INTERNATIONAL LAW

Professor David Kennedy
Harvard Law School

Fall 2007

Syllabus
Assignments

Assignments are from Damrosch, Henkin, Pugh, Schachter and Smit, International Law Cases and Materials Fourth Edition (2001) and other materials. Those marked with an asterisk (*) are required. Those marked with WS are available on the course website. Assignment abbreviations refer to the following sources:

DHPSS Damrosch, Henkin, Pugh, Schachter and Smit casebook


Course Description

This course takes up "public international law" as a discipline --- a community of lawyers and academic jurists with a common vocabulary, a shared sense of history and a shared range of professional activities. We will approach the discipline as participant observers, anthropologists, sociologists, historians. How do these people come to be part of a common enterprise, what is their project, how do they argue and persuade? How do they see the world? What stories do they tell about their origins and aims? What are they seeking to do about what sorts of problems? How do they differ among themselves?

This is also a course about the start of a new century. In many ways the discipline of public international law, well represented by the casebook, is a product of the twentieth century. What came before --- and how was modernism born, built in the first half of the last century? In the forty years after 1945 a liberal and modernist consensus was consolidated in public international law. And now? How can we understand the proliferation of new approaches to the field unleashed in the last decades? Feminism, historicism, interdisciplinarity, cultural studies, post-colonialism, multiculturalism, environmentalism, doctrinal and theoretical critique. Decay? Rebellion? Renewal?

The casebook presents itself as a "classical" treatment, suitable for a course in the "grand classical tradition." We will take this as our starting point. The distributed materials juxtapose historical, theoretical and avant-gardist points of views.
Information about the Exam for International Law

(i) Fall 2007

Professor David Kennedy

This five-credit course will require one 2,000 word final exam essay and three two-page papers.

One half of the grade will be a take home exam essay (maximum 2,000 words or roughly 10 double-spaced pages), distributed on the last day of class and due on the last day of the exam period.

The other half will be the average of three two-page essays. Each should comment on the readings for one assignment. Students should select three of the assignments and write a two-page essay reflecting on the readings. These papers must be turned in to me before the class in which that assignment is discussed.

One paper must concern an assignment considered during September, one must concern an assignment considered during October, and one must concern an assignment considered during November or December.
## International Law Fall 2007 ASSIGNMENT SCHEDULE

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### THIRD PAPER DEADLINE AND FINAL EXAM
Course Outline

I. Origins

1. International Law as a Discipline: People with Projects
2. Histories of International Law
3. Doctrinal Sources
   1. Doctrinal Machinery to Identify Norms
   2. Custom
   3. Treaties and Special Problems
      (Omitted Fall, 2007)
4. Reception of International Law in U.S. Courts
5. Institutional Establishment

II. History of Ideas

9. The 1648 Westphalian Watershed: Precursors and the 18th Century
10. The Nineteenth Century: A Classical Period
11. Early Modernism: The Interwar Period
12. Modernism Into Pragmatism After 1945
14. After the Cold War: Liberalism Continued
15. Liberalism Discontinued: New Approaches to International Law

III. Sovereignty Into Process: From 19th Century Theory to a Modern Procedural Regime

16. History and Theory of Sovereignty: Towards Modernism
17. A Modern Regime of Doctrines and Procedures
   1. Statehood and Recognition
   2. Jurisdiction
      a. Territory/Interest Based Exercise
      b. Private Ordering and Regulation
      c. Nationality, Citizenship and Statelessness
      d. Limits and Conflicts
   3. State Responsibility and Remedies
18. Institutional Pragmatism: Beyond Process
   1. Sovereignty Over Land and Self-Determination
   2. International Territories

IV. International Institutions

24. Global Ordering Through Diplomacy
   a. Unilateralism, Bilateralism, and Ad Hoc Arrangements
   b. Multilateral Conferences and Rule Making
B. A Discipline Defined by Reform

C. The Plenary (Omitted Fall, 2007)
   1. Membership, Representation and Institutional Role
   2. Voting
   3. Law Making and Powers: Declaring, Denouncing, Deciding, Spending, Rule Making
   4. Personality, Privileges, & Immunities

D. International Administration
   1. Secretariat and the Secretary General: Leader and Clerk, Norm and Policy Entreprenuer
   2. International Administrative Law and Coordination

E. International Judiciary
   1. The International Court of Justice
   2. Non-adjudicatory Dispute Settlement and Commercial Arbitration (Omitted Fall, 2007)

V. The Law of Peace

A. A Substantive Regime: The Law of Cooperation

B. The Law of the Sea: An Exemplary Regime of Architecture and Regulation

C. International Criminal Law
   1. Individual Responsibility and War Crimes
   2. Terrorism

D. The Environment: A New Pragmatism

E. Human Rights: Doctrines, Institutions, and Advocacy

F. Refuges and the UNHCR

G. Women's Rights

VI. International Economic Law

A. Two Regimes: Public International Law and International Economic Law: A Constitutional Question

B. Structuring the Transnational Social State: The European Union, Market Freedoms and Technocratic Order

C. Economic Policies (Omitted Fall, 2007)
   1. Labor Standards
   2. Sex Trade, Pornography, and Adoption
   3. HIV / AIDS
   4. Narcotics

D. Law and Economic Development

38. VII. Comparative Law and The Problem of Culture (Omitted Fall, 2007)

VIII. The Laws of Force
A. The Law of War
B. The Law in War
C. Weapons Control, Nuclear Weapons and Disarmament (*Omitted Fall, 2007*)
D. The Regime in Action

1. Peaceful Settlement, Enforcement/Intervention
2. Intervention and Peacekeeping
Assignment 1

I. Origins

A. International Law as a Discipline: People with Projects

Readings:

- *DHPSS:* xix-xii (Introduction) xxxvii-lxxiv (Contents)

Optional:


Background:


Questions for Discussion:

- How have the casebook editors bounded and organized their subjects? What is "in" and "out?"

- The phrase "international law" suggests at least some boundary between international and national and perhaps also between law and politics, yet such distinctions also seem unworkable, formal, and old-fashioned. How do the casebook editors handle this?

- The "state" seems central to the subject, but how exactly? How do the casebook editors handle the paradox that international law seems more important these days precisely because the state seems less so, while the state somehow remains central to the field?

- Looking through the table of contents, which topics seem "hot" and which "cold?" Where are issues of procedure? Of substance? Lots of big news stories in the past years seem likely to have had an international law dimension --- where would Afghanistan, Kosovo, Bosnia, NATO, Russian reform, NAFTA, or Israel/Palestine, be discussed? What about refugees, nationalism, underdevelopment, terrorism, UN reform, war, women's rights, multiculturalism, war crimes, post-colonialism, torture, third world debt, international financial stability, conflict of law? Do you have an intuition about whether international law makes these issues more or less intractable? Which parts of international law make things better? Worse?

- This casebook concentrates on "public" international law. In what sense? What would be different about "private international law" in style, coverage, substance? What challenges to this distinction are already visible?
Assignment 2

I. Origins

B. Histories of International Law

Readings:

- *DHPSS: xxvii-xxxvi (historical introduction)

- DAVID KENNEDY: Charts of the History of International Law and Organization


Background:


For an excellent article summarizing the current status of scholarship in the field of history of international law and analyzing possible developments in the future, see: MARTI KOSKENNIEMI,

For recent scholarship re-examining the history of international law through the lens of gender, see: JOCELYN CAMPANARO, Women, War and International Law: The Historical Treatment of Gender-Based War Crimes, 89 Geo. L.J. 2557 (2001).


Earlier historical works include:

Questions for Discussion:

➢ What roles do you see historical narratives playing in constructing the discipline of international law -- stories about origins, narratives of progress, doctrines rooted in "custom."


➢ How continuous is the history? Where do intellectuals figure in its development? How much of the transformative energy comes from struggle within the discipline? Between philosophies? Generations? Among national or cultural approaches? Where is the current avant-garde?

➢ How does Berman's project differ from that of DHPSS? How would Berman read this 2001 casebook? Is it still "modernism?" What do you make of Berman's comparison of artistic and legal intellectuals?
Assignment 3

I. Origins
   C. A Doctrinal Sources: Custom and Norms
      1. Doctrinal Machinery to Identify Sources

Readings:

- *DHPSS: 56-68 (A.38, Schachter, general, Paquete Habana, McDougal, notes)
- Chart: The Order of Sources Doctrine
- Chart: The Structure of Sources Doctrine

Background:

DAVID KENNEDY, A New Stream of International Law Scholarship, 7 Wisc. Int. L. J., 28-39 (1988);

Questions for Discussion:

- Why do international law materials devote such a great deal of energy to the "sources" of normative authority?
- What does Schachter mean by “intellectual instrument…for providing objective standards of legal validation” on page 57?
- What does it mean to have converted the philosophical or political question of law's binding force into a doctrinal issue?
- What does it mean to create law out of politics? To remove the "subjective" from law?
- Try answering the questions on pages 54 and following. Can you imagine yourself arguing for one or another position as an attorney?
- The doctrines about sources are reminiscent of private law doctrines about contract. What about the fact that these are states? What's sovereignty got to do with it? International sovereignty? Public order?
- Is there a difference between international norms created "publicly" and "privately?"
- In historical terms, does the Paquete Habana move things forward? Backward? How practical is the court’s sources methodology?
Assignment 4

I. Origins

C. Doctrinal Sources: Custom and Treaty

2. Custom

Readings

- *DHPSS: 68-87 (S.S. Lotus, Nuclear Weapons)
- *DHPSS: 105 (Weil, "Relative Normativity")

Background:


After years of relative scholarly neglect, customary international law has recently been a subject of academic controversy, often in connection with its reception in U.S. law (see assignment 7).

1. Rational Actor (Realist) Description

Some commentators argue that in the few instances where state practice appears consistent with regard to a particular legal norm, this adherence derives from a convergence of state interests rather than a sense of legal obligation. Because rational choice rather than opinio juris motivates state practice in all regards, CIL does not have independent normative force. See JACK GOLDSMITH AND ERIC POSNER, Understanding the Resemblance between Modern and Traditional Customary International Law. 40 VA. J. INT’L L., 639 (2000).

In response, some argue that rational choice theory can accommodate the formation of CIL by taking into account a broader range of state interests, such as the desire for stability and cooperation or the desire for international credibility. In effect, these scholars use rational choice theory to explain and legitimate CIL. See EDWARD T. SWAINE. Rational Custom, 52 DUKE L.J., 599; MARK A. CHINEN, Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner, 23 MICH. J. INT’L L. 143 (2001).

Professor Andrew Guzman argues for a recasting of CIL under a “reputational” model. CIL
compels compliance by threatening a state’s reputation as a law-abiding and reliable member of the international community. Under this theory, legal obligation arises if states other than the breaching state feel that the obligation is present. Widespread state practice takes a back seat to the opinio juris of the community of states evaluating the reputation of the breaching state. By arguing that reputational concerns constitute state interest and compel compliance, this model purports to subsume the concerns raised by the rational actor theorists. See ANDREW GUZMAN, A Compliance-Based Theory of International Law. 90 CAL. L. REV., 1823 (2002).

2. Problems with Democratic Process, Problems with Incorporation into US Fed Common Law

Some have pointed out that the creation of CIL is not rooted in a democratic process. The current system gives the courts too much discretion in their ability to determine which norms meet the CIL threshold. See PAUL STEPHAN, AEI Conference Trends in Global Governance: Do They Threaten American Sovereignty? Article and Response: International Governance and American Democracy. 1 CHI. J. INT’L L., 237, 238 (2000).

Furthermore, some scholars criticize the generally established position that CIL is a form of US Federal common law. They argue that the incorporation of CIL into a Federal common law violates fundamental constitutional principles. For example, applying the last-in-time rule to norms designated by the court as CIL, and hence federal common law, would allow the court to trump prior legislation and treaty. In effect, this gives the court the power to use federal common law to trump the very statutes that federal common law was designed to implement. See CURTIS BRADLEY AND JACK GOLDSMITH, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV., 815, 843 (1997)


Many international law scholars have pointed out fundamental difficulties with Customary International Law. State practice is rarely both widespread and consistent and scholars often disagree about what criteria courts should adopt in their analysis. Furthermore, some critics have pointed out that the process by which custom becomes law is inherently circular. If a customary norm requires widespread state practice arising out of a sense of legal obligation in order to be deemed CIL, then CIL merely describes rules rather than creating them. See ANTHONY D ‘AMATO, The Concept of Custom in International Law, CORNELL UNIV. PRESS (1971); J.
Questions for Discussion:

➢ The casebook begins with custom, although treaties are now thought the pre-eminent source of international law --- there are more of them, they seem less normatively problematic from a consensual point of view. Why do you think they did so?

➢ If sources of law differ in their pedigree, do they differ also in their normative force? Is it on/off? More relative than that?

➢ We can now begin to develop a sense for changes in international law in this century. What can we say about the history of international law in this century from the three points of Paquete Habana (1900), Lotus (1927), Weil (1983), and Nuclear Weapons (1996)?

