SYLLABUS

IINTRODUCTION TO INTERNATIONAL LAW (BLHV 243 01)
Spring Semester 2013
Wednesdays, 5:20 PM-7:50 PM

INSTRUCTOR:
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COURSE DESCRIPTION:

The course is designed to give students an introduction to the sources of international law – and the mechanisms for enforcing it. It will address the theoretical shift away from "natural-law theory" as developed in the seventeenth century to the "empirical approach" to international law - which supplanted natural-law theory in the nineteenth century and continues to provide the foundation of international law in the modern era. The readings and class-discussion will explore various contemporary theories on the process by which international custom and practice become sources of binding law – including application of the concept of "ius cogens" to human rights. The course also will examine the structure of the United Nations - with particular attention to the respective roles of the Security Council, the General Assembly, the Secretariat, and the International Court of Justice. Finally, utilizing case-studies, the course will examine how international law works in practice – focusing on jurisdiction over global commons and regulation of international commerce.

TEXTS: REQUIRED BOOKS:

INTERNATIONAL LAW ANTHOLOGY (Anthony D'Amato editor, Cincinnati: Anderson Publishing Company, 1994) [ISBN: 087084-360-5]

LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY (Simon Chesterton, Thomas M. Franck & David M. Malone editors, first edition, New York: Oxford University Press, 2008) [ISBN 978-0-19-530843-3]

A large portion of the required readings for the course is contained in the Anthology and in the casebook; the remainder (treaties, case law, scholarly articles, and excerpts from

treatises on political theory) will be available through the Reserve Department of the Lauinger Library and online.

LEARNING OUTCOMES:

The purpose of this course is:

1) to give students an introduction to the legal and political theory underlying modern international law by tracing its origins from the early modern period (i.e. the seventeenth century) through the drafting of the Charter of the United Nations;
2) to give students a basic understanding of the sources of international law – including bilateral agreements, multilateral agreements, and international custom and practice, and the concept of "jus cogens";
3) to allow students to develop further their skills in analytical reasoning, research, and writing through completion of original research papers on a topics of their own choosing in the field of international law.

GRADING:

The grade for the course will be based upon a research paper and a take-home examination – both of which are due at the end of the semester. The paper and the examination will each count 50% toward the grade for the class. A deduction of one full grade (e.g. from an "A" to a "B") will be made for work that is not completed on time – unless the reason for delay is documented and deemed valid by University or BALS policies.

International law is by nature controversial. Each student will bring her/his own individual values and political beliefs to the class, and each should feel free to express those values and beliefs in her/his work. Grading for the examination will be based upon the organization of the arguments and the clarity of the presentation for each of the essay-questions. An "A" examination should demonstrate effective use of the readings assigned throughout the semester, insightful analysis, and analytical reasoning in the form of "analogy and distinction" as generally practiced in legal writing. To receive an "A" for the research paper, a student must present a clear thesis and provide creative insight – supported by effective use of primary and secondary sources properly cited in footnotes. Letter grades will correspond to the following numerical percentages: A: 100%-94%; A-:93%-90%; B+:89%-87%; B:86%-83%; B-:82%-80%; C+:79%-77%; C:76%-73%; C-:72%-70%; D+:69%-67%; D: 66%-60%; F: Below 60%.

Students will have one week to complete the take-home examination; the maximum page-limit for the examination is 21 double-spaced pages. The examination will be available on the first day of the exam period [May 3].

With regard to the research paper, students are free to select their own topics in the field of international law relating to dispute resolution. The paper can be in the form of a traditional term paper – or written as a "comment" or "case-note" of the type students submit to law reviews. Case-notes may examine decisions of U.S. federal courts addressing international law, decisions of the International Court of Justice at The Hague, or other decisions rendered by other international tribunals. (I will describe the formats

for both "comments" and "case-notes" in class.) The deadlines are as follows: A one-paragraph description of the paper topic is due by Week/Session 6 [February 15]. An outline of the research paper is due by Week/Session 10 [March 22]. Completing these two assignments will count toward the final grade on the paper, though both the paper-topic and the outline will be graded individually on a pass/fail basis. The paper is due one week after the last day on which the class meets [April 29]. Any student is free to change topics after submitting her/his paper topic in Week Six [February 15] – so long as she/he notifies me and submits a new one-paragraph summary.

