

Preface

1. This is an open book examination, that is, you can use any materials in the library, computer, Internet, etc. at your disposal.
2. Write legibly in ink, not pencil.
3. You may use 2 blue books as a maximum, if need, for question #1. Use a separate blue book for question #2. Each blue book has 8 pages. Use only one side of each page.
4. Make certain that you label each of your responses to question #1 carefully and accurately.
5. Plan your answer before writing.
6. The value of each question is approximately the same.
7. You can keep the examination questions.
8. You are not to discuss this questionnaire or the issues with anyone before handing in the blue books on December 19.
9. This examination response by you is due by December 19, 1997 at 5:00 p.m. Your blue books are to be given to Professor Tibbles in his office, Room 551 (South West corner of the 5th floor). His office telephone number is 236-6552.

GOOD LUCK

Question #1

Article 38(1)(b) of the Statute of the International Court of Justice refers to "international custom, as evidence of a general practice accepted as law." Some writers have found this formulation curious, since it is the practice which is evidence of the emergence of a custom.

However, the order of words makes little difference. What is clear is that the definition of custom comprises two distinct elements (1) "general practice" and (2) its acceptance as law. Clear as it may seem to be, this definition gives rise to a number of questions, many of which are highly controversial.

(1) What constitutes state practice?

(a) Are claims or assertions of states in themselves practice or must they be accompanied by physical acts? Would assertions *in abstracto* constitute practice or must they be made in the context of particular situations? Are votes for general declarations of law in international bodies manifestations of practice?

(b) Is state practice made only by organs competent to bind or speak for states in international affairs? May national laws, municipal court judgments, executive acts of an internal character constitute practice? Are there circumstances in which actions of non-official entities may be regarded as state practice? Are omissions and absence of action a form of practice?

(2) How much practice is required?

(a) Is repetition required or may a single act be sufficient to constitute general practice? What if a large number of states participate in a single act (e.g., a decision of a conference)? What if there is no practice contradicting the rule asserted in regard to a single act?

(b) How much time is required? What if no precedents can be found against the rule? Are there special circumstances which affect the requirement of time?

(c) How many states are needed? Is it necessary that there be "a very widespread and representative participation in the practice"? (International Court of Justice in *North Sea Continental Shelf Cases*, p. 129 in casebook.) Must it include states specially affected? Is there a significant difference in the numbers required when there is conflicting practice or absence of conflict? Is a greater number required to overturn an existing rule of law?

(d) Is the practice of some states more important than the practice of others? How much weight should be given to the non-participation of states with special interests?

(3) How much consistency is required?

(a) Are minor inconsistencies sufficient to negate a custom?

(b) Can one resolve apparent inconsistencies on the basis of new conditions and attitudes? Can 19th century precedents be considered as inconsistent with 20th century practice, when conditions are substantially different?

(4) Are dissenting and non-participating States bound by custom?

(a) May a state be bound if it has no practice and if the precedents did not involve it? Can a state prevent a rule of customary law from becoming binding on it? At what time must it express its opposition?

(b) Are new states bound by established custom in which they had no opportunity to participate? How may they change rules to which they are opposed?

(5) Do special customs involve different requirements? May a special custom (i.e., one which conflicts with general custom) bind a state which has not supported the special custom?

Is a more rigorous standard of proof required to show the existence of a special custom? Are special customs essentially similar to tacit international agreements?

(6) What evidence is required for *opinio juris*, the requirement that practice be accepted as law?

(a) Must states "believe" that something is law before it can become law?

(b) Is *opinio juris* necessary to distinguish usage from custom, legal from non-legal obligations? Can one presume *opinio juris* from consistent practice when there are no negative statements (or disclaimers) as to legal obligations?

(c) Can the requirement of *opinio juris* be met by a finding that the practice was socially necessary or suited to international needs?

(d) Is it necessary that the belief as to legal requirement be accompanied by statements that the conduct in question is obligatory? May the context provide evidence of belief in the absence of such statements?

Are such statements or positive indication required to prove an obligation to act, but not required to support a permissive rule (the freedom to act)?

(e) What significance do protests and acquiescence have for *opinio juris*?

Are isolated protests enough to prevent customary law on the basis of substantial practice? Would protest by a single state carry decisive weight if that state was the only one seriously affected?

Is failure to protest against an abstract assertion of law less significant than failure to protest concrete application of the purported rule? May protests override practice arising from physical acts (e.g., seizures) by states?

(7) May treaties be invoked as evidence of customary law? May they create customary law?

(a) Should decisive weight be given statements in a treaty or in preparatory work to the effect that some or all provisions are declaratory of existing law?

(b) May one infer that a treaty is not declaratory of international law from the fact that it provides for withdrawal, revision, or reservations?

(c) Under what circumstances are treaty rules which are not declaratory initially likely to become part of customary law by subsequent practice?

(d) Would bilateral treaties which have similar rules and are widely adhered to constitute evidence of state practice accepted as law or by custom?