➢ Can you fit the Paquete Habana (1900) and Lotus (1924) into the conventional story of international law’s movement from nineteenth century positivism to something more modern after World War I? How about the narrative of the discipline’s 19th century progress from naturalism to positivism? Are either of these cases “traditional”? “modern”? “transitional”?

➢ Perhaps custom structures the background norms, allowing more detailed substantive matters to be handled by treaty. Is Paquete Habana about background or foreground? Lotus?

➢ What do you make of the fact that the status of international law in the U.S. legal system required adjudication as late as 1900?

➢ Are Lotus and Paquete Habana consistent?

➢ If we take the short Weil paragraph as typical of the post-1950 period, what has happened to the Lotus world? What could "relative normativity" mean? Has the system matured or collapsed?

➢ The private law analogy, which seems appropriate for treaties, seems less so for custom. Is there an analogy between the custom/treaty and public/private distinctions?

➢ What do you make of the argument in Lotus? Is it conceivable that a system based on the
"principle of freedom" and one based upon its antithesis will yield "the same result?" How does this configure the public? What result for the distinction between treaty and custom?

- As you consider the results of the various sources cases, do you find the doctrinal rhetoric of sources helpful? Argumentatively persuasive? "Realistic?" Institutionally satisfying? What do the results suggest about international law as a response to war? As a form of peace? As a process?
Assignment 5

I. Origins

C. Doctrinal Sources: Custom and Treaty

3. Treaties & Special Problems

Readings:

- *DHPSS: 108-118, (general, codification, relations between treaty and custom); 451-457 (Vienna Convention, definition of a treaty); 457-462 (unilateral declarations, Nuclear Tests Case, Burkina Faso/Mali); 462-466 ("non-binding agreements"); 105-108 and 532-536 (jus cogens)


- *DHPSS: 553-568 (fundamental change of circumstances, Fisheries Case, war, Techt v. Hughes)

- International Load Line Convention Case

Background:


DHPSS: 431-463 (conclusion, entry into force); 487-503 (invalidity, termination, suspension);

Questions for Discussion:

- Is a "non-binding agreement" the same as a "relatively normative" custom? If Schachter expresses the consciousness of the post-war period, how do the "progressive development" projects of the 1960s and 70s differ from "codification" projects of the 1920s? Is "third world" participation a factor or a coincidence? How might Schachter have dealt with the problem of unilateral declarations posed by the Nuclear Tests Case?

- Arguments about both consent and justice or equity are present in talk about doctrines of treaty formation and stability such as pacta sunt servanda as well as in doctrines about treaty termination such as rebus sic stantibus. So what?
What do you make of *jus cogens*? A doctrinal trivia? A central issue of treaty law? How do you explain the lack of cases? Why is this a doctrine about treaties rather than about the strength of the substantive norms involved --- why not mandatory sentencing rather than tinkering with the effect of genocide on capacity to contract?

How do you account for the political energy expended to get norms recognized as *jus cogens*? Is there a relationship between substantive hyperbole and remedies? Does *jus cogens* have a gender? Do treaties and custom also have a gender? What about sources doctrine? What about states?

What about war --- should all bets be off?
I. Origins
   C. Doctrinal Sources: Custom and Treaty

Readings:

- *DHPSS: 118-134 (Schachter, Mann, Friedmann, private law analogy)
- *DHPSS: 142-158 (Filartiga, Schachter)
- SINHA, Perspective of the Newly Independent States on the Binding Quality of International Law (1965) in Snyder and Sathirathai Third World Attitudes Toward International Law, 23-31
- JAMES GATHII, International Law & Eurocentricity 9 European Journal of International Law, 184-211 (1998)

Background:


Questions for Discussion:

- What about cultural diversity, cultural relativism and so forth? The first wave of scholarship developing a "third world approach" to international law used sources doctrine to focus attention on the exclusion of third world nations from the origins of international law and to build a basis for third world participation, in part through doctrines of state succession and regional custom.

- The status of General Assembly Resolutions was a preoccupation of international law scholars in the sixties and seventies. To oversimplify, radicals (including some socialist and third world scholars) sought to give them force, liberals proposed creating a new category of "soft law," and conservatives thought them simply hortatory. How might we evaluate these political strategies? How might we compare this moment to that of "relative" normativity and "non-binding agreements?" Does the hierarchy of treaty and custom have a center/periphery tilt? How about that of treaty-custom/general principles? Do rules favor the weak? Conversation the strong? The reverse?

- Is there a politics of sources doctrine? How confident can we feel about the politics of preferring treaties or principles or custom?

- As Mutua suggests, third world international law scholars (such as Khushalani) often argued that their societies "had" human rights just like the West, arising from different cultural or religious traditions. Some scholars from the center contested this claim. The issue feels somewhat different today, as we will see. Cultural diversity now seems rather to challenge than confirm the universality of human rights norms. What do you make of this switch? How can such a reversal be squared with a narrative of "consensual" principles or a historical process of progressive "harmonization?"
Assignment 7

I. Origins

C. Doctrinal Sources: Custom & Treaty

5. Reception of International Law in U.S. Law

Readings:

- *DHPSS: 159-180 (International law “as law”, Henkin, judicial application)

Optional:


- DHPSS 195-205 (Treaties, Federalism, Missouri v. Holland)

Background:


Questions for Discussion:

- What is the role of international lawyers in the reception of international law? What impact does reception have on international law?

- Would “reception” look differently if we thought of international law as a custom rather than a treaty? As principles rather than rules? As a sensibility rather than a legal regime? As a political project? As a professional commitment?
International law is not only different in different locations and periods, it is also “received” differently in every legal culture and in different policy sectors. These materials concern the U.S. reception – a complex and contested matter of domestic public law. How are we doing?

Bradley & Goldsmith take on a generation of settled judicial interpretation – what do you make of their arguments? The DHPSS response?
Assignment 8

I. Origins

D. Institutional Establishment

Readings:

- CORBETT, What is the League of Nations?, British Yearbook Int. L., 119-148 (1924)
- KIRGIS: International Organizations In Their Legal Setting, 1-6 (1977)
- ROLAND BARTHES, The Eiffel Tower

Background:


DAVID KENNEDY, A New Stream of International Law Scholarship, 7 Wisc. Int. L. J., 39-49 (1988);
The Move to Institutions, 8 Cardozo L. R., 841 (1987);


Questions for Discussion:

- Corbett is struggling to think about international institutions in the terms familiar to public international lawyers of the day --- how’s he doing? In what ways is Corbett a man of his time?
- Sovereignty – a bundle of rights? More than the sum of its parts? Personality? Can we say more now than in the casebook introduction about the authenticity of politics and the artificiality of law?
- "International Organizations," like "international law" and "international relations" might be seen as an independent discipline with its own history as well as its own political, methodological and professional character. Comparing the Kirgis history with that of DHPSS, how do these disciplines distinguish themselves? Does Kirgis have room for Corbett in his story?
II. History of Ideas
   A. The 1648 Westphalian Watershed: Precursors and the 18th Century

Readings:


Background:

**DAVID KENNEDY**, *Primitive Legal Scholarship*, 27 Harv. Int'l L. J., 1 (1986);

**ARTHUR NUSSBAUM**, *A Concise History of the Law of Nations*, 1-114 (1954) (chapters covering ancient Orient, Greece and Rome, Middle Ages, and "modern" times until the Thirty Years' War);

**MARTTI KOSKENNIEMI**, *From Apology to Utopia: The Structure of International Legal Argument*, 73-98 (1989) ("early scholarship");

**LUIS RIVERA**, *A Violent Evangelism: The Political and Religious Conquest of the Americas*.

Questions for Discussion:

- International legal scholars generally date the beginning of their discipline to the Peace of Westphalia in 1648. Earlier scholarship is generally considered significant only as a precursor -- foreshadowing later doctrinal developments or embodying, in nascent form, later visions of international law. It is remembered as intellectually immature, entangled with religious belief, and conflating the domestic and the international. The two centuries after 1648 are often remembered as the "age of philosophy," an extended scholarly debate between natural law and positivism in which positivism gradually took the upper hand. It is also remembered as the period in which international law was disentangled from the religious and domestic spheres, and in which scholars opened their eyes to methodological concerns. What do you make of the significance of 1648 in light of the readings?

- If pre-1648 scholarship is misunderstood today, what is it that makes it "sharply different" from post-1648 scholarship? Does Vattel seem all that different from Vitoria or Grotius? How? Is his account of the law of nations less mystical, more secularized? Does it distinguish between the international and the domestic in a new way? Does it deal with the problem of conflict between
sovereign freedom and the normative order in a new way? Why does 1648 continue to loom so large in our stories of the origins of international law?

- How should we remember Vitoria? As someone working out the conditions for order among independent sovereigns? Or as someone responding to the implications of the colonial encounter? Are the very foundations of international law inextricably caught up with colonialism?

- Like some of the pre-Westphalian scholars, Vattel seems to locate the sources of many international rights and obligations in the domestic sphere—in obligations owed by the sovereign or nation to itself. What do you think of the way he uses this device to justify the colonial encounter—every Nation has an obligation to cultivate the soil; the wandering tribes of America have failed in this duty and do an injury to other Nations by claiming more land than they can cultivate; and the European Nations have a corresponding right to colonize tribal lands. How would Anghie read Vattel?

- What relation does Anghie have to the tradition of “third world” thinking we encountered in Assignment 6?
Assignment 10

II. History of Ideas
   B. The Nineteenth Century: A Classical Period

Readings:


Background:


Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 98-130 (1989) ("traditional" and "professional" international law; see esp. pp. 106-08, 116-19, 121-23, 127-30);


Arthur Nussbaum, *A Concise History of the Law of Nations* 115-250 (1954) (chapters covering from the Peace of Westphalia to the Napoleonic Wars, and from the Congress of Vienna to World War I);

You might wish to compare the selection from the first edition of Wheaton included in the distributed materials with the same sections of later editions, particularly Henry Wheaton, *Elements of International Law* (1866).
Questions for Discussion:

- The discipline of public international law looks back on the nineteenth century in various ways. For some it is the period of philosophical debate in which positivism displaced naturalism; for others it is the period of magisterial doctrinal synthesis, the "classic" or "traditional" international law. Sometimes nineteenth century international law is figured as a partial or immature precursor to modernism, although for most it is treated as a unified system against which to react.

- What is/was/are “positivism?” A culture? A method? A theory?…..

- Each of the contemporary writers in this set of materials enlists an image of nineteenth century international law in a contemporary project of criticism and methodological innovation. How? What are their projects? Are they related or compatible? Are their nineteenth centuries related or compatible? How would Riles or Anghie read Wheaton’s classic text? Onuma?

- In light of Wheaton’s disclaimer that there is a "universal" international law, what can be said about the relationship between universality and colonialism or the role of the colonial encounter in international law’s formation?

- Are the following hypotheses about the 19th century borne out by the readings?
  - that the "discipline" was less coherent early than later in the century
  - that the naturalist-positivist philosophical debate wasn't experienced as particularly important
  - that people did not agonize over whether international law existed, could be separated from politics, could bind sovereigns, etc.
  - that the century saw a slow consolidation of a specific project of sovereignty which included:
    a) a move from diverse and overlapping sovereign rights and powers toward an idea of a unified sovereignty;
    b) a move to consolidate territory as the mark of sovereign boundaries;
    c) a move from divergent international laws for different regions or orders to a single international law, with the allocation of territory among sovereigns as the reason and method for this unification;
    d) a move toward the idea of interchangeable and equal sovereigns;
    e) a move to the idea of a universal system unified by law--ratifying the colonial land grab;
    f) a move to a law without content except for procedural sovereign boundaries: doctrines about sources, statehood and jurisdiction;
    g) the slow emergence of a public/private dichotomy of significance for international sovereign rights
Assignment 11

II. History of Ideas
   C. Early Modernism: The Interwar Period

Readings:

- **ALVAREZ, The New International Law, Grotius Society, 35-51 (April 16, 1929)**
- **JESSUP, The Functional Approach as Applied to International Law, (1928)**
- **REDSLOB, The Problem of Nationalities, Grotius Society, 21-32 (April 16, 1929)**
- **DETLEV VAGTS, International Law in the Third Reich, 84 A.J.I.L., 661 (1990) (excerpts)**

Background:

ALEJANDRO ALVAREZ, International Law and Related Subjects from the Point of View of the American Continent, (1922) Carnegie Endowment;

HANS MORGENTHAU, Positivism, Functionalism and International Law, 34 A.J.I.L., 260 (1940);


You may wish to review the Lotus Case at DHPSS 63 which we read in Assignment 4, and Nathaniel Berman's essay on cultural modernism in international law which we read in Assignment 2.

For a fascinating treatment of international law's approach to nationalism during the period, which includes (at pages 1808-1821) an analysis of Redslob's essay, see: NATHANIEL BERMAN, 'But the Alternative is Despair:' Nationalism and the Modernist Renewal of International Law, 106 Harv. L. Rev., 1793 (1993).

