International Law Outline

I. The Nature of International Law (pp. 1-19)

A. Introduction—History and Nature of International Law:

International Law has two parts:
(1) public—legal relations of states
(2) private—foreign transactions of individuals/corporations

How is international law created?
(1) treaties—the main source of int’l law
(2) practice (custom)

How to enforce international law?
• Compared w/ municipal law, intl law lacks some enforcement mechanisms. For instance, if there is a money judgment, there may be no way to collect the money.
• The UN is allowed to enforce ICJ judgments, but this hasn’t been done except in cases of aggression (like the invasion of Kuwait).
• Sanctions, however, are somewhat viable due to public opinion—most countries want to be a part of the “family of nations.”
• Intl courts are also there to develop norms and standards.

Individuals in International Law:
• Only states can be parties in the ICJ (except for advisory opinions for intl orgs)

Efficacy of International Law—how to make it more effective in the context of sovereignty.

UN Charter:
• Sort of a constitution—sets up machinery and rules
• Declarations of the UN—no binding effect
• Security Council Decisions have a binding effect.
• Two types of Resolutions:
  o Declaring Existing Law
  o Trying to Create law (have to be careful here).
  o To tell the difference → “adopted by consensus” (meaning no vote) or there will be a list break down (vote).
• Four Normative Declarations from the UN:
  o On Human Rights (this resolution is generally accepted)
  o Torture (Filartiga)—based on fundamental practices/norms.
  o Decolonization
  o Resolution against Apartheid (crime)
• How to distinguish normative from not:
Consensual element. What if something voted for has been abandoned? You can fill this gap w/ fundamental law, general principles, natural law.

- Activities of the General Assembly can be evidence of state practice.
- Should every country have the same vote? Depends on the topic being addressed. e.g., the Law of the Sea, should landlocked countries get the same vote.

B. An International Law Sampler:
- Another problem to consider: Do you take a case to an international or national tribunal?
  - Filartiga—national tribunal—unsuccessful.
  - Golder—intl tribunal--successful

The Golder Case (European Court of Human Rights, 1975, p. 3)

- Facts: Prisoner in Great Britain accused in a riot. He attempted to contact his legislator by mail to explain his wrongful accusation, but the letter was not allowed to leave the prison. It came to light that he hadn’t been a part of the riot. Although never charged, his prison record reflected his being on the list. He attempted to petition the Secretary of State to request a transfer and to request he be allowed to contact a civil lawyer. The prison also stopped this letter. The prisoner brought a cause of action for violation of the Convention for the Protection of Human Rights, which the UK had signed.
- Holding 1: The prison violated the treaty b/c Article 6, sec. 1 said “everyone is entitled to a fair and public hearing within a reasonable amount of time.”
- The right to access constitutes an inherent element of Art 6, §1.
- It was not for the prison or Secretary to decide on the prisoner’s possible case against the prison.
- Holding 2: The prison violated Article 8, §§1 and 2 that “everyone has a right to respect for…his correspondence” and “there shall be no interference by a public authority with the exercise of this right. Impeding correspondence is interference.
- Court looked to express sources (was more objective)
- Efficacy of international law (p. 9, n. 3)

Filartiga v. Pena-Irala (2nd Circuit, 1980; p. 10)

- A Paraguayan boy was tortured to death by Pena. It appeared local remedies were exhausted. The boy’s sister was in the US on a visa and Pena then moved to the US. The boy’s sister brought charges against Pena in the US under 28 USC §1350—Federal courts have jurisdiction over “all causes where an alien sues for a tort committed in violation of the law of nations.”
- Holding 1: Pena’s conduct violated the law of nations b/c freedom from torture is now a part of intl customary law.
- The court looked at scholarly writings, intl agreements and orgs, laws from different nations and the US stance on torture according to the State dept.
• This case is more subjective than Golder—not as clear where the rules are.
• The monetary relief awarded could never be enforced.
• BUT: 90% of countries practice torture so how can it be state practice??
  o There is a general recognition that torture is wrong, but still not state practice.
  o He is recognizing jus cogens.
• Fundamental norms supercede express laws.
• Mutharika: Judge doesn’t make the case for state practice, but he does for jus cogens norm.

II. Treaties (pp. 20-86)

SOURCES OF INTERNATIONAL LAW:
• In intl law, hierarchy of sources is difficult. (see n.4, p. 22). Usually treaties are considered the primary source.
• Article 38 of the ICJ statute (VERY IMPT):
  o International Conventions
  o Intl Custom: Custom w/ Article 38 is difficult to apply.
  o General Principles of Law Recognized by Civilized Nations—
    ▪ There are certain concepts shared by countries—e.g., appellate procedure, no person should be a judge in their own case.
    (These are things that pervade almost every system).
    ▪ “Civilized nations” now means all countries w/ developed legal systems.
  o Subject to Art 59, judicial decision and the teachings of the most highly qualified publicists of the various nations (as a subsidiary means b/c they are intl sources).
    ▪ Judicial/teachings—ICJ is talking about national ones.
    ▪ When there is a conflict—this is when fundamental notions/norms come into play (although ICJ doesn’t specifically recognize these).
    ▪ N. 4 in Filartiga—the Judge narrowly defined this—looking only at lawyers from American law schools.
  o If agreed upon by the parties, ex aequo et bonus (by what is equal and good)—
    ▪ This has never happened in practice.
    ▪ This means fairness/justice.
    ▪ Shouldn’t the court apply equitable pwrs always?
• The first three in Article 38 are the primary sources for the ICJ. Treaties are probably top in the hierarchy.
• Other sources not listed in Article 38 of the ICJ (see n. 1, p. 21):
  o Natural law
  o Equity
  o Jus cogens
  o The resolutions of international organizations.
• There are ways of getting around Article 38—for example: A declaration issued at a major conference could be considered law by international custom due to state practice.
• Article 38 is supposedly only for the ICJ, but people seem to follow this even in countries who aren’t bound by the ICJ.

Treaties, in general:
• Treaties are the conventional law because they represent the express consent of states.
• Many people during the Cold War thought this was the only source.
• Legally binding effect b/c a state may exercise its sovereignty by making int’l law (see p. 9, n. 2)

Types of Treaties:
(1) Universal treaty—Charter of the UN, Convention on the Law of the Sea
(2) Regional Treaty—NAFTA
(3) Bilateral Treaty—Most common—Treaties of Friendship/Commerce; FCN or FCE.

Treaties and US Law:
Treaties are a part of US law through Constitution—Articles 2 and 6.

UN process for treaty ratification:
(1) Conference or committee starts it
(2) General Assembly may adopt and then
(3) Countries ratify.
(4) no secret treaties.

• Until this, treaty law was customary law.
• P. 868, Art. 2(1)(a), treaties must be:
  o Between states
  o Must be in writing
• 1986—Vienna Convention—now int’l orgs can enter into treaties.
• Article 64—treaties are not valid that violate fundamental norms.

Why enter into treaties?
• further political objectives
• w/ authenticity
• setting up common goals to ensure people will abide by the treaties.
• To let people know.

Why abide by a treaty?
• Self-interest
• Treaties become a part of municipal law.
**Treaty Sampler** (p. 22-37)

- The Treaty Btwn the Jews and the Romans:
  - Romans were a state but the Jews were not. This is not like the modern era.
  - Jews: Promised to aide Rome if war is declared against it and promised not to give food/aid to Rome’s enemies.
  - Romans: same promise in reverse.

- Peace of Westphalia (1648):
  - Btwn the Holy Roman Empire and Sweden—ending the Thirty Years War.
  - Treaty to re-establish peace and amity btwn the parties.
  - Equality among Catholics/Protestants.
  - Establish boundaries.
  - This marked the beginning of modern intl law.
  - A treaty can also regulate behavior within the states. (from my notes)

- Treaty of Paris (1783)
  - Ended the Revolutionary War.
  - GB: Recognize the US and relinquish all claims
  - US: must give restitution to UK subjects.
  - Strikes bargain w/ respect to boundaries.
  - One of the most impt the US has entered into.

- Cessation of Alaska (1867):
  - Contract function being served here btwn US and Russia.
  - Money in exchange for land—a bargain.

- Kellogg-Briand Pact (1928):
  - Treaty of Versailles after WWI
  - Renunciation of war as a policy.
  - India and Canada signed as colonies.
  - Treaty failed b/c Treaty of Versailles was set up in a way as to enable Hitler to do what he did and take advantage of the provisions.
  - UN CHARTER:
    - More successful—no global wars since.
    - League Nations—they learned fr om it—put in a mechanism for sanctions in the UN Charter and the US participates now.

**Hull Lothian Deal** (1948; p. 40):

- US Sec of State and the UK broker a deal to trade ships for army bases, but made it look like it wasn’t a quid pro quo.
- They cldn’t break intl law (the US was at peace w/ the UK’s enemies and thus, could not sell it warships).
- They argued that belligerents were estopped from raising questions about their possible breaking of the Hague Convention.
- **This isn’t a treaty b/c the exec branch can’t make a treaty by itself.**
- **Was the US bound since this wasn’t sent to the Senate? Yes even if the agreement is illegal under US law. If you view the world in a dualist point of view.** See Article 46 of the Vienna Convention (p. 882).
How to know the difference in an executive agreement and a treaty:
- Treaty—requires implementation in American law.
- This was an executive agreement. (Pres pwr is plenary)
- Exec agreements can be secret if they involve natl security—Just have to inform the intelligence committees on in both houses of the leg.

