuals such as corporate managers or executives could be held liable for human rights violations, but neither treaties nor customary international law holds corporations so liable.

2. Answer: The statute applies extraterritorially because the context of the wording shows that Congress assumed much of the conduct regarding bringing illegal aliens into the U.S. would occur outside the U.S. It is for this reason that the Bowman exception does not apply. That exception relates to statutes involving domestic conduct—where no external conduct was contemplated—while here external conduct is very likely. U.S. immigration offenses are often planned outside the U.S. territory.

3. Answer: Public international law is a body of rules binding nation states in their mutual and global relationships. Recently, this has been extended to cover international organizations. Private international law is the body of rules binding individuals of different nations in their interactions. This falls into one of two categories: (1) mechanisms for resolving disputes

between individuals or corporations from different countries or (2) treaties that apply to individuals or businesses subject to different legal systems. International Business Law would borrow from both and pertain to the international body of rules that have developed to order business relationships.

4. Answer: A wide variety of problems lend themselves to resolution through the application of international law. These issues include problems arising between states in their relations with one another and the conduct of states in their relations with individuals. Specific examples include human rights, criminal law and transnational crimes such as terrorism.

5. Answer: Typically, such individuals are speaking from a legal egocentric understanding of law or are speaking in shorthand. Those who claim that international law is non-existent may mean that international law does not possess the characteristics of American law: there is no international constitution; there is no legislatively drafted code; there is no one court system with supreme authority to interpret law, decide disputes, and issue binding decisions.

Nonetheless, there is, very clearly, international law. There exist a multitude of international treaties, essentially contracts, between nations setting out standards and legal rules. There exist a variety of adjudication mechanisms, including courts and arbitration venues. There is also a well-developed body of legal understandings, such as those found in customary law that are accepted and enforced globally despite the absence of codification.

6. Answer: International conventions tend to harmonize national laws by creates uniform and widely accepted bodies of law. Harmonization benefits business by making applicable law more uniform and predictable. Harmonized laws are not identical, but they can be considered similar, generally having the same objective. As business and individual life becomes more global in nature, firms and individuals seek laws that are similar or harmonious. As laws are interpreted and enforced nationally, they are more national than international.

7. Answer: This question calls for an opinion regarding the efficacy of corporate codes of conduct and the extent to which they may replace government regulation.

8. Answer: Compliance with corporate codes of codes may be promoted through effective communication with employees, incorporation into corporate culture, adoption of disciplinary measures for assuring compliance and development of a system for measuring effectiveness.

9.. Answer: Corporations are accountable to all of their stakeholders, including shareholders, employees, customers, members of the supply chain, the governments of their home and host states and the community at large. Human rights are of increasing concern globally and firms that are unconcerned or nonresponsive will lose favor.

10. Answer: Transnational business crimes are a major problems calling for global solutions. Typical crimes include bribery and corruption, tax evasion, customs fraud, criminal violations of export control laws, financial crimes, and criminal violations of environmental laws, securities laws, and antitrust laws

11. Answer: **Territoriality** refers to jurisdiction over all persons, places and property within the territory, airspace or territorial waters of a state. **Nationality** requires individuals and corporate citizens comply with the laws of the state of their nationality no matter where they are

located in the world. The **protective principle** allows jurisdiction of noncitizens for acts done abroad on the basis of a country's need to protect its national security, vital economic interests and governmental functions. It has been used as a basis for the prosecution of accused terrorists. **Passive personality** jurisdiction gives a state the right to hear cases stemming from crimes committed against their own citizens by foreign citizens outside of their own territory. It also has use in the prosecution of terrorism. The **universality principle** permits any state to prosecute perpetrators of the most heinous and universally condemned crimes regardless of where they occurred or the nationality of the victims or perpetrators.

Universal jurisdiction has been reserved for piracy, war crimes and crimes against humanity. Terrorism has been omitted from this list due to difficulties in achieving a uniform international definition or proscription. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment recognizes universality by calling upon signatories to enact laws punishing those who commit torture and exercise jurisdiction if the victim was one of their citizens, if the act occurred in their territory or if the offender was later found in their state.

12. Answer: The International Court of Justice hears cases brought by nations against other nations. Individuals and private corporations are not parties to cases before the court. The court has jurisdiction over all cases brought by nations under the UN Charter or involving treaties, conventions, international obligations, or questions of international law. The Rome Statute of the International Criminal Court (122 parties as of 2013), is a 2001 treaty that created the International Criminal Court, which sits at The Hague, Netherlands. It is independent, and not a part of the United Nations. The court hears three types of crimes: genocide, crimes against humanity (attacks against civilians through murder, slavery, forced deportations, torture, rape and sexual violence, disappearances, apartheid and other persecutions on the grounds of religion, race, ethnicity, national origin, political beliefs, or gender), and war crimes. The European Court of Justice hears disputes from EU members and conflicts between member nation laws and the EU Treaty. Its role is similar to the U.S. Supreme Court's role re federal and state laws.

