Global Law and Governance

Harvard Law School
Fall 2010
David Kennedy

Thursday and Friday  9:50 AM - 11:50 AM

This course explores a range of legal disciplines which purport to explain how we are governed globally and which propose projects for improving global governance through law. We will focus on the field of international law and organization, examining the history of ideas, legal doctrines, institutional and administrative structures developed over the last century to organize and legalize international economic and political life. The readings will focus on various ways to think about the legal organization of global order, and on the history of legal efforts to organize and institutionalize international affairs.

The course takes the discipline of “public international law” as a starting point. Across the twentieth century, the discipline consolidated a community of lawyers and jurists with a common vocabulary, a shared sense of history and a shared range of professional activities. They continue to offer accounts of how the world is organized and projects for its reorganization. The casebook presents itself as a “classical” treatment, the distributed materials juxtapose various alternative historical, theoretical and avant-gardist points of views. The start of the twenty-first century has been characterized by a variety of challenges and proposals to rethink and reorient our modes of collective problem solving and policy making at the global level. As a result, we will spend some time thinking about history. What came before twentieth century international law? How was international legal modernism born and built in the first half of the last century? What happened in the half-century after 1945, after 1989, after 2001? What will happen next?

Evaluation:

This four credit course will require one 2,000 word final exam essay and two 500 word papers, which will be weighted proportionately in the final evaluation. The two papers combined will be worth one third of the grade, the final essay will be worth two thirds. The take home exam will be distributed on the last day of class and due on the last day of the exam period. Each of the two 500 word essays should comment on the readings for one assignment. These papers must be turned in to me in hard copy before the class in which that assignment is discussed. At least one paper must concern an assignment considered prior to October 15.

Materials:

Casebook assignments are from Damrosch, Henkin, Murphy and Smit, International Law: Cases and Materials West, Fifth Edition (2009), abbreviated DHMS in this syllabus.

You may also wish to purchase the following books at the bookstore:


Course Outline

I. The Mystery of Global Governance Today

Topic 1: The Disciplines of International Law and International Institutions:
People with Projects and a History of Ideas

II. The Background Architecture of Public International Law

Topic 2: The Norms
  Custom
  Special Problems

Topic 3: The Entities:
  Statehood and Recognition
  Sovereignty and Sovereign Rights

Topic 4: The Entities
  Individuals and “Other Entities”
  International Criminal Law: Individual Responsibility

Topic 5: The Powers
  Jurisdiction

Topic 6: The Powers
  Territory
  International Territories
  Law of the Sea: Architecture and Regulation

Topic 7: The Powers
  Conflicts

Topic 8: Mobilizing the Architecture: Claims and State Responsibility

III. The Architecture in History

Topic 9: Before Modernity
  1648-1815
  1815-1914

Topic 10: The Turn to Modernism: 1914-1945

IV. New Thinking: Adjudication

Topic 12: National Courts in a Transnational Legal Process and Questions of Reception

Topic 13: A Global Juridical Perspective: International Courts and Dispute Resolution

Topic 14: Consciousness as Governance: Rulership and the Power of Ideas

  Human Rights

  Environmental Protection

V. New Thinking: Administration and Execution

Topic 15: Statecraft and Diplomacy

  Unilateralism, Bilateralism and ad hoc Arrangements / Multilateral conferences and rulemaking

  GATT and the WTO: Bargaining in the Shadow of the Law / Law in the Shadow of Bargaining

Topic 16: International Institutions

  League of Nations, the United Nations and a History of Reform

  Leadership as Governance: The Secretary General

Topic 17: Administration as Governance

  Global Administrative Law

  Restructuring the Transnational Social State: The European Union, Market Freedoms and Technocratic Order

VI. New Thinking: Legislation

Topic 18: Regulation and Private Ordering

VII. New Thinking: Theories of the Whole

Topic 19: Constitutionalism, Systems Theory, Legal Pluralism and Fragmentation

VIII. Global Governance in Action: The Law of Peace and Humanitarianism

Topic 20: Humanitarian Policy and the “Law of Cooperation”

  Case Study: Refugees and the UNHCR
IX. Global Governance in Action: War as an International Legal Institution


Syllabus

I. The Mystery of Global Governance Today

Topic 1: The Disciplines of International Law and International Institutions: People with Projects and a History of Ideas


- DHMS xv-xvii (introduction) and xxxi-xxxiv (summary of contents)


- DHMS xix-xxx (historical introduction)

- David Kennedy, *Charts: Schools of Thought*, and *Intellectual History*

II. The Background Architecture of Public International Law

Topic 2: The Norms

Custom

- DHMS 55-67 (Article 38 of the Statute of the International Court of Justice, Schachter, customary law questions, The Paquette Habana (1900), McDougal note 4)
- DHMS 68-76 (The Lotus (1927))
- DHMS 79-87 (Nuclear Weapons (1996))
- DHMS 112-119 (treaties and customs compared)

Optional: (In broad terms, the law of treaties should be familiar from study of contract law. Those with a special interest in the ways in which common private law ideas have and have not been given expression in the law of treaties may wish to skim DHMS, 122-215)

Special Problems

- DHMS 105-107 (jus cogens, hierarchy of norms, Weil, “relative normativity”)
- DHMS 292-295 (unilateral acts, Eastern Greenland (1933), Nuclear Tests (1974))
- DHMS 286-291 (nonbinding international agreements)
- David Kennedy, Chart: The Structure of Sources Doctrine
II. The Background Architecture of Public International Law

Topic 3: The Entities

Statehood and Recognition

- DHMS 300-313 (definition of statehood, Montevideo Convention)
  348-359 (recognition)
- DHMS 370-375 (recognition criteria and effects, Salimoff (1933))

