INTERNATIONAL LAW FALL SEMESTER 1990 PROFESSOR TURACK

Preface

- 1. This in not an open book examination. No outside books or notes may be used.
- 2. Write legibly in pen.
- 3. Answer the questions fully, based on your knowledge of the course materials and any outside reading that you have done.
 - 4. The examination is three hours.
 - 5. Question 2 has twice the value of Question 1.

QUESTION 1.

The Whitewater Draw of the Yaqui River is a small non-navigable stream which flows from Arizona southward into Mexico, and whose waters have long been used to irrigate farms in Mexico near the international boundary. In 1987 the State of Arizona built a dam across the Draw about five miles north of the boundary to impound water for the use of a new city water supply in Arizona, which greatly diminished the water available for the Mexican users. Mexico, which has signed the "Optional Clause" of the Statute of the International Court of Justice (Art. 36, paragraph 2), accepting compulsory jurisdiction of the Court, brings in 1990 an action against the United States before the international Court, seeking compensation for the damages suffered by the Mexican farmers. What weight (if any) should the Court give to each of the farmers following "evidences" of international law put forward by either side in its efforts to establish the existence of an applicable rule of international law?

Evidences of international law set forth by Mexico in favor of her contention that international law forbids such a diversion to the injury of lower riparian users: (a) the "law of nature" that the flow of a stream should continue as it did naturally; (b) a statement by Grotius and echoed by Zouche, Vattal and Blackstone, that the natural flow of a stream should not be diverted; (c) the private law rule of "western water law" (prior appropriation) in force in Arizona; (d) the treaty of 1909 between the United States and Canada, providing that no stream flowing across the boundary between those countries should be diverted in the upper riparian state without the permission of the International Joint Commission, the international organization established by the treaty between the United States and Canada; (e) a decision of the Permanent Court of International Justice in a similar case between France and Belgium; (f) Mexican protests in 1895-1906 against American diversion of the Rio Grande, which resulted in a treaty between Mexico and the United States which permitted the United States to divert the Rio Grande at Elephant Butte Dam but specified that Mexico should receive annually 60,000 acre-foot at the head of an irrigation canal on the international boundary; (g) a series of protests by Egypt

between 1850 and 1950 against any diversion of the upper Nile by either Ethiopia or by British authorities in the Sudan, as a result of which the two upper riparian countries always agreed that there should be no diminution of the normal flow of the Nile into Egypt; (h) the statement in H. A. Smith, Economic Uses of International Rivers (1930) and R. Zacklin & L. Caflisch, 32a Legal Regime of International Rivers and Lakes (1981), that there is no place in international law for the doctrine of the absolute supremacy of the upper riparian sovereign; (i) Mexico has signed and ratified the 1982 Law of the Sea Convention which recognizes the principle of jus cogens, which it claims to be applicable to these circumstances; (j) the principle of erga omnes is recognized by the organization of American states, in which both the United States and Mexico are Members, and has been applied in the Mexican-Panamanian Banking Arbitration case of 1987.

