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Editors

International Law Stories

Nuremberg and Its Legacy

Filártiga v. Peña-Irala

The Velásquez Rodríguez Case

Soering v. United Kingdom

Foster v. Neilson and United States v. Percheman

The Paquete Habana

Missouri v. Holland

Hamdan v. Rumsfeld

The Caroline

The Reparation for Injuries Case

The Nicaragua Case

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Abu Ghraib

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INTERNATIONAL LAW STORIES

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Introduction

John E. Noyes, Laura A. Dickinson, and Mark W. Janis

Classic Cases, Diverse Decision Makers, and Efficacy

International Law Stories explores the personal, social, political, and historical foundations of thirteen classic international law cases. The authors of our essays—law school deans and professors, international court judges, and government lawyers—bring these stories to life, telling tales helpful, we hope, for those well-acquainted with the cases, as well as for those new to the field. One short book cannot address all the important cases in the vast arena of international law, but these essays provide a rich and lucid understanding of modern international law.

International Law Stories has three parts. Part I, "Nuremberg and Its Progeny," begins with the story about the judgment of the International Military Tribunal at Nuremberg, by Judge Theodor Meron of the International Tribunal for the former Yugoslavia and Jean Galbraith. Following are three chapters on cases from other courts, each building on *Nuremberg*: *Filártiga* from a U.S. federal court, by Dean Harold Koh of Yale Law School; *Velásquez Rodríguez* from the Inter–American Court of Human Rights, by Dean Claudio Grossman of American University's Washington College of Law; and *Soering* from the European Court of Human Rights, by David Seymour, the Legal Adviser to the U.K. Home Office, and Jennifer Tooze, also of the Home Office. These four cases, all of which concern the human rights or humanitarian law obligations of states, feature the individual as a central actor in international law.

Part II, "International Law: The Domestic Impact," also has four chapters, each of them looking at how the U.S. legal system has treated the complex interplay among international law, constitutional law, and domestic politics and culture. Professor Carlos Vázquez of the Georgetown University Law Center explores *Foster & Elam* and *Percheman*;

Professor William Dodge of the University of California's Hastings College of Law considers *The Paquete Habana*; Professor Mark Janis of the University of Connecticut School of Law writes about *Missouri v. Holland*; and Professor Oona Hathaway of Yale Law School presents *Hamdan*.

Finally, Part III, "International Law: Interstate Conflicts," contains five chapters showing how international law and process have addressed controversies over the use of force, the development of international institutions, the treatment accorded citizens of one country who are accused of crimes in another, and the treatment of detainees in the "war on terror." The chapters in Part III include: *Caroline*, by Professor John Noyes of California Western School of Law; *Reparation for Injuries*, by Emory University Law Professor David Bederman; *Nicaragua*, by Professor Mary Ellen O'Connell of Notre Dame Law School; *LaGrand*, by Judge Bruno Simma of the International Court of Justice and Carsten Hoppe; and Abu Ghraib, by Professor Laura Dickinson of the University of Connecticut School of Law.

This Introduction continues with three short essays by the editors of *International Law Stories*, providing perspective on the contents of this volume. The first, by Mark Janis, discusses what makes an international law case a "classic." John Noyes, in the second introductory essay, explores the wide variety of fora that interpret and apply international law. Third, Laura Dickinson reflects on the efficacy of international law in our cases.

"Classic" Cases of International Law

Mark W. Janis

What makes an international law case a "classic"? How have we decided what to include as "classic" international law cases for *International Law Stories*? We can think of at least three tests to determine "classic" status. The first is reliance: Is the case one on which international lawyers rely? Do international lawyers make steady reference to the case in subsequent practice? The second test is transformation: Has the case changed international law? Have international lawyers come to think about and to do their discipline differently because of the case? And third is expectation: Is the case one that international lawyers are expected to know? Could one be counted a real international lawyer if one was not familiar with the case?