The Belilios Case (1988 European Court of Human Rights; p. 49)
- Swiss woman punished for demonstrating. The municipal police board imposed a fine on her in her absence. The bd responded to her claims of illegitimacy of the board by saying that their jurisdiction cld not be challenged. The woman appealed and was unsuccessful w/ the federal court b/c the court said the European Convention on Human Rights was subject to the interpretive declaration Switzerland added—Swiss “consider that the guarantee of a fair trial is intended solely to ensure ultimate control by the judiciary over the acts and decisions of the public authorities.”
- Holding 1: The interpretive declaration added to the treaty is really a reservation.
- Holding 2: The reservation is invalid.
- The reservation basically meant that the right to a fair trial was limited as long as there was judicial review of the law.
- The reservation was too general.
- Holding 3: Switzerland violated Article 6(1) of the Convention (“right to a fair trial”)
- The police bd wasn’t enough b/c there is no tribunal—not really adjudicated in the traditional sense.
- The Convention doesn’t define “fair trial,” but custom/practice w/in the region (norms) show that Article 6 requires and “independent and impartial.”
- The court in this case rejects a fundamental rule of international law: silence (if other countries don’t object to a reservation to begin with, it should be valid). It is likely the court concerned here w/ human rights.
- Why do countries make reservations and remain parties to a treaty?
  - It just makes the treaty more dormant for the country.
- Court’s approach here was about universality.
- Can’t have a reservation in Bilateral treaties. Duh.

Eastern Airlines v. Floyd (S CT 1991, p. 60)
- Case where an airplane lost oil pressure but landed safely. Passengers claiming mental distress sue the airline. Issue is what kind of injury is protected under the Warsaw Convention.
- Interpreting the Warsaw Convention (1929)
- Intertemporal doctrine—if you interpret a law in 1929, but must take into account today’s view.
- Treaty interpretation:
  - Text itself
Dictionary

Context (Vienna Convention talks about this):
- What did indiv countries consider the term’s meaning.
- Something adopted (understanding different from today)
- Do you take the intertemporal problem into account?

Subsequent behavior

- **Broader sources here than in Filartiga:**
  - Court looked a broad number of countries (but confined to European ones)
  - State practice hasn’t included mental suffering.
  - Where Israel said such was covered, Israel ct played role of interpreter:
    - Policy reasons justifying this in 1929 that do not exist today.
    - So no policy reason for limiting now.
    - Very different case—a hijacking

- **Mutharika: Court was right (b/c don’t want to break new ground—except Israel.)**

- **Section 3 of the Vienna Convention deals w/ treaty interpretation**

- **It is hard to create uniformity w/ treaty interpretation b/c of decentralized international world.**

- Textual approach: See n. 4, p. 68—no matter how clear you are, there is always a context w/ any K, however.

- Municipal Courts: see n. 2, p. 68. Why differences in interps?
  - Diff cts use different interp methods.
  - A ct might find a that a treaty provision implicitly refers to its own municipal law.
  - A municipal court might not view the treaty as controlling, in light of competing rules of domestic law.

- **Accommodating change in intl law and treaties: n. 6, p. 80**

**Case Concerning the Gabčíkovo-Nagymaros Project** (ICJ—Hungary/Slovakia; 1997; p. 70)
- Hungary’s reasons for renouncing treaty:
  - Necessity Doctrine—claims new environmental troubles and the fall of the Soviet Bloc.
  - Fundamental Changes.
- Court rejected Hungary’s arguments. **Political changes not so closely linked to treaty object as to render it radically altered.**
- Can’t invoke impossibility where the impossible is created by the non-perf parties. See Vienna Convention Art. 61, p. 886.
- **Fundamental Changes must have been unforeseen when the treaty was promulgated.**
- Vienna Convention addresses when it is ok to breach a treaty.
- Czech also didn’t perform b/c it put into place a third plan for the region when Hungry didn’t perform.
- Hungary’s notification of terminating the treaty was not valid in terminating.
• Slovakia was party to the treaty as a successor state of Czech.
• Hungary and Slovakia must negotiate in good faith to achieve treaty objectives.
• Unless agreed on another way, Hungry must compensate Slovakia. Slovakia shall compensate Hungary.
• *Res Sic Stantibus* (Doctrine of Fundamental Change—Vienna Convention article 6, p. 886).
• How are treaties legally terminated?
  o Some have a clause.
  o Some have objectives, which, once completed, terminate the treaty.
  o Other treaties are renegotiated or mutually abandoned (Anti-Ballistic Missile Treaty, e.g.)
• n. 3, p. 79: *rebus sic stantibus vs. pacta sunt servanda*.
  o Key is the fundamental assumption concept on p. 886. No one has ever satisfied this test.
  o Treaties must be stable, but need to be written to accommodate change.

**The Eastern Greenland Case** (Denmark/Norway; PCIJ 1969; p. 81)
• Denmark wanted a judgment saying that Norway’s proclamation (claiming that it had proceeded to occupy eastern Greenland) and steps taken in regards to it were unlawful and invalid. Danes had been trying to get sovereignty over Greenland for yrs. Norway guy told them that its govt “wld not make any difficulties in the settlement of the question” (Ihlen Declaration).
• Ct says the Ihlen cldn’t have meant (or be understood to mean) that it recognized Danish sovereignty over Greenland. But the statement did mean that Norway wld refrain from contesting Danish sovereignty over Greenland as a whole and (thus to refrain from occupying it.)
• The Ihlen statement is binding, unconditional, and definitive.
• The court reasoned by looking at the activities of Norway both before and after the remark—including other of Ihlen’s remarks.
• Art. 2, Vienna Convention (p. 868) says treaties must be written. There was an *unwritten agreement in this case*. Since it wasn’t an agreement, cld it be a K? Could have been. Though the ct seems to say this was an unwritten treaty. See p. 85, n. 1.
• Did this case say essentially that statements by foreign ministers could be binding on a country? According to intl law, it is irrelevant whether domestic law has been violated or whether a country is bound by domestic law. The party is still bound by intl law.
• Ct does say that there was a legal obligation btwn the countries and that good faith was enough to create a norm. The ct says that Norway is estopped based on Ihlen’s statement—even if the statement doesn’t constitute a treaty.
• What if the constitution of such countries requires that treaties be written and ratified? P. 85, n. 2.
Could the Ihlen Declaration be instead the consummation of a Bargain between two parties instead of a treaty? Or a unilateral, but binding, promise in international law?

III. Custom (pp. 87-172)

The general position is that practice must be so universal as to be unquestionable. (But this is a case-by-case approach—no precedent)

However, state practice is very controversial.

For custom to develop, there must be:

1. Practice
2. Opinio Juris

- Problem with Custom and Developing Countries: Many feel international law is Euro-centric, Judeo-Christian. So many feel they’re only bound by express agreements.
- Custom can be general (protection of diplomats, e.g.) or specific to a region or to parties.
- Where to you look for customary law?
  - History of the principle asserted as custom
  - Academic materials
  - Case law
  - State practice.

A. Customary International Law

The Paquete Habana (S Ct, 1900; p. 87)

- Cuban/Spanish ships. She was stopped by the blockading squadron and captured. (they were fishing vessels). Brought to US and sold by auction.
- Holding: The vessels were not subject to capture by the armed vessels of the US during the war with Spain.
- General rule was that vessels engaged in fishing activities during war could not be captured as prize.
- Court looks to state practice since it could find no treaty between Spain and US. (examining agreements between various nations in history and then examining works of jurists).
- Acceptance that international law is a part of US law (monist approach—this is the first time this is stated)
- Good example of national tribunal making international decision.
- No treaty so court found in works of jurists and opinio juris
- Justice Gray evaluates opinio juris on the same level with other sources.
- How to establish state practice?
  - Generally practice—more than 50/50.
  - Article 38(1)(b)—“evidence”—here, judicial decisions, statements at conferences/by offices, treaty.
Elements of custom: These are tough to know with a new custom.

n. 1, p. 96: **This case was imp't b/c custom conflicted w/ an exec agreement. Unusual that vague practice wld trump an exec order.**

N. 2, p. 96—How do you tell when a state practice has ripened into intl law? There must be universal practice and Opinio juris. You tell if something is opinion juris by looking at if this practice has been incorporated into municipal law.

The Asylum Case (Columbia v. Peru in ICJ 1950; p. 97)

- Peru guy sought asylum in Columbian embassy in Lima. Peru rejected Columbia’s assertion of diplomatic asylum.
- In L Amer, normally host states accepted diplomatic asylum in embassies.
- **Columbia tries to prove custom by using:**
  - # of extradition treaties.
  - Cases where this has happened.
  - Montevideo Treaty (1993)---Columbia says the convention is codification of existing custom.
- Columbia fails b/c Peru didn’t agree—no ratification of the Montevideo Treaty.
- Ct takes a VERY positivist approach by saying, for custom to exist, Peru must accept this custom and the no ratification shows they don’t consent.
- Ct seems to be rejecting custom as a source.
- **Persistent objector (p. 99, n. 3)—a state can remove itself from custom in this way—this is a very positivist view.**
- Mutharika: Thinks Columbia has better sources than Justice Gray in Paquete b/c Gray’s sources were so old.
- How courts weigh evidence is subjective.