Sovereignty and Sovereign Rights

- The Antelope 23 U.S. (10 Wheaton) 66 (1825)
- American Banana v. United Fruit (1909)
- Corfu Channel (1949) (excerpts)
- Karen Knop, RE/Statements: Feminism and State Sovereignty in International Law, 3 Transnational Law & Contemporary Problems 293 (1993)
II. The Background Architecture of Public International Law

Topic 4: The Entities

Individuals and Other “Entities”

- DHMS 447-451 (individuals, Lauterpacht)
- 453-455 (LeGrand (2001))
- 458-467 (nationality and Nottebohm (1955))
- 481-490 (corporations and Barcelona Traction (1970))

International Criminal Law: Individual Responsibility

- DHMS 1306-1313 (background on international criminal law)
II. The Background Architecture of Public International Law

Topic 5: The Powers

Jurisdiction

- DHMS 755-761 (jurisdiction defined, overview of principles)
  780-784 (Helms-Burton Act, sanctions)
  793-796 (passive personality, *Yousef* (2003))
  798-802 (protective principle, *Vasquez-Velasco* (1994))


II. The Background Architecture of Public International Law

Topic 6: The Powers

Territory

- DHMS 1384 (El Salvador v. Honduras (1992))

International Territories


Law of the Sea: Architecture and Regulation

- DHMS 1372-1379 (introduction, basic principles: freedom and commonage, status of the treaty, the concept of “zones”)
II. The Background Architecture of Public International Law

Topic 7: The Powers

Conflicts

- DHMS 851-859 (jurisdictional immunities)
- Schooner Exchange v. McFaddon, 11 U.S. 116 (1812)
- American Banana v. United Fruit (1909)
- DHMS 835-836 (conflicts of jurisdiction)
II. The Background Architecture of Public International Law

Topic 8: Mobilizing the Architecture: Claims and State Responsibility

- DHMS 498-502 (general principles of State responsibility)
  532-541 (countermeasures, retorsion, reprisal)

- France v. US Air Services (1978) (excerpts)


III. The Architecture in History

Topic 9: Before Modernity

1648-1815


1815-1914

- *The Antelope* 23 U.S. (10 Wheaton) 66 (1825)

Optional Background:

III. The Architecture in History

Topic 10: The Turn to Modernism: 1914-1945


- Philip Jessup, *The Functional Approach as Applied to International Law*, Third Conference of Teachers of International Law (1928)


III. The Architecture in History


- Corfu Channel (1949) (excerpt)


- DMHS 1-36 (nature of international law)


Optional background:

IV. New Thinking: Adjudication

Topic 12: National Courts in a Transnational Legal Process and Questions of Reception


IV. New Thinking: Adjudication

Topic 13: A Global Juridical Perspective: International Courts and Dispute Resolution

- DHMS 582-587, 638-641 (ICJ, jurisdiction, other international courts and tribunals)
- US v. Iran (1979)
- DHMS 598-610 (Nicaragua v. US (1984))
IV. New Thinking: Adjudication

Topic 14: Consciousness as Governance: Rulership and the Power of Ideas


Human Rights

- DHMS 956-961, 975-988 (introduction to human rights)

Environmental Protection

- DHMS 1486-1502 (general principles, *Trail Smelter* (1941), Chernobyl)
V. New Thinking: Administration and Execution

Topic 15: Statecraft and Diplomacy.

Unilateralism, Bilateralism and ad hoc Arrangements / Multilateral Conferences and Rulemaking


GATT and the WTO: Bargaining in the Shadow of the Law / Law in the Shadow of Bargaining


V. New Thinking: Administration and Execution

Topic 16: International Institutions

- Roland Barthes, The Eiffel Tower and Other Mythologies, Hill and Wang 3-17 (1979)

League of Nations, the United Nations and a History of Reform

- Julian Corbett, What is the League of Nations?, 5 British Yearbook International Law 119-148 (1924) (excerpts)

Leadership as Governance: The Secretary General

- Oscar Schachter, Dag Hammarskjold and the Relation of Law to Politics, 56 American Journal of International Law 1 (1962)

- David Kennedy, Leader, Clerk or Policy Entrepreneur? The Secretary General in a Complex World, in Simon Chesterman (ed), Secretary or General?: The Role of the United Nations Secretary General in World Politics, Cambridge University Press 158-181 (2006)

You may wish to consider a couple of pieces I have written on international institutions: David Kennedy, A New World Order: Yesterday, Today and Tomorrow 4:X Transnational Law and Contemporary Problems 330 (1995), and David Kennedy, The Move to Institutions, 8 Cardozo Law Review 841 (1987)
V. New Thinking: Administration and Execution

Topic 17: Administration as Governance


Global Administrative Law


Restructuring the Transnational Social State: The European Union, Market Freedoms and Technocratic Order


VI. New Thinking: Legislation

Topic 18: Regulation and Private Ordering


VII. New Thinking: Theories of the Whole

Topic 19: Constitutionalism, Systems Theory, Legal Pluralism and Fragmentation


- DHMS 36-41 (fragmentation of international law)


VII. Global Governance in Action: The Law of Peace and Humanitarianism

Topic 20: Humanitarian Policy and the “Law of Cooperation”


Case Study: Refugees and the UNHCR


VIII. Global Governance in Action: War as an International Legal Institution


- Sigmund Freud, *Thoughts for the Times on War and Death* (1919)


- DHMS 1276-1296 (law of war, control of weapons)
VIII. Global Governance in Action: War as an International Legal Institution


- Clausewitz, *On War* 101-122, 399-410 (1832)