Since all tests of "classic" status involve opinion, we acknowledge that it will be much harder to agree upon "classic" cases in international law than upon cases in a subject matter drawn from a single legal system, like that of the United States. Plainly, there will always be a

greater degree of intellectual, social, and professional coherence among lawyers from a single country about a domestic legal field like U.S. constitutional law, property law, or tort law, than there will be among lawyers from almost two hundred different countries about international law, a fundamentally "shared" legal field. So, to be honest, we must admit that deciding what cases to include in *International Law Stories* is colored by the fact that we three editors are all American, all educated at U.S. law schools (though one was first educated at an English law school), all members of a bar of a state of the United States, and all professors at U.S. law schools. Moreover, we perceive our principal audience to be students, though not necessarily American, taking courses in U.S. law schools or undergraduate and graduate schools, or U.S. lawyers, judges, and academics. Hence, our choice of "classic" international law cases has, and is meant to have, a distinctly American flavor. As international lawyers, of course, we are by trade and emotion keenly sympathetic with foreign audiences; we hope that our choice of cases will also reach out to foreign students, lawyers, judges, and academics.

In choosing and organizing our international law cases, we have thought both about the tests marking a "classic" case and about our inevitable American focus. The choice of Nuremberg is the most compelling among all the thirteen chapters. Nuremberg is relied on as the foundational case in international human rights law; it transformed, indeed perhaps created, the field of international human rights law, itself the most important change in international law in general in the twentieth century. No one, in our opinion, could be counted an international lawyer unless he or she knew about the case. Moreover, Nuremberg is a case of plainly universal import; it is foundational for every country, not just our own. The three other cases in Part I that follow Nuremberg are not as clearly "classic" in a universal sense, but each is, we believe, a "classic" within a certain important context. *Filártiga* is the liberating case for international human rights litigation in the U.S. national legal system. *Velásquez Rodríguez* opens up international human rights law within the regional international law system of inter-American human rights law. *Soering*, though not transformative in the same way, shows the strength of the European Court of Human Rights at Strasbourg, the most important lineal descendant of Nuremberg and its revulsion at the horrors of the Second World War. Certainly the Strasbourg Court is the world's busiest and most effective court of international human rights law. In a sense it is the European Court of Human Rights, rather than any particular Strasbourg case, that is truly "classic."

The cases in Part II that deal with the domestic impact of international law on the United States are, of course, less universal than the cases in Parts I and III, but their very limits make the "classic" tests

easier to apply. These are not only international law cases; they are also U.S. constitutional law cases. *Foster & Elam* is acknowledged to be the "classic" case interpreting Article VI(2), the Supremacy Clause, where Chief Justice Marshall set the foundation for America's special self-executing treaty doctrine. Similarly, *Paquete Habana*, though not the oldest of its kind, is generally recognized, perhaps because of Justice Gray's resounding and quotable language, as the "classic" case about the incorporation of other sorts of international law into U.S. law. The third leg of the U.S. international law tripod, *Missouri v. Holland*, again probably because of the wonderful and powerful language of Justice Holmes, is the "classic" case addressing the international law implications of that omnipresent conundrum of U.S. constitutional law, federalism—the tension between the powers of the central government and those of the states. It is, we think, easy to say that no American could call himself/herself an international lawyer without having a ready familiarity with *Foster & Elam*, *Paquete Habana*, and *Missouri v. Holland*. It is too early to say if the fourth case in Part II, *Hamdan*, will figure as importantly in fifty or a hundred years as it figures now, but it is a modern "classic," if you will, a case that explores the strange and oftentimes sad modern relationship between the United States and international law. American international lawyers from earlier generations might well be disappointed with some of the practices of our country nowadays. It is, we think, appropriate for modern students, lawyers, judges, and academics to try to come to terms with recent U.S. policy vis-à-vis international law.

In Part III, we return to more universal cases. All are, we think, "classics" that would be recognized outside of the United States, albeit all have at least something of a U.S. focus. *Caroline* is an often-used example showing how international legal rules can be employed in non-judicial settings; moreover it remains one of the "classic" cases about the permissible use of force, probably the archetypical issue of international law since the Middle Ages. The next three cases are all set in the International Court of Justice, the one universal international court. *Reparation for Injuries* is the touchstone case relating to the personality of international organizations, *Nicaragua* the most important ICJ case about the use of force, and *LaGrand* perhaps the "classic" case to do with the difficulties of enforcing international court judgments against even a rule-of-law state like the United States. *LaGrand*'s critique of the United States is accentuated in the final case, Abu Ghraib, where *Stories*' plot goes full circle. In our first story, Nuremberg, the United States and the international community held Germany accountable for international law violations. Now it is the turn of Germany and German officials in *LaGrand* and the international community in Abu Ghraib to hold the United States and American officials accountable for our

breaches of international law. Here is perhaps the most vital of the "classic" lessons of international law, going back to the sixteenth and seventeenth centuries and to Suarez and Grotius: every nation is bound by the universal rules of international law.