The Lotus Case (France v. Turkey, PICJ 1927; p. 100)

- Collision in intl waters b/wn Fr and Turkey. Turkey claims flying of its flag on the ship (making it Turkish territory) means that it shld have jurisdiction. French said nationality and flag (territory).
- Treaty of Lausanne:
  - Ended the Ottoman Empire (Brits took over Palestine 1923-1947 and then they decided to get out and UN decided to create a Jewish state and Palestine state (but then war broke out.).)
  - Ended “capitulations.”—source of conflict b/wn middle east and Western.
  - Article 15, see p. 103—intl law governs when conflict b/wn Ottoman Empire and the West. “principles of intl law.”
- France: positivist approach—says T shld pt to some jurisdiction rule.
- Turkey: burden is on Fr to produce a rule.
- Issue is burden of proof: Fr must have proof that T’s jurisdiction wld violate intl law.
- What are “principles of intl law”?
The positivists prevailed—so no look at natural law.
Strong conceptual arguments on both sides so Fr didn’t meet its burden.

- No longer applicable case today due to Law of the Sea.—jurisdiction based on flag and nationality.

**Texaco-Libya Arbitration** (Arbitration, 1978; p. 112)
- Libyan law nationalized Texaco properties/assets. Deeds of concession btwn the companies involved and Libya in which the law applicable was “principles of intl law.” (Choice of law provision)
- This case is interesting b/c it is a private party v. a state. This is likely why arbitration was chosen here.
- Arbitration is impt:
  - More expedient than trials.
  - Two conventions on this. (see my 9/19 (4) notes).
- Libya wld abide by arbitration decision b/c they wouldn’t like to be seen as a “violator” and b/c they are interested in Western capital/investment.
- Appropriate compensation must be given.
- Ct goes to UN to discern “principles of intl law.”—UN resolutions (recommendations).
- There is no dispute that countries can nationalize-the conflict is over the appropriate compensation. (Prompt, adequate [Western Companies] v. including things like did the company exploit)
- **Custom can be created outside of the Article 38 sources.**
- **Have to distinguish btwn resolutions that state the existence of a generalized agreement and those that have nothing more than a de lege feranda value only in the eyes of those States that adopted them.**
  - Paragraph 87, p. 120
- Article 38 makes no reference to resolutions—what shld be their status?
- International Resolutions of other international orgs.
- What about resolutions of NGOs that 90% of countries support but the few largest countries do not.
- P. 121, n.1: arbitrations can be tailor made to specific situations like this one.
- P. 122, n. 3: To have custom, you must have opinio juris. (this is how resolutions fit into Article 38)
- **General Principles of International law:**
  - One source of intl law
  - Question of consent—not necessary here
- **Lotus and Asylum** really focused on consent. 19th Century Positivist View

B. General Principles of Law:

**The AM & S Case** (European Ct of Justice, 1982; p. 123)
- AM&S was required by an EC Commission to turn over documents in connection with an investigation of competitive conditions (in re to EEC
treaty). AM & S withheld some of the documents on grounds they were protected by atty/client privilege. They instituted the trial to nullify the order from the Commission.

- **Holding 1:** Absence of express language in a treaty regarding the legal privilege of documents does not preclude the privilege.
- **Holding 2:** Community law principles are in effect in the absence of express language.
- Community law is qualitative law based on spirit and gen tendency of natl laws.
- National law is means to find “unwritten principles” of community law.
- Total unanimity is not necessary.
- C. Natural Law and Jus Cogens
  **Jus Cogens and Natural Law—not in Article 38, but there is a general feeling that an intl tribunal can act as a municipal ct wld (so still room for these). The trend now is that these are sources—even tho in the early 20\textsuperscript{th} century when Art 38 was written the controversy over them caused them to be left out.**

**US v. Smith** (S Ct 1820, p. 133)
- **Piracy Case:** TS crewed a private ship but seized another vessel and robbed/plundered it. There was a special verdict in the case: if plunder and robbery are piracy under US law, then prisoner was guilty.
- **Holding:** Robbery and Plunder are party of piracy as defined by the law of nations.
  - Justice Storey looks to common law, justices, and state practice to find rules w/ respect to privacy in int'l law.
• Storey doesn’t really demonstrate custom, he is more basing it on fundamental principles.
• Where do you look for evidence of natural law? It is self-evident—accept norms as axiomatic—can really only look at opinio juris then. It is enough b/c consent is not needed for fundamental norms (so no need to be a custom). Like Filartiga → there is an appeal to higher concept.
• Erga omnes w/ discrimination, slavery, etc. Danger of this: possibility of all sorts of judges throwing in their opinions. When it takes 10/20 yrs to create a treaty you run the risk of not being able to correct an out-of-control judge.

Forbidden Treaties in Intl Law (1937 Verdross Article, p. 137)
• Writing at a time when Europe had beginnings of facism.
• Must try to find an ethical minimum recognized by all states in the intl community. Examples: maintenance of law/social order w/in the state, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, protection of citizens abroad.
• Question at the time: Shld state consent be the basis of normativity?
• How do changes in norms come about? This article talks about terra nullius, but now there are some areas which are considered “global commons,” such as Antarctica. One impetus of change w/ the Law of the Sea was deep-sea mining. Norms have developed with this w/o state practice.
• Verdross is saying that non-consensual sources can trump treaties w/o state practice. He is saying some treaties won’t be enforced, such as immoral ones.
• With jus cogens and erga omnes, we tend to define with examples.
• Verdross concept is found in the Vienna Convention—very controversial. Ethical Minimum—have to look to fund. norms to find this. Can’t be answered in objective/universal way—can only find in context of given period.
• We can all agree that some treaties would be immoral whether it be b/c of (1) how they were made or (2) content.
• Morality may depend on context to some extent.

SW Africa Case (ICJ 1966, p. 142)
• Ethiopia and Liberia alleged contraventions of the League of Nations mandate. The mandate gave country pwr to administer certain territory (now this is called the trusteeship system)
• Trust relationship: German west Africa—UK asked S. Africa to administer this area after WWI. They did a good job until Apartheid (post 1948).
• The idea is to advance a country twrd self govt.
• Holding: Liberia and Ethiopia cannot be plaintiffs here b/c indiv. countries can’t assert violations of the League—must be done collectively.
• Very positivist case—credibility of ICJ greatly diminished.
• First ct held they had standing; then held no legal right to requested outcome.
• Essence of the majority’s argument is that you must bring forth this issue to the League and not as an individual in court.
• Maybe at the back of the ct’s mind that since SA wldn’t abide by a decision, it just wldn’t make that decision!!

• Π’s argument had been that notions of morality require that Δs report and that individual countries have a right under natural law.

• Jessup (dissent): Sees it as a common interest—notion from the Genocide Convention can be transplanted into this situation.

• N. 2, p. 147: Distinction btwn Jus Cogens and erga omnes. (same examples used for both):
  o Jus cogens—a norm that evolves—can’t be modified—no treaty violating this will stand. (There are certain fund. norms which will trump state acceptance)
  o Erga omnes—an obligation → a duty (can be modified by treaties).

• Vienna Convention says that norm of a treaty (consensual) that violates jus cogens will be void. How do such jus cogens norms develop? When it is “accepted and recognized”—I can’t define it, but I will know it when I see it.

• Some people treat jus cogens, natural law, and fundamental norms as the same thing. (e.g., Kaufman in Filartiga)

D. Equity

Equity—one must figure out where this fits in the scheme of intl law—there is no reference to it in Art 38. Muth thinks §2 is equity

Cayuga Indians Case (American and British Claims Arbitration, 1926; p. 148)
• UK brings action on behalf of Indians against the US arguing treaty br to pay annuity to them. Some Cayugas in Canada, some in US after split of the tribe. Annuities paid to US Cayugas only. Ct says that the money shld be paid.

• Two types of treaties involved:
  o Three btwn Cayuga Indians and NY
  o Treaty of Ghent btwn US and UK

• Cayugas cld not enter into treaty today—Vienna Convention Art 2, p. 868

• Montevideo Convention defines state:
  o Territory
  o Govt
  o People
  o Capacity to enter into relations btwn states
  o Democratic.

• Holding: Based on treaty interpretation (b/c treaty says that disputes will be decided on intl law and equity), ct looks to recognized principles of fairness and justice.

• Why go to arbitration w/ this ques? B/c it is quicker and parties can control the issues. This cldn’t go to the ICJ b/c Cayugas aren’t a state.

• Several types of equity used here:
  o Intra legem—decided according to law.
  o Praeter legem—equity applied in place of the law (adds to law)
  o Contra legem—contradicting the law.
Not always necessary to make these kinds of distinctions—so many issues sometimes it wld be ridiculous (Nicaragua case).

The Meuse Case (PCIJ, 1937, p. 152)
- Maestricht Treaty—Netherlands accuses Belgium of violating the treaty but Belgium’s defense is that the Netherlands is violating the treaty.
- Ct agrees w/ Belgium and decides based on equity.
- Here ct sees equity as general principles. In Cayuga the equity seemed to be based on custom/consent.
- Seems to be a connection btwn equity and gen princ.
- Judge looks at US, Gr, Roman & Fr law as sources—limited to West b/c want to lime to safe places (case is in 1937). How universal shld one be today?
- N. 1, p. 155—Is equity just a pt of intl law or can it exist separately—outside of intl law? Is there one type of equity (justice/fairness) or many types?
- N. 4, p. 155—Article 38 §2—What is the diff btwn equity and this? Maybe no one has used it b/c they feel it is tautological. (cts will find it w/o the parties having to agree!)