For an interesting historic piece on the tendency of economic change to run ahead of political adjustments as the causes of war, see EUGENE STALEY, War and the Private Investor, A Study in the Relations of International Politics and International Private Investment (New York: 1967).

For the origins and development of the discipline international institutions in the period, see DAVID KENNEDY, The Move to Institutions, 8 Cardozo L. R., 841 (1987).
For classics of the discipline of international relations in the period, see: HAROLD NICOLSON, Peacemaking 1919 (1933, 2nd ed. 1939) and Diplomacy (1939, 2nd ed. 1950) or E.H. CARR, International Relations Between the Two World Wars, 1919-1939 (1947) and The Twenty Years Crisis (1939, 2nd ed.1946).

Alvarez's call for codification was in tune with a number of efforts made during the period to codify international law. On these developments, you might review DHPSS 97-100 and see E. NYS, The Codification of International Law, 5 A.J.I.L., 871 (1911) and Report of the First Conference for the Codification of International Law, Research Committee of the Geneva Office, League of Nations Association (March 1930).

**Questions for Discussion:**

- Like the nineteenth century, the interwar period is remembered by the discipline in a variety of quite different ways. For international relations, this is the field's formative --- and classical --- period, the nineteenth century important only for diplomatic history and political philosophy. For international institutions, this is also the formative era, if a disappointing one, the nineteenth century remembered for precursors. Public international law now remembers two quite different interwar traditions --- an experimental and progressive modernism associated with Wilson, the League and questions of minorities, mandates, labor, social issues, women's rights and self-determination; and a tradition doctrinal period of high positivism associated with much academic literature, the codification projects and jurisprudence of the Permanent Court of International Justice. All these recollections read a distinctive "modernism" into the period.

- What is new and modern about the international law of the inter-war period? In what ways does it seem old to us now?

- How might the Lotus Case be seen as part of these new modernisms?

- What is distinctive about Alvarez's clarion call? How is his call for an "American" international law related to postwar calls for a "third world" voice? What does he mean by "scientific"?

- What about the Nazis? In which of these modernisms do they participate?
II. History of Ideas
D. Modernism Into Pragmatism After 1945

Readings:

- Conditions of Admission of a State to Membership in the U.N. Advisory Opinion of May 28th, 1948, I.C.J. (opinion of Alvarez)

- M. McDougal, Law and Power, A.J.I.L., 102 (1952)

Optional:

- DM: P. Potter, Liberal and Totalitarian Attitudes Concerning International Law and Organization, A.J.I.L., 327 (1951)


Background:


Other pieces which give some flavor for U.S. International law in the fifties include:

The immediate post-war and early Cold War years were complex ones for the international law establishment in the U.S. Despite numerous doctrinal and institutional developments, the discipline seemed stuck in methodological debate and existential anxiety. Some seemed rooted in the pre-war doctrinal world which felt threatened on every front --- even, or perhaps particularly, by internationalists engaged in the United Nations. Some were U.N. enthusiasts, yet experienced the Charter and U.N. legal system in formal, constitutional terms --- about which they might be either hard-boiled or idealistic, but which either way would seem unduly formal to lawyers today. Throughout the period, with the exception of the McDougal school, the discipline was slow to engage methodological changes which were transforming other American law disciplines in the wake of the New Deal and legal realism --- including engagement with other disciplines like political science, international relations, economics, sociology and so forth.

To what extent do these writers seem to share an "internationalist" perspective? In what sense are they "for" the international? What international are they for? Is it the combination of international administration, pragmatic problem solving, social justice, universality, human rights, and so forth which we now associate with international law? Can you trace the development of a metropolitan perspective, of a sense for international law's universality, density and commitment to social justice? Are these people "liberals?" How do you imagine them situated in contemporary political discourse about American exceptionalism, nuclear armament, the Korean War? What about McCarthyism? Are any of these people "Cold War Liberals?" How could we know? McDougal and his followers have been seen for a generation both as rebels against the postwar consensus and as peculiarly American scholars. For the McDougalian alternative to DHPSS see: McDougal and Riesman International Law in Contemporary Perspective: The Public Order of the World Community, Cases and Materials (1981). See also: Harold Laswell, World Politics Faces Economics (1945) and Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair (1992). Their effort was the first and most sustained of
periodic U.S. efforts to "bring international law up to date." Indeed, it foreshadowed a tradition calling for a renewal of the field.
Assignment 13

II. History of Ideas
   E. Modernism Reviewed and Renewed: Liberalism 1960-1980

Readings:


- WOLFGANG FRIEDMANN, *The Relevance of International Law to the Processes of Economic and Social Development*, 60 ASIL Proc., 8 (1966)

- *DHPSS*: 1-39 and preface to the fourth edition

Background:


Questions for Discussion:

- In many ways, the Fifties had been a decade of turmoil in international law. The Sixties was one of consolidation and renewal. A younger group of self-conscious liberals came to dominate the field in the U.S., developing the voice that animates the DHPSS casebook. The Kennedy administration, the Eichmann trial, the U.N. of Dag Hammarskjold, decolonization, enthusiasm for Great Society programs in the U.S.--all influenced the development of international liberalism and pragmatism.
How did these scholars resolve the anxieties about law and politics, international law's "reality" or "relevance," the terrors of an ideologically divided world, the frittering away of traditional doctrinal materials, which had plagued the Fifties generation? How did they come to combine pragmatism and liberalism? What would they have made of the Vietnam conflict? Soviet tanks in the streets of Prague in 1968?

What do you make of the references to multiculturalism in notes and squibs through the chapter? How should we understand the attitude of mainstream writers about international law's universality in this period? How do you imagine they understood the development of a strong rhetoric and reality of "bipolarism" which accompanied the early Cold War?

How does the bold opening ("first, law is politics") resonate throughout the chapter? What do you make of the fact that pages 1-10 (and 42-50) were added in after the end of the Cold War? Does the preface explanation make sense to you?
II. History of Ideas

F. After the Cold War: Liberalism Continued

Readings:

1. Transnationalism and Legitimacy


   • DAVID KENNEDY, Tom Franck and the Manhattan School, 35 NYU J. Int’l L. and Pol., (Winter, 2003)

1. Networks

   • JESSICA MATHEWS, Power Shift, 76 (1) Foreign Affairs 50 (1997)


   • JOHN GERARD RUGGIE, Global_governance.net: The Global Compact as Learning Network, 7 Global Governance 371-378 (2001)


Background:

For other classic works in the new international law liberalism, see:


Another major trend in recent international law scholarship has been a resurgence of interest in interdisciplinary collaboration between international law and international relations theory. Although such AIL/IR projects are not a new phenomenon, many writers treat them as if they were new, and as if they held the key to the renewal of international law as a legal science and policy tool. Examples include:

Institutions

Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the E
the Democratic Peace: Principles for a Post
Neoliberal
ed., special issue on epistemic communities,
A
International Organization: A Stat
its Critics
After Hegemony: Cooperation and Discord in the World Political Economy
Consequences: Regimes as Intervening Variables
classicus
international law include:
Scholarship
see;
and International Relations Theory, and International Law

Although the IR theory academy was until recently generally unreceptive to (or unaware of) these
overtures, a growing number of IR theorists have begun to reciprocate the international lawyers’
advances. See, e.g., ROBERT O. KEOHANE, International Relations and International Law: Two
Optics, 38 Harv. Int'l L. J., 487 (1996); JOHN K. SETEARI, An Iterative Perspective on Treaties: A

For a critique of Slaughter's project of "liberal international law," see OUTI KORHONEN, Liberalism
and International Law: A Centre Projecting a Periphery, 65 Nordic J. Int'l Law, 481 (1996)., and
JOSE E. Alvarez, Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory, 12
European J. Int’l L., 183-246 (2001). See also FRANK J. GARCIA, Book Review: A Philosophy of

For other critical perspectives on law and international relations theory, see MARTTI KOSKENNIEMI,
The Place of Law in Collective Security, 17 Mich. J. Int'l L., 455 (1996); PHILIP ALLOTT, Eunomia:
New Order for a New World, xii, xvii (1990); SUSAN MARKS, The End of History?: Reflections on
some International Legal Thesis, 3 E.J.I.L. 449-477 (1997 (addressing also T. Franck’s conception of
an "emerging right of democratic self governance"). For a good commentary on this development,
see; STEPHAN WOOD, et. al. International Relations Theory: A New Generation of Interdisciplinary

International relations theory homologues to this "renewed" or "continued" stream of liberalism in
international law include: KENNETH WALTZ, Theory of International Politics (1979) (the
locus classicus of neorealist IR theory); STEPHEN D. KRASNER, Structural Causes and Regime
Consequences: Regimes as Intervening Variables, 36 Int'l Org., 1 (1982); ROBERT O. KEOHANE,
After Hegemony: Cooperation and Discord in the World Political Economy (1984); Neorealism and
its Critics (Robert O. Keohane ed., 1986); JOHN G. RUGGIE and FRIEDRICH KRATOCKWIL,
International Organization: A State of the Art on an Art of the State, 40 Int'l Org., 753 (1986);
ALEXANDER WENDT, Anarchy is What States Make of It, 46 Int'l Org., 391 (1992); PETER M. HAAS
ed., special issue on epistemic communities, 46 Int'l Org., 1-390 (1992); Neorealism and
Neoliberalism: The Contemporary Debate (David A. Baldwin, ed., 1993); BRUCE RUSSETT, Grasping
the Democratic Peace: Principles for a Post-Cold War World, (1993); THOMAS RISSE-KAPPEN, Ideas
Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War,
48 Int'l Org., 185 (1994); MARK W. ZACHER and RICHARD A. MATTHEW, Liberal International
Theory: Common Threads, Divergent Strands, in Controversies in International Relations Theory,
107 (Charles W. Kegley, ed., 1995); JOHN J. MEARSHEIMER, The False Promise of International
Institutions, 19 Int'l Sec., 5 (1994-95).

For an effort to get beyond ideas of co-existence and co-operation, see SIENHO YEE, Towards an International Law of Co-Progressiveness, in International Law in the Post-Cold War Word – essays in Memory of Li Haopei (London and New York: 2001).

Questions for Discussion:

➢ How would you read these pieces in relation to the end of the Cold War? Compare Falk’s dramatic reassessment of his own earlier attitudes toward McDougal’s work (see Falk, p. 2003) with DHPSS’s new forthrightness about the politics of international law.

➢ What do you think of the turn to international relations theory? Why do many international lawyers appeal to it for theoretical inspiration, methodological innovation or empirical confirmation? What work is IR theory doing in these international lawyers’ renewalist projects? Does it get them very far? Are they seeking what Alvarez was seeking from political science in the 1920’s?
Along with "the end of the Cold War," a number of themes or catch phrases seem to characterize the Anew liberalism" in international law: "compliance"; "globalization," "international governance;" the purported demise of the sovereign state, and its resurrection; the futility of further United Nations institution-building. Are these new themes? Is there something new or different about the way these materials address them?
Assignment 15

II. History of Ideas

G. Liberalism Discontinued: New Approaches to International Law

Readings:

- *DHPSS*: 40-55


Optional:

- DAVID KENNEDY, When Renewal Repeats: Thinking Against the Box, 32 New York Journal of International Law and Politics 2, 335 (Winter 2000).


Background:

Aside from the scholars working actively to renew the disciplines and traditions of international law from a "legal process" or "international relations" perspective, there are now a number of Anew approaches" to the field which do not style themselves as efforts at renewal, including narrative, new historicism, postcolonialism, postmodernism, and a variety of new interdisciplinary perspectives such as that suggested by Riles. We have taken and will take up a variety of these materials in other assignments. In addition to the excerpts included in this and other assignments, work on Anew approaches" to international law includes: MARTTI KOSKENNIEMI, From Apology to Utopia, (1989); OUTI KORHonen, New International Law: Silence, Defense, or Deliverance?, 7 Eur. J. Int'l L., 1 (1996); B.S. CHIMNI, Marxism and International Law: A Contemporary Analysis, Economic and Political Weekly, 337 (February 6, 1999); MARTTI KOSKENNIEMI, The Politics of International Law, 1 Eur. J. Int'l L., 4 (1990); JOEL R. PAUL, Comity in International Law, 32 Harv. Int'l L.J., 1 (1991); KAREN KNOP, Re/Statements: Feminism and State Sovereignty in International Law, 3 Transnat’l L. & Contemp. Probs., 293 (1993); NATHANIEL BERMAN, But the Alternative is Despair European Nationalism in the Modernist Renewal of International Law 106 Harv. L. Rev., 1792 (1993); ANNELISE RILES, Representing in Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity, U. Ill. L. Rev., 597 (1994); DEBORAH Z. CASS, Navigating the New Stream: Recent Critical Legal Scholarship in International Law, 65 Nordic J. Int'l L., 337 (1995); After Identity: A Reader in Law and Culture (Dan Danielsen and Karen Engle eds., 1995); DIANE OTTO, Subalternity and International Law: The Problems of Global Community and the


For an earlier bibliography of some of this work, see:


A number of different feminisms have also now begun to be heard in international law. For examples, see the works of HOM, ENGLE, KNOP and others scattered throughout the course materials.

