Advanced International Law (Fall 2013)

UNIT 1 READING GUIDE

(Based on work by Jennifer Hainsfurther, Doreen Lustig, Erin Delaney and Odette Lienau.)

Unit 1 provides an introduction to the primary theoretical frameworks through which you will study international law in this course, and then uses US experience under the Vienna Convention on Consular Relations as a case study with which to illustrate and explore these frameworks.

The material in section I (**Theoretical Background**) introduces two competing models of international law, referred to as the "foreign office model" and the "global governance model", and gives some background on the different "logics" that often dominate thinking about international law. Although these "logics" have often been associated with particular categories of issues (realism for military and security issues; institutionalism for markets, commerce and trade; and cosmopolitanism for moral issues, particularly global justice and human rights), they also purport to offer a perspective on international law as a whole.

The extracts from **Chimni** offer a critical perspective on the international order that brings out many of the key themes of the "global governance" model (the increasing role of international institutions and non-state actors such as corporations and international human rights organizations; the power inequalities between states and the increasingly intrusive and prescriptive nature of international legal regimes; and the ambitious, if conflicting, global aspirations in play), while also developing a sharp focus on the role of economic structures in these features of governance. The background reading by **Schreuer** goes into more detail on statist aspects of the "foreign office" model, and the comments by **Owada** present one variant of the "global aspirations" at stake in the "global governance" model.

The extracts from **Krasner, Keohane & Martin**, and **Held** are examples of arguments made from within the three different "logics" brought to bear on international law: realism, institutionalism, and cosmopolitanism. As you will see, some of these pieces are very much of their time. As you read them, you might reflect on whether more recent developments in international law and global politics suggest additional insights or limitations in relation to the positions taken.

In reading the Section I materials, you might consider the following general questions:

- Which model (foreign office or global governance) more accurately reflects the world, or particular aspects of international law, today? Could we trace a struggle between agents who are advocating for the continuation of the foreign office model and those who seem to acknowledge that a "new world order" has arrived?

Section II (**Applying the Model: The Vienna Convention on Consular Relations**) includes cases and other documents on US compliance with art 36 of the Vienna Convention.

It may help to consider the Vienna Convention and the cases in this section through the analytic lens of game theory, in particular the idea of international law as a "two-level game". An international actor such as a state must be sensitive to two levels of pressure: domestic and international. These two levels interact in complex ways, and legal and political exigencies at one level can limit an actor's freedom at the other. For example, in some of these cases, the domestic limitations of federalism negatively influence the US' ability to meet its international obligations (this is just one example of how the "two-level game" plays out – in other contexts, a state's position in international negotiations may be strengthened by domestic constraints).

As you read the Section II materials, you might bear in mind the following points and questions:

- Which model (foreign office or global governance) better captures the dynamics of the Vienna Convention cases, or particular aspects of these cases?
- How would you categorize the issues dealt with in these cases (military, markets, morals)? Does any one "logic" explain the judicial analysis and practical consequences of the decisions, or could these cases be approached through more than one of the "logics"? (One point of interest is the tension between the diplomatic protection framework, which seems to embody the foreign office model, and an individual/human rights framework that the ICJ tiptoes around in *Avena*.)
- Notice the interaction between domestic and international law. What role does US constitutional law play in international law, and vice versa? What role should separation of powers and federal concerns play in the interpretation of and acceptance of international law, particularly a treaty regime which a state has voluntarily joined? Does it matter if we are confident that we have a higher level of "meaningful" rights protection here in the US than would be provided by international law?
- Does international law rely on domestic actors for enforcement? Contrast the actions of the executive branch in the Paraguay cases versus the Mexico ones.
- How does the Supreme Court see itself in relation to the ICJ? How might the Supreme Court's attitude to international legal tribunals affect its decisions?
- In the *Medellín* oral argument and judgment, we see the disaggregated state in the extreme: the state (i.e. the US) clearly does not function as a unitary actor. Who is the state? Is it the executive branch? Texas? The Supreme Court? Where does the ICJ opinion fit in?
- Notice the different institutions involved in these cases: Virginia/Texas, the state courts, the federal executive branch, the ICJ, and the Supreme Court. Who has the better claim to determine what the law is? Does it matter? Should it matter? After *Avena*, when the President says "the United States will discharge its international obligations under the decision of the [ICJ] by having state courts give effect to the decision in accordance with general principles of comity …", does this mean he does not view the Vienna Convention as creating legally binding obligations?
- Consider the Supreme Court's decision on the application for a stay in the *Leal* case, the Consular Notification Compliance Bill 2011 and testimony provided to the Senate Judiciary Committee in support of this bill. What models and logics of international law are at play in this new legislative effort to secure compliance with the Vienna Convention?

Section III (Applying the Model: Kiobel v. Royal Dutch Petroleum) includes a recent decision of the Supreme Court concerning the application of the Alien Tort Statute (ATS), a federal law that grants district courts original jurisdiction over torts committed by aliens in violation of the law of nations. As you read the case, note how the Supreme Court understands the general objectives of the ATS and how it explains the need to restrict its extraterritorial reach. What model of international law does the court's reasoning reflect? To what extent does the concurring opinion of Judge Breyer (joined by Judges Ginsburg, Sotomayor and Kagan), with its emphasis on the ATS's applicability to "modern pirates", represent a different approach to international law? Another issue that you may consider is the court's finding that in view of the defendant corporations' weak ties to the United States and the fact that they were only indirectly involved in human rights violations committed by the Nigerian Government, the presumption against extraterritorial jurisdiction is not refuted in this case. How can this conclusion affect the behavior of transnational corporations in the future? Try to analyze it from markets as well as morals logics.

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