Diverse Decision Makers

John E. Noyes

Understanding any area of law requires us to understand the institutions that interpret and apply legal rules. One reason international law is complex is because of the great variety of fora in which its rules are interpreted and applied. Often these fora are not third-party tribunals. For example, national military services rely on international law (see the essay on Abu Ghraib in Chapter 13), and diplomats use it in interstate negotiations, as the *Caroline* incident showed (Chapter 9).

Judicial opinions nevertheless feature prominently among our selections of famous, foundational pronouncements on international law. This is true despite the fact that Article 38 of the Statute of the International Court of Justice, which international lawyers often consult as a listing of the sources of international law, deems pronouncements of jurists only "subsidiary means for the determination of rules of law." Furthermore, decisions of international courts and tribunals (unlike judicial decisions from courts in the United States or other common law countries) do not, as a formal matter, count as "precedent." Given these formal limitations, why are so many classic statements of international law made by courts? Perhaps the adversarial and judicial processes sharpen thinking about critical disputes. Judicial decisions also provide detailed, reasoned rulings about international law, and the prestige of some courts may contribute to the respect accorded their rulings. Courts have increasingly developed normative guidelines for international law.

Many different courts and tribunals hear cases involving international law. National courts frequently decide international law disputes, and several of our essays feature U.S. court decisions, including *Filártiga* (Chapter 2), *Foster & Elam* and *Percheman* (Chapter 5), *The Paquete Habana* (Chapter 6), *Missouri v. Holland* (Chapter 7), and *Hamdan* (Chapter 8). In addition, the number of international and hybrid national-international courts and tribunals is increasing. There are now about three dozen standing international and hybrid courts and tribunals, most of them created by treaties, but a few established by decisions of the United Nations Security Council. States and private parties also often arrange international arbitrations, contributing to the thousands of decisions that international courts and tribunals hand down each year. Although many international courts and tribunals are of very

recent vintage, the international courts represented in these essays—the International Court of Justice (ICJ), the European Court of Human Rights, and the Inter-American Court of Human Rights—are all many decades old, making them relatively venerable.

These various international fora are not linked through any overarching hierarchical structure. There is no international equivalent of a national supreme court. Even the ICJ (or World Court)—the successor to the Permanent Court of International Justice established by the League of Nations after World War I and the principal judicial organ of the United Nations—does not hear appeals from national courts or other international courts. Instead, it functions as a trial court, hearing contentious cases between mutually consenting states, and provides advisory opinions at the request of certain organs of the United Nations. Still, the ICJ, composed of distinguished jurists representing all parts of the world, is the preeminent international court, and three of the essays in this book—*Reparation for Injuries* (Chapter 10), *Nicaragua* (Chapter 11), and *LaGrand* (Chapter 12)—feature ICJ decisions. Some regional and specialized international courts and tribunals—including the European Court of Human Rights, which decided *Soering* (Chapter 4), and the Inter-American Court of Human Rights, which decided *Velásquez Rodríguez* (Chapter 3)—do serve as central components of their own sophisticated international regimes. Yet such regional international courts do not sit, as do many national supreme courts, at the apex of a system of courts of general jurisdiction.

As international law has recognized individuals as actors, international legal process has correspondingly accorded individuals roles before tribunals. Individuals may be parties to international law cases set in national courts. In some regional and specialized tribunals, individuals may also bring cases and appear as parties, a jurisdictional feature that promotes frequent use of those tribunals. In addition, international criminal courts, highlighted in the essay on the International Military Tribunal at Nuremberg (Chapter 1), allow individuals to be tried for war crimes and other violations of international law.

The diversity of international dispute settlement fora leads one to question how uniform a body of law is "international law." Do different international courts all take the same view of common questions? Do national courts, when they apply international law, to some degree reshape or modify it? With such a variety of fora, problems of "conflict of laws" may arise. If one court's interpretation of a rule conflicts with another court's interpretation, or with the other court's determination that a different rule should govern, how should such conflicts be resolved? Some of the cases in this book—notably *Soering* (Chapter 4) and *LaGrand* (Chapter 12)—highlight choice-of-law dilemmas.

