

International law by malcolm shaw critical thinking examples

[Law](#), [Criminal Justice](#)



Chapter 3

Post 1 – Professor Franck's brings up an interesting question, why states obey international law despite the undeveloped condition of the international system? I would say a very important reason is that criminals, even those who have been nation-state leaders have been brought to trial on the international stage at The Hague. So all the characteristics he mentions that give legitimacy – transparency, symbolic validation, adherence and coherence – are met by the World Court and can be observed on the television news all over the world. There exist inconsistencies in terms of which leaders are taken to trial when others have been responsible for crime on their watch. The fact the inconsistencies can be discussed by people all over the world adds to the validity of the institution even though it does not meet all the goals desired.

Post 2 Resolutions from the United Nations General Assembly do need to be used carefully if they are being considered as a foundational rule on which to build law. The author makes a very important comment when pointing out that some resolutions are reached with compromises. When political compromises and political arrangements are made with arm twisting, bribery or threats they should be rejected as *opinion juris*. Because progress is being made toward establishing legal norms; establishing a consistent and practical method of choosing those resolutions that are useful might be a good idea. The intent of the resolutions weren't to be used as legal norms they each had some political goal so the choice of using them or not must be done with wisdom.

Chapter 4

Post 1 Sovereignty of nations is a worthy goal yet boundaries of nations change over time so whereas consistency is need in International Law towards nations but when the nations themselves change - how is that be possible. When searching for methods of connecting logically with legal means, entities that are global to those that are municipal the task seems overwhelming. Best to plan it piece by piece and willingly discard what does not work and have the flexibility to try new methods. But each step in the decision making must rely upon the moral and ethical considerations which are in accord with international Human Rights. That is not to say that corporations are to be given “ personhood.” On the contrary Human Rights are for human beings and that is line that cannot be argued in a justice system that is serious about finding the just course of action when making a decision.

Post 2 The nation-state stand on “ a non-justiciable political question, not appropriate for judicial resolution” is one that shows the spinelessness of nation-state high-courts to take the high moral and ethical ground.

Separation of powers does not mean that the judicial system needs to stay out of the executive branch and representative branch in cases of foreign policy which are in the common vernacular referred to as “ the national security excuse.” On the contrary especially in cases that are as easily determined as “ who is dead” and “ who did the killing” the more complicated issues of policy leading to the death and complicity of government departments should be of primary concern for a nation’s court, such as in the United States the Supreme Court. If the US Supreme Court is

unwilling to take such cases then the International system of justice must necessarily be used particularly in case which cross nation-state borders.

Post 3 Unfortunately with every stance the court take on what is non-justiciable and is justiciable there will be entities in the government which will desperately want to influence the choice made. But easier than trying to influence the court's choice is to take the court out of the loop altogether by finding away to not even have to deal with the Supreme Court. This is easily done by refusing cases when a treaty is involved no matter how ludicrous the crime. Such as allowing US citizens employed in private armies (contractors) or the CIA to never face murder charges even when the murders have been filmed and are common knowledge. In Iraq the injustice of occupying a nation, setting up a government in that nation and then "making a treaty" with that nation to not try American employees is an example of justice not being nor policy for the public good being; for either the "public" or citizens that is of Iraq or the USA.

Chapter 5

Post 1 An interesting concept concerning "legal personality" to explore would be if it could be used by courts of nations who want to have taxes (that have been legally levied) to be paid. At the moment money can be moved from one country to another or from one address to a post box in the Cayman Islands in order for the person or corporation to avoid paying taxes in their home country. There is also the consideration that corporations are considered "persons" in the United States but not all of them are held accountable for paying their taxes. Perhaps an international legal identity or

personality for persons and corporations needs to be defined. With people in many countries suffering from no incomes and countries obsessing about debt this may be the time to take that seriously under consideration. It seems to be something only International law can handle fairly.

Post 2 Indeed economic and human rights law should play a large part in defining what constitutes “ legal person.” Wouldn’t it be just that when an entity clearly other than of flesh and blood is considered a “ legal person” then that entity should be held to all the laws the people are held to as well as the international laws deemed necessary. Otherwise the danger lies in the perception that the “ legal person” is not viable to be defined as a “ legal person” and therefore degrade its legitimacy as a “ legal person.” There is a need for judicial personalities for entities other than humans but they should be held accountable even more severely to the law.