In the white male theory department, in addition to KOSKENNIEMI'S From Apology to Utopia, the following are often cited as book length departures in the field: PHILIP ALLOTT, Eunomia: New Order for a New World, (1990); ANTHONY CARTY, The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs, (1986); VEIDO HEISKANEN, International Legal...


CARTY has written an interesting account of two works, one renewalist, one critical, which he feels do not go far enough: see ANTHONY CARTY, Social Theory and the "Vanishing" of International Law: A Review Article, 41 Int'l & Comp. L.Q., 939 (1992) (reviewing ALLOT'S Eunomia and FRANCK'S The Power of Legitimacy Among Nations). For a defense of "legitimacy" as a response to "deconstruction," see DENCHO GEORGIEV, Politics or Rule of Law: Deconstruction and Legitimacy in International Law, 4 Eur. J. Int'l L., 1 (1993).


There have been other critical efforts to rethink the field using other interdisciplinary tools. See e.g., Jeffery Dunoff and Joel Trachtman, Economic Analysis of International Law, 24 Yale J. of Int'l L., 1, 1-55 (1999).

Questions for Discussion:

- DHPSS lump feminism and "critical legal studies" together. Does this make sense? How do
they relate to the field as a whole? How coherent are these two traditions? DHPSS states that "critical legal scholars have argued that much, if not all of international law is merely an ideological construct intended to secure the observance of international norms by convincing states and people that the law is politically neutral and just" (p. 49). Is this a good description of Carty and Koskenniemi? How does this reading relate to the ideas about the relationship between law and politics suggested by the theoretical chapter of DHPSS?

- How would you have reacted to Allott's lecture as a student studying international law for the first time?

- Most efforts to renew or rebuke international law have tended to take two forms: either criticism of what seems the internal development of international law (largely for philosophical difficulties or pragmatic failings), seeing issues of cultural engagement, colonialism, etc., as examples or by-products of these difficulties; or criticism of international law from what is thought to be the outside (largely for excluding this or that political or cultural perspective), seeing issues of philosophical or pragmatic incoherence as by-products of the failure to contextualize. Can you detect these two strands in the readings?

- The most interesting “new approaches” try to bring these critical traditions together by showing how the internal contradictions and pragmatic limitations of international law are connected to its cultural exclusions and how both the identity of the culturally excluded and the modes of its possible representation are marked by the contradictions and pragmatic failings of the discourse from which it seeks recompense or engagement. This is easy to say, but hard to do. Do you think any of the readings achieve this? How?
Assignment 16

III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime.
A. History and Theory of Sovereignty: Towards Modernism

Readings:

- The Antelope 23 U.S. (10 Wheaton) 66 (1825)
- WHEATON, Nations and Sovereign States (excerpts), Elements of International Law (1866), Chapter II,
- BUTLER, Sovereignty and the League of Nations, B.Y.I.L., (1920-21)
- KELEN, Law and Peace in International Relations: The Oliver Wendell Holmes Lectures 1940-1941, Lecture III (1942) (excerpts)
- Corfu Channel Case (excerpts)

Optional:


Background:


**Questions for Discussion:**

- What is sovereignty anyway? A doctrine? A power? A slogan? These materials elaborate images of sovereignty in relation to ideas about authority, territory, war and right? How have those images changed over this period? Can you place these materials in relation to the historical, doctrinal and philosophical materials we have already considered?

- If we think of sovereignty as an intellectual project, pursued over a long period of time, we might identify a number of different registers or elements. How are these (or other) elements pursued in these texts?
  - X unification/consolidation of the unit
  - X standardization of the unit
  - X formalization of the boundary between international law and municipal law
  - X centralization of authority: the law/morality boundary
  - X identifying territory as the only substantive a priori
  - X consolidation of the use of force: the law/politics boundary
  - X universalization and relations with the other as outsiders

- Karen Knop presents a broad ranging feminist analysis of state sovereignty in international law -- how does she depart from Charlesworth and Chinkin? From Henkin and Schachter?
Assignment 17

III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime

B. A Modern Regime of Doctrines and Procedures

1. Statehood and Recognition

Readings:

- *DHPSS: 249-268 (definition of statehood, recognition)
- *DHPSS: 292-312 (Recognition criteria and effects, Salimoff, Upright v. Mercury)
- CHARLESWORTH, The Sex of the State in International Law, in Naffine and Owens ed., Sexing the Subject of Law, 251 (1997)

Background


KAREN ENGLE, Views From the Margins: A Response to David Kennedy, Utah L. R., 105-118 (1994).

Customs Regime Between Germany & Austria, P.C.I.J. (1931)


Questions for Discussion:

- How do the two "views" on statehood elaborated on page 252-253 of DHPSS relate to the "conditions of statehood" elaborated on page 253 and following?

- What can you make of the statement in the Customs Regime Case that "the legal conception of independence has nothing to do with the numerous and constantly increasing states of de facto dependence which characterize the relation of one country to other countries? How does this vision orient you to the domestic effect of recognition cases? How does this relate to The Lotus? To Redslob? Butler? Corbett?
What do you make of the law/fact distinction in these materials? Do you agree with Engle about its strategic value? How would Engle respond to Knop's analysis of recognition practices in E. Europe?

What does it mean to see statehood as a matter of law? As outcome of legal "process?" As a matter of "rights?" What can we understand about the relationship between international law and politics in the 20th century by comparing the Montevideo Convention, the DHPSS materials on statehood and the practices Knop describes?
III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime

B. A Modern Regime of Doctrines and Procedures

2. Jurisdiction
   a. Territory/Interest Based Exercise

Readings:

- *DHPSS: 1134-1143 (protective principle, universality principle, Pinochet)
- ROBERT MALLEY, JEAN MANAS, CRYSTAL NIX, NOTE, Constructing the State Extra-territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms 103 Harv. L. R., 1273 (1990) (excerpts)

Background:

For a historically rooted critique aimed at the 401 bases for jurisdiction, rather than the 403 reasonableness approach addressed by Malley et. al., see Carty, Doctrinal Conceptions of the Law Relating to Territory, 4 The Decay of International Law, 43-60 (1986).

For a recent effort to utilize and limit universal jurisdiction, see The Princeton Principles on Universal Jurisdiction, Program in Law and Public Affairs (2001)


MORGAN develops a broad critique of jurisprudence of extraterritorial criminality along lines parallel

Prof. Lan Cao uses corporate nationality and US trade law to reassess nationality as a basis for jurisdiction and suggests an alternative to the conventional national and international responses to the postnational economic system (trade, production and investment), see LAN CAO, Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Law 90 California L. Rev. 2 (2002).

For a discussion addressing doctrinal and theoretical gaps in the effort to hold corporations accountable under international law, see the 18th Annual Symposium – Holding Multinational Corporations Responsible Under International Law, 24 Hastings Int’l & Comp. L. Rev. 3 (2001).

With recent advances in technology, there is a growing number of cases dealing with jurisdictional loop holes:

An early effort to develop more flexible ideas about jurisdiction appropriate for new intellectual property issues, see COOMBE, Authorial Cartographies: Mapping Proprietary Borders in a Less than Brave New World, 48 Stanford L.R. 5, 1357 (1996)

PAUL SCHIFF BERMAN uses the challenges of the cyberplace and globalization to offer a cosmopolitan pluralist conception of jurisdiction that allows us to think of a community not as geographically determined territory, but as multiple moments in the network of social relations, see Paul Schiff Berman, The Globalization of Jurisdiction U. of Penn. L. Rev 2002;

On Uniform Domain Name Dispute Resolution Policy, see LAURENCE R. HELFER AND GRAEME B. Dinwoodie, Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy 43 Wiliam & Mary . Rev. 1 (2001) (exploring ‘non-national’ law making as a way to resolve the inherently transborder activity of digital technology).

For a re-evaluation of the basic principles of international criminal jurisdiction to assess whether extraterritorial application is warranted in cases of computer fraud, see Ellen S. Podgor, International Computer Fraud: A Paradigm for Limiting National Jurisdiction 35 U.C. Davis L. Rev. 2 (2002).

Questions for Discussion:

➢ What is jurisdiction? Is it a relative or absolute matter? Is municipal jurisdiction consensual at international law?

➢ Why need there be doctrines about jurisdiction? Why not simply doctrines about statehood and substantive powers? What makes jurisdiction a process doctrine? Different from issues of participation?

➢ More than one type of jurisdiction, for more than one purpose, in differing institutions, all decided by different authorities, in different traditions and locations. How does this work? In the absence of agreed rules? standards?
What are the “background” rules here? “Foreground?” Substance? Procedure?

Carty develops a complex agreement about the role played by a hypothesis about territoriality in nineteenth century ideas about sovereignty. He claims that the analogy to private law property rights constricted the international political possibilities --- see for example his agreement at 53 that "[t]he crucial consequence of focusing upon the analogy of private law methods of acquiring political legitimacy, the control of some people over others, from any consideration in the law of territory." Is this akin to the Malley/Manas/Nix agreement about a diminished appreciation of political choices in contemporary jurisprudence of extraterritoriality?

Malley/Manas/Nix argue that a formal nineteenth century idea about jurisdiction gave way to a modern "reasonable" balance of state interests in a way which also limits the political imagination. Is their proposal that "reasonableness" give way to a jurisprudence of contending groups likely responsive to Carty's criticism? Their own? Would it work? Would it change anything?
Assignment 19

III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime

B. A Modern Regime of Doctrines and Procedures

2. Jurisdiction

b. Private Ordering and Regulation

Readings:


Regulation

III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime

B. A Modern Regime of Doctrines and Procedures

2. Jurisdiction

c. Nationality, Citizenship, and Statelessness

Readings:

- *DHPSS: Review 1091 (from previous assignment) (Restatement '402(2), jurisdiction over nationals); 1111-1121 (jurisdiction based on "active" and "passive" nationality)

- *DHPSS: 425-434, 441-450 (significance of nationality; statelessness; Nottebohm case; Barcelona Traction case)

Background:


General sources on nationality and statelessness in international law include: IAN BROWNlie, The Relations of Nationality in Public International Law, 39 Brit. Y.B. Int'l L., 284 (1963); RUTH DONNER, The Regulation of Nationality in International Law (2d ed. 1994); A. PETER MUTHARIKA, The Regulation of Statelessness under International and National Law (1977+) (looseleaf service)

Reform polemics about what to do about the "crisis" of statelessness typically fall in a (narrow) range between setting limits on the ability of a state to withdraw nationality (see, e.g., SATVINDER JUSS, above), recognizing a universal human right to a nationality (see, eg., JOHANNES M.M. CHAN, The Right to Nationality as a Human Right, 12 Human Rights L.J. 1 (1991)), and establishing a form of "international citizenship" which would give stateless people fewer rights than full citizens of the state they find themselves in, but more rights than other aliens (see, e.g., CHANAKA WICKREMASINGHE, International Law, Citizenship and the Refugee Crisis, in Hallmarks of Citizenship: A Green Paper, 183 (J.P. Gardner ed. 1994)). For a more extreme and utopian version of
the "international citizenship" solution, see, e.g., World Citizenship: Allegiance to Humanity (Joseph Rotblat ed. 1997) (an utopian polemic from the Pugwash movement)


**Questions for Discussion:**

- What role does nationality play in the construction of the "international plane"--the procedural arena for the assertion and resolution of claims and counterclaims between states?

- The Nottebohm and Barcelona Traction cases enunciate rules of international law – how do they use the source materials? How do they metabolize Lotus? Differently from The Nuclear Weapons Case? What can we say about the substantive law of citizenship and corporations enunciated by the court?
Assignment 21

III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime
   B. A Modern Regime of Doctrines and Procedures
      2. Jurisdiction
d. Limits and Conflicts

Readings:

- *DHPSS: 1197-1200 (jurisdictional immunities)
- Schooner Exchange v. McFaddon, 11 U.S. 116 (1812)
- American Banana v. United Fruit (1909)
- WILHELM RÖPKE, Economic Order and International Law, 86 Recueil des Cours, 207 (1954 II) (Excerpts)

Background:

For an interesting series of cases resolving this issue through judicial deference and “comity” see the Imperial Chemical Industries Litigation (1950s)


Questions for Discussion:

- How is the conflict among various sovereign authorities proceduralized by these jurisdictional resolutions? What visions of sovereignty, force and order present themselves in these cases?

- How do you read the historical relations among these cases? Does the distance between Schooner Exchange and American Banana confirm Carty's analysis? Does that between American Banana and ICI confirm M/M/N? Would M/M/N find support for their proposed new jurisprudence in Nova Scotia?