INTERNET EXERCISE

1. Using "constitution finder" or some other electronic resource, have students locate the U.S. and U.K. constitutional provisions pertaining to free speech and press. Also ask students to compare and contrast these provisions with the constitutional provisions (i.e., the First Amendment counterparts) of other countries and to analyze the facts of the case under these provisions. Some examples that demonstrate a variety of protections and models include the constitutions of Germany (the German Basic Law), Romania, and Canada. Would the result be different? Why?

MANAGERIAL IMPLICATIONS

1. Students may discuss numerous methods by which to demonstrate respect for a foreign state's culture, environment, natural resources and local laws. Some examples include affirmation of the OECD Principles, adoption of codes of conduct adopted by other private organizations and respect for such principles expressed in the company's own code of conduct.

2. The United States may assert jurisdiction using the territoriality and passive personality principles. South Korea may exercise jurisdiction utilizing the nationality principle. Canada may exercise jurisdiction using the protective and passive personality principles. Finally, Saudi Arabia may exercise jurisdiction utilizing the territoriality principle. An action arising from the abduction asserted pursuant to the Alien Tort Statute will fail due to the holding with respect to arbitrary arrest in the U.S. Supreme Court's opinion in *Sosa v. Alvarez-Machain*.

3. Students should distinguish between legal and ethical ramifications, particularly in developing countries that are largely unregulated. One's domestic law, however, may still restrain certain business practices abroad. Furthermore, regardless of whether regulations exist, business practices considered unethical may invite negative customer response at home.

ETHICAL CONSIDERATIONS

The first scenario primarily implicates the theories of moral relativism and utilitarianism. Moral relativism is implicated to the extent that one may contend that the sale of lifesaving (but expired) pharmaceuticals is acceptable given the time and place of the sales. Utilitarianism is implicated to the extent that the sale of such pharmaceuticals adds to the overall utility of the community. Ethical conduct is that which is likely to produce the greatest overall good not just for the decider but for all persons who will be affected by the decision. In this case, the alternative would be the destruction of the pharmaceuticals. Why not utilize the remaining life of these products to save lives in the developing world?

The second scenario primarily implicates moral relativism and the related topic of cultural relativism. The quotation attempts to justify bribery on the basis that it may be acceptable given the time and place in question. Cultural relativism is defined as the belief that different practices and accepted behaviors in different cultures should be respected rather than subject to condemnation. Cultural relativism would serve as an additional ground supporting bribery in certain circumstances if such practices were the cultural norm in business transactions.

TEACHING SUGGESTION / COOPERATIVE LEARNING ACTIVITY

In light of the U.S.'s belief that there should exist some international legal mechanism for addressing international crimes (such as crimes against humanity) but its disagreement with the present ICC draft, have students draft a new statute. This may be done through two complimentary mechanisms. In one group, students will use the existing statute as a guide and correct it, so to speak. In another group, students will work without the language of the statute, drafting clauses to address jurisdiction, specific procedures, parties, checks and balances, and appeal.

SUPPLEMENTAL ACTIVITY: CASE BRIEF ASSIGNMENT

Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 731 F.Supp. 619 (S.D.N.Y. 1990).

Have students find, read, and brief *Trans-Orient*. This case is in the context of a change of Sudanese government via military coup.

Questions:

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1. What was the critical international legal issue addressed by the court?

Answer: Was the change in Sudan a change in the state or in the government representing the state. The court said only in the government.

2. What is the difference between a “succession of state” and a “succession of government”?

Answer: Succession of state means old state no longer exists.

3. How does this effect contracts to which the state is a party?

Answer: Contract liability continues for a new government in the same state, but not for a new state where the old state is gone.

Reid v. Covert, 354 U.S. 1 (1957).

To further investigate the hierarchy and connection between the U.S. Constitution and international law, have students locate and read *Reid v. Covert*, 354 U.S. 1 (1957).

In *Reid*, two civilian wives were accused of killing their husbands, members of the U.S. army. Defendant Covert killed her husband on a military base in the U.K. and defendant Smith killed her husband on a base in Japan. Pursuant to Status of Forces (SOF) Agreements between the U.S. and those countries, the wives were prosecuted by military tribunals. The defendants claimed that they could not be tried by the military courts. The court agreed, noting that when the U.S. acts against its citizens abroad, those citizens continue to be protected by the Constitution and the Bill of Rights.

1. What was the SOF agreement and what was its import in the instant case?

Answer: The SOF, or a Status of Forces Agreements, was an executive agreement (entered into by the president) between the U.S., Japan, and the U.K. providing that crimes committed on foreign military posts would be tried and punished by U.S. military authorities.

2. What specific constitutional rights were the wives allegedly deprived of?

Answer: The right to a jury trial and a public trial by one's peers, pursuant to the Fifth and Sixth Amendments.

3. To which portion of the Constitution did the court point in laying out the hierarchy of the SOF and the Fifth and Sixth Amendments?

Answer: Article VI, the Supremacy Clause.