Post 3 the argument about the declaration of the State of Palestine in Algiers November 1988 begs to be argued because at the same time the author speaks of “ decolonization” he assumes that occupying entities have “ higher” or “ more legitimate” legal status than the people of the country which is being occupied. This Orientalist view is from past centuries.

International law must now concern itself with all the peoples involved including Arabic peoples. Palestinians are of course not only Arabic but of several races and many hold American citizenship yet still are forced to live in the way the occupiers see fit. The Israelis are now governed by a pro-Zionist group who are backed by moneyed and powerful interests in the United States. I would venture to argue that the Palestinians have a much greater right to their nation, their homes and their belongings than do the

Zionists and those with the Zionist attitude. (Consider from Chapt 9 “ the rights of belligerent occupationb, but the territory remains the legal possession of the ousted sovereign”)

Chapter 9

Post 1 Other factors that have influenced the reduction of the power of territorial exclusivity would be not only technological and economic changes but also natural changes. As the climate shifts for example nomadic tribes can no longer survive in the old way and must settle down in some “ territory” but how does a nation or an international court decide which territory. So many massacres have occurred due to the absence of international laws governing this issue I would suggest this should be a priority. The laws governing territoriality should be interpreted not as in colonial times but in modern times. They can be used as a measure of what works and what doesn't work and some may still be built upon to face the new millennium realistically and practically.

Post 2 What the author is saying about the roots of international law on possession and other issues of “ territorial sovereignty” are very important and need long and hard consideration. As the author notes that laws rooted in ancient Roman culture no longer serve the contemporary citizens who are grappling with the way to honor or reject territorial sovereignty. The issue is very complicated even when the problem of roots in ancient law is not the focus. Some countries like Greece have survived serial occupations over thousands of years. Not until the 1970s were they able to throw off foreigners and finally be able to defined their own sovereignty. Whose

territory is belongs to who is still at issue for instance in Cyprus.

Post 3 The concepts of terra nullius and res communis. It's hard to draw a boundary that stays put in the sea so international waters aren't easily defined. Lately we've been seeing the legal problems that come up when portions of the oceans or seas are used as dumps for developed countries' toxic waste as in the fishing waters of Somalia. There is also the problem of responsibility for other kinds of damages to the sea than might be better solved by community rather than territorial laws. Outer space is a really interesting case if one is considering responsibility for waste in legal terms. Also the idea that parts of the atmosphere are public and part private bring up legal questions that have to be solved "across and between borders." It begs the question, do nations have the right to kill?" that has worked on land to gain legal rights over territory but will it work in other places?

Chapter 10

Post 1 "doctrine of self-defence may be of relevance in certain situations, for example, if the intruding aircraft was clearly involved in an act of aggression or terrorism. While a civilian airliner will rarely pose this level of threat, justifying a shooting down, the attack on the World Trade Center on 11 September 2001 demonstrates that it is a possibility." Just had a thought, if the doctrine of self-dense is not used and the shooting down of a civilian airplane is not used and thousands of lives are lost does that then constitute a breaking of the law that could be appealed to a court of law?

Post 2 It was good "sportsmanship" for Iran to essentially drop the case brought before the International Court on May 17th, 1989 about their civilian

plane carrying only civilian passengers was shot down by military of another country (the USA). In terms of making progress to establishing realistic, practical and just International Law though the case would have been very interesting to study. Issues of human rights of innocent civilians versus the ambiguity of the territorial “ownership” of the airspace would certainly be argued. It would be very interesting to see if the argument of self defense by the military would hold sway when used against an unarmed civilian aircraft. It’s a situation similar to the USS Liberty which was attacked by Israel and sunk although the Liberty was offering no threats to Israel and had permission to be exactly where it was located. The loss of life in that case were members of the US Navy but were they any more dangerous than the passengers of the commercial aircraft since no threat was advanced in either case?

Post 3 The Cold War has ended so how practical is the *usque ad coelum* concept? So many countries are using outer space for communication and research purposes the difficulties of imposing the law with the basis of *usque ad coelum* concept seems impossible. I agree that it can’t be viable where space exploration is concerned. It’s better to balance the involvement and cooperation between countries rather than try to set boundaries and advance competition interests. Using *res communis* which does not allow any portion of outer space to be claimed by any sovereign states seems to be the best way to start when developing international laws for outer space.

Chapter 12

Post 1 Jurisdiction laws are complicated. Trying to figure out which international laws and which conflict of laws rules. Where human rights can be invoked by international law concerning a nation's own treatment of its own citizens seems like a good idea but very hard to make work. The treatment of domestic prisoners in domestic prisons may be reported by human rights organizations but would the family of a prisoner (for example) need to take a case before the international court so that international law could be invoked? And what about the "black prisons" or "secret prisons" that China has and that the US maintains in foreign countries? It's really good that international is starting to address the issue at least in theory.

Post 2 It's interesting to read about how the United Nations functions as a layer of International Law in terms of self determination and human rights. Since the acceptance that national law cannot breach international law that seems to validate International Law venues as legitimate. The civil cases differences like serving a writ versus habitual residence of a defendant (USA/England versus European consideration of jurisdiction in civil cases.) seems hard to compare, like apples and oranges. The problems must be hard to resolve when there is a divorce and child custody issues are part of the case (between couples with different nationalities.)

Post 3 So many crimes are covering many territories it seems that there are more cases than ever that need to be handled by international law. In drug enforcement and stopping illegal arms deals which are both passing over the borders of many countries and the sea and the air - seems that international

covering such crimes would be invaluable. And so many financial crimes are done electronically where there are no borders that would be another place international law needs to develop. It does seem that there needs to be some kind of distinguishing features defined for territories that under occupation but defined differently than by old fashioned colonial laws.

Chapter 13

Post 1 The immunity status from jurisdictions seems to be very subjective and hard to pin down in the examples given. “A department of government would, however, be entitled to immunity, even if it had a separate legal personality under its own law” In the *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria* the author in talking about the possibility of immunity if proven the entity is in the government and the separate legal personality which is complex enough. I thought it would be more straightforward what is part of the government so then reading the advice from Shaw LJ to not attribute immunity too easily I really have to stop and rethink my assumption.

Post 2 “legislative intention of the government in creating and regulating the entity and the degree of its control” I understand this better when the case in Nigeria is compared to the case in *Poland Czarnikow Ltd v. Rolimpex* where the government created it and it was considered part of the government yet independent enough of the government to be considered to have its own identity. I wonder if a case could be in the USA that if the entity is not directly created by the democratic i.e. the vote of the people then it must be considered independent of the government.

Post 3 these decisions all seem to need to be made by considering the details of each case within its unique situation. That seems to work against trying to make systematic organized International system of judicial law simply due to the time it would take to always work out so many details, as well as the number of lawyers. Yet it is necessary to have an International Court which must be able to distinguish what is a government, what is attached to the government and what has a separate personal identity. I don't know how this could work out though given so many types of governments and government structures in all the countries.

Chapter 14

Post 1 Would it be fair to consider a human right the right to a clean environment? Therefore use of nuclear weapons or endangerment due to the transport or production of nuclear weapons would have to be reconsidered whether or not it meets the test of human rights. And sanctions used as countermeasures be illegal if they resulted in a decline in the nations population through death and or birthright due to withholding of nutritional food or necessary medicines. Situations are complicated when treaties exist and how long the treaty was intended to last. Is there such a thing as creating a treaty over trade or something but set an exact time period of duration. I'm trying to think of an example.

Post 2 I don't think I'm comfortable with lawful countermeasures " must be in response to a prior wrongful act and taken in the light of a refusal to remedy it, directed against the state committing the wrongful act and proportionate." Because it seems to easy to glide past " the refusal to

remedy it” by misinterpretation of a desire to remedy but not the means, or a desire for third part mediation but the person or entity who wants to take countermeasures feel they are in their rights to use a countermeasure before a third party arbitration could be organized. Simply put, two wrongs don’t make a right. I would like to see international law error on the side of diplomacy rather than “ countermeasures” which sounds like the ancient law of an eye for an eye, tooth for a tooth.

Post 3 this is the part that seems clear “ customary international law for precluding the

wrongfulness of an act not in conformity with an international obligation” but by assigning anthropogenic characters to a government entity such as having a choice in the case in Mexico where the house was destroyed. Because someone must have felt somewhere along the line the government was responsible (as I imaging the situation) for causing or not preventing the act so it seems this is something that the government would remedy (rebuilding the house) without having to be taken to court. Perhaps even something like a fund like an insurance fund for unintended harm.

Chapter 16

Post 1 “ T'he Court held that one had to look behind the title given to the declaration in question and to seek to determine its substantive content. It was necessary to ascertain the original intention” the author said this referring to the Belios case. It seems that 1. substantive content and 2. Original intention are two very important motives to consider in almost all cases not just case involving a declaration that the author doesn’t expand

upon but he says that this seemed like a test case that sided on the side of the states. I wonder if this case would apply to in declarations made by states within the European Union and if the test case siding with the state would still apply generally.

Post 2 Since the League of Nations stood by the polling of all the states on such a matter that seems to answer my question that each state in the EU would be able to weigh in on the case, I'm not sure that is what would happen now but it seems like a reasonable scenario. On page 826 in the discussion about the Genocide convention and the flexibility etc. what I noticed is the importance of the United Nations as a "buffer" between the "old world international law" and the modern international law that is developing to meet the contemporary needs. Without the existence of the UN it seems like such an international congress would have to be started or the Making of an International Justice system would seem impossible.

Post 3 "The author talks about the Vienna Convention on the Law of Treaties (1969, 1986) that the UN Human Rights Committee emphasized" that they were not appropriate to "address problems of reservations to human rights treaties" made me think once again about the duration of treaties and their applicability to modern situations. . It does seem reasonable that the state who brings the reservation forward has the responsibility to make a convincing argument. but the ILC reaffirmed their applicability. The importance of sorting out which has priority: human rights or the contents of a treaty when protecting human rights runs contrary to the intent of the

treaty. But it seems that the ability of human rights to supersede treaties should seriously be considered.

Chapter 17

Post 1 Interesting that utipossidetis juris that the former Spanish Empire was instrumental in making the administrative divisions of South America, Central America and Mexico. It has been used since then as the foundation for this type of legal case. But in Africa with so many changes for instance the division north and south Sudan by a general election; as citizens become more involved in using the electoral process to define boundaries maybe utipossidetis juris will become a relic of the past. The old fashioned way seems to arbitrary and removed from the people to be a contemporary solution to setting boundaries.

Post 2 Merging territories (Syria-Egypt) (Zanzibar-Tazmania) is easier the splitting regions from a nation which is considered established. I wonder about old quarrels which have become very dangerous and people have died and may die again because the peaceful solution has yet to be found. For example the Basque country has its own identity both historically and culturally yet Spain will not permit even discussions about it instead putting citizens in danger from terrorist attacks by a few extremists who use that terrible way to communicate their displeasure with the situation. Or the situation Palestine where a merger between the occupied and the occupiers would seem a logical solution yet for some reason in this case it is not viewed as such an easy thing to do as it is in every other place in the world.

Chapter 18

Post 1 It's promising that the settlement of disputes by private systems against organizations such as the World Bank are already in place.

International Law is so overwhelming when trying to grasp the totality of the whole world and all the nations and municipalities and citizens that when I first started learning about International Law I felt very pessimistic that good solutions could be found using a justice system with such a huge area of impact. But as the nations became more connected, like the European Union being formed so that WWI and WWII wouldn't be repeated and with better, faster communication like fiber optics and the Internet the idea of the World Court and International Law, etc. are actually very reasonable goals.

Post 2 The Court of Arbitration of the International Chamber of Commerce is really going to be used more and more I think. The foundation being the already existing International Chamber of Commerce then the idea of diversity and flexibility needed in different cases up for arbitration might be built in. Since the UN Commission on International Trade Law has been in existence for 45 years the history of cases to build upon must be massive. Also interesting that The Hague is flexible enough to form necessary bodies which pertain to finding solutions due to a certain international event between two countries such as the Iran-United States Claims Tribunal.

Post 3 The author talks about " the establishment of the UN Compensation Commission which " process claims for compensation for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations" this is the type of commission needed in Mexico for the case mentioned earlier

about the man who lost his house and ended up taking the government of Mexico to court over trying to get compensation. had his house destroyed as a result of sudden and unforeseen action by opponents of the Mexican government on pages 710 and 711.

Chapter 19/20

Post 1 The Security Council seems like a reasonable place to take disputes concerning Inter-State Courts and Tribunals but the problem is the rigid make up of the members of the Security Council. Some of the seats are revolving but 5 of the seats are not so the decisions are not necessarily based on justice as much as politics and are often predictable. Maybe I missed it but I searched in the Index too and could not find any place where the author directly addresses the judicial system of China and how it fits into the scenario of an International Justice system, given that it is hierarchal from top down as opposed to building upon cases that have already been decided.