- Röpke gives us a first introduction to the cosmopolitan sensibility of international economic law. How would jurisdictional conflicts look from his perspective?
Assignment 22

III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime
   B. A Modern Regime of Doctrines and Procedures
      3. State Responsibility and Remedies

Readings:

- *DHPSS*: 684-699 and 713-730 (general principles, attribution doctrine, injury, Barcelona Traction, international crimes and delicts, excuses, Rainbow Warrior, counter-measures and self help, France v. U.S.- Air Services, collective sanctions, reparation)

- *DHPSS*: 773-775 (Responsibility for Terrorism: Lillich and Paxman)

- Chart: State Responsibility Doctrines

Optional:


- DHPSS: 701-713


Background:


State responsibility doctrine is also the source of doctrines concerning claims of one state against another for injury to aliens who are its Naturals, see DHPSS: 742-752, 767-775 (Conflicting views on basis principles, substantive bases of Responsibility); and 753-767 (Procedural aspects). These materials include a number of efforts to build substantive rules into the procedural regime, from rules about protection of property, human rights standards, to techniques for combating terrorism. Which of the various styles for doing so seem most practical? Most roundabout? What do you make of the different "views" of this effort ascribed to commentators from various parts of the world? Is there a "Third World" view? Should there be? Are you more or less comfortable with the Barcelona Traction decision than with the various U.S.-Mexican claims? Why?
**Questions for Discussion**

- Why is breach doctrine separable from doctrines of rights and doctrines of responsibility? Is this "process?"

- What do you make of the apparent autonomy of this elaborate scheme from any particular doctrines of a substantive nature? Can you compare this to the impulse behind efforts to develop norms of *jus cogens* or normative hierarchies?

- These doctrines lie quite close to rules about war. Would these doctrines look different if understood as doctrines about intervention? About "just war?"
Assignment 23

III. Sovereignty Into Process: From Nineteenth Century Theory to a Modern Procedural Regime
   C. Institutional Pragmatism Beyond Process
      1. Sovereignty Over Land and Self Determination

Readings:

- *DHPSS: 315-331 (acquisition, Palmas 1928, Eastern Greenland 1933, Botswana/Namibia 1999)

- Western Sahara Case (1975) (excerpts) (although the opinion is quite lengthy, I included most of the substantive discussion because it represents a high point of international judicial fact-finding and of engagement with the institutional process of decolonization)


Background:

DHPSS: 270-281 (self-determination, Quebec secession)


Diasporas – groups who maintain ties to a homeland while living abroad – present a challenge to the conventional state-based structure of international law. For a diasporan model which accommodates the dual loyalties of people living diasporas by allowing them to be governed by the laws of both their homelands and their adopted countries, see Anupam Chander, Diaspora Bonds76 NYU L. Rev. 4 (2001).

2. International Territories


**Background**


You might wish to consult a brief piece by Carty which places this debate (law/politics) in relation to economic ideologies engaged by ideas about "development." His essay foreshadow themes we will take up in later assignments treating international economic law and development: CARTY, *Towards a Theoretical and Sociological Framework for a Study of the Right to Economic Self-Determination of Peoples* in Paul de Waart, Paul Peters and Erik Dieters eds. *International Law and Development* (1988) at 45 ff.

**Questions for Discussion:**

- How is international jurisprudence about territory inflected by the emergence of international institutions? Has the attitude towards state sovereignty changed from *Island of Palmas* to Burkino Faso v. Mali?

- Historical narratives play an important role in most of these cases --- compare the treatment of imperfect sovereigns (Western Sahara) and imperfect exercises of sovereign authority. Is the historical material in *El Salvador* persuasive?

- Compare the use of historical facts in the *Palmas*, *Eastern Greenland* and *Western Sahara* cases. Does the lengthy factual discussion in Western Sahara yield an outcome which is more peaceful? Just? Correct? Forceful? Procedural? Institutional?

- What about colonialism?
How do these materials relate to procedural doctrines of jurisdiction or statehood? To substantive doctrines concerning use of force?

Berman suggests that we see self-determination as a quite unique doctrine --- does he seem right?

The decolonization process has engaged international institutions in new ways --- is this still a "procedural regime?" We might recast the procedure/substance discussion as an issue of international and national authority, or of law and politics. Has thinking about these three different polarities developed in a parallel way over the last century?
Assignment 24

IV. International Institutions
   A. Global Ordering Through Diplomacy

A. Unilateralism, Bilateralism and Ad Hoc Arrangements

Readings:

- RUTH WEDGWOOD, Unilateral Action in a Multilateral World in Multilateralism and U.S. Foreign Policy: Ambivalent Engagement, S. Patrick and S. Forman, eds., (Rienner, 2001)
- The White House Fact Sheet, Proliferation Security Initiative (September 4, 2003)

Supplemental Readings:

- STEPHAN G. BROOKS and WILLIAM C. WOHLFORTH, International Relations Theory and the Case against Unilateralism, 3 Perspectives on Politics, No.3, (September 2005), 509
- Transforming Alliances: Coalitions of the Willing vs. Enduring Regional Alliances, from webmemo #475, Heritage Foundation, proceedings of November 6-7, 2003 conference “The Viability of International Regimes and Institutions”.

D. Multilateral Conferences and Rule-Making

Readings:

Assignment 25

IV. International Institutions

B. A Discipline Defined by Reform

Readings:

- *DHPSS: 359-360 (IOs in general)
- U.N. Commemorative Calendar
- *DHPSS: 384-388 (NGOs)
  421-424 (TNC’s)
- KIRGIS, International Organizations In their Legal Setting (2d. ed. 1993) (Preface and Table of Contents)

Background:


You might wish to compare the United Nations Charter found in the DHPSS Documents Supplement with the Covenant of the League of Nations in A.5.

For an interesting early history of the discipline of international institutions see: LOUIS B. SOHN, The Growth of the Science of International Organizations, in Deutsch, ed., The Relevance of International Law, 251-269. (1968) I have also written about the early history of the field (1918-1945) and its relations with various political and social movements in DAVID KENNEDY, The Move to Institutions, 8 Cardozo L. R. 841 (1987).

If you wish to compare these "new" voices with an established perspectives in the field, you may wish to read: National Press Club Luncheon: Madeline Albright as U.S. Permanent Representative to the U.N. (1994); THOMAS FRANCK, Nation Against Nation: What Happened to the U.N. Dream and


**Questions for Discussion:**

- How do you evaluate these waves of disciplinary establishment and renewal? How do you relate to their politics? What does it mean to be "for" or "against" the UN in different ways at different periods?

- In the coming assignments we will look at a variety of reform ideas --- constitutional design changes, administrative reorganizations, political redeployment, etc. --- how do you anticipate feeling about these initiatives? Too radical? Not radical enough? Irrelevant? Utopian? What's missing?

- Kirgis and Schermers provide basic teaching materials for the discipline in an American and a European style --- compare their approaches. How do they situate their field in relation to international law? Are international institutions procedural or substantive systems? Is that division meaningful in this context?
Assignment 26 (Omitted Fall, 2007)

IV. International Institutions
C. The Plenary

1. Membership, Representation and Institutional Roles

- DHPSS: 382-384 (membership)
- UN Charter, Chapter II
- Claude, Swords into Plowshares, 85-97 (1971)(membership, package deals and the China case)
- Nato and the Have-Not, Foreign Affairs, Vol. 75, No. 6, pp. 13-15
- Representation Cartoon
- Kirgis, International Organizations in Their Legal Setting (first edition) 84-89 (ICJ membership case and dissent)

Background:

Withdrawal from membership presents an interesting parallel, in which the arguments are often reversed. The classic case is that of Indonesia's attempted withdrawal in the 1960s, described Sohn, United Nations Law, 95-104. The Reagan administration also sought legal withdrawal from overly "politicized" international institutions. See for example the documents reproduced in Department of State Bulletin vol. 84 no. 2083, February 1984; vol. 85 no. 2095,Feb 1985 (pp. 36-37); vol. 85 no 2094, January 1985 (pp. 53-56); and UN Chronicle vol 13, no. 1 pp 83-84, January 1986, concerning U.S. withdrawal from UNESCO.


Questions for Discussion:
How would you describe the differences between the frames Claude and Schermers present for considering constitutional issues like membership, representation or voting?

In considering membership doctrine we will begin by contrasting arguments about universal and restrictive approaches to membership. How do arguments about restricted or universal membership relate to visions of consensus? Of constitutionalism? To what extent can the discussions of restrictive and universal membership resolve issues of participation in an international institution? To what extent do they depend upon these issues having already been resolved?

How do these issues play out in the debate about NATO’s enlargement? And what is NATO anyway? An integral part of a process-oriented institutionalized European Security Structure? A western alliance against Russia? What is the relationship between NATO, WEU, EU, OSCE and UN? Which forum would you use to put forward legal claims in times of crisis as an East-European diplomat? As a lawyer for NGO? How do the answers to these questions relate to the question of membership?

How do you evaluate the 1950s "package deals" proposal of the Soviet Union? Should membership be a "legal" or a "political" question? How did the ICJ deal with the clash between these two rhetorical styles in the membership case? Has the relationship between these rhetorics become a relationship within the institution? Between the plenary and the judiciary? The members and the organs?

The China case described by Claude presents the same issue as one between membership and representation --- or between two "approaches" to membership between which the US is said to "waver." Which formulation seems most helpful?

The materials from Schermers raise arguments for and against the use of "individual experts," suggesting that the matter can be resolved, if at all, as a strategic choice reflecting the institution's "nature" and "function." Yet the ICJ in the membership case deduced the nature and function of the Security Council from precisely such constitutional features --- what's going on?

2. Voting

- C. Wilfred Jenks, Unanimity, The Veto Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations, Cambridge Essays in International Law Essays in Honour of Lord McNair, 48-63 (1965)


- Bringing Eastern Europe and Russia into NATO: Decision-making with More Members

Background:
Questions for Discussion:

- Contrast arguments about who should participate in voting with those about who should participate in the organization. How is additional voting power for "important" states justified? How is reduced voting power for "parties to a dispute" justified? Compare arguments about unanimity, majority voting, the veto or consensus with those about restricted and universal membership or broad and narrow teleology.

- Does Allott describe a voting scheme?

- Looking at Russia and NATO: How does the partnership for Peace and NATO-Russia Founding Act compare to membership? What significance, if any, does the voting scheme NATO adopts have in this context?

- Those involved in the discipline of international institutions have often advocated changes in the structure of membership, representation or voting when making proposals or polemics for institutional reform. Indeed, the move from unanimity through weighted voting and majority voting to consensus may have been fueled by precisely such polemics. How can we evaluate reform suggestions of this type --- legally? politically? strategically? Case by case?

- What is the relationship between constitutional change and political struggle in international organizations? What role for international lawyers? As individual experts? Team players? Advocates?

3. Law Making and Powers: Declaring, Denouncing, Deciding, Spending, Rule Making

- U.N. Charter, Articles, 7-32
- UN Commemorative Calendar

• CLAUDE, Swords Into Plowshares 175-181 (1971) (politics of GA/SC relations)

• Boston Globe, (July 29, 1994), Security Council Offloads Peacekeeping on Great Powers

• "NATO, the UN and the Use of Force: Legal Aspects," 10 FJIL 1.

**Background:**


If you are totally unfamiliar with the UN system, you might wish to consult a basic description of the respective roles and history of the General Assembly and Security Council such as BOWETT, *The Law of International Institutions* pp 25-51. A good collection of essays on the relationship between international law and the UN system in various substantive fields is: Christopher Joyner, ed., *The United Nations and International Law* (ASIL and Cambridge University Press, 1997)

**Questions for Discussion:**


➢ The law/politics nexus gets pretty thick and complex here --- what's creating what? Is it still rhetorically significant to keep track?

4. Personality, Privileges, and Immunities

• DHPSS: 347-364 (personality, Reparations Case)


• 1214-1224 (privileges and immunities, Lutcher Case)

• Goodman v. Winterton, *Reports of Public International Law Cases*
1919-42, at 205-207

- DHPSS: 149-171 (int. law and mun. law)

**Background:**


**Questions for Discussion:**

- These materials consider the relationship between the international institutions and the process regime. What images of international institutions animate legal efforts to determine their powers, privileges and immunities?

- What is "personality?" Is it like "sovereignty?" What is it based upon? How might its extent vary with the theory used to justify it? Do these elaborative or justificatory alternatives relate to the objective subjective approaches to constitutional or administrative doctrine?

- What would it mean to have legal personality if international law were to be looked at as a disaggregated non-federal process? What about NGO’s and corporations?

- Privileges and immunities for international organizations are variously justified by analogy to statehood, by extrapolation of some aspect of institutional personality, or of the inherent role of independence of the representative involved. How do these patterns of justification differ in their vision of who should decide the extent of immunity?

- How might these views of immunity doctrine be related to the various visions of the administrative or constitutional essence of international institutions?

- Although discussion of the "status" of international organizations is often at the beginning of classic treatises on the subject, it seems to depend in important ways upon the theoretical, constitutional and administrative discourse. What do you make of the theory of "functionalism" -- particularly as it relates to determinations of implied powers?

- What is the significance of separating immunity doctrine from substantive rules governing the behavior of institutions and their staff?