My office hours are 2:30 PM to 4:00 PM on Wednesdays. If you are not available to meet me then, please let me know before or after class (or by e-mail), and we can arrange a mutually convenient time to talk about paper-topics or the class-readings.

While the grade for the class will be determined by the examination and the paper, I will take participation in class-discussion into consideration in raising students' grades.

CLASS POLICIES:

Students are expected to attend class. Please notify me in writing or by e-mail in the event of illness or family emergency – either prior to class or at the earliest opportunity practical after the class has met for the week. Students also should notify me in the event that they need to be absent from class for religious observances. If absence from class for religious observances occurs on one of the days on which a written assignment is due, the student should notify me in advance so that we can arrange another time for delivering the written assignment. I am free to talk with students during my office hours (or by telephone at a pre-arranged time for a teleconference) regarding a lecture missed during an absence for religious observances, illness, or family emergency. Please note that pursuant to BALS program policy, students who miss three classes will receive failing grades for the course.

Students requiring an accommodation for a disability pursuant to the Americans with Disabilities Act of 1990, the Federal Rehabilitation Act of 1973, applicable local law, or standing University policy must contact the Academic Resource Center at (202) 687-8354 before the start of classes to establish eligibility and to coordinate reasonable accommodations. The Academic Resource Center is located in Leavey Center, Suite 335.

GEORGETOWN HONOR SYSTEM:

As with all course-work at this institution, the Georgetown University Honor Code and Honor System apply. The Honor Code Pledge is as follows:

"In pursuit of the high ideals and rigorous standards of academic life, I commit myself to respect and uphold the Georgetown University Honor System: To be honest in any

academic endeavor, and To conduct myself honorably, as a responsible member of the Georgetown community, as we live and work together."

Students agree that by taking this course all required papers may be submitted to Safe-Assign – which is available through Blackboard - for detection of plagiarism. The penalty for plagiarism will be failure of the assignment.

I. HISTORY OF SUBSTANTIVE INTERNATIONAL LAW

Working from ancient sources ranging from Cicero to the Corpus Juris Civilis, political theorists of early modern Europe fashioned a model of international law grounded in the law of nature. While this model may have reached its apex in the works of such scholars as Pufendorf and Barbeyrac, both Grotius and Vattel (though not yet rejecting the law of nature as the basis for the law of nations) addressed the concept of international law grounded in both multilateral agreements and the conduct of nations. As early as the seventeenth century, Sir Richard Zouche eschewed natural-law theory entirely and looked toward empirical evidence for the law of nations, and by the nineteenth century, the empirical approach began to supplant natural-law theory in defining international law. The first four sessions trace the history of international law from its origins the natural-law theory of early modern Europe through the rise in the nineteenth century of the "positivist" approach – grounded in state-practice.

WEEK 1 [January 15]: INTRODUCTION

This introductory session examines the development of international law from the early modern period through the present and examines generally how international law resembles – and differs from – domestic law.

Readings:

International Law Anthology (Anthony D'Amato editor, Cincinnati: Anderson Publishing Company, 1994), Chapter 3: "Is International Law "Law"? [pages 37-51]; Chapter 2: History of the Law of Nations", Subsections A and B [pages 11-36]

WEEK 2 [January 22]: THE LAW OF NATIONS IN EARLY MODERN EUROPE

Drawing inspiration from ancient sources, ranging from Cicero to Gaius, early modern writers on the law of nations often equated it with the Roman "ius gentium" (or "law of peoples") –which by later Roman practice had come to be regarded as grounded in the "ius naturale" (or law of nature). This concept of international law encompassed both law governing relations between sovereign states and law governing private transactions that crossed national boundaries. There were, however some dissenting voices. Alberico Gentili, Sir Richard Zouche, and Cornelius von Bynkershoek sought to derive the law of nations from empirical observation of the actual behavior of sovereign states. Staking out

a middle ground between these extremes were the "eclectics', such as Hugo Grotius and Emmerich de Vattel, who retained a belief in the law of nature but allowed for the creation of some binding international law through the custom and practice of nations. This session examines the impact of these three schools of thought on the development of modern international law.