The North Sea Continental Shelf Cases (ICJ, 1969; p. 155)
- Gr v. Denmark—What are the principles and rules of intl law that are applicable to the delimitation as btwn the parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the 1965 convention?
- Holding: No one way can be determined. It must be carried out under equitable principles tailored to the circumstances. Court emphasizes that equity does not equal equality.
- Thalweg principle—boundary is in the middle of the deepest part of channel.
- Continental shelf—normally a country can use the resources in this.
- Equidistant principle—one option (see p. 157) This is not an inherent necessity of the continental shelf doctrine. With certain geographies, this leads to inequity—as may be the case here.
- Geneva Convention on the Continental Shelf 1958—Denmark and Netherlands are parties, but Gr is not b/c Gr did not ratify it. D and N suggest that Gr is bound by manifested acceptance—ct says it is not likely it cld be bound in this way. Ct says there is also no evidence of estoppel. Ct also says that this agreement did not codify existing customary law. Ct also rejects the idea that the treaty has since become custom.

IV. International Law and Municipal Law (pp. 173-242)

A. Treaties in Municipal Law

Foster & Elam v. Neilson (S Ct 1829, p. 173)
- Issue over what country owned the land when the plaintiffs acquired it. Treaty btwn Spain and Fr—Spain ceded the territory (Lousiana) to Fr and Fr later ceded it to the US. Π claims the land was granted by the Spanish
governor (in Treaty btwn Spain and US) after the treaties had already taken place. This is why the Δ (current possessor of the land) claims the land grant is invalid.

- Ct says the treaty btwn Spain and US is not helpful b/c it was not self-executing and was never ratified by the US.
- Ct says treaty can’t be effective b/c it was never ratified—cites no authority for this, but says this is the gen princ of the US.
- Ct took a dualistic approach.
- Ct says that non-self-executing treaties only produce political effect and are more like Ks. A K that the legislature must execute. Treaties such as land mines, global warming, etc. would require ratification by Congress.

**Askura v. City of Seattle** (S Ct 1924, p. 177)

- Seattle passed law that no license to pawnbrokers who aren’t US citizens. Askura was denied a license, but said the Seattle law violated the treaty btwn the US and Japan (stating that each party’s subjects cld enter, travel and reside in each others territories and that they would be protected and cld carry on trade like native citizens) and that it also violated the 14th amendment.
- **Holding:** Ct says the treaty is self-executing and is binding on Seattle and that the ordinance violates the treaty. (Art. 6 of the Constitution)
- The treaty used the term “shall” and didn’t mention ratification.
- Determining whether or not something is self-executing is a matter of semantics and the nature of the treaty.

**Sei Fujii v. California** (California 1952, p. 179)

- Π sues CA b/c he land was escheated b/c he was ineligible for citizenship (Alien Land Law). Π relies on the UN Charter that states that human rights and fundamental freedoms will be observed w/o distinction to race.
- **Holding:** Ct says the UN Charter is not self-executing.
- Ct looks to the intent of the parties to determine if it is self-executing (as manifested by the treaty language and if that isn’t clear, as manifested by the circumstances surrounding the treaty’s execution).
- Ct said the Charter wasn’t b/c they state general purposes/objectives and do not purport to impose legal obligations. It is clear that these contemplated future legislative action. This is further evidence b/c other areas made it clear that those provisions were self-executing.
- **The court shot down the law based on the 14th Amendment, however.**
- **Provisions of the UN Charter are more like aspirational treaties, which aren’t binding but are hoped to be complied w/ by most nations.**

**Missouri v. Holland** (S CT 1920, p. 183)

- Migratory Bird Treaty Act (1918) had a statute to enforce it and MO complained the statute was unconstitutional b/c of the rights reserved to the states in the 10th Amendment.
• Ct says that if the treaty is valid, then under the necessary and proper clause, the statute must be constitutional.

• States have no possession over the birds due to their migratory pattern.

• Ct says there is a huge natl interest involved and that this is something that can only be protected by federal action. Since it is not sufficient to rely on the states, the treaty and statute are upheld.

• Congress can legislate in matters clearly the domain of the states under Art. 6 of the US constitution on p. 826.

Whitney v. Robertson (S Ct 1888, p. 187)

• Πs are importers of sugar/molasses from San Domingo. (Goods similar to the kinds produced in Hawaii, which are admitted free of duty into the US under a treaty with Hawaii and a statute executing the treaty.) Π says his products shld be admitted free of duty as well due to the similarity of the products to those from Hawaii. The treaty w/ the Dominican Republic says no higher duty shall be imposed on the import than on any other like articles.

• Ct says that if they are on the same subject try to give effect to both but that if there is any conflict btwn a treaty and legislation—last in time wins.

• Holding: The act under which the monetary duties were collected came after the treaty and thus is the correct law.

• The doctrine of last-in-time is a municipal doctrine, not an international one, yet the treaties involved are int'l. The ct said that if other countries were dissatisfied w/ this rule, they cld complain to the exec branch, but that the ct had no pwr to decide int'l issues.

• S Ct takes another dualistic view here.

• Does this mean that the US can get out of a treaty by entering into a contrary treaty and then having Congress a law in pursuance of the 2nd treaty? No. Still be a problem in int'l law.

United States v. Belmont (S Ct 1937, p. 189)

• A Russian corp deposited money w/ Belmont, a private banker in NY. Belmont died. USSR dissolved the corp and nationalized the assets, including the money w/ Belmont. Then USSR gave the money to the US, but the respondents refused to give the Belmont money over to the US.

• Diplomatic agreement btwn USSR and US that USSR wld not take steps to enforce claims against Americans and that all claims were released to the US.

• This assignment of the USSR assets included this claim.

• Ct: No state policy (NY) cld prevail against an intl compact b/c govt power gover external affairs rests solely with the national govt.

• Ct: This is a foreign policy agreement not requiring ratification by the states.

• Ct: But it was a “treaty” for purposes of treaties superceding state laws.

• The president can, by using art. 6 treaty pwr, make viable municipal law which trumps state law. The presidtherefore has some sort of legislative pwr.
**United States v. Curtiss-Wright** (S Ct 1936, p. 192)

- **Appellees** conspired to sell guns to Bolivia in violation of joint resolution of Congress. Joint resolution of Congress authorizing president to prohibit the sale of arms. Appellees argue that Congress illegally delegated lawmaking pwr to the President.
- **Holding:** There is sufficient warrant for the broad discretion vested in the President to determine whether enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries.
- **The real issue is the source of the President’s power**—Constitution w/ respect to foreign affairs or legislative (where can’t delegate)
- W/ respect to intl ones, ct says fed govt shld decide on foreign affairs.
- This pwr didn’t depend on Constitution, but passed from King to Fed Govt.
- **Troublesome thing about the opinion:** it goes beyond the intl pwr being in the exec and talks about functional reasons (need for secrecy, etc.)
- N. 3, p. 197—Source of foreign affairs—does the fed govt possess extra-constitutional pwrs? Like Missouri v. Holland. **Suggestion that President does have some extra-constitutional powers in foreign affairs/intl law.**
  This is pt of the dualism pwr. The Vienna Convention recognizes dualism.

**Dames & Moore v. Regan** (S Ct 1981, p. 199)

- **Exec orders to nullify attachments and liens on Iranian assets in the US.**
  US/Iran agreement over hostage crisis (suspended all litigation against Iranians) D & M had a K w/ an Iranian company. Π objects to the pwr to suspend claims by individuals.
- IEEPA explicitly authorized the Pres to nullify attachments.
- **Ct says this power of the Pres is ok.**
- This power of the Pres is pretty expansive considering there is a constitutional (fundamental) right to take claims before a court.
- Both this and Alvarez were decided by Rehnquist. He uses Intl Claims Settlement Act and Prior Ct cases to allow this.
- **Muth:** Thinks this decision was appropriate. Best grounds on which it was made were flimsy (past practice; congressional acquiescence). **Good decision but not really authorized by any law.**
- **Youngstown Case** (steel mill case—Truman—Korean War) (p. 203, 207)
  Three tier approach:
  o When Pres acts pursuant to an express or implied authorization for Congress, he exercises not only his pwrs but those delegated by Congress. (Burden of persuasion on those who would attack this pwr)
  o When the President acts in the absence of Congressional authorization he may enter “a zone of twilight in which he an Congress may have concurrent authority, or in which its distribution is uncertain.” (validity of Pres action hinges on consideration of all of the circumstances including “Congressional inertia, indifference, or acquiescence.”)
When the pres acts in contravention of the will of Congress, “his pwr is at its lowest ebb.” (Ct will sustain his actions “only by disabling the congress from acting upon the subject.”)

- The President here is acting w/o the authority of Congress (2nd tier)

- Guy kidnapped and brought to the US to get jurisdiction.
- *Ker Frisbee-Machain Doctrine*—bringing people from other places and trying them here. Shld this continue?
- Muth: Thinks this is a good idea in some situations.
- Δ argues that extradition treaty means no kidnapping (law of extradition is treaty based—treaties say which crimes for which people can be extradited).
- Art. 9 in Treaty p. 212: seems that it does prevent abductions.
- Rehnquist admits the abduction was shocking, but says that it doesn’t matter.
- What is really the theory behind this case? Treaty doctrine (intl) v. Ker-Frisbee (domestic). Why no deference to treaty here?
- Muth: Thinks this is a bad opinion and that the real theory (see above) shld have been how the ct framed the issue. Ct cld have said, if person finds himself here, issue is domestic—presence in US means jurisdiction?
- Double standard—if someone did this to the US, we wld claim its illegal.
- State Dept thought this was terrible but Justice Dept thought this was fine.
- N. 4, p. 222: **The PLO Case**—Another judgment that stretched the interp of a treaty to avoid conflict w/ US domestic law. (1987 Anti-Terrorism Act wld not be applied to close down the PLO’s NY office b/c, as a Permanent Observer to the UN, the PLO was protected by US/UN Headquarters Agreement, 1947).

