

INTERNATIONAL LAW

Spring 2011

Meeting Times: Mondays and Wednesdays 8:00 AM – 9:20 AM, Room 205

Course Description

There are two conventional answers to the question, “What is International Law?” First is the classic definition: international laws govern the relations of sovereign states. Second is the contemporary definition: international laws are those rules, norms, and processes regulating international actors in their transactions transcending national frontiers.

Attending the espousal of either definition is a belief in the tremendous scope of international law. Typical issues include: the nature of sovereign states, the mechanics of state succession, jurisdiction, immunity, diplomacy, commerce, and responsibility; the rules regulating decisions to go to war, rules regulating the conduct of war, rules obligating states to protect their citizens as well as the citizens of other states from disaster; rules regulating individual rights and duties, in the contexts of war, peace, and trade; the nature and power of international organizations, transgovernmental networks, non-governmental organizations, and multinational corporations; the rules of the sea, space, the environment; and more.

While the classic and the contemporary definitions both share in this expansive view of the scope of international law, they also share a common sense with regard to an independent or autonomous “international law.” That is, both perspectives on the discipline regard it as somehow existing prior to the practitioner—the international jurist must seek out the stuff of international law—it’s out there, waiting to be excavated, sometimes progressing, sometimes not. It is with this sense in mind that it becomes natural to talk of international law as a “body of rules” or a “set of processes” that operate independently of the actual performances of international lawyers.

A third definition of international law exploits this shared understanding, and brings focus instead to the notion of international law as a field of global governance comprised of particular people, dedicated to particular projects, situated in time. On this view, an interest in the definition of international law brings with it an exploration of the self-identified representatives of the “international community.” International Law is, in this sense, whatever it is that international jurists are doing.

The approach of this course is to split the difference with regard to our twin interests in being able to view international law in “objective” (international law is out there) and “subjective” (international law is found in the habits of international legal professionals) guises.

In the first Part, we approach the discipline of international law from the perspective of a lawyer in the United States working at an international organization, government agency, or law firm. Or to

put it another way, we will study the basics of international law from an “insider” perspective—we are performing the role of an actual international lawyer, and we have to learn how to play it. In this position, we will take for granted the existence of an international law, and accept the task of learning the structural mechanics of international law: What are the sources of international law? How do these sources interact with one another? What happens when certain sources appear to conflict with others? What are the powers of states? What are the powers of international organizations? In the context of the United States, what is our judiciary’s view on these questions? When do US courts have jurisdiction over international claims? When do US courts have jurisdiction over other sovereign states?

As for our study of these basic tools, our outline looks like this:

- I. The International Legal Order
- II. Sources Doctrine
 - a. Customary International Law
 - b. Treaties
 - c. Peremptory Norms and Soft Law
 - d. International Organizations
- III. The U.S. Perspective
 - a. Is International Law a Part of U.S. law?
 - b. Sovereign Immunity
 - c. Jurisdiction

In the second Part of the course, we approach the discipline from an “outsider’s” perspective. We will no longer imagine ourselves as an actor within the discipline, and will instead examine international law as a social analyst, asking what it is that distinguishes this discipline from its sisters, namely, international politics on the one hand and moral philosophy on the other. In so doing, we will ask: Who are these international law professionals? What do they think about? How do they talk? What are their habits? What are their worries? What are their projects, their accomplishments, their aspirations? Which ideas are in the foreground, and what others in the background? Are their arguments “law-like,” or something else?

In terms of our approach, we will read the story of international law and its heroes chronologically, beginning just after World War I and the creation of the League of Nations. We will break the story into three very rough and overlapping periods, (i) 1920-1960, (ii) 1960-1990, and (iii) 1990-present. In each period, we will divide our study into two parts. In the first part we will familiarize ourselves with the key intellectual debates of the time, and in the second part we will focus on some of that period’s major international law projects.