Readings:

International Law Anthology (Anthony D'Amato editor, Cincinnati: Anderson Publishing Company, 1994), Chapter 2: "History of the Law of Nations", Subsection C [pages 25-36]

Hersch Lauterpacht, The Grotian Tradition in International Law, 23 British Yearbook of International Law 1-53 (1946) [PDF]

Edwin D. Dickinson, Changing Concepts and the Doctrine of Incorporation, 26 American Journal of International Law 239-260 (1932) [PDF]

Thomas Hobbes, De Cive, Entitled in the first Edition "Elementorum Philosophiae Sectio Tertia De Cive" and in Later Editions"Elementa Philosophica De Cive (2 vols., Howard Warrener editor, Oxford: The Clarendon Press, 1983), Vol. 2, Chapter II, Sec. 1 [2 pages] [PDF]

Emmerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns (1758 Edition, Charles G. Fenwick translator, Washington, D.C.: Carnegie Institute of Washington, 1916), Preface at pages 3a-13a; Introduction at pages 3-9 [PDF]

WEEK 3 [January 29]: EMERGING AMERICAN THEORIES OF THE LAW OF NATIONS

While heavily influenced by their European precursors and contemporaries, eighteenth-century Americans made significant contributions to the development of the foundations of modern international law. During the Revolution, natural-law theory dominated American thought, in part because it bolstered American arguments that some acts of Parliament violated the law of nature – thus providing the revolutionaries with a moral justification for rebellion. After gaining independence, the political need for appeal to a higher source of immutable law vanished, and American writers were willing to look past "ius naturale" for a new foundation for international law. Alexander Hamilton wrote of the "modern law of nations" – grounded in the custom and practice of sovereign states. Thomas Paine – the author of "Common Sense" and "The Crisis" during the Revolutionary War – ultimately rejected not only the law of nature as the foundation of international law, but also the notion that any international law could exist in the absence of a treaty. While James Wilson retained a belief in the relevance of natural law, he not only accepted custom and practice as creating international law, but also maintained that such empirically adduced rules could bind nations that neither participated nor assented in a given practice or custom.

Readings:

Thomas Paine, Compact Maritime (Washington, D.C.: Samuel Harrison Smith, 1801) [24 pages] [PDF]

James Wilson, The Works of James Wilson (2 vols., Robert Green McCloskey ed., Cambridge, Massachusetts: The Belknap Press of Harvard University, 1967), Vol. I , "The Law of Nature" at pages126-147; "The Law of Nations" at pages 148-167 [PDF]

Alexander Hamilton [writing as "Camillus"], "To Defense No. XX", in The Papers of Alexander Hamilton (27 vols., Harold C. Styrett editor, New York: Columbia University Press, 1973), Vol. XIX at pages 329-347 [PDF]

Steven L. Snell, "The Law of Nations in Late Eighteenth-Century America", in Courts of Admiralty and the Common Law: Origins of the American Experiment in Concurrent Jurisdiction (Durham: Carolina Academic Press, 2007), Chapter IV: pages 332-359 [PDF]

WEEK 4 [February 1]: POSITIVIST THEORIES OF INTERNATIONAL LAW

By the end of the nineteenth century, positivism had replaced natural-law theory as the dominant paradigm for analyzing international law. Grounded in empiricism and characterized by its optimistic view of the potential for progress, the aim of positivism was to create well-defined, binding rules of international law through codification – with a heavy emphasis on multilateral treaties. The positivists admitted the legal force of custom, but were careful to distinguish it from mere "usage". More importantly, for positivists international custom was binding only upon those nations among which the custom was practiced. While positivism did place more emphasis on the real-world interactions of sovereign states than had much natural-law theory, its greatest challenge was to provide an adequate explanation of how custom changes over time and at what point such custom becomes enforceable as law.

{PLEASE NOTE: This session will meet in the Library, and will include a lecture and demonstrations in research-techniques for international law.}

Readings:

Lassa Oppenheim, The Science of International Law: Its Task and Method", 2 A.J.I.L. 313-356 (1908) [PDF]

II. SOURCES OF MODERN SUBSTANTIVE INTERNATIONAL LAW

WEEK 5 [February 8]: CUSTOMARY INTERNATIONAL LAW

Article 38 of the Statute of the International Court of Justice empowers the Court to decide cases "in accordance with…international customs as evidence of a general

practice accepted as law…the general principles of law recognized by civilized nations...[and] judicial decisions and the teachings of the most highly qualified publicists of the various nations…" By what method is the Court to ascertain which international customs qualify as binding law, and how is the Court to construe the precise parameters of substantive rules of customary law? By what means is the Court to identify and apply "general principles of law recognized by civilized nations"? What weight should the Court accord case-law and the writings of "most highly qualified publicists" in rendering its decisions? These readings examine the two components of customary international law – "opinio juris" and "state-practice" – and critique the traditional modern interpretation of the terms.