**Crosby v. National Foreign Trade Council** (S Ct 2000)
- Holding: Burma Law of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business w/ Burma, is invalid under the Supremacy Clause of the Constitution b/c of its threat of frustrating federal statutory objectives.
- Can states pass statutes that affect intl law? What about “buy America” statutes? Reality today, however, come cities have foreign affairs—not clear. Commerce Clause says Congress has the pwr.
- Reasons here: ct thinks fed statute was more reasonable approach, EU upset and WTO—state interference; division of power here; foreign policy issues (state making it very difficult for foreign policy).
- Ct cld have back pedaled a little—must defer to fed govt w/ foreign affairs.
- Problem now: hard to distinguish foreign affairs from domestic affairs.
Recent developments: Peru—US gave no warning to embassy to try for murder—DOJ says no stay—went ahead w/ execution. Germ got a temporary injunction from the ICJ, but the US wldn’t listen.

B. Customary Intl Law in Municipal Law

• Very few cases on this (Paquete Habana [intl law is pt of American law assumption] and Filartiga [ct found incorp]).

**Respublica v. De Longchamps** (Ct of Oyer and Terminer at Philly 1784; p. 233)

- DeL was indicted that he did threaten and menace bodily harm and violence to person F, a French diplomat. L struck F’s cane and F struck w/ cane. L wanted F to refute slanderous accusations which had been in the newspaper. L was found guilty by an unbiased jury. **France wanted L delivered up to them, but the ct said no.** Ct says he can’t be imprisoned—Δ is fined.

- **Both Foreigners**—trying to assert sovereignty so it doesn’t allow Fr to try him. Crime was one against the law of nations b/c F was a diplomat.

- **Today:** Vienna Convention on Diplomatic Relations (1976)—person wld be tried here and fined unless an extradition treaty said otherwise.

- How does intl law become pt of American law? Flimsy evidence of this being a violation of intl law and assumes intl law is a pt of Pennsylvania law.

- How does intl law become pt of state law?
  - Statute (like Alien Tort Act)
  - Customary Law

- p. 237, n. 1: Is the “law of nations” also pt of supremacy clause (Art 6, cl. 2)? The ct just assumes here that it is. But the Constitution only makes reference to treaties. Mention is made in Art. 1 of the law of nations.

- P. 237, n. 2 and 3 (political context): Shld he have been punished under the law of nations but which is so unclear? We discussed this in the Elam case—doctrine of incorp into American law—exec agreements.

**Amerada Hess v. Argentine Republic** (2nd Cir, 1987; p. 238)

- US oil tanker attacked by Argentina during Fauklands War. US Ct said had no jurisdiction over this. (see n. 1, p. 240) Nationality of ship—Liberia. (S Ct rejects jurisdiction)

- Jurisdiction—why no jurisdiction? No exception to Foreign Sovereignty Immunities Act of 1976 (FSIA) to allow the suit here. FSIA—generally foreign nations can’t be sued in the US except:  
  - Waiver of immunity
  - If engaged in commercial activity.

- Bigger issue: what other avenues are open for you then?
  - Sue in Argentina
  - Sue in the US through the Alien Tort Act
  - Diplomatic arrangement w/ another only when:
    - You’ve exhausted this remedy
    - You’ve been denied justice.
Here this wasn’t possible → no access to Argentine ct. (so no remedy for Π!)
  o What can/shld intl law do? N. 2, p. 241. It is a clear violation but no way to get remedy (efficacy of intl law)
  o N. 3, p. 241—this is probably not an issue for American cts—esp where the Πs aren’t technically American citizens (Liberia). Liberian cts might have jurisdiction, but probably pointless.

V. International Dispute Settlement (243-313)

Dispute Resolution in Intl Law:
(1) Peaceful Settlement (Pacific Settlement)
(2) Use of Force—accepted as alternative here. Problem is some countries don’t have resources to use it. Public outcry sometimes leads to this, but not always (times when it didn’t—Rainbow Warrior and Dogger Bank)

Peaceful Methods:
(1) Arbitration:
  o Two types:
    ▪ Private (dispute btwn investors):
      ▪ Sometimes one party refuses to appt an arbitrator
      ▪ In private situations, arbitration avoids one party being subject to a foreign law.
      ▪ In private arbitration, involves state b/c still need arbitral decision to be enforced (state may or may not)
    ▪ Public (states)
      o NY Convention—signatories to Convention must enforce arbitration decisions unless such wld be against public order.
      o ICJ being used a lot in territorial disputes. One exception in which ICJ has review pwr: administrative tribunals of the UN.

(2) Adjudication
(3) Advisory options.
(4) Mediation system by notable figure: (this is one of the most effective)
  o Negotiation
  o Or can actually get involved in mediation
(5) Special Claims Tribunal (like in Dames & Moore).

A. Public International Arbitration
Public Administration—When will a country go to arbitration over using force?
  o Wars can cause other problems that the party might not want
  o When really serious issues, intl law cant really deal—such as Cuban Missile Crisis. No real mechanisms for enforcement in intl law. (only force available then is a country’s own)
The Dogger Bank Case (Hague; Great Britain v. Russia; 1905; p. 247)

- Russia shoots GB fishing trawlers and claims it thought they were torpedo boats.
- Chose admirals over lawyers for the arbitration b/c of the technical nature of the case.
  - More sympathetic to Russian situation.
  - More familiar w/ custom in law of sea at this time.
- Arbitration panel says that the Russian admirable-not justified in his actions.
- N. 3, p. 250: Intl inquiry commission a good thing when people really mad over something small. Diplomacy here is reminiscent of the Hull Lothian deal.
- Why not use countermeasures here? (reprisal/retorsion—these are allowed in intl law). Econ consequences if UK was to retaliate.
- There is a problem w/ compliance—why some cases might not do arbitration.
- What wld have happened if Russia hadn’t paid the UK?
  - In 1905, no sanctions available (diff now b/c other measures—like attacking assets—freezing them for force compliance)
  - Probably not much cld be done.

The Rainbow Warrior Case (New Zealand v. France, Arbitration 1990; p. 251)

- Fr special agents sink Greenpeace vessel in New Zealand. Fr and NZ went to mediation. Agents supposed to stay on island for three years. They didn’t.
- Good thing about arbitration is that you can choose the issues.
- Fr breached the arbitration agreement by taking people out of Hao and not returning them.
- France’s force majure argument: ct says no necessity here b/c no absolute and material impossibility.
- The arbitration agreement governed by:
  - Vienna Convention
  - Customary law of treaties.
- Muth: Ct was right. Really no distress here b/c no danger to life.
- Sources of Law: Drafts of Intl Law Commission (representing 54 countries). Intl tribunal shave used these as law like w/ Restatements in the US.
- Decision of the arbitration tribunal was based on:
  - Treaty btwn Fr and NZ
  - Customary intl law reference to this but w/o stating what principle is (so leave tribunal w/ option of defining these principles).
- Public arbitration remedies:
  - Satisfaction
  - Set up fund (here)
  - Efficacy of these remedies here?
- Fr has continued nuclear testing in this area of the world.
- N. 6, p. 259-60: question of compromissory clauses in treaties—allowing for arbiters to hear disputes. US v. France—air landings in Fr and US—Fr due to oil crisis wanted to use smaller overseas planes so US banned Air France
flights to LA. Principle: Even while arbitrations are going on, US had the right to act in a unilateral method to preserve its rights.

B. The International Court
- Judges: supposed to be selected by geographic distribution
- Qualifications: purely political process (elected by General Assembly)—many are academics; very difficult for judge in natl ct to get elected b/c usually don’t have the experience w/ intl law cases.
- Ct mostly gives advisory opinions—it wldn’t make sense to give it appellate pwrs over all other nation’s cts.
- Muth: Not so sure it is a good ct.
- Influence of the Ct: very removed—most people don’t know it is a ct—intl—esp b/c it isn’t in Geneva. Things have changed for the better.
- More than ½ of ICJ disputes are territorial. Lawyers sometimes have problems w/ evidence b/c many times there are really no documents.
- Two ways to get to the Ct:
  - Compulsory jurisdiction (US withdrew from this) Fr and UK recognized it in the next case.
  - Compromissory Clause

Minquiers and Ecrehos Case (France and the UK at the ICJ 1953, p. 262)
- The UK has sovereignty over them.
- Issue phrased: Does the UK or FR have sovereignty? So as to preclude finding of res nullius.
- Ct looks at how to establish title:
  - Showing of control.
  - Proximity to a country
  - Physical possession.
- The evidence here is amorphous. Ct decided it the way it did probably b/c of the framing of the issue. Ct looked to historical factors and looked at the different/control possession showings the UK had been doing.
- When you add all this together, ct somehow means the UK has it.
- There were four choices in this case: UK had sovereignty; Fr had sovereignty; Res nullius; Condominium (both Fr and UK).
- Might have been better to send to arbitration since issues weren’t so clear.
- Some have suggested this case went to ct due to (1) fishing and (2) oil/gas—worry of exploitation. When you have a sensitive issue—better to go to the prestige of the ICJ.
- Ct says self-determination isn’t possible—except for former colonies.
- Problem w/ starting w/ history—b/c always someone declares that they were there first. (Yet ct started w/ history here!) This case is more historical—no real legal issues here.
The Diplomatic and Consular Staff Case (US v. Iran; ICJ 1980; p. 271)

- Iran violated intl law (treaties and customary law) b/c it wouldn’t return the hostages from the Embassy unless the US sent the Shah back to Iran.
- State succession—treaty of amity entered into in 55 by the Shah.
- Muth: No question that Iran was bound by the treaty of amity—Khomeni is not a “new state.” Bringing this case may not have been wise.
- Ct concedes that initial decision to attack was not state sanctioned (until later).
- Nothing really to argue—case taken to ICJ to make a political point. Ct accepts jurisdiction even tho both the ct and the US know Iran will not appear or abide by any decision. N. 4, p. 286: The proper role of the court—shld it turn away when it is being used? Is this a negative effect on the ICJ’s rep?
- How does a ct operate effectively when state’s won’t cooperate?
- Ct makes note that US military incursion (helicopters sent by Carter to free hostages) was inappropriate and undermined justice.
- Another possible purpose of the ICJ: develop intl law—maybe ok then.