The outline of the second part of the course looks like this:

- I. 1920-1960
 - a. Functionalism vs. Neo-Positivism
 - b. Away with the Sovereign, Towards Institutions and Individuals
 - i. From Process to Substance in the Law of War
 - ii. From the League to the UN
 - iii. From Minority Rights to Human Rights

II. 1960-1990

- a. Process, Rule, Critique
- b. Return of the Sovereign: Decolonizing International Law
 - i. Enter the Third World
 - ii. From Mandates to New States I
 - iii. From Mandates to New States II
 - iv. Rise and Fall of the New International Economic Order

III. 1990-Present

- a. From International Legal Order to Global Governance
- b. A Responsible Sovereign?
 - i. State Responsibility
 - ii. Individual Responsibility
 - iii. The Terror War I
 - iv. The Terror War II

Sequence of Courses

LAWS 6400 International Law is a stand-alone course, and it is not necessary to have previously taken LAWS 6008 International Legal Order. Similarly, those students that have taken LAWS 6008 should not worry about any redundancies between that course and this one. To be sure, those students of LAWS 6008 are intended to experience the continuation of those narrative themes driving international legal argument in prior times, but this class consists in a continuation of the story, and not a repetition of it. At the same time, I have designed this course on contemporary international law to be entirely accessible to those students that lack any prior exposure to international law or international relations.

For those students interested in focusing on the history and theory of international law, I recommend you take my courses in International Legal Order, International Law, and the advanced seminar, What Should International Law Become?

Readings

The text for this course is International Law (Malcolm Evans, ed., 2010) (Third Edition). This text is strongly recommended, but it is not required. The required readings are available on TWEN and as a coursepack at the bookstore. Please notice that I have occasionally italicized page numbers in the readings. If page numbers are italicized, you are not responsible for those pages, either in class or on the exam. I have made them available to you for background purposes, and it is fine for you to cite to these pages in your final exam.

The reading for Assignment 1 should be completed in preparation for the first day of class.

Participation, Exam, and Grading

The exam is take-home. My expectation is that every student will participate in all class discussions. I reserve the right to adjust your final grade in proportion with your participation in the class.

Law School Absentee Policy

§3-3-1 Absences

Colorado Law requires regular and punctual class attendance of all students. Absence or lateness by a student for more than 20% of the total number of classes or lectures in any course shall be cause for the instructor to levy on the student a grade penalty the instructor deems appropriate, up to and including the assignment of a failing grade. Nothing in this rule prohibits an instructor from rewarding by enhanced grades students whose attendance, preparation, and participation exceed what is required.

Assignments

Assignment 1 – The International Legal Order

- Evans, pp. 32-39, 204-228

Part I: Where Does International Law Come From? (A View from the Inside)

Assignment 2 – Sources of International Law – Customary Law

- Evans, pp. 95-108, 111-115
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, pp. 97-110
- Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, pp. 253-260

Assignment 3 – Sources of International Law – Treaty Law

- Evans, pp. 172-183, 189-199
- Vienna Convention on the Law of Treaties (1969) (Preamble, Articles 2, 3, 18, 19, 20, 26, 27, 31, 32, 53, 62, 64)
- Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951, pp. 20-30

Assignment 4 – The Hierarchy of Sources – Peremptory Norms and Soft Law

- Evans, pp. 122-124, 141-157

- Hillary Charlesworth and Christine Chinkin, The Gender of Jus Cogens, 15 Human Rights Quarterly 66 (1993), pp. 66-79
- Kenneth Abbot and Duncan Snidal, “Hard and Soft Law in International Governance,” in Legalization and World Politics (Judith Goldstein et. al. eds., 2001), pp. 37-42, 50-66

Assignment 5 – Other Sources – International Organizations

- Evans, pp. 252-261, 264-271
- Jose Alvarez, International Organizations as Law-makers (2005), pp. 65-74, 184-198, 608-620
- David Kennedy, Challenging Expert Rule: The Politics of Global Governance, 27 Sydney Law Review 1 (2005), pp. 1-12

Assignment 6 – International Law in Domestic Context – Sources

- Evans, pp. 411-418, 421-422, 424-437
- Medellin v. Texas, 552 US 491 (2008), pp. 6-15, 20-29

Assignment 7 – International Law in Domestic Context – Sovereign Immunity

- Evans, pp. 340-379
- Banco Nacional de Cuba v. Sabbatino, 376 US 398 (1964), pp. 3-5, 5-13
- Bradley Goldsmith and Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harvard Law Review 815 (1997), pp. 816-837, 859-876
- Harold Koh, Is International Law Really Law?, 111 Harvard Law Review 1824 (1997), pp. 1824-1829, 1833-1841, 1852-1861