Readings:

International Law Anthology (Anthony D'Amato editor, Cincinnati: Anderson Publishing Company, 1994), Chapter 4: "Sources of General International Law", pages 51-73; 86-116

The Lotus Case, P.C.I.J. Ser. A, No. 10 (1927) [PDF]

WEEK 6 [February 15]: THE LAW OF TREATIES

This session will address the interpretation of treaties – and the effect of a sovereign state's reservation on its status as a party to a treaty.

Readings:

International Law Anthology (Anthony D'Amato editor, Cincinnati: Anderson Publishing Company, 1994), Chapter 5, pages 121-139

The Vienna Convention on the Law of Treaties (1968) [PDF]

WEEK 7 [February 22]: THE CONCEPT OF "JUS COGENS" AND HUMAN RIGHTS

While the Statute of the International Court of Justice identifies as binding international law "general principles of law recognized by civilized nations", it stops short of declaring any set of these general principles to be capable of overriding treaty-obligations. Article 53 of the Vienna Convention on Law of Treaties, however, declares void any term in a treaty that violates a "peremptory norm of general international law". The Vienna Convention codifies an older concept – that of "jus cogens" – which maintains that there are some rules of customary international law that cannot be abrogated by treaty and which can be binding on a nation against its will. "Jus cogens" squared easily with a theory of the law of nations grounded in natural law, but its status in positivist theories of international law is more nebulous. Modern proponents generally apply the principle of "jus cogens" in the field of international human rights. This session will examine both expansive and restrictive constructions of the concept of "jus cogens".

Readings:

Karen Parker & Lyn Beth Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 Hastings International & Comparative Law Review 411 (1988-89)

Law and Practice of the United Nations: Documents and Commentary (Simon Chesterton, Thomas M. Franck & David M. Malone editors, New York: Oxford University Press, 2008), Chapter 13: Human Rights, pages 448-479

International Law Anthology (Anthony D'Amato editor, Cincinnati: Anderson Publishing Company, 1994), Chapter 4, pages 116-119

The Vienna Convention on the Law of Treaties (1968), Articles 53, 64 & 69-72 [PDF]

III. THE UNITED NATIONS

These two sessions examine the structure of the United Nations – and its power for resolving disputes among nations. This segment of the course will examine the roles and powers of the Secretariat, the Security Council, the General Assembly, and the International Court of Justice - comparing and contrasting the roles of each in preventing and/or resolving conflict among nations. Among other issues, these sessions will address the legal force of General Assembly resolutions. Particular attention will be given to the International Court of Justice ("I.C.J."), including the scope of its jurisdiction, the source of the law it applies, its canons of construction in interpreting treaties, its power to grant interim measures for relief, and its power to issue advisory opinions. These sessions will also examine issues relating to nations' rights, duties and obligations in litigation before the I.C.J. - including reservations to compulsory jurisdiction and the right of third-party states to intervene in an action before the I.C.J. when their interests are at stake.

WEEK 8 [March 1]: THE SECRETARIAT, THE SECURITY COUNCIL, AND THE GENERAL ASSEMBLY

This first session on the United Nations will concentrate on its structure, purposes, and goals – including the role of the Secretariat and the law-making powers of the Security Council and the General Assembly.

Readings:

Law and Practice of the United Nations: Documents and Commentary (Simon Chesterman, Thomas M. Franck & David M. Malone editors, New York: Oxford University Press, 2008), Introduction: pages 3-15; Chapter 1 "The U.N. Charter": pages19-51; Chapter 3.1 "Legal Personality": pages 84-98; Chapter 3.3 "Law Making by the Security Council": pages 109-116; Chapter 3.4 "Law Making by the General Assembly: pages 117-119; Chapter 4 "The Secretary-General and the Secretariat": pages132-162

WEEK 9 [March 15]: THE INTERNATIONAL COURT OF JUSTICE

In this second session on the United Nations, the focus shifts to the role of the International Court of Justice in adjudicating disputes between nations – examining the scope of jurisdiction and the sources of substantive law that the Court applies. This session will examine the "Optional Clause" in Article 36 of the Statute of the International Court of Justice, which provides that states may (but not must) accept the Court's compulsory jurisdiction - either unconditionally or with modifications.