- Is the relationship between international and national law a subject fundamentally similar or dissimilar to the privileges/immunities and status of international institutions?
Assignment 27

IV. International Institutions
   D. International Administration.
      1. Secretariat and the Secretary General: Leader and Clerk, Norm and Policy Entrepreneur

Readings:

- **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, 2006)

Background:

- **OSCAR SCHACHTER**, *Dag Hammarskjold and the Relation of Law to Politics* 56 *A.J.I.L.* 1 (1962)


2. International Administrative Law and Coordination

Readings:


Supplemental:


- **NORMAN DUF'TY**, *Organizational Growth and Goal Structure: The Case of the ILO*, 26 *International Organization*, 479 (1972)
Background:


For an interesting memoir of service as a high level UN civil servant, see BRIAN URQUHART, A Life in Peace and War, (1987); DAVID KENNEDY, International Refugee Protection, 8 Hum. Rts. Q. 1 (1986) (excerpts)

See also: Remembering the UN: A Program for Reform (UN press release) (Assignment 24); United Nations: Talk About a Hard Call: Reform From Within (Assignment 24) U.S. News, (July, 21, 1997)


Questions for Discussion:

- How does the Secretariat differ from legislative organs? What is the relationship between the Secretariat and the Secretary-General? Should the Secretary General be a "leader" or a "clerk?"
- How does Kofi Annan conceive of his role? Bhoutros Ghalî was often accused of being arrogant.
- Kurt Waldheim, General Secretary in the 70's, was referred to as "maître d'hôtel" How do these terms relate to the law/politics distinction?

- The U.N. has institutionalized a combination of staffing strategies. Do you agree with Meron that the symptoms of malaise and inefficiency might be diagnosed to result from "pursuing the
twin goals of competence and equity?” What about affirmative action in UN staffing --- should we think about it any differently than in law school or law firm staffing? How do arguments about staff selection policy relate to arguments characteristic of discussions about membership, organs and voting?

- What form of administrative review (political, legal, discretionary, formal) seems associated with various staffing strategies or visions of bureaucracy? With images of the organization as leader or clerk, political or legal?

- The administrative review materials introduce a further internal functional specialization --- like the move from membership to representation or from the plenary to the secretariat --- now to the judiciary. How does the judiciary participate in the work of establishing or confirming the UN as a working institution?

- The casebook devotes most of its attention to institutions when considering the international law of cooperation, as if humanitarian issues had become, in some cases, issues of institutional design and development.

- The astonishing proliferation of independent agencies is certainly remarkable --- What needs to be coordinated? Communicated? Controlled? What institutional mechanisms are best suited to controlling? To communicating? How do they go astray? What can you make of the alphabet soup in Berteling's piece --- is this just a matter for insiders? How do you evaluate Kofi Annan's reform proposal?

- How are the arguments for top-down and bottom-up approaches to coordination linked to issues of membership or the role of the secretary general --is there a law/politics angle here? Is bottom-up top-down linked to centralization and decentralization? Which approach to centralization or decentralization is associated with a political vision of the organization? A legal vision? A rational-machine vision of bureaucracy? An expert's model of bureaucracy?

- The Sloan and Dufty pieces offer quite different ideas about the ways institutions grow, change, and react with their environments. Also different ideas about ways to coordinate and control their parts.

- As modern pragmatists, how should we think of the administrative process --- as political work? Legal work? In what sense?
IV. International Institutions
   E. The International Judiciary
      1. The International Court of Justice (ICJ)

Readings:

- *DHPSS: 854-861 (ICJ, compulsory jurisdiction)
- MARTTI KOSKENNIELI, The International Law Commission Report on Fragmentation (excerpts)
- DAVID KENNEDY, "One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream" NYU Review of Law and Social Change (Forthcoming, 2007)

Background:


At the time of the Nicaragua Case, the ICJ was under considerable political attack in the US. For the discipline's response to this attack see THOMAS FRANCK, Judging the World Court (1986)


Questions for Discussion:

- How appropriate was it to use the ICJ in either the Iran or Nicaragua situations?
- What about the Nuclear test case? Are the agreements convincing? Statesmenlike? Legal?
- From a strategic point of view, how should we evaluate establishing norms, establishing institutions and bringing cases --- which is more likely to situate us where the rubber meets the road?
- Can we trace Alvarez’s conception of the relationship between law and politics back through the materials we have read this semester? Or the earlier Alvarez?
- Is Bello right that “less is more?” What is the relationship between Bello’s conception of dispute resolution and Alvarez’s? Might they both be traced back to…Alvarez? Jessup? Others?

On the proliferation of _____tribunals see: JENNY S. MARTINEZ, Towards an International Judicial System, 56 Stan. L. Rev 429 (2003) (especially 447-528); PIERRE-MARIE DUPUY, The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, 31 N.Y.U. J. Int’l L. & Pol., 791 (1999); Dupuy addresses the issue of whether the proliferation of international courts and tribunals will lead to the fragmentation of the international legal system or the fragmentation of the interpretation of its norms. He holds that the establishment of new jurisdictions and systems of control improves efficiency by helping in the implementation of obligations and by generating a more refined and precise system of interpretation of norms; however, this development creates dangers including the illusion of completely autonomous sub-systems and the potential problem of conflicting jurisdiction. He suggests that a solution to such concerns is the emergence of a central role for the ICJ which can be achieved by the judges themselves, and in the way they view the true function of the Court within the international legal system. MONICA PINTO, Fragmentation or Unification Among International Institutions: Human Rights Tribunals, 31 N.Y.U. J. Int’l L. & Pol, 833 (1999).

Pinto explores the connections and conflicts in the jurisdiction, functioning, and jurisprudence of two international human rights bodies: the Inter-American Commission on Human Rights (IACHR) and the
Human Rights Committee (HRC). She concludes that the significant differences between the two bodies, makes unification extremely difficult. For additional arguments (mostly by judges of the International Court of Justice) against the proliferation of international judicial bodies, see The Court and Other International Tribunals, in CONNIE PECK & ROY S. LEE, Increasing the Effectiveness of the International Court of Justice, 280-323 (1997).

The use of domestic tribunals for ______ adjudication, particularly in human rights case has also generated controversy. See for example ELLEN LUTZ AND KAREN SIKKINK, The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America, 2 ChiJil 1 (2001). Lutz and Sikkink contend that the recent shift in international norms towards using foreign or international judicial processes to hold individuals accountable for human rights is the result of a justice cascade by an epistemic community who developed legal arguments, recruited plaintiffs and witnesses, marshaled the evidence, and persevered through years of legal challenge. In Latin America, Lutz and Sikkink suggest that the trend has increased pressure on the state to open previously blocked domestic avenues for pursuing justice.

BETH STEPHENS, Translating Filártiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations, 27 Yale J. Intl L. 1 (2002). Stephens provides an overview of the current application of the Filartiga doctrine. She advocates for domestic remedies for international human rights violations by discussing the international law foundation and describing how different legal systems achieve these common goals through other mechanisms. Stephens brings this analysis to bear on the drafting of an international convention governing civil jurisdiction and enforcement of judgments, holding that understanding different domestic procedures is necessary to achieving a consensus on how to protect civil human rights claims within this convention.

PAUL KAHN, On Pinochet, Boston Review February/March (1999). Kahn describes and evaluates the validity of arguments for two differing normative perspectives to domestic courts exercising universal jurisdiction over human rights violations. While Pinochet is celebrated as an indication of the emergence of international human- rights conventions that transcend national borders and that hold human rights abuses as a legal obligation of state governments, Kahn expresses doubt as to whether the adoption of human rights conventions without uniform application constitutes international law. Kahn concludes that the Spanish’s efforts to prosecute Pinochet should be understood as legal means to pursue moral ends.

BETH STEPHENS AND MICHAEL RATNER: International Human Rights Litigation in US Courts, Transnational, 7-23 (1996). Stephens and Ratner provide a brief, streamlined overview of the background of the ATCA, the facts and implications of Filartiga, and the controversy around the interpretation of the ATCA.

M.O. CHIBUNDU, Making Customary International Law Through Municipal Adjudication: A Structural Inquiry, 39 Virg. J. Intl L. 1069 (1999). Chibundu explores the consequences for international law of using domestic institutions to generate and contour it. Chibunda examines the relationship between the idea of limited extraterritorial jurisdiction and representativeness within a community, and embeds this analysis within a summary of customary international law and critique.
of the judicial and academic literature on the use of US domestic courts to enforce international human rights norms.

Additional articles:

Context: 
PAUL SCHIFF BERMAN, The Globalization of Jurisdiction, 151 U.Pa. L. Rev. 311 (2002). Berman takes a broad, theoretical approach to conceptualizing jurisdiction in the context of the challenges that the rise of cyberspace and globalization pose to a territorially based legal system. He argues that existing theories are unsatisfying because they fail to pay sufficient attention to the social meaning of legal jurisdiction and community definition. Through surveying literature from other disciplines, the definition of community emerges as a politically charged (and sometimes hegemonic) social construction. He constructs a cosmopolitan pluralist model for understanding the globalization of jurisdiction, discussing how such a conception might operate in both cyberspace and international law practice.

JOSHUA RATNER, Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act, 35 Colum. J.L. & Soc. Probs 83 (2002). Ratner argues for a broad interpretation of the standard for the ATCA. He advocates that in determining whether a plaintiff has alleged a “violation of the law of nations” under the ATCA, courts should view the law of nations through the lens of the CIL of human rights, not just jus cogens norms. He asserts that the Filartiga decision itself, subsequent Congressional and Executive branch endorsement of Filartiga, and an examination of the meaning of the term “law of nations” at the time the ATCA was drafted all mandate a general CIL of human rights standard and methodology in adjudicating claims of human rights violations under the ATCA. He also holds that relying on jus cogens only, creates practical and normative problems, and unnecessarily narrows the lists of violations actionable under the ATCA.

CURTIS A. BRADLEY, The Costs of International Human Rights Litigation, 2 Chi. J. Int’l L. 457 (Fall 2001). Bradley provides a context of the current litigation under the Filartiga doctrine and argues that the litigation entails significant domestic and international costs, which though difficult to measure, suggest that courts should await specific guidance from Congress before allowing further expansions of this litigation.

RYAN GOODMAN, Congressional Support for Customary International Human Rights as Federal Common Law: Lessons of the Torture Victim Protection Act, 4 ILSA J. Int’l & Comp. L. 455 (Spring, 1998). In response to arguments that threaten ATCA litigation, Goodman analyzes the TVPA and its legislative history to demonstrate the scope and consequence of Congress’ endorsement of human rights litigation. If customary international law is federal common law, as some scholars hold, the federal judiciary arguably could not elaborate other causes of action without specific political branch authorization. Goodman contends that that passage of the TVPA provides ample political branch authorization for the wider Filartiga doctrine if such authorization was indeed necessary; and that the TVPA legislative history indicates Congressional agreement with the conventional view that customary international law is federal common law absent political branch action.
Applications of the ATCA:
Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is Unocal the Answer?*, 42 Wm. & Mary L. Rev 619 (Dec. 2000). Thadhani charts the trend of an increase in human rights suits brought by aliens against multi-national corporations (MNCs) and explores the implications of cases such as *National Coalition Government of Burma v. Unocal Inc.*, which imply that a corporation’s purely private actions can also be sanctioned under international law. Thadhani concludes that federal courts should be wary of sanctioning the conduct of corporations under the murky standard of international law. Thadhani proposes the adoption of a mandatory code of corporate conduct similar to the corporate codes of conduct proposed by the United Nations, which were never formally adopted.

**Sample Cases**
Papa v. US., 281 F.3d 1004 (9th Cir. 2002); Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001); Hilao v. Marcos, 103 F.3d 767 (9th Cir. 1996); Bagguley v. O’Donnell 953 F.2d 660 (D.C. Cir. 1991); DeArellano et. al. v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983).
Assignment 29 (Omitted Fall, 2007)

IV. International Institutions

G. The International Judiciary

2. Non-Adjudicatory Dispute Settlement and Commercial Arbitration

Readings:

- DHPSS: 820-823 (obligation to settle)
  826-833 (non-adjudicatory)
  836-841 (arbitration)

- A. SHALAKANY, Disempowering the National: The Contribution of International Commercial Arbitration (excerpts)


Background:


Questions for Discussion:

- Is there a geography to commercial arbitration? What do you think of Shalakany's claim that commercial arbitration is not per se a biased medium, but is strongly influenced by "the public/private distinction in international law as an enduring system in legal consciousness?" What does that mean? Are the accounts given of commercial arbitration by Sornarajah and Shalakany contradictory? Complimentary? In which respect?

- How can we compare non-adjudicative methods? By beneficiary, north or south, trade and economics or politics; by sector, by type of dispute, public v. private?
Assignment 30

V. The Law of Peace
   A. A Substantive Regime: The Law of Cooperation

Readings:

- **DAVID KENNEDY**  The Dark Sides of Virtue, Chapters 4 and 9

- **WOLFGANG FRIEDMANN**, *The Changing Structure of International Law*, 365-81 (1964)


Background:


B. The Law of the Sea: An Exemplary Regime of Architecture and Regulation

Readings:

- *DHPSS:* 1383-1392 (introduction; basic principles--freedom and commonage, derogations for coastal states)

Optional:

**Background:**


**Questions for Discussion:**

- What is the Law of the Sea Convention's substantive vision? How does it use jurisdictional doctrines & assignments to create a substantive regime? Does this fulfill the substantive hopes of international law which have been deferred by sources doctrine and the procedural regime we have considered up to this point in the course? If not, is this a failing or is it the secret of the Convention's success?