Assignment 8 – International Law in Domestic Context – Jurisdiction

- Evans, pp. 313-337
- Restatement Third, Foreign Relations Law, Section 401 and Comment; Section 402 and Comment; Section 403 and Comment; Section 421 and Comment (a); Section 431 and Comment (a),
- United States v. Aluminum Co. of America, 148 F2d 416 (2nd Cir. 1945), pp. 26-27
- Kadic v. Karadzic, 70 F 3d 232 (2nd Cir. 1995), pp. 5-16

Part II: Where Does International Law Come From? (A View from the Outside)

1920-1960 A. Functionalism vs. Neo-Positivism *Assignment 9 – Functionalism*

- Oliver Wendell Holmes, The Path of the Law, 10 Harvard Law Review 457 (1897), pp. 464-474
- Philip Jessup, The Functional Approach Applied to International Law, Proceedings of the Third Conference of Teachers of International Law (1928), pp. 134-137
- Philip Marshall Brown, The Individual and International Law, 18 American Journal of International Law 532 (1924), pp. 532-536
- Philip Marshall Brown, International Lawlessness, 32 American Journal of International Law 775 (1938), pp. 775-778
- Hans Morgenthau, Positivism, Functionalism, and International Law, 34 American Journal of International Law 260 (1940), pp. 260-274
- Georg Schwarzenberger, Jus Pacis ac Belli? Prolegomena to a Sociology of International Law, 37 AJIL 460 (1943), pp. 460-479

Assignment 10 – Neo-Positivism

- Hans Kelsen, The Pure Theory of Law and Analytical Jurisprudence, 55 Harv L Rev 44 (1942)

1920-1960 B. Away with the Sovereign: Towards Institutions and Individuals *Assignment 11 – From Substance to Process in the Law of War*

- Evans, pp. 586-598, 606-614 (ICJ)
- Evans, pp. 615-638 (Use of Force)
- Statute of the International Court of Justice (excerpts)
- David Caron, War and International Adjudication: Reflections on the 1899 Peace Conference, 94 American Journal of International Law 4 (2000), pp. 4-30
- Martti Koskeniemi, The Ideology of International Adjudication (2007), pp. 1-18

Assignment 12 – From the League to the United Nations

- Evans, pp. 21-27
- Nathaniel Berman, Sovereignty in Abeyance: Self-Determination and International Law, 7 Wisconsin Journal of International Law 51 (1988), pp. 52-60, 72-79
- The Covenant of the League of Nations (http://avalon.law.yale.edu/20th_century/leagcov.asp)
- United Nations Charter (excerpts)
- Montevideo Convention (1933)
- Minority Schools in Albania, Advisory Opinion, Permanent Court of International Justice (A/B) (1935), pp. 7-14 (skim), 14-22
- International Status of South-West Africa, Advisory Opinion, ICJ Reports 1950 (McNair's Separate Opinion), (skip bottom of 150 to top of 153)

Assignment 13 – From Minority Rights to Human Rights

- Evans, pp. 284-306, 784-811
- United Nations Declaration of Human Rights
- Daniel Whelan, Indivisible Human Rights (2010), pp. 11-12, 47-58
- Quincy Wright, International Law and Ideologies, 48 American Journal of International Law 616 (1954), pp. 616-626
- Makau Matua, The Ideology of Human Rights, 36 Virginia Journal of International Law 589 (1995), pp. 589-607

A. Process, Rule, Critique

Assignment 14 – The New Haven School vs. The Manhattan School – I

- Myres McDougal, Law and Power, 46 American Journal of International Law 102 (1952), pp. 107-114
- Myres McDougal, Harold Lasswell, W. Michael Reisman, Theories About International Law: Prologue to a Configurative Jurisprudence, 8 Virginia Journal of International Law 188 (1967), pp. 194-207, 243-260, 260-275
- Wolfgang Friedman, The Changing Structure of International Law (1964), pp. 75-95, 365-381

Assignment 15 – The New Haven School vs. The Manhattan School – II

- Louis Henkin, How Nations Behave (1979), pp. 39-49, 88-98, 319-339
- W. Michael Reisman, Coercion and Self-Determination: Construing Charter Article 2(4), 78 American Journal of International Law 642 (1984), pp. 642-645
- Oscar Schachter, The Legality of Pro-Democratic Invasion, 78 American Journal of International Law 645 (1984) pp. 645-650
- Oscar Schachter, Remarks on “McDougal’s Jurisprudence: Utility, Influence, Controversy,” 79 American Society of International Law Proceedings 266 (1985), pp. 266-273
- W. Michael Reisman, Remarks on “McDougal’s Jurisprudence: Utility, Influence, Controversy,” 79 American Society of International Law Proceedings 273 (1985), pp. 273-280