Compulsory Jurisdiction: (Art 36(2)—p. 261)

- Many in the past have accepted this.
- US had allowed it but had excepted interpretation of treaty; after Nicaragua case, US withdrew its compulsory jurisdiction. Problem: once you do this, you lose control over the matter.
- Malawi—self judging exception to this. You have to wonder whether ct giving up an impt part of its responsibility (e.g. violations of human rights).
- Article 2(7) of the UN Charter, p. 829—this only prevents the UN—not other states.

C. Advisory Opinions at the International Court

- Very few intl orgs ask for advisory opinions (3-4 each year)—this is b/c they don’t want the publicity.

Western Sahara (ICJ, 1975; p. 288)

- It had been colonized by the Spanish for many yrs—since Papal Bull (1492). Spain resisted adjudication.
- Morocco claimed the north half and Mauritania claimed the S. Half. Mauritania was indep from Fr in the 60s, but Morocco claimed it was part of Morocco). This area had a huge deposit of phosphates. (Oil deposits)
- Resolution 1514 (1960)—a normative Gen Ass resolution—Declaration on the Granting of Independence to Colonies.
- Morocco eventually claimed the whole area and Spain wldn’t consent to a contentious proceeding. If this is really a contentious proceeding, can an advisory opinion work? Within the framewk, Muth says this is ok. Ct sees its role as broader—to help the UN.
- Holding 1: At the time of colonization, the land was not terra nullius.
- Presence of organized tribes made it not terra nullius.
• Holding 2: There were some ties btwn the nomadic tribes and Morocco but not enough to say full political allegiance. (Like in E. Greenland case and Muth says ct is right). Ct says the same about the ties w/ Mauritania.

• Muth: Agrees there are legal issues in this case.

• What shld be the role of the ct in the 21st century?
  o In North Sea Case—ct was very bold in its application of the law.
  o In others, it has been very passive (SW Africa, Lotus)

• Problem with a referendum is how do you ask the question—W. Sahara and Morocco cldn’t agree on this. So now UN won’t even push for a referendum.

• Efficacy of intl court: It’s opinion in this case has been ignored for 26 yrs!

• Muth: Ct needs to address the issue of political questions b/c if it doesn’t, this cld undermine the court if it is not managed well.

The Elsi Case (United States v. Italy ICJ 1989; p. 303)

• Italy seizes the plant (belonging to the US) claiming debts, and labor disputes. Palermo mayor wanted to protect his citizens.

• US says Italy violated FCN (Friendship, Commerce, and Navigation) treaty (1948-now called the FCEstablishment treaty) by not letting the US organize, control, manage its corporation.

• Ct says no violation b/c it was really on its way to bankruptcy—hard to show appreciable damage.

• This was a chamber case (see below). US and Italy wanted Western Judges that wld be more familiar w/ the issues (bankruptcy, labor, etc.)

• Ct took this case even tho it really involved private parties—the countries went to ct on behalf of private parties. (an espousal case).

• N. 1, p. 312—cynical attitude: The US had just decided not to go in the Nicaragua Case and had just withdrawn compulsory jurisdiction. So why bring this case? Muth: doesn’t really know why. It is a fairly minor case not really a lot of $--US didn’t take the Amerada Hess to the ct and it was more impt!

• Jurisdiction is governed by statute (must show exhaustion of local remedies and denial of justice.) (Nottebohm and Barcelona involve the same concept)

• Possibly US took case to help insure better intl climate for US investments.

• Dissent (US judge)—very rare that a judge votes against his own country.

• Other venues available for Raytheon:
  o Municipal court
  o Arbitration
  o Regional Court if one exists (esp w/ quasi-public issues like AM&S)

• One issue in reforming the court: Shld private parties be able to bring cases?

• N. 3, p. 313: Cld have a halfway system where a municipal ct refers for an advisory opinion if it thinks it is a more intl issue. It is very expensive, tho, to litigate at the ICJ (but this type of system wks well in Europe).

• N. 4, p. 313-There are many mechanism for dispute resolution (FOR MY JOURNAL ARTICLE!!)
• Issue for the future: Shld there be more universal tribunals or more specialized/regional ones? Guillame article says there too many of the latter and shld unify these cts (Muth Agrees, but it wld still be difficult, he says).

Chambers at Intl Ct:
• Art. 26 of the ICJ Statute allows for this.
• Wasn’t utilized before as it is now—as cases become more complicated.
• What is the advantage of doing this? The question is one of control—judges are elected to a chamber upon request by the parties. (p. 311).
• W/ Chambers it is almost like arbitration b/c of the party control.
• Also, if a judge has certain expertise, you can choose this judge.

VI. Individuals and International Law (pp. 314-342)

A. Individuals as Objects of Intl Law
• Nationality v. citizenship.

Question of who is a national?
The Nottebohm Case (Liechtenstein v. Guatemala; ICJ 1955; p. 315)
• Can Liechtenstein represent Nottebohm at the ICJ? No.
• Two concepts:
  o State protection—state of which person is a national can protect.
  o State responsibility—state where alien resides (see p. 322, n. 1). This has now expanded to include:
    ▪ Territorial integrity. (Rainbow Warrior Case p. 323)
    ▪ Harm to Environment.
    ▪ Breaching Treaty Obligations.
    ▪ Responsible for violating rights of its own citizens. Problem: (1) What are considered human rights? (2) How to enforce? Esp. when UN can’t intervene in domestic relations. Query: Is this really domestic?
• Attribution (n. 2, 323)—who in facts binds the state? For what acts is a state responsible? What if it is the act of a state/local agency—can whole nation/state be responsible? Esp w/ (a) federal system and (b) private parties. (Intl comm. has been working on this—but very controversial)
• Is Guatemala required to recognize Liechtenstein naturalization on intl level?
• Limitations on naturalization—can’t naturalize a member of foreign forces or someone who enjoys diplomatic immunity.
• Dualism: Liechtenstein can grant naturalization, but intl law does not require Guatemala to recognize this naturalization.
• Ct says that there must be a “genuine link” btwn a country and the person asking for protection for the ct to require Guatemala to recognize.
• This opinion is limited today b/c naturalization has become a matter of convenience. “Genuine Link” is dead.
- Ct goes into idea of when a state can bring an action—objective theory/positivist theory (only states can).
- N. 1, p. 322: Mavrommatis Palestine Concessions Case (PCIJ—1924) Est the doctrine that actions against individuals are actions against states. Denial of justice or exhaustion of remedies before it can go to the intl tribunal.
- There is a gap in the system—what recourse do Nottebohm type people have?
- N. 3, p. 318: Ct seems to focus on this extensive link w/ Guatemala (but implication that other states might be expected to recognize him.)
- Reparations: Wld they be given to Liechtenstein and Nottebohm? Stateless persons—do they have any rights? World has over 20 million refugees. Nansen---alien travel documents issued on behalf of UN for people in trouble. These don’t require protection by issuing states.

**Barcelona Traction Case** (Belgium v. Spain; ICJ 1970; p. 325)
- Case was very traditional and pushed the law backwards!
- Govt of things did things to BT causing it to go bankrupt. Canada tried to get Spain to agree and Spain refused. Canada wasn’t allowed to bring an action. Spain was being cynical knowing Belgium suit wldn’t succeed. (Some stockholders lived in Belgium).
- **Holding:** Belgium cannot represent citizens whose shareholder rights were affected by Spain.
- Ct relies on erga omnes. No genuine link btwn BT/Belgium so no standing.
- What about corporation as an individual?
- Like SW Africa Case—Canada can’t really take action unless Spain agrees to arbitration.
- N. 4, p. 337—where does BT go? If there had been a bilateral treaty btwn Belgium/Spain—it wld have had to be constructed in a way to recognize the rights of shareholders. N. 5, p. 337—“genuine link.”

B. **Individuals as Subjects of Intl Law**

**Mark Janis Article** (1984, p. 338):
- Individuals have more clout in intl law than they used to.
- Interesting development—gives individuals access to intl law.
- In UK, no right of access to sue the UK in UK cts (Human Rights Act of 2000—changed this?)
- When natl law prevailed before the 19th Century, individuals did have access, but when positivism took over, it did away with this.
- American Law has changed in this way.
- In Europe and L. America:
  - Interamerican Ct of Human Rights (successful)
  - European ct of Human Rights (more successful)
VII. States and International Law (pp. 400-459)

- After decolonization of Africa, many scholars thought state succession was dead, but of course this isn’t true now.
- States are now considered the main participants in intl law (since Westphalia).
- N. 7, p. 408: Is sovereignty restricted by human rights?
- Ethnic/religious groups; indigenous people have certain rights w/in the context of states and regional orgs/unions (EU, e.g.).
- N. 5, p. 406; Variety of state types:
  - Micro-states—Republic of Nauru, Liechtenstein (shld equality be extended? Impt b/c majority of smaller state can bind the larger states.)
  - Subjugated States—Navajo Nation, Andorra e.g.—these have given up their capacity in intl relations.
  - Failed States—Somalia, Yugoslavia, USSR, Czechoslovakia, Burundi e.g. (suggested trusteeships—have to change UN charter to do this.)
  - States in Economic and Strategic Unions—EU, Commonwealth of Independent States, e.g.
  - Federal States—US, Australia, Brazil, Canada, e.g. (Quebec involved in treaty negotiations, for instance).