- Can you locate the influence of various historical conceptions of international law in these materials? Can you isolate historical, doctrinal and institutional elements?
Assignment 31

V. The Law of Peace
C. International Criminal Law
   1. Individual Responsibility and War Crimes

Readings:

- *DHPSS: 396-401, 404-409, skim pages 409-419, read 419-421 (individual responsibility, Nuremberg trials, Yugoslavia, Rwanda, International criminal court, terrorism)

- *DHPSS: 1314-1320 (International criminal law) (for further information on the Pinochet case, see pages 1139-43)

- MARTTI KOSKENNIEMI, Between Impunity and Show Trials, 6 Max Planck Yearbook for United Nations Law (2002), 1-36

Background:

See: Letter from Jack Straw about the Extradition of Pinochet, (April 15, 1999), Published online by Equipo Nizkor & Derechos Human Rights; LUCAS W. ANDREWS, Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory, 11 Emory Int'l L. Rev., 471 (description of the establishment of the Tribunal) (excerpts)


For a historic description of the developments that have taken place in the field of international criminal law: M. CHERIF BASSIOUNI, From Versailles to Rwanda in Seventy-five Years: The Need to


For a cautionary, but ultimately optimistic view, see GERRY SIMPSON, Didactia and Dissident Histories, in War Crimes Trials, 60 Albany L. R., 801 (1999).

CATHARINE A. MACKINNON, Rape, Genocide and Women’s Human Rights, 17 Harvard Women's L. J., 5-16 (Spring 1994)

FRANCIS X. CLINES "NATO Opens Broad Barrage Against Serbs as Clinton Denounces 'Brutal Repression',” NY Times (March 25, 1999)


Questions for Discussion

- How do the situations in Yugoslavia and in Rwanda resemble each other? How do they differ?

2. Terrorism

Readings:

- *DHPSS: 416-420 (an international crime)
Background:


While Reisman’s article remains the best overview of international responses to terrorism, for more articles dealing with specific ways to combat terrorism see:


There are various possibilities to combat terrorism, ranging from employing the UN framework to using existing procedural norms such as state responsibility or the use of force, to even establishing a new international norm against terrorist activities.


For a discussion on the definition of terrorism, see:
Carty, "The Limits of the "Word" Terrorism and the Rhetoric of "Legal Peace" in Ireland" in International Law and Armed Conflict Bradney ed. 4, 39 (1992) (excerpts)


For constituting terrorism as crime against humanity, see Anne-Marie Slaughter and William Burke-White, An International Constitutional Moment 43 Harv. Int’l L. J. 1 (2002) (September 11th provided a constitutional opportunity for international law to fuse together international criminal law, the
law of war and the law of terrorism into one principle).


For the “Just war” doctrine, see RICHARD FALK, Defining a Just War, The Nation, October 29, 2001 (a call for cooperative military action with limited means and ends).

You might want to look also at the following articles:
For a discussion on the morality of terrorism, see THEODORE P. SETO, The Morality of Terrorism, 35 Loyola L. Rev. 4 (2002).

For a good theoretical consideration of Islamism as a theory of political thought and action, hence a view of terrorism as a political act through its relationship to Islamism, see ALIYA HAIDER, The Rhetoric of Resistance: Islamism, Modernity and Globalization, 18 Harv. Black Letter L. J. (2002).

For a detailed overview of the motivations of religious terrorists and possible mechanisms to control and contain terrorists, see PATRICIA A. LONG, In the Name of God: Religious Terrorism in the Millennium an Analysis of Holy Terror, Government Resources, and the Cooperative Efforts of a Nation to Restrain Its Global Impact, 24 Suffolk Transnat’l L. Rev. 51 (2000).


If you are interested in a further look at the terrorism literature of the 1980s, you might consult: GAL-OR, International Cooperation to Suppress Terrorism (1985); SOFAER, Terrorism and the Law Foreign Affairs, 901 (Summer 1986); EVANS AND MURPHY, ed. Legal Aspects of International Terrorism (published under the auspices of the American Society of International Law); LAQUER, The Terrorism Reader (1987).

Questions for Discussion:

➢ The casebook editors dispersed references to terrorism and war crimes among the substantive law of force and the procedures of state responsibility and individual capacity. Lillich and Paxman are eager that the existing rules of international law --- primarily those of procedure --- be well used in the war on terrorism. How do you evaluate this crossover from a procedural to a
What is the difference between the way international law deals with war crimes, terrorism and diseases? It is possible to think of war crimes and terrorism as diseases? Diseases as crimes?

How do you read the political projects of these various authors? What does it mean to use international law?
Assignment 32

V. The Law of Peace

D. The Environment: A New Pragmatism

Readings:

- *DHPSS: 1524-1531 (climate changes)
  1509-1521 (general principles, Trail Smelter Case, Chernobyl)


- Oh No, Kyoto, The Economist (April 5th, 2001)


Background:


JOBY WARRICK, U.N. Summit Reaches Ineffectual End; Wrangling Delegates Fail to Reach Consensus on Global Environment, Washington Post, (June 28, 1997)

G. PASCAL ZACHARY, Environmentalists Find A New Line of Work as Soldiers of Fortune, Wall Street Journal, (June 19, 2001)

environmental law, in an explicit project to domesticate the critique and put it to "practical" use; CHRISTOPHER C. JOYNER and GEORGE E. LITTLE, It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law, 14 B.U. Int'l L.J., 223 (1996) (using an essentialized "feminist theory of international law" to examine international environmental law);


For Third World approaches to the problem of sources, see: DAVID A. WIRTH, Legitimacy, accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues 100 Yale L.J. 2645 (1991). Wirth has developed his argument on the relationship between trade and the environment in a number of recent pieces; see e.g., DAVID A. WIRTH, Some Reflections on Turtles, Tuna, Dolphin, and Shrimp, 9 Yearbook of Int'l Environ. L. (1998); DAVID A. WIRTH, the Role of Science in the Uruguay Round and NAFTA Trade Disciplines, (United Nation Environment Program: 1994); and DOUGLAS J. CALDWELL AND DAVID A. WIRTH, Trade and the Environment: Equilibrium or Imbalance? 17 Michigan J. of Int'l L., 3 (1996).

See also: ROBERT VERCHICK, Critical Space Theory: Keeping Local Geography in American and European Environmental Law, 7-3 Tulane L.R., 739 (1999)

Questions for Discussion:
The environment provides a good recent example of the modern international legal regime being deployed in all its manifestations—doctrines, procedures, institutions, etc.—to confront or respond to a new international problem. This, in a sense, is contemporary pragmatism at its best. What do you think?

Can you trace the influence of the regime's preoccupations and structure on its responsiveness to environmental challenges? How do you evaluate this pragmatic effort? What do you make of the Rio Plus Five Conference of June, 1997, and the apparent dissipation and disappointment of the hopes embodied in the Rio Declaration and Agenda 21?

What role does the tension between environmental protection and economic/social development play in international environmental law? Does the concept of sustainable development promise a substantive resolution to this tension?

What does "globalization" have to do with international environmental law? Do you share Falk's worry about a deepening international crisis of public goods like environmental quality?
Assignment 33

V. The Law of Peace

E. Human Rights: Doctrines, Institutions, and Advocacy

Readings:

- *DHPSS:* 586-612, 623-644 (substantive law, Universal Declaration, enforcement)
- *DAVID KENNEDY:* The Dark Sides of Virtue, Chapters 1 & 2
- PROUST, The Guermantes Way - Cities of the Plain, (excerpts)
  Remembrance of Things Past

Background:


On human rights and the Third World:
Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 Harv. Int'l L. J. 201 (2001);
ONUMA YASUAKI, Towards an Intercivilizational Approach to Human Rights, 7 Asian Yearbook of International Law 21 (DATE);
B. DE SOUSA SANTOS, Toward a Multicultural Conception of Human Rights, 18 Zeitschrift für Rechtssoziologie, 1 (1997);
DIANNE OTTO, Rethinking the Universitality of Human Rights Law, 29 Columbia H.R.L.R., 1 (1997);

Human rights and Indigenous people:
For material on the status and rights of indigenous people, see: CHRIS TENNANT, Indigenous Peoples,

Human rights and sexual orientation:

For human rights law and trade matters, see:
JAMES THUO GATHISHI, Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law, 5 Buff. Hum. Rts. L. Rev. 107 (1999) (human rights used by/with international economic institutions, see); Inserting human rights concerns into economic development issues, see JOHN CIORCIARI, The Lawful Scope of Human Rights Criteria in World Bank Credit decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement, 33 Cornell Int'l L.J. 331 (2000)

For an amusing effort to correlate human rights compliance with other social variables, see: PARK, Correlates of Human Rights: Global Tendencies, Hum. Rts. Q., 405-413


For human rights and accountability issues:

For an excellent argument that reservations to human rights treaties should be presumed to be severable unless for a specific treaty there is evidence of a ratifying state’s intent to the contrary, see Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 American J. of Int’l L. 3 (2002).


Think about these materials in light of the materials on self-determination we read earlier. What is the relationship between the doctrines and procedures of self-determination and the substantive hopes of (and for) indigenous peoples? Can you identify the substantive content of "indigenous rights?" Of self-determination? How do the structures of international legal argument--ideas and doctrines about sources, sovereignty, jurisdiction, state responsibility, etc.--shape the possibilities for resistance and other political action relating to indigenous peoples? How do they shape international lawyers’ images of indigenous peoples? How do images of the indigenous "other" help to shape international law’s self-image? What anxieties or regrets about modernity does international law project onto indigenous peoples?

**Questions for Discussion:**

- What do you make of the many charts in the casebook outlining enforcement procedures? How do you evaluate this institutionalization -- does it strengthen the normative claims? Do you agree that "international human rights law, at best, is a matter of procedure alone?" How do these materials compare with those on state responsibility for injury to aliens?

- How would you compare the “rights” of human rights with the “principles” of environmental protection?
The international human rights movement – problem or panacea? Something in between? What could it mean to think “pragmatically” or “strategically” about human rights?
Assignment 34

V. The Law of Peace
   F. Refugees and the UNHCR

Readings:

- **DAVID KENNEDY:** The Dark Sides of Virtue, Chapter 7


G. Women’s Rights

Readings:

- **DHPSS:** 674-681 (the human rights of women)


- **MADHAVI SUNDER,** Piercing the Veil 112 Yale L. J. (2003) This article is quite long – you should read pages 1-38, and, if you are interested, skim the rest.

Background:

From DHPSS, see also: 457-59 (reservations to CEDAW); 1441 (World Bank’s "Women in Development Division”); 43-48 (Charlesworth, Chinkin & Wright). Note how women fit into DHPSS’s vision of international law—As producers and subjects of radical scholarship at the margins of the discipline (pp. 43-48); as the instantiation of a general problem of treaty interpretation (pp. 457-59); as a minor footnote to the role of the World Bank in development (p. 1441).

Human rights and women rights:

For women and international law generally, see:

For women rights and human rights law, see:

Women’s rights and the developing world, see:

On the Beijing Conference and its aftermath, you might want to consult:

For the effect of globalization on women rights, see:

Similar feminist energies have been brought to bear on international relations theory, see:

For an interesting effort to relate feminism to international economic law is the Symposium on Feminism and Globalization, see: The Impact of the Global Economy on Women and Feminist Theory, 4-1 Indiana J. of Global L. Studies (Fall 1996).

Questions for Discussion:

- How should we think about women's rights and universalism? Is there tension between women's rights and (other) (universal) rights? Particular cultural practices? What is culture anyway?
Assignment 35

VI. International Economic Law

A. Two Regimes: Public International Law and International Economic Law: A Constitutional Question

Readings:

- *DHPSS: 1573-1586 (introduction to trade law)
- WILHELM ROEPKE, Economic Order and International Law, 86 Recueil des Cours, 203-71 (1954) (excerpts)

Optional:


Background:


On the broader relationship between public and private power, see NOBERTO BOBBIO, Democracy and Dictatorship: The Nature and Limits of State Power, 1-17, 22-26, 39-47; JEFFREY L. DUNOFF,
Those interested in further reading about international economic law may wish to consult John Jackson, The World Trading System (1997).


Questions for Discussion:

- The first readings suggest a contrast between public international and international economic law parallel to that between "public" and "private" law. Is this parallel satisfactory?

- Roepke and Streek share from very different starting points, a sense of international economic law as a space of reduced governmental or public policy. Are they right?