(e) What effect would a resolution of the General Assembly or of an unofficial expert body (such as *Institut de Droit International*) have on the recognition of a treaty or the draft of a treaty as customary law?

(f) Are there circumstances in which the negotiation of a treaty and drafts of treaties will substantially affect the positions of states and the *opinio juris*, as to new rules?

(g) May tacit international agreements be treated as local or special custom? Does it make any difference whether treaty or custom is the basis of the obligation?

(8) Is there a normative hierarchy in customary law?

(a) Are some general principles accepted implicitly irrespective of consent as postulates of the state system (e.g., territorial integrity of a state, *Pacta sunt servanda*, autonomy)?

(b) Does this mean that current state practice and *opinio juris* are no longer relevant in defining their application?

(9) Would declarations of law adopted without dissent by the UN General Assembly constitute presumptive evidence of accepted international law, irrespective of actual state practice?

(a) Would the rules stated in a General Assembly declaration be binding on a state that claimed it voted for the declaration on the understanding that the General Assembly had only the authority to make recommendations?

(b) Would a declaration adopted by a substantial majority that asserts the existence of a particular legal principle have evidentiary value as a statement of customary law in litigation before an international or national judicial tribunal?

(10) Would the adoption of recommended standards of conduct by the UN General Assembly or another representative international assembly give rise to customary law if they are generally followed by states? Would such compliance constitute state practice for purposes of establishing customary law? What factors would be relevant to showing *opinio juris* in respect of such practice?

All of the questions above have arisen in cases or in exchanges of views among states.

Throw as much light as you can in your answers to these questions.

Question #2

Hibernia is a small republic in Europe with a strong Catholic tradition. Indeed, Catholicism is declared the official state religion in Hibernia's constitution.

One aspect of this national religious commitment is a constitutional provision that protects the right to life and that explicitly extends this right to the unborn. A recent decision of Hibernia's highest court recently considered the scope of this provision and held that the right to life of the unborn could be superseded only if the mother's life were in "imminent danger." In addition, Hibernian law makes it a crime to procure or perform an abortion. Provision of information about abortion services is illegal, punishable by fines and prison sentences of six months to three years.

Kerry Kildare, a citizen of Hibernia, is employed as an engineer at Hibernia State Motors, an automobile manufacturing company. One day while performing a routine assembly line procedure, a faulty machine collapsed and crushed her left hand. She was declared unfit for work, and, under Hibernian industrial legislation, given indefinite leave and a disability pension equal to her annual salary until her hand recovered adequately.

Recently, about two years after her accident, Ms. Kildare became pregnant, for the first time, and soon thereafter was advised by the Hibernian Disability Pension Board that her pension would be canceled upon the birth of her child. After protesting this advisory, she received the Board's formal determination. It provided, among other things, as follows:

A woman's entitlement to a disability pension ceases upon the birth of her first child. This is in accord with the long-held policy of the Disability Pension Board that women should discontinue working when they give birth to a child in order to

promote traditional family values.

The Board's decision threw Ms. Kildare into deep despair. As her partner is unemployed, she is completely financially dependent on her pension for her economic well-being. Thus, Ms. Kildare decided to investigate the possibility of an abortion. Hearing of a local women's health clinic, she promptly made an appointment to see a counselor there. The women's health clinic, she was informed, would provide information and nondirective counseling on abortion. Also, if requested, it would arrange appointments for Hibernian women to have legal abortions in neighboring countries.

On the day of Ms. Kildare's appointment, the women's health clinic was raided by the local Hibernian police who, in addition to confiscating the clinic's books, pamphlets, and videos, promptly arrested both Ms. Kildare and the counselor interviewing her, Meath Galway. Kerry Kildare was arrested for attempting to procure an abortion and Meath Galway for providing abortion information. Some time ago, in a local Hibernian magistrate's court, both women were found guilty of the charges against them, and each were sentenced to six months imprisonment and heavy fines.

Angered by what has happened to them, Ms. Kildare and Ms. Galway, through their lawyers, submitted individual petitions to the European Commission of Human Rights in Strasbourg, France, under Article 25 of the 1950 European Convention on Human Rights and Fundamental Freedoms. Hibernia, as it happens, had several years ago accepted the Court's jurisdiction over individual petitions. Recently, however, owing to the failure of the Commission to achieve a "friendly settlement," and after reporting its findings and opinion to the parties and to the Committee of Ministers of the council of Ministers as required, the Commission referred Ms. Kildare's and Ms. Galway's cases for a decision "on the merits" to the European Court of Human Rights, also in Strasbourg, where the case is now pending.

QUESTIONS PENDING

(1) Has Hibernia violated Kerry Kildare's and Meath Galway's human rights? If so, what rights?

(2) In any event, are there any additional or alternative legal norms, procedures, and/or institutions to be recommended that might further help to prevent or discourage situations of the kind posed by this problem?