Evidence of international law set forth by the United States in favor of her contention that international law does not forbid such a diversion even though there may be some injury to the lower riparian users of an international stream: (k) the principle that a stream should be used for the greatest good of the greatest number, coupled with proof that many more people would use the water for domestic purposes in Arizona as a result of the diversion than would have used it in Mexico for farms; (1) an opinion by U. S. Attorney General Harmon in 1895, holding that under international law, territorial sovereignty enabled the United States to divert the Rio Grande without regard for Mexico=s interest; (m) the fact that the 1906 treaty with Mexico providing for delivery of the water in exchange for the Elephant Butte diversion contained a stipulation agreed to by Mexico and the United States that: "The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water, Mexico waives any and all claims to the waters of the Rio Grande" between specified points; (n) the fact that although Mexico protested the diversion of water from the Colorado at and near Boulder Dam (Hoover Dam), a 1944 treaty between Mexico and the United States recognized the right of the United States to divert 15,500,000 acre-feet annually, guaranteeing Mexico a flow of one-fifth that amount; (o) a United Nations General Assembly resolution adopted in 1982, by vote of 135 to 15, to the effect that a state has sovereignty over waters within its own territory; (p) a 1902 decision of the United States Supreme Court in a case between Wyoming and Colorado involving an interstate river; (q) the fact that in the 1909 treaty between the United States and Canada, and the 1944 treaty between the United States and Mexico relating to the Colorado River, it was provided that use for domestic purposes should be given priority over uses for irrigation; (r) the principle of Roman law that the proprietor of a farm may do what he wishes with a stream which flows across it, without regard to the interests of a lower riparian owner; (a) the fact that a Bolivian protest in 1921 against Chilean diversion of the Rio Mauri was rejected by Chile, which continues to divert the stream; (t) a 1933 decision of an Austrian court that lower Hungarian users had no right to object to a diversion of the Laitha River in Austria authorized by the Austrian Government; (u) the opinion expressed in an 1890 Resolution of the Institute of International Law that the upper riparian state may divert as it wishes so long as the water is employed for a useful purpose and not merely wasted; (v) that the Non-Aligned States Conference Resolution adopted unanimously by 122 States in 1984, of which Mexico is a member, contains the principle "an upper riparian user's unilateral diversion of waters is an expression of the common heritage of mankind."

What difference, if any, would it make if the United States and Mexico agreed that the

International Court of Justice should decide ex officio et bono? What difference, if any, would it make if instead of the International Court of Justice this dispute were referred to arbitration before a special ad hoc tribunal authorized and directed to decide "according to international law, justice and equity"?

QUESTION 2.

For just over 60 years until its independence in June 1961 Kuwait was a British protectorate. Before that it had been under Turkish suzerainty. Shortly after independence, Iraq laid claim to the whole of Kuwait, arguing that it had been an integral part of Basra province under Turkish rule and that Iraq had succeeded to Turkish sovereignty after the end of the first world war. Fearing an Iraqi invasion, Kuwait requested assistance from Britain, which sent troops in 1961. These troops were later withdrawn and replaced by troops from Arab League countries, who left the country at the Kuwaiti government's request in 1963. In October 1963, Iraq recognized Kuwait as a sovereign state.

Iraq, however, maintained its claims to certain parts of Kuwaiti territory, notably the islands of Warbah and Bubiyan in the Persian Gulf and the land border area incorporating the southern tip of the Rumaila oilfield. In 1973 Iraqi forces occupied a border post but later withdrew. In 1975 Iraq proposed the leasing to Iraq by Kuwait of parts of Bubiyan and the coding of Warbah in return for Iraqi recognition of Kuwait's land borders. In response Kuwait stressed that the two islands belong to it. In 1981 Iraq repeated its 1975 proposal.

During the Gulf war between Iraq and Iran in the 1990's, Kuwait supported Iraq and provided substantial war loans.

In mid July 1990, Iraq demanded financial as well as territorial concessions from Kuwait. In need of higher oil revenues from oil production to finance post-war reconstruction, Iraq accused Kuwait of depressing the world price of crude oil by exceeding production quotas agreed by the Organization of Petroleum Exporting Countries (OPEC). Iraq further demanded reparation for "stolen" oil revenues and the cancellation of Kuwaiti war loans. Mediation by Egypt and other Arab countries proved unsuccessful. Claiming to have responded to a request from the "Provisional Free Kuwait Government", Iraq invaded and occupied the whole of Kuwait on 2 August, deposing the ruling royal family and installing its own regime. Iraq announced the annexation of Kuwait on 8 August.

You have been required to read The New York Times since the first class back in August. Since that time, you should have read on an every-day basis some relevant matters that relate to international law issues involving Iraq and its occupation of Kuwait.

Outline as many international law issues which affect the invasion and occupation, and, explain what legal arguments and international law rules apply from reference to the course materials and any outside related reading that you have done during the semester.