

Reading Guide for International Law Unit III

Spring 2008

Prepared by Jennifer Hainsfurther and Doreen Lustig
(Building on work by Erin Delaney and
Odette Lienau)

This reading guide is designed to give you a few principles that you should think about when you read the material. It should highlight points that Professor Kingsbury may go over in class that are not necessarily self-apparent from the reading. By thinking through these topics while reading, you should be able to get more out of the material and the in-class discussion.

Unit III

The Sources of International Law

The generally recognized formal sources of international law are identified in Article 38 of the Statute of the International Court of Justice. What theory of law is embedded in Article 38 of the ICJ statute? In what way is it a feature of the foreign office model? What actors in the international field are empowered by it? What contemporary features of international law today (the Global Governance model) challenge the hierarchical relations between the sources? Article 38 was drafted to govern the work of the Permanent Court of International Justice in the 1920s. Does the reality of international legal tribunals, as dealt with in Unit II, problematize the idea of judicial decisions as subsidiary means? Who and what is missing from the statute? More generally, does the idea of 'sources' still capture international law as it is practiced today?

Customary International Law

The doctrine of customary rules in international law consists of two combined elements: an established, widespread, and consistent *practice* on the part of states and a psychological element known as the *opinio juris*. As you read the cases, try to be aware of the different methodologies used to determine the two elements. What is your general reaction to the idea of *customary* international law? How closely does it accord with the basic rule of traditional international law as a law that depends on state consent? What are the ramifications of customary international law for countries that haven't been around long enough to contribute to the customary practice? Studying the doctrine of customary rules in the context of the Law of the Sea provides an opportunity to see the tensions between treaty law and custom. While reading the materials try to be sensitive to these tensions: is the doctrine of customary rule a residual element of a previous era or is it still significant in the world of international law today? Could you detect a push towards 'codification'? Is this tendency only evident in the move towards treaties or is it also present in the changing approaches towards customary rules?

In *Germany v. Denmark*, what is the Court's approach to specially affected states? Try and pay close attention to the relationship between treaties and custom which govern similar issues in the context of the Law of the Sea. What are the implications of the fact that a treaty – the 1958 Geneva Convention on the Continental Shelf – regulates some of the issues dealt with

in this case? How could a rule which was conventional in its origin become binding on parties outside the treaty? What are the elements the Court considers in its analysis of this question? What are the implications of the faculty to make reservations to the Article in question. Pay close attention to the definition of the requirement for state practice (paragraph #74, "extensive and virtually uniform") and that of *opinio juris* (e.g. Paragraph #77, "the belief that this practice is rendered obligatory by the existence of a rule of law requiring it...a subjective element..."). The Court concludes its decision by setting "equitable principles": what factors should be taken into account? What approach to justice is embedded in these principles? Does the Court subject its own definition of the principles to extensive practice and *opinio juris*?

Look at the dissenting opinion of Judge Lachs: What policy implications, especially for developing countries, emanate from his opinion when contrasted with the majority's articulation of the standard for custom? Specifically, Judge Lachs would use a different standard when searching for custom. If his view prevails, what would it mean in the grand scheme of international relations? What does going to the ICJ mean for these two countries?

In *UK v. Norway*, how does opposability give a first mover advantage? What would the result have been if France first showed concern about Norway's baselines? What is the scope for states to drive the creation of law? Is customary international law a way for the global community to get around the fact that there is no global legislature? Should 'majority' rule be the driving principle behind recognizing custom? (See Lachs dissent.) Note the tension between international law based on bilaterality and opposability which is general, based upon a global regime (community/legislative model).

On the topic of developing countries and international law, can you think of the implications for a developing country of a strict persistent objector requirement versus a looser requirement? Could a poor, yet interested, state send a ship into seas which are distant from its territory? Should it matter that the state cannot, at least this day, object via practice? More generally, the case illuminates how the formation of customary rules poses a challenge to the administration of power in international relations. How does the Court address this challenge?

Review the *LOS Convention Sea Claims Structure* (Chart 9-1 in the materials). How does this structure balance the tensions between the principle of sovereignty and other principles such as freedom of navigation, fishing or the principle of the rule of law? How do these tensions play out in the context of *international straits*; how were they dealt in the *Black Sea Affair*? How does the centrality of *the principle of reciprocity* influence the form of regulation chosen by states in this field? How does the rationale of the EEZ address the *tragedy of the commons*? Reading the controversy between Japan and New Zealand try to think how does the persistent objector become a bargaining chip in this context? Pay attention to the concepts of jurisdiction – who has jurisdiction where over what – on a ship (exclusive flag state jurisdiction – unless treaties, see proliferation security initiative), on the sea, 12 miles out? Continental shelf? EEZ? These are black letter law type issues that have a very good chance of being on the exam.