B. Structuring the Transnational Social State: The European Union, Market Freedoms and Technocratic Order

Readings:

• **DAVID KENNEDY**: *Dark Sides of Virtue* Chapter 6


**Supplemental Materials:**


• **PERTTI AHONEN**, *Soft Governance, Agile Union? Analysis of the Extensions of Open Coordination in 2000*, European Institute of Public Administration, Maastricht, (18 April 2001)

**Background Readings**

Assignment 36 (Omitted Fall, 2007)

VI. International Economic Law:
   C. Economic Policies
      1. Labor Standards

Readings:


- Financial Times 12/13/96, WTO Refuses to Link Trade Measures to Labor Rights.

- Financial Times 6/12/97, Developing Countries Attack Move to Link Labor Standards to Trade


- Brian Langille, General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trades Destiny), Fair Trade and Harmonization, Prerequisites for Free Trade?, 231-266 (Bhagwati and Hudec eds.1996)

Background:


On the move to render Multinationals accountable for their labor practices through corporate codes see L. COMPA and T. HINCHCLIFFE-DARRICARRERE, Endforcing International Labor Rights Through Corporate Codes of Conduct, Columbia Journal of International Law, 663-689 (1995)


2. Sex Trade, Pornography and Adoption

Readings:


- CHANTAL THOMAS, Illegal Markets

Background:


HEIDI TINSMAN, Behind the Sexual Division of Labor: Connecting Sex to Capitalist Production, 17
Yale Journal of International Law, 240 (1992) (excerpts)


3. HIV AIDS

Readings:

I am including only the introductions from these two articles discussing a variety of issues raised by the effort to mobilize the international legal order in the fight against AIDS


4. Narcotics

Readings:


Questions for Discussion:

- For each of these economic policy problems, people have sought to mobilize the international legal order in different ways. Compare what works or didn’t work in addressing one problem to another. Can you think of more imaginative ways to harness the range of procedures and substantive precedents we have analyzed to address these issues?

- Does the regulation of pornography or of adoption present different issues than those involved in setting labor standards? Does ”free trade” help us think about either set of issues?

- How would you think about a new policy issue such as the AIDS crisis? Analogies to law of the sea, environment, international criminal law, human rights, labor standards? Other models?
What is the best framework to combat a health crisis – WTO, WHO, UN, national legislator, or an international human right approach?
 Assignment 37

VI. International Economic Law:
D. Law and Economic Development

Readings:

- DAVID KENNEDY, The Dark Sides of Virtue, Chapter 5


Assignment 38 (Omitted Fall, 2007)

VII. Comparative Law and the Problem of Culture

Readings:


- J. BALDWIN, The Discovery of What it Means to Be an American, and Princes and Powers, Nobody Knows My Name


Background:

For more on comparative law and the problem of culture, see:

For Culture and the Third World, see:


COOMBE has developed her argument in a number of recent pieces, see e.g., R. COOMBE, Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers, 11 (2) Cultural Anthropology 202 (1996); COOMBE, Critical Cultural Legal Studies, 10 Yale J. of L. 2 (1998) (the constitutive role of intellectual properties in commercial and popular culture and the forms of cultural power the law affords holders of copyright, trademark and publicity rights). COOMBE AND JONATHAN CHOEN, The Law and Late Modern Culture Reflections on Between Facts and Norms from the Perspective of Critical Cultural Legal Studies, 76 Denver U. L. Rev. 4 (1999) (using critical culture study of law in order to challenge some of the central categorical distinctions of the liberal legalism of Habermas’s conception of the law).

Tom Franck has recently taken up the relationship between cultural identity politics and liberal cosmopolitanism in several pieces. See e.g.: T.M. FRANK, Postmodern Tribalism and the Right to Secession, in Bröllmann et. al. eds. Peoples and Minorities in International Law 3-27 (1993); FRANK, Tribes, Nation, World: Self-Identification in the Evolving International System, 11 Ethics
International Affairs 151 (1997).


See also:


You may also wish to look again at Annelise Riles’ and Anthony Anghie’s pieces in previous assignments.

*Questions for Discussion:*

- How do these materials differ from those advocating a third world or women's perspective on international law? Would they share the reform proposals of the instructional, doctrinal, pragmatic, or more broadly theoretical nature advanced by feminists or third world scholars?

- How do they figure "culture" in relationship to "law"? Cultural identity? In relation to "sovereignty"?
Assignment 39

VIII. The Laws of Force
   A. The Law of War

Readings:

- SIGMUND FREUD, “Thoughts for the Times on War and Death,” (1919)

- DAVID KENNEDY: Of War and Law (Princeton, 2006), Introduction. You will want to read chapters 1-3 for assignments 39-42


Background:

- *DM but not required
  
  *On the legality of the use of force in Iraq*
  
  - 20 March 2003 Letter from US Permanent Representative to the UN
  - Resolutions in 1990: 660, 661, 667, 678, 687
  - Resolution 1441 (2002)
  - UK Attorney General’s statement on the legality of the conflict in Iraq


Questions for Discussion:

- What boundary do these materials establish between war and peace? Why a law of war and a law in war? How does the law of war differ from that of process? Sources? Peace? Does the law of war reinforce or undercut those laws?
Can you trace a historical transformation in these materials parallel to that we followed in doctrines about sovereignty and institutions?

How can the concern for "aggressive" be distinguished from concern about "intervention?"

What value is the lexicon of violence created by the outlawry of war and its exceptional inlawry? What role do lawyers play in the machinery of war by refining their "concepts?" Does pragmatism work here as it worked in creating a system for environmental protection?
Assignment 40

VIII. The Laws of Force
B. The Law in War

Readings:

- *DHPSS 1054-1076 (humanitarian law)

Background:


On the question of the legality of humanitarian intervention, see BRUNO SIMMA, NATO, the UN and the Use of Force: Legal Aspects; JUDITH GARDAM, Proportionality and Force in International Law 87 A.J.I.L.,391 (1993); An Alien's Encounter with the Law of Armed Conflict, Sexing the Subject of Law 251 (Naffine and Owens, eds, 1997); DAVID KENNEDY, *International Legal Structures*, 245-286 (1987)


For analysis of the high tech/low tech was distinction and its pitfalls, see: Eliot A. Cohen, The Mystique of U.S. Air Power, 73 Foreign Affairs 1, 109 (1994) (excerpts).


Questions for Discussion:

- What significance is the relationship between human rights law and the law in war?
- How do you evaluate the political projects reflected in the DM pieces by Rogers, Jochnick & Normand, Fenrick, Cohn and Gardam?
- What image of war, of peace and of the law is suggested by the principles of humanitarian law?
- Can legal norms of military conduct [as opposed to norms learned by intensive military training] work effectively on the battlefield?
- What is the real function of the law in war? Is it to codify norms of behavior to give the military more clarity on how to conduct military operations? Or is it to provide restrictions on the military freedom of behavior?
- Should the law of warfare be the domain of lawyers or of warriors?
- Is it relevant what Martins says: "Fighting wars, performing military missions in operations other than war, training soldiers--these are functions that embody a separate science and art, that inhabit a separate sphere, that require military rules, not legislated ones" [text accompanying note 223]?
- Should we see Rules of Engagement as just translating the laws of war into simple orders to the
soldiers? Martins suggest that they remain a matter for training - Phillips is of the opinion that they are a matter for lawyering.

- Can the media - with their mere presence on the battlefield - increase the respect of the laws of war? Change the laws of war?

- Does increased precision of military operations lead necessarily to greater respect of jus in bello? If so, is that another step towards the legitimation rather than the elimination of war? What about non-lethal weapons? What about the States that cannot afford the sophisticated military technology that allows "surgical operations?" Another example of high standards imposed by the developed world that leave 3rd world states in the impossibility to comply?

- Cohen contends that civilians will continue to be killed notwithstanding the existence of surgical operations [page 123]. Isn't that a contradiction with the whole idea of "surgical operations?" Or is it rather than air power and surgical operations are important just because they can give a military advantage?
Assignment 41 (Omitted Fall, 2007)

VIII. The Laws of Force
   C. Weapons Control, Nuclear Weapons and Disarmament

**Readings:**
- DHPSS: 1077-1087 (Weapons Control)
  77-83 (nuclear weapons case - review)
- Lawyers Committee on Nuclear Policy Statement

**Background**


On efforts to decrease landmines, see KENNETH ANDERSON, *The Ottawa convention Banning Landmines, the Role of International Non-governmental Organizations and the idea of International Civil Society*, 11 EIIL, 91 (2000).

**Questions for Discussion**
- Are the Legal Arguments for and against nuclear weapons convincing? What is their nature? Statesmenlike?
The ICJ has stated that "Since the turn of the century, the appearance of new means of combat has - without calling into question the longstanding principles and rules of international law - rendered necessary some specific prohibitions of the use of certain weapons" [Legality of the Threat or Use of Nuclear Weapons Advisory Opinion of (July 8, 1996)]. Does that imply that in the law of force everything that is not expressly prohibited is legal? If so, international law has distanced itself from the Lotus case only for the norms of the law of peace? What do we make of the Martens Clause recalled by Judge Weeramantry in his dissenting opinion?
Assignment 42

VIII. The Laws of Force  
D. The Regime in Action  
1. Peaceful Settlement, Enforcement/Intervention

Readings:

- **DAVID KENNEDY**: *Of War and Law*, Epilogue
- **CLAUSEWITZ**, *On War*, 101-122, 399-410 (1832)
- **FOUCAULT**, *Discipline and Punish*, 1-31

Peaceful settlement

- **DHPSS**: 820-836 (peaceful settlement) (review)

Intervention

- **DHPSS**: 980-1004 (intervention for democracy, humanitarian intervention, Spain, Kosovo)


Background:

**EDWARD LUTTWAK**, *Toward Post-Heroic Warfare*, 74 *Foreign Affairs* 3, 109 (1995) (excerpts);  
**EDWARD LUTTWAK**, *A Post-Heroic Military Policy*, 75 *Foreign Affairs* 4, 33 (1996) (excerpts);  

On trusteeship, see **RUTH E. GORDON**, *Some Legal Problems With Trusteeship*, 28 *Cornell Int’l L. J.* 310, (1995);  
**CATRIONA DREW**, *The East Timor Story: International Law on Trial*, 12 *EJIL* 651 (2001);  

On the legality of the humanitarian intervention in Kosovo, Editorial comments, *NATO’s Kosovo Intervention*, 93 *American J. Int’l L.* 4 (1999);  
**BARTRAM S. BROWN**, *Special report – humanitarian Intervention in Kosovo, Humanitarian Intervention as a Cross Road*, 41 *William and Mary L. Rev.* 5 (2000);  
**JULIE MERTUS, MIHAILO CRNOBRNJIA, AND JEFFREY K. Walker**, *Old Laws and New Wars*:

Questions for discussion

- What is the nature of intervention: is it retributory or is it instrumental for the enforcement of international law? Does it help in answering this question to determine whether the intervention is performed by the U.S. [retributory] or by the U.N. [enforcement]? See page 114 of "Toward Post-Heoric Warfare": what do we make of Luttwak's reference to the loss of U.S. commercial opportunities provoked by international conflicts? With the U.S. as the sole military superpower, is its unilateral intervention an instrument for the merchants or for the peace-makers?

- Is intervention at odds with Art. 2(4) of the UN Charter?

- Was the world more secure with a cold-war-like situation (deterrence, two strong super-powers)? If that is the case, does that amount to a defeat of international law in that international law doesn't work as efficiently as a well-arranged distribution of spheres of influence?

- Should U.S. intervention be conditioned by public opinion? If public opinion is pro-intervention only where vital U.S. interests are at stake, does intervention lose any residual patina of international law enforcement [as opposed to instrument of foreign policy]? Should public opinion be entitled to have voice in the decision to intervene? If so which public opinion: that of the U.S., that of the State in which intervention takes place or the "World Public Opinion" [if it exists]?

2. Intervention and Peacekeeping

Readings:

- *DHPSS: 1005-1043 (Collective Use of Force, Korea, Iraq, Cambodia, Somalia, Palestine, Rwanda, Yugoslavia)

- United Kingdom Attorney General’s statement on the legality of the conflict in Iraq

- TIMOTHY GARTON ASH, Creating a New Country, The Independent, 5 (July 15, 1999)

- Army JAG Corps Advertisement

Background:

On preventive action, sanctions and peacekeeping.


Questions for Discussion

- When should the U.N. send Peacekeeping forces? If - like Crocker states at p. 6 - the Security Council shouldn't send blue helmets when they would be exposed to severe risks, what is left? If the U.S. is both a permanent member of the U.N. Security Council and the leading military power, would its contribution to the UN forces [command and troops] be just a modern way to send troops where its vital interest are threatened without the risk of violating Art. 2(4) of the U.N. Charter?

- What is war? What does Clausewitz mean on page 119 that "war is a mere continuation of policy by other means?" What does this suggest for the relationship between the law of force and the laws of source, process and peace?

- What about his query on page 402: "is not war merely another kind of writing and language for political thoughts? It has certainly a grammar of its own, but its logic is not peculiar to itself?"
- How did our consideration of sources, processes and peace doctrine prepare us for force?
- How has our consideration of doctrine prepared us to study institutions?
- Should the collectivization of force be viewed as the triumph of force? Peace? Process? More or less skeptically than the refinement and classification of force characteristic of the law of war?