Montevideo Convention (1933, p. 403)

- No condition to recognition of states.
- Who decides whether an entity is a state? Is this is an intl law or municipal—is it a legal or political question. UN admission is not it.
- Is recognition essential to statehood? Recognition plays an impt role in reality: Cts (use of municipal cts).
  - Ex: FYROM (Macedonia) b/c of Greece’s objection to name. Greece worried about separatist movement from its province of Macedonia.
  - You can still be a state w/o recognition—the declaratory theory of statehood prevails, but you may be limited in what you can do/join by recognition issues.
- Govt by rules of municipal law—question of foreign immunities—matter of acts of states.

Tinoco Arbitration (1923; p. 409)

- UK refused to recognize Tinoco (in Costa Rica), then it brought action on behalf of the companies b/c new govt had nullified all Ks of people w/ Tinoco govt. No UK detrimental reliance on Costa Rica b/c this wld undermine relation. Ct finds for UK.
- Many govs did recognize the Tinoco govt and the country remained the same—no big opposition when he was in.
- The real question is “Has it really established itself in such a way that all w/in its influence recognize its control, and that there is no opposing force assuming to be a govt in its place?”
- Access to cts—if this had been brought in UK it probably wldn’t have gone on.
- There is a difference btwn recognition of states and recognition of govts.
• Differences btwn non-recognition and withdrawal (downgrade) of diplomatic relations.
  
*Rebus Sic Stantibus*—Art. 46 of Vienna Convention—Difficult to decide whether something is a change in a state or a change in govt.

• **De Jure v. De facto** (in control)—very unclear.
  
N. 2, p. 416—Problem—when old govt had committed some crimes—can new govt be bound by this and be responsible for them?
  o Ct said that Malawi had to address wrongs of old govt.
  o DeMarcos leaving the in debts.
  o This problem has come up in post-Apartheid South Africa. (new govt is made up of victims from the old govt—sometimes this leads to symbolic compensation [like naming a road or bridge]).

• Devolution agreements—btwn emerging state and departing colonial govt to honor colonial Ks, etc.

**Church of Cyprus v. Goldberg** (7th Cir., 1991; p. 418)
• Church wanted to get back wks of art stolen by the Turks when they invaded northern Cyprus. The defendant had purchased these works of art under the table and was unwilling to give them back.
• The court awarded the mosaics to Church.
• Context of cultural heritage is a BIG issue in intl law.
• Turks in Northern Cyprus were not allowed to intervene.
• **No legal significance to Oppenheim** deal (“a new state before its recognition cannot claim any right which a member of the family of nations has towards other members”) and no recognition of northern Cypriote govt.

• Sabbatino case—n. 5, p. 427 (Comparing Recognition and Est of Diplomatic Relations)—Courts not closed to Cuba. Tate letter (evidence in case—now this has changed) *Comity of Nations*—used diff contexts (in Cuba→one way—recog. of govt, but no diplomatic relations; here→Greece and Turkey).

• US has now stated that it will no longer recognize govt.
• N. 4, p. 427: Access of Unrecognized States and Govts to US Cts—(Comity is “that reciprocal courtesy which one member of the family of nations owes to the others.”) **No comity was due a foreign govt appearing as a plaintiff in US unless the country is recognized.**
  
1976 Foreign Sovereign Immunities Act—ct doesn’t have to depend on exec.
• If the state dept/justic dept intervenes—ct will take this into acct b/c exec branch and foreign policy.

**Kadic v. Karadzic** (2nd Cir., 1996; p. 428)
• Alien Tort Law. **Victims of Bosnia suing leader of the Bosnian-Serb forces.**
• Holding: **Subject matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state acotr, and that he is not immune from service of process.**
Delta's argument: the state can’t be sued and no state committed his act b/c Srpska not a state.

- **Genocide and War Crimes**—individuals can be liable.
- **Torture and summary execution**—state off. or under color of law only.
- Under intl law a state can be a state for some purposes (genocide) and not for others (assets).
- **For purposes of torts, Srpska is a state.**

**Republic of Croatia, et al. v. GiroCredit Bank A.G. Der Sparkassen** (S CT of Austria, 1997; p. 430)

- Austrian bank was holding assets of the RFYC. Austria followed the rules according to the UN. This was a choice of law issue—domestic or intl?
- Former bank was state property and **SFRY wasn’t the sole successor state.**
- 2 and 4 were excluded b/c no indep. Claim—natl bnks were state property.
- No succession occurred.
- Interplay of Austrian Law, SFRY law and intl law:
  - Austrian law—new states not a successor to SFRY.
- **Question of Recognition**—impt here b/c this is evidence of whether or not new state is created.
- Ct looks at recognition—EU, UN and concludes it is NOT a successor state.
- **When a state breaks up, its assets are allocated**—Intl law says nothing so its contextual in each case so no rules that can be applied in all cases.
- Intl law does require negotiation btwn the parties.
- What does equity mean in this context?
  - Distributive justice—doe you take into acct who is poorer and give them more money.
  - Does it really have any meaning here—maybe procedure here instead of substantive issue. Try to find out what is fair for everyone.
- n. 8, p. 438: new states and customary intl law: based on consent—but they will be judged by this law—raises the pt—what really is a state under intl law? So srpska can be a state for one purpose and not another.
- N. 7, p. 438—devolution agreements.
- Once you go beyond colonial context, how do you deal w/ ethnic, religious, linguistic groups? **Group rights balanced w/ territorial integrity.**

**Self-Determination**

- Very impt—it is still a movement in its definition (amorphous concept) and its scope. What “peoples”/What “autonomy?” Diff people view the concept diff.
- Issues involving:
  - Puerto Rico—reps can’t vote in Congress but they pay taxes.
  - Virgin Islands—they don’t demand their own govt b/c they don’t pay taxes but get benefits and get a delegate in Congress that can’t vote.
  - Gibraltar—former governor of Gibraltar discussing self-determination (self-govt w/ some ties to UK but Spain wants it too)
Corsica—very hot political area (Napoleon was born there—most of the worlds corks). France gives them $, but they want to be Corsican and not French.

Australia—aborigines.

Concept is about grps of people—not individuals--NOT a human rights issue.

The Aaland Islands Question (League of Nations, 1920; p. 439)

- Islanders have more characteristics/affinities to Sweden. Shld self-determination be determined under domestic law in this case? No.
- Finland not really a state at the time.
- Ct says islanders were distinct group.
- Ct relates self-determination concept to traditional notions of sovereignty and careful to stay we are applying this only in THIS situation.
- Can this be applied where a grp is not as distinct as these people, but where they still feel separate from Finland? No.
- They are still a part of Finland today (but given control over investments and real estate). Must be some acquiescence by Aalanders for this to be the case.
- Internal self-determination was achieved—they just didn’t get external.
- N. 4, p. 445—protection of minorities and self-determination. Canadian govt discussed in passing (see below).
- N. 5, 6, p. 445—Autonomy of a group is one possible outcome of applying a right of self-determination. “Internationalized territories” such as Danzig (structure developed there cld be used in Jerusalem—Colin Powell says three religions shld be given access). Look at it.

Reference Re Secession of Quebec (S Ct of Canada, p. 1998)

- Intl law does not give the govt of Quebec the right to effect the secession of Quebec from Canada unilaterally.
- International law expects that this principle will be exercised w/in framewk of existing sovereign states Muth: this policy can’t stop where it is.
- Helsinki Accords are soft law—not a treaty but represent consensus.
- Self-Determination can be applied when:
  - Colonial situation
  - Where people under subjugation.
  - Where neither the first or second issue, but denied participation in their state.
- One of cts arguments is that the aborigines can succeed Quebec wins, but Quebec doesn’t win.
- Uti Posideus—Freeze things where they are at the end of the war. This the policy woodenly applied by in the Burkino Faso case.
- Palau—p. 456, n.3: Palau became independent when its trusteeship dissolved.
- Quebec case shows how concept has been applied in latter 20th century.
- Namibia (p. 456, n. 5) South Africa’s presence there deemed illegal by the UN. All states called on to shut off ties w/ South Africa. What happens when
people do try to exercise self-determination? What if people excluded from this—what happens?

- N. 6, p. 457 Helsinki Accords—dealing w/ people, not as ethnic groups.
- Indigenous Peoples Question—this is a BIG issue—Shld concept of self-determination be applied? How to apply it?

VIII. **International Law and the Use of Force** (pp. 504-538)

- Contradiction in terms—Int’l Law does allow use of force.
- Dispute Settlement, however, is expected to be pursued by peaceful means, if possible. Law of Peace v. Law of War
- **2 ways of settling disputes under the UN Charter:**
  - Chapter 6—Pacific Settlement of Disputes (READ IT!!)
  - Chapter 7—if Ch. 6 doesn’t work—when there is a threat to peace, Br of peace—All sorts of mechanisms for these situations listed there. (Enforcement Action is what this is called)
- **Two situations where force is used:**
  - Self help (reprisals) allowed under certain circumstances. (smaller countries may not have the resources to do this.)
  - Self-defense.