Keep *Erga Omnes* and *Jus Cogens* separate. *Erga Omnes* is a duty or obligation owed to all members of the international community – it is a relation between *actors*, while a norm that is *Jus Cogens* is a meta-norm (e.g. the prohibition against genocide) – it marks a hierarchical relationship between different *norms*. These may overlap, but are conceptually different. How are these ‘general principles of law’ justified? Can they be justified on consent grounds? Why would global governance organizations have to turn to these principles more often? How does the Foreign Office model predict states will react to general principles of law?

Governance of Areas beyond National Jurisdiction: From Custom to Coordination

The Commission on the Limits of the Continental Shelf

The establishment of the Commission on the Limits of the Continental Shelf under the LOS convention (hereinafter: the Commission) was aimed to facilitate its implementation. While relying upon the criteria and methodology defined in the Convention, the work of the Commission requires scientific interpretation and expertise in areas that aren't legal; the scientific and Technical Guidelines adopted in 1999 are of highly technical nature. Review Arts. 76-77 of the LOS Convention (especially Art. 76; Annex II): who are the members of the Commission? How are they elected? What are the Commission's functions? Who could participate in the decision-making? What are the implications of the Commission's recommendations? To what extent is it transparent? What are the tensions embedded in this regime between the Foreign Office model and the Global Governance model? Could we extend customary international law status to the role and position of the Commission? Could a non-party to the LOS convention utilize the Commission? How do you think article 76(8) should be interpreted: Should the capacity of boundary making be a sole prerogative of the state, in which case the Commission role is to facilitate its decision, or should the Commission be allowed further interference? What does "final and binding" mean?; to whom are its decisions binding?

The Economist article on the Arctic illuminates further the kind of 'bargain' or the political choices made in this regulation. How does the case on the *Humane Society International Inc. v. Kyodo Senpaku Kaisha* problematize some of its conclusions? What are the Japanese claims against the jurisdiction of the Australian Federal Court? How does the discussion over the jurisdiction of the Court illustrate the disaggregated state? Pay close attention to the identity of the actors involved (Kyodo, a private company incorporated in Japan, the Humane Society International Inc., the Australian and Japanese governments etc.) and the course of the procedures (e.g. the attempt to use diplomatic channels). What are the procedural and practical challenges the Court faces? Do you find its solutions satisfying? How would you describe the Federal Court's involvement, is it engaging in dispute settlement or adjudication?

Resources beyond National Jurisdiction

Skim over the materials on *Marine Biodiversity* (B.2.). This sub-section deals with the issue of *marine biodiversity beyond national jurisdiction*. While the LOS convention establishes the legal framework for all activities in the oceans it doesn't specifically address issues relating to biodiversity. The discussion between the different bodies that is covered in this subsection captures current attempts at addressing the need to establish a legal framework to engage with

this issue. Thinking more generally on resources beyond national jurisdiction, try to pay attention to the identity of the actors involved in the regulation of the set of issues under this heading. What particular challenges are at stake? How does the institutionalism logic address the problems of data gathering and other coordination challenges? What would be the realist approach to these issues? What would be the arguments for and against an ex ante v. ex post policy? What are the considerations in favor of a universal framework and why would some actors favor a regional or a sectoral one?

Using the logics of institutionalism and realism try to analyze the battle over the regulation of *Genetic Resources* between developed and developing countries: Why do developing countries favor an international legally binding regime and why are developed countries opposed to it? What is the industry's position? Try to think which form of global governance (CBD, WTO, WIPO, A regime under UNCLOS, regional regimes etc.) is potentially more favorable to which actor and why? Whose interests seem to be disregarded? How do these different positions play out in the working paper of the EU and India's statement?

Climate Change Regime

How does the reality of climate change correspond with the distribution of wealth in the world? Does the Kyoto Protocol address these inequalities? In the discussion on Genetic Resources developing countries prefer an international binding regime. Conversely, in the context of climate change, the Indian government chose a voluntary regime to decarbonize its economy. From the realist perspective of an anarchical world, what rational interest based calculation would support its policy choices? Analyzing India's behavior as part of a greater prisoners' dilemma – why has India abstained from 'locking in' its policies in a global institutionalized regime? Review the distinctive features of the Indian CDM (The Clean Development Mechanism) experience in light of the realist/institutionalist logics (unilateral, small, voluntary; who are the stakeholders or interests represented in its DNA etc.). Would you refer to the Indian policy choices as based upon the Foreign Office model or the Global Governance one?

More generally, the discussion in this section (II) raises difficult questions on how the global governance model allocates power and representation in an international system characterized by extreme imbalances. Are environmental policies an attempt of stronger countries to use international law to shape the world according to their interests? Could the Indian approach be perceived as part of its struggle to maintain relevance in a highly competitive world? What would be the possible critique to this approach?