Readings:

The Oxford Handbook on the United Nations (Thomas G. Weiss & Sam Daws editors, New York: Oxford University Press, 2008), Part III, Chapter 11: James Crawford & Tom Grant, "International Court of Justice", pages 193-213 [PDF]

International Law Anthology (Anthony D'Amato editor, Cincinnati: Anderson Publishing Company, 1994), Chapter 5 "World Court Jurisdiction": pages 139-145

Simon Chesterman, Thomas Frank & David M. Malone, Law and Practice of the United Nations: Documents and Commentary (Oxford, 2008): Chapter 3.2 "Who Interprets the Charter": pages 99-109; Chapter 3.5 "Special Courts and Tribunals": pages 119-131; Appendix B "Statute of the International Court of Justice": pages 619-629

Netherlands v. Sweden (Application of the Convention of 1902 Governing the Guardianship of Infants) 1958 I.C.J. 55 (Nov. 28) [PDF]

Nicaragua v. United States (Case Concerning Military and Paramilitary Activities against Nicaragua) 1984 I.C.J. (Nov. 26) (jurisdiction); 1986 I.C.J. (Dec. 22) (merits) [PDF]

The Vienna Convention on the Law of Treaties (1969) [PDF]

IV. JURISDICTION OVER GLOBAL COMMONS

"Global commons" are those areas over which no nation exercises sovereignty. Development of recognized rules for regulating global commons was instrumental in forming the foundation of much modern international law. Originally applied to the high seas, the law regulating global commons has been extended to include Antarctica – and with the advent of space-exploration, it has been expanded to include outer space and celestial bodies as well. Through three case-studies, these three sessions will address the substantive rules pertaining to global commons.

WEEK 10 [March 22]: THE HIGH SEAS

The "Law of the Sea" represents the world's first efforts to define and regulate "global commons" and grapple with the notion of territory or resources managed and preserved

by the international community as the "common heritage of mankind". Maritime commerce had facilitated economic growth in early modern Europe. If one or more nations had been able to assert claims over the world's oceans, these claims would have effectively restricted (and reduced) trade. As the size of northern European merchant fleets grew, challenging Spanish and Portuguese monopolies over certain trade routes, would international custom and practice permit the old doctrine of "res nullius" (granting title to unclaimed land to the discovering nation) also to recognize as legitimate nations' claims over portions of the seas? Best exemplified in the debate between English jurist John Selden and Dutch political philosopher Hugo Grotius, seventeenth-century Europe grappled with the issue, ultimately recognizing the right of nations to free navigation of the seas. Today, most public international law related to oceans has been codified in a multilateral agreement, the United Nations Convention on Law of the Sea ("UNCLOS III"). Nevertheless, while most nations are parties to the agreement, several (most notably the United States), are not. Are these nations nonetheless bound by UNCLOS III through "international custom and practice"? This session examines the substantive rules of law of the sea, including free navigation, the right of innocent passage, the limits on a nation's territorial sea, and UNCLOS III's innovation, the Exclusive Economic Zone ("EEZ") - a 200-mile area in which a nation may exercise a limited (but not exclusive) control over resources adjacent to its coastline. Does this system promote efficient use (and conservation) of scarce natural resources? Do other treaties, such as the Fisheries Convention (which protects "straddling stocks' and highly-migratory species), adequately cover gaps in UNCLOS III?) What is the residual role for national courts in adjudication of matters arising on the high seas under the doctrine of "communis juris"?

Readings:

United Nations Convention on Law of the Sea, 1982 (21 I.L.M. 1263 (1982)) ("UNCLOS III") (selected provisions) [PDF]

Hugo Grotius, Mare Liberum (1633; Latin critical edition with translation by Ralph van Daman McGoffin, Oxford, 1916) Ch. 1 at pp. 7-10, Ch. 8 - Ch. 12 at pp. 61-71 [PDF]

John Selden, Mare Clausum, seu De Dominio Maris (Marchemont Nedhem trans., 1652), Book I, Ch. 1 at pp. 1-3, Ch. 7 at pp.42-45, Ch. 20 at pp. 123-127,Ch. 24 at pp.168-179; Book II, Ch. 1 pp.181-188, Ch.24 at pp.382-394, Ch. 33 at pp. 447-457. [PDF]

United Kingdom of Great Britain v. Iceland (Fisheries Jurisdiction), 1974 I.C.J. 3 (July 25) (merits) [PDF]

United Kingdom v. Albania (Corfu Channel Case), 1949 I.C.J. 4 (1949) [PDF]

The Belgenland, 114 U.S. 335 (1885) (illustrating the principle of communis juris) [PDF]

L.F.E. Goldie, Title and Use (and Usufruct)) – An Ancient Distinction Too Often Forgot, 79 American Journal of International Law 690 (1985) [PDF]

*March 25 [Saturday]: Instruction on research-techniques for international law (to be recorded for students who are not able to attend in person).