A. **Traditional Laws of War**

**The Nauliaa Case** (Portugal v. Germany; Arbitration 1928; p. 506)

- A translation misunderstanding caused several Germans to be killed by the Portuguese and several others were captured. There was a reprisal for the killings.
- Holding: **The force must be proportional.**
- Proportionality makes sense, but deciding what is proportional is more complex? Germans here, probably went beyond that in this case.
- Difference btwn reprisals and retorsion (see pl. 509, para. 3).
- Question of self-help—p. 509, last para. This is a good example of what a **countermeasure** is—France/US flights case—Arbitration was going on, but can do countermeasures if it’s proportion.. Can downgrade your embassy, etc.

**The Caroline Case** (1841-42; p. 510)

- Canadian Insurrection—rebels got support from US citizens. **Caroline** ship delivered supplied to Navy Island and UK attacked and destroyed the ship and one American died. UK citizen was arrested in NY after the incident.
- US: **This wasn’t self defense—it wasn’t instant, overwhelming, leaving no choice, no means and no moment for deliberation.** (This is the **necessity argument**). UK: Apologizes.

Both the **Nauliaa** and **Caroline**:

- Why not go to arbitration?
  - Caroline: maybe special relationship btwn US and UK (even tho Cayuga Indians went to this)—this is a bilateral exchange—can
international law be created this way? No, but they are attempting to articulate what is already there—and since then there has been acquiescence in the international community on this.

- Principles raised by these two cases
  - **Principle of proportionality.** Would going after Al Queda camps in other countries be a part of this under the Nauliaa case?
  - **Principle of necessity.**

- Pg. 512, n.2—The Caroline rule isn’t applicable to 21st century (says student) Does this rule apply today? It has been established that there was a meeting in the Nauliaa case before the reprisal occurred—would this be enough to justify the US v. Iraq (evidence that Iraq is producing weapons of mass destruction? 
  **Muth is trying to get at how Caroline operates today in a world w/ nuclear weapons—under what circumstances—very much an impt part of this chapter w/ today.**

- **Reprisals**—the attack is already over usu and w/ self defense it is supposed to be continuing—the problem is use of the term “armed attack” in article 51?
  - **Other forms of attack**—what about these (such as economic and electronic methods [the radio station from Miami broadcasting to Cuba saying to rebel]) These are certainly a hostile acts—but not armed. So how shld the other countries respond? Is there some self-defense there? The scheme breaks down in these situations—esp. w/ nuclear weapons—no way to effectively respond once it is launched. So if there is evidence of an imminent attack—then it is ok to attack if proportional (for ex: Entebbe hijacking case—most people agree this deal was self-defense and proportional)

- **Today the attack will likely be finished before response occurs, but still self-defense.**

**B. Article 2(4) and the Use of Force by States:**

- Look at the language of **Article 2(4):**
  - You have to interpret it differently today—non-state actors ARE bound (says Muth). This is a principle of custom of int'l law—this isn’t just based on the charter—see the Nicaragua case.
  - Use of force against the territorial integrity or political independence of any state—the suggestion is that for this to be proper it must threaten the political indep or territorial integrity. Probably what they had in mind was to move this from individ decision making to making determinations of force the job of the United Nations.

- **Article 51:**
  - Talks of inherent right of individ or collective self-defense. This is a function of sovereignty. The pwrs are there b/c the US is a country.

*Henkin* and *Reisman* articles (p. 513, 520 respectively).

- Debate is a bit outdated b/c of no cold war.
- Henkin is very to the left and Reisman is just the opposite.
• **Muth finds Henkin views more persuasive personally.**

• **Henkin:**
  - Use of force in only very limited circumstances—one universally accepted, he says, is intervention for humanitarian reasons.
  - Very much concerned about nuclear weapons.
  - ICJ accepts that there may be cases (p. 524) where in fact—in n. 3—nuclear weapons could be used in “extreme circumstances of self-defense.” (Muth can’t see how this would ever be plausible)
  - Thinks promote peace should be the paramount principle of int'l relations.
  - He talks about use of force—erga omnes.??
  - He sees only a narrow area where force is allowed—collective/individual self-defense. Henkin would probably accept the Afghanistan situation as ok.
  - Chapter 7 of the Charter—enforcement action—assuming this is arrived at in a proper way—this would be ok (but in Iraq case this has been questioned).
  - Is a good legal policy to go beyond what Henkin accepts?

• **Reisman:**
  - He is doesn’t like black letter idea of no use of force no matter what.
  - He sees international law as a system of authorized coercion.
  - When he talks about self-determination—Muth says you must be careful of who is inviting you in these situations.
  - Idi Amin Uganda situation—see p. 521—people took over after this murdered even more people. Reisman thinks this was good thing—but Muth is not so sure! It killed the economy, e.g.
  - He criticized the assumptions under a stiff reading of Articles of the UN Charter.

Which of the two has a better argument?

**Nicaragua Case** (ICJ, 1986, p. 526)

• **US and Nicaragua**—US gave arms to rebels and blew things up itself.

• **Court’s** treatment of the different concepts of “armed attack” and “self-defense” is what is important in this case.

• Very conservative and rule-oriented approach—not a policy discussion.

• **Armed Attack**
  - US reservation—excepted cases w/ multilateral treaty interps—ct couldn’t look at the UN charter use of force issues, but could look on customary international law. Ct came up w/ the same answer.

• The resolutions show practice, but opinio juris here says the opposite?

• Three imp't parties: Nicaragua, US, and El Salvador.

• Ct says **armed attack** is: para. 195 on p. 530
  - Armed attack isn’t sending logistical support (but these still may be problematic and you will be able only to do countermeasures)
  - **Armed attack is sending people to carry out acts of armed force.** (This includes using planes as weapons, biological weapons)
  - Ct concludes this definition is part of international law—
- Don’t be carried away by this opinion b/c ICJ not binding except to parties.
- This case shld have gone to arbitration.
- Ct’s opinion is just one side of a debate.

- **Collective Self-Defense:**
  - US argues that under customary and treaties it was entitled to come to the aid of El Salvador.
  - Court takes a **narrow approach** to this.
    - This was way after the fact of the actual attack on El Salvador.
    - Overly technical point—UN says you must inform security council immediately and US did not.
  - **Collective self-defense-under what circumstances does it operate?**
    - Armed attack (ct narrowly defines)
    - **Only the country affected has the right to initiate and must ask the others to come to its assistance.** (narrow approach)
    - W/ El Salvador it was only a matter of time.
    - Art 51 does not make it clear that the affected countries must go and ask for assistance. P. 513—
      - If the threat is against one country but is a threat to intl peace, then other state’s could come to the aid that country w/o doing all that other stuff.
  - Was ct being too cautious? Is this correct? Barcelona Traction is another case or the Iran Case (Diplomatic) **This is again a country trying to make a political point rather than to get the dispute settled.**
  - Court takes a narrow approach to this saying no force legally except in self-defense. Ct says countermeasures wld be legal.
  - What about human rights? Is force justified? Was the court right? Was Reisman entirely wrong? Reisman may have a point in extreme situations.
  - Para. 199, p. 530—rules here—ct implying that custom has emerged on the basis of resolutions. When does the dichotomy btwn UN resolutions and what states actually do—then state practice cannot be the thing. You end up talking about customary law w/o state practice—and this is not necessarily appropriate. Must be a higher norm, more important norm. para. 190, p. 538—court is concerned w/ this question—has it attained jus cogens. Ct doesn’t take a position on this. If it is, you don’t have to worry about state practice. Ct seems to say that it recognizes some people see this as important, but the ct doesn’t want to go that far.
  - Has the use of force attained the status of jus cogens or not? Maybe intl law is moving in this direction or maybe not? **Use of Force will never become normative on the basis of state practice b/c of the fact that states will always use it—it would have to become normative in another way—jus cogens or erga omnes.**
  - If you have real issues—the ICJ may not be the best forum—maybe arbitration is better.
Congo case in note 1, p. 536—not all of these have been as dramatic as one—Congo hasn’t been resolved. Congo ambassador to Belgium was arrested and charged w/ war crimes and Congo suing Belgium on this.

Exam: three questions in three hours—involves what we have covered. One will probably involve a problem related to actual case. One will involve a statement upon which you will be asked to comment—to get a sense of the understanding of a concept we have studied—especially borderline issues. Make a choice and demonstrate what you think. You might be asked to comment on a particular case but requiring you to go beyond what we discussed in class—read questions and cases very carefully. Can e-mail if you have questions. Or just call. Open book is fine!! Can bring anything except library stuff.

Afghanistan/September 11 stuff:

- Some extreme cases where international law isn’t helpful (such as 9/11)
- Use of Force issue: Art. 51—self-defense is not applicable under article 51. Although possibly under reprisal law.
- Harboring Bin Ladin is not a violation of international law except if he is allowed to use the territory to plan attacks.
- US using Article 51 to justify strikes on Afghanistan—was 9/11 an “armed attack?”
- Perfectly w/in federal law to seize assets of Bin Ladin people. Trade w/ Enemy Act in WWI is still there and until recently US w/ natl emergency.
- US didn’t use mediation in Afghanistan due to public outcry.
- Afghanistan is use of force—Allies have bi-passed the UN and gone directly to action, but this is self-defense under Article 51 (but UN does expect you shld come to Security Council—except maybe in situations of extreme danger and terrorism might fall in under this).
- Afghanistan isn’t a reprisal b/c the Taliban didn’t carry out the attacks so it can’t be described as such.
- Article on p. 29 of newest US News and World Report on Al Queda activities.
- You can offer asylum to someone but you cannot let that person/group launch attacks from your country (think osama bin ladin and al queda)—this is part of state responsibility.