

Global Law and Governance

Harvard Law School

Fall 2010

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

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

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

Evaluation:

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

Materials:

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

Materials marked **DM** are available in the distributed materials and should be available on the course website.

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

David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism, Princeton University Press (2005).

David Kennedy, Of War and Law, Princeton University Press (2006)

Course Outline

I. The Mystery of Global Governance Today

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

II. The Background Architecture of Public International Law

Topic 2: The Norms
Custom
Special Problems

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

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

Topic 5: The Powers
Jurisdiction

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

Topic 7: The Powers
Conflicts

Topic 8: Mobilizing the Architecture: Claims and State Responsibility

III. The Architecture in History

Topic 9: Before Modernity
1648-1815
1815-1914

Topic 10: The Turn to Modernism: 1914-1945

Topic 11: Modern International Law Extended and Contested: 1945-2000

IV. New Thinking: Adjudication

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

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

Topic 14: Consciousness as Governance: Rulership and the Power of Ideas
Human Rights
Environmental Protection

V. New Thinking: Administration and Execution

Topic 15: Statecraft and Diplomacy
Unilateralism, Bilateralism and ad hoc Arrangements /
Multilateral conferences and rulemaking
GATT and the WTO: Bargaining in the Shadow of the Law /
Law in the Shadow of Bargaining

Topic 16: International Institutions
League of Nations, the United Nations and a History of Reform
Leadership as Governance: The Secretary General

Topic 17: Administration as Governance
Global Administrative Law
Restructuring the Transnational Social State: The European
Union, Market Freedoms and Technocratic Order

VI. New Thinking: Legislation

Topic 18: Regulation and Private Ordering

VII. New Thinking: Theories of the Whole

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

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

Topic 20: Humanitarian Policy and the “Law of Cooperation”
Case Study: Refugees and the UNHCR

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

Topic 21: “The Law of Armed Conflict,” “Humanitarian Law,” the “Laws of War” or “jus in bello”

Topic 22: The Law of Force and the Use of Force: Modern War and Modern Law

Syllabus

I. The Mystery of Global Governance Today

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

- DM David Kennedy, *The Mystery of Global Governance: The Kormendy Lecture*, 34 Ohio Northern University Law Review 827-860 (2008)
- DHMS xv-xvii (introduction) and xxxi-xxxiv (summary of contents)
- DM Fredric Kirgis, International Organizations in Their Legal Setting, introduction 1-6 (1st edition, 1977), and *preface and table of contents* (2nd edition, 1993)
- DHMS xix-xxx (historical introduction)
- DM David Kennedy, *Charts: Schools of Thought*, and *Intellectual History*
- DM Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 Yale Journal of Law and the Humanities 351 (1992) (excerpts)

II. The Background Architecture of Public International Law

Topic 2: The Norms

Custom

- DHMS 55-67 (Article 38 of the Statute of the International Court of Justice, Schachter, customary law questions, The Paquette Habana (1900), McDougal note 4)
- DHMS 68-76 (The Lotus (1927))
- DHMS 79-87 (Nuclear Weapons (1996))
- DHMS 112-119 (treaties and customs compared)
- Optional: (In broad terms, the law of treaties should be familiar from study of contract law. Those with a special interest in the ways in which common private law ideas have and have not been given expression in the law of treaties may wish to skim DHMS, 122-215)

Special Problems

- DHMS 105-107 (jus cogens, hierarchy of norms, Weil, “relative normativity”)
- DM Charlesworth and Chinkin, *The Gender of Jus Cogens*, 15 Human Rights Quarterly 66-76 (1993) (excerpts)
- DHMS 292-295 (unilateral acts, Eastern Greenland (1933), Nuclear Tests (1974))
- DHMS 286-291 (nonbinding international agreements)
- DHMS 218-231 (fundamental change of circumstances: Fisheries (1