WEEK 11 [April 8]: CASE STUDY: Piracy or Terrorism? How does international law deal with the seizing of ships off the coast of Somalia?

Though long used as the textbook-example for the concept of "communis juris", until recently most people regarded international law applicable to piracy as a relic of the days of "wooden ships and iron men". Recent events in the Malacca Straits and off the coast of Somalia have thrust piracy back onto the front pages of newspapers – and into debates over of modern international law. While freedom of the high seas is well established for peaceful navigation, traditionally international custom recognized the authority of all states to seize, try and punish pirates if they were found in international waters. By conventional definition (codified in U.S. law by an act of Congress), "piracy" is the seizure of a vessel at sea by another vessel not acting under the control of the government of a sovereign state during time of war. "Piracy", strictly speaking, is theft at sea for profit. "Terrorism", by contrast, is generally politically-motivated. For pirates, threats of force are merely a means of obtaining goods-in-transit or ransom-money; for terrorists, violence is often not a means to an end but rather an end unto itself. Until the spring of 2010, it was common for ship-owners to negotiate for the release of ships, cargoes and crews held as hostages through payment of ransom. The law of "general average" permitted ship-owners to collect a portion of sums paid as ransom from cargo-owners – on the theory that only by the ship-owners' expenditure (i.e. the ransom-payment) could the cargo be returned to its rightful owners. That practice has been abrogated by Executive Order 13536 of April 12, 2010, which equates payment of ransom to Somali pirates with payments to terrorists – which in turn constitutes a felony under U.S. law. This case study examines the ramifications – pro and con – of the U.S. State Department's new policy. Is the policy consistent with international law's definition of piracy? Will the new policy reduce the level of piracy off the Somali coast as some argue, or will it instead lead to an escalation of violence as others contend? The readings address this ongoing debate.

Readings:

Executive Order 13536 of April 12, 2010: Blocking Property of Certain Persons Contributing to the Conflict in Somalia (Federal Register: Volume 75, No. 072) [PDF]

18 U.S.C. sec. 1651-1661 [PDF]

Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty (2nd edition, New York: Foundation Press, 1975), Chapter 5: "General Average", pages 244-248 [PDF]

Jonathan S. Spencer, "Piracy in 2009": presented at the Fall Meeting of the American Bar Association's Section of International Law (Miami Beach, Florida, Oct. 29, 2009) [PDF]

Joel H. Samuels, "How Piracy Has Shaped the Relationship Between American Law and International Law": presented at "Troubled Waters: Combating Maritime Piracy with Rule of Law", 2010 Founders' Celebration Conference, American University, Washington College of Law (Washington, D.C., March 31, 2010) [PDF]

Milena Serio, The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution", presented at "Troubled Waters: Combating Maritime Piracy with Rule of Law", Founders' Celebration Conference, American University, Washington College of Law (Washington, D.C. march 31, 2010) [PDF]

Bruce G. Paulsen, Lawrence Rutkowski & Jonathan D. Stoian, "Mugged Twice? Payment of Ransom on the High Seas", presented at "Troubled Waters: Combating Maritime Piracy with Rule of Law", Founders' Day Celebration Conference, American University, Washington College of Law (Washington, D.C., 2010) [PDF]

WEEK12 [April 15]: CASE STUDY: Marine Salvage and the UNESCO Convention on Protection of Underwater Cultural Heritage