Yet, despite the diversity of fora, the possibility of identifying or developing enduring legal values remains alluring. Principles established at Nuremberg (see Chapter 1), for example, are strong candidates for fundamental norms. As the essays in Part I demonstrate, the Nuremberg Tribunal both articulated basic international human rights and humanitarian law norms and influenced the development of later international tribunals. Several essays, e.g., *Filártiga* (Chapter 2) and *LaGrand* (Chapter 12), explore how international legal norms are filtered among international and national institutions. The stories in this book thus not only introduce a diverse group of international dispute settlement bodies, each one interesting in its own right, but also introduce the challenges and opportunities for norm diffusion among tribunals and other institutions.

The Efficacy of International Law

Laura A. Dickinson

Although compliance with international legal norms has long been the problem most troubling international lawyers, there has been, until recently, remarkably little real study of why states do and do not obey international law. Thus, liberal internationalists have traditionally assumed that liberal democratic states comply with international law because their norms and values resonate with those contained in international agreements. Others have suggested that if international rules are deemed procedurally and substantively "fair," they compel compliance. And those promoting "transnational legal process" have argued that states obey international law because they come to internalize international norms and values over time. Yet, for years there were only fitful efforts to test these hypotheses with comprehensive data on international law compliance.

For their part, international relations skeptics of international law have long used rational choice and game theoretic models to argue that international law does *not* have any independent valence and that a nation-state obeys international law only when doing so is in that state's own self-interest. But these arguments too have tended not to be empirically grounded, relying far more on logical models and hidden (or not so hidden) assumptions concerning state behavior. And while constructivist scholars have challenged such skeptical assumptions and argued that international law *itself* shapes what comes to be thought of as the state's interest, this proposition—like the others—has not been sufficiently tested. The field, therefore, cries out for further empirical analysis, and over the past few years international law scholars have begun to respond.

Against this backdrop, *International Law Stories*, in addition to its many other virtues, makes a useful contribution to the emerging literature on international law compliance. To be sure, this book is not intended as a work of empiricism, and it in no way obviates the need for more empirical studies, both qualitative and quantitative. Yet, the essays assembled here do—both individually and together—shed some light on the vexing question of international law's efficacy by emphasizing both the complexity inherent in how we conceptualize what *counts* as efficacy and compliance in this context, as well as the many difficulties scholars are likely to encounter in trying to measure such compliance.

To begin, we might attempt to measure international law's impact by considering simply the extent to which court judgments finding violations of international law are actually enforced. Clearly they are, at least some of the time. Indeed, even when the ruling under consideration is issued by an international tribunal—where the obstacles to enforcement are likely to be greatest—the volume provides powerful examples of the law's efficacy in this sense. In the *Soering* case, for example, the United Kingdom, a strong state, nevertheless yielded to the Strasbourg Court's interpretation of the European Convention on Human Rights. Thus, Britain halted the extradition of a British subject to the United States—despite the existence of an extradition treaty between the two nations—because the Court determined that the prisoner might be subjected to cruel treatment in violation of Article 3 of the Convention. Likewise, in *Velásquez Rodríguez*, the Honduran government obeyed a judgment of the Inter-American Court of Human Rights imposing a fine for allowing the disappearance of one of its citizens. And of course at Nuremberg, an international tribunal tried twenty-two defendants and convicted nineteen (though certainly the court's effective power was intimately bound up in the Allies' military power over Germany at that time).

Elsewhere, however, the results are more ambiguous. In *Nicaragua*, although the International Court of Justice (ICJ) granted judgment to Nicaragua, the United States refused to appear during the Court's consideration of the merits and threatened to withhold aid from Nicaragua until it withdrew its claim for reparations. In the *Reparation* case, the ICJ ruled that the United Nations had the international personality enabling it to bring an international legal claim against Israel for the death of a U.N. agent, and Israel indemnified the United Nations for this death. But Israel never punished those who committed the assassination that gave rise to the case, although the identities of the individuals involved did ultimately come to light.