Assignment 16 – Dissident Voices – The Contradictions of International Legal Argument

- David Kennedy, Theses About International Law Discourse, 23 German Yearbook of International Law 353 (1980)

Assignment 17 – Dissident Voices – Liberalism and International Trade

- Evans, 722-742
- Daniel Tarullo, Beyond Normalcy in the Regulation of International Trade, 100 Harv L Rev 546 (1986), pp. 547-601

II. 1960-1990

B. Return of the Sovereign: Decolonizing International Law

Assignment 18 – Enter the Third World

- *Evans*, pp. 230-248
- United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)
- United Nations General Assembly Declaration on Friendly Relations (1970)
- Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2004), pp. 196-244

Assignment 19 – From Mandates to New States I

- Mohammad Bedjaoui, “Succession of States and Governments: Succession in Respect of Matters other than Treaties,” Report to the International Law Commission (1969)
- Legal Consequences for States of the Continued Existence of South Africa in Namibia, Advisory Opinion, ICJ Reports (Separate Opinion, Ammoun) (1971), pp. 67-87

Assignment 20 – From Mandates to New States II

- *Evans*, pp. 230-236
- Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 *Wisconsin Journal of International Law* 51 (1988), pp. 84-105
- Western Sahara, Advisory Opinion, ICJ Reports (1975), pp. 29-33, 37-49, 56-65

Assignment 21 – The Rise and Fall of the New International Economic Order

- United Nations General Assembly Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (1974)
- *Balakrishnan Rajagopal, International Law from Below: Development, Social Movements, and Third World Resistance* (2003) pp. 73-94
- Mohammad Bedjaoui, *Towards a New International Economic Order* (1979), pp. 23-63
- *Louis Henkin, How Nations Behave* (1979), pp. 199-211
- Thomas Franck, “Lessons of the Failure of NIEO,” Proceedings of the Fifteenth Annual Conference of the Canadian Council on International Law (1986), pp. 82-100

III. 1990-Present

A. From International Legal Order To Global Governance

Assignment 22 – Transnationalism

- Harold Koh, *Transnational Legal Process*, 75 *Nebraska Law Review* 181 (1996)
- Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *European Journal of International Law* 503 (1995), pp. 507-514

Assignment 23 – Rational Choice Theory

- Jack Goldsmith and Eric Posner, *The Limits of International Law* (2005), pp. 7-14, 23-43
- Joel Trachtman, *The Economic Structure of International Law* (2008), pp. 72-88, 104-118

Assignment 24 – TWAIL

- Makau Matua, *Critical Race Theory and International Law: the View of an Insider-Outsider*, 45 *Villanova Law Review* 841 (2000)
- Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003) pp. 9-23

B. III. 1990-Present
A Responsible Sovereign?

Assignment 25 – State Responsibility

- *Evans*, pp. 441-469, pp. 504-525
- International Law Commission *Articles on Responsibility of States for Internationally Wrongful Acts* (2001)
- Gabcikova-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports (1997), pp. 38-42
- LaGrand (Germany v. United States of America), Judgment, ICJ Reports (2001), pp. 489-492, 508-514
- United Nations Secretary-General, Ban Ki-Moon's Speech, "Responsible Sovereignty: International Cooperation for a Changed World," (July 15, 2008)
- United Nations Secretary-General, *Implementing the Responsibility to Protect* (2009), pp. 4-10

Assignment 26 – Individual Responsibility

- *Evans*, pp. 752-765
- *International Human Rights in Context* (Henry Steiner, Philip Alston, and Ryan Goodman, eds. 2007), pp. 1256-1269
- Martti Koskeniemi, *Between Impunity and Show Trials*, 6 *Max Planck Yearbook of United Nations Law* 1 (2002)

Assignment 27 – The Terror War – I

- *Evans*, pp. 814-846 (*humanitarian law*)
- Hamdan v. Rumsfeld, 548 US 557 (2006), I, IV-VII
- Catharine MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 *Harvard International Law Journal* 1 (2006)

Assignment 28 – The Terror War – II

- ~~Scott M. Lyall, "Imperialism, Sovereignty, and the Making of International Law" (2004), pp. 273-309~~