Since antiquity, the lex maritima has treated ships and cargo lost at sea as remaining the property of the owners. However, marine salvors who recover portions of wrecked ships or cargo on the high seas are entitled to salvage awards of up to a moiety – or half the value of the salvaged property. Long recognized by international custom and practice, for the last century marine salvage has been regulated – at least among signatory-states - by two successive multilateral agreements, the Salvage Convention of 1910 and the International Convention on Salvage of 1989. While there is no international tribunal for adjudicating salvage-claims, claims for salvage may be filed in the domestic courts of coastal nations – even where the acts of salvage occurred on the high seas. The law of salvage is intended to promote economic efficiency by providing incentives for recovery of property lost at sea. In contrast, archaeology seeks greater understanding of other cultures through study of surviving artifacts. Placing a monetary value on such artifacts is difficult - and arguably impossible. The United Nations Convention on Law of the Sea ("UNCLOS III") provided limited protection for undersea historical sites within 24 miles of a nation's coastline. In 2001, the UNESCO Convention on International Protection of Underwater Cultural Heritage sought to extend this protection to historic shipwrecks on the high seas, sparking controversy as many maritime nations have refused to sign the new treaty. The opposition has not been limited to commercial interests seeking to assert salvage-rights. Language in the UNESCO Convention arguably conflicts with provisions of UNCLOS III. This case study will allow us to examine the problems that result when nations fail to reach unanimous agreement on how to regulate global commons. Moreover, it illustrates another common problem in international law, namely how to resolve conflicting language in two multilateral agreements governing the same conduct.

Readings:

International Convention on Salvage (signed London, April 28, 1989; entered into force July 14, 1996) [PDF]

United Nations Convention on Law of the Sea, 21 ILM 1263(1982): Articles 33, 149, 303 [PDF]

UNESCO Convention on Protection of Underwater Cultural Heritage [PDF]

Robert Blumberg, International Protection of Underwater Cultural Heritage (2005) [PDF]

R.M.S. Titanic v. Haver, 171 F.3d 943 (4th Cir. 1999) ("The Titanic I") [PDF]

R.M.S. Titanic v. Haver, 286 F. 3d 194 (4th Cir. 2002) ("The Titanic II") [PDF]

IV. JURISDICTION OVER ECONOMIC ACTIVITIES

To Grotius, Vattel and the framers of the U.S. Constitution, the "ius gentium" included both law regulating relations between sovereign states and law regulating private transactions in international commerce. Once known as the "lex mercatoria", much of this international mercantile law was incorporated into the common law of England by Holt, Mansfield, and other English judges of the eighteenth century. Modern international law seeks to regulate international commerce as well – though today much of the substantive rules are provided by treaties rather than by customary international law. Often, however, these treaties do not provide comprehensive solutions, and nations may seek to fill the gaps in treaty-law through extraterritorial application of their respective domestic laws. The following case study examines the friction that often arises in the regulation of international commerce.

WEEKS 13-14 [April 22; April 29]

CASE STUDY: Extraterritorial Jurisdiction over Anticompetitive Business Practices

While regulation of business practices traditionally has been a domestic concern, commerce is becoming increasingly global in nature, and markets for many commodities and services are world-wide. While the World Trade Organization has moved beyond mere regulation of tariffs to addressing some nontariff trade barriers and anticompetitive business-practices (e.g. dumping), much business-conduct remains beyond the ambit of W.T.O. control. Prominent among anticompetitive practices falling outside the purview of the W.T.O are abuses of market power – specifically the activities of monopolies and cartels. As monopolies and cartels affect global trade, the most efficient solution would be a multilateral antitrust treaty – coupled with a supranational tribunal for adjudicating

alleged violations. This session addresses three questions. First, why have nations not been able to find a multilateral solution – complete with both substantive rules and a dispute-resolution mechanism – and what does the failure to do so in the context of antitrust tell us about similar failures in other contexts? In short, what are the prerequisites for reaching multilateral agreement? Second, assuming that nations cannot reach agreement on substantive norms, nations will have to apply domestic antitrust law to the activities of foreign cartels and monopolies when their activities restrain trade domestically. Does international custom and practice provide choice-of-law rules for determining which nation's laws on competition policy should govern the activities of multinational monopolies or, if not, should the concept of comity limit a nation's application of its own law extraterritorially? Finally, how useful is the concept of territory in delimiting jurisdiction in the modern world, and what are the possible approaches – and implications – for non-territorial models of jurisdiction?

Readings:

Karl M. Meesen, Antitrust Jurisdiction under Customary International Law, 78 American Journal of International Law 783 (1984) [PDF]

Brainerd Currie, Selected Essays on the Conflicts of Law (1963), Chapter 4, pages 177-187 [PDF]

Steven L. Snell, Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity, 33 Stanford Journal of International Law 215 (1997) [PDF]

Lea Brilmayer, Rights, Fairness, and Choice of Law, 98 Yale Law Journal 1277 (1989) [PDF]

Kingman Brewster, Antitrust and American Business Abroad (1958), pages 288-290 [PDF]