Turning to examples of U.S. court enforcement of international law, the results are also mixed. *Missouri v. Holland* supports the assertion of federal authority to impose treaty law on the states, but the reach of

that authority remains the subject of scholarly debate. In both *Foster* and *Percheman*, the Supreme Court also asserted the supremacy of treaties, ruling that treaties are presumptively enforceable regardless of legislative implementation. Yet, language in *Foster* suggesting that *some* treaties may not be self-executing has given rise to subsequent challenges to the applicability of treaties more generally, despite the fact that *Foster*'s result was effectively repudiated in *Percheman*. Similarly in *Paquete*, the Court asserted the authority of customary international law, but dictum on the role of the executive has opened the door to recent claims that the President may contravene such law. In *Filártiga*, the Second Circuit issued a strong judgment that awarded damages to a non-citizen victim of torture, but the victim was never able to collect payment from the defendant, also a non-citizen. In *LaGrand* (and other cases involving U.S. violations of the Vienna Convention on Consular Relations), while the U.S. Supreme Court has refused to give any deference to ICJ judgments, at least one *state* court went so far as to quash a death sentence, based in large part on the concerns raised by the ICJ. Finally, in *Hamdan* the U.S. Supreme Court relied in part on international law to resist claims of the Executive Branch concerning the legal status of military detention centers in Guantánamo Bay, Cuba. But the ultimate outcome of that exchange—particularly in light of Congress's subsequent limitations on the scope of judicial enforcement—remains uncertain.

Another, more subtle, way to measure international law's efficacy or impact might be to look at how the law—particularly during key moments of its articulation and interpretation—provides pathways for subsequent legal or social actions. Here, the cases tell a different set of stories. *Filártiga*, Dean Koh argues, paved the way for a transnational human rights movement that gained strength in part through litigation efforts. Similarly, the *Reparation* case, in Professor Bederman's account, gave a distinct role to the United Nations within the international system by establishing the U.N. Charter as a "super-treaty." And Nuremberg, as Judge Meron and Jean Galbraith point out, provided the impetus for subsequent international tribunals.

In addition, international legal decisions can help shape legal and political institutional realities over time. For example, *Velásquez Rodríguez*, Dean Grossman maintains, established the authority of the Inter–American Court. Similarly, Professor O'Connell contends that the *Nicaragua* case legitimated the ICJ, at least for countries outside of the global north and west. Professor Noyes's account of the *Caroline* incident suggests that the *Caroline* rule and its focus on necessity and proportionality have, despite ongoing debate about the *content* of these elements, effectively framed the contours of political debate about the use of force in self-defense. The *Soering* case, according to David Sey-

mour and Jennifer Tooze, played a role in the events that ultimately led the United Kingdom to incorporate the European Convention of Human Rights into domestic law. And as I suggest in my chapter, long-standing commitments to international law within the military—strengthened through organizational reforms implemented in the post-Vietnam War period—meant that members of the uniformed military were among the most effective critics of U.S. detention policies following the revelations of detainee abuse at Abu Ghraib prison in Iraq.

Finally, we might measure the efficacy of a particular international law by focusing on its normative legacy, including its circulation and enforcement in subsequent settings. By that measure, as Judge Meron and Jean Galbraith tell it, Nuremberg has had a truly revolutionary impact, spawning the development of crucial jurisprudence at the International Tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court. *Filártiga*, too, has had widespread effect, as its core precepts have stood the test of time within the United States, even as its principles have found support in, and provided the inspiration for, judgments of foreign and international courts. *Velásquez Rodriguez*, as Dean Grossman describes it, laid the foundation for establishing disappearance as an international crime. Dean Grossman goes even further and suggests that the decision may actually have deterred further disappearances, though of course it would be difficult to establish a definitive causal link.

Indeed, part of the difficulty of "proving" the efficacy of international law generally is that international law compliance, at its most basic level, is likely to manifest itself in changes to attitudes, public perceptions, and political discourse over long periods of time. Such subtle shifts of consciousness are difficult to measure, but they are likely to be more fundamental than short-term metrics of compliance such as literal enforcement. The challenge for empirical studies of international law will be to try to trace such shifts through both longitudinal statistical analyses and thick qualitative case studies. Thus, a comprehensive "story" of international law compliance will ultimately need to extend beyond just the discussion of legal cases. Nevertheless, the stories assembled here provide a rich set of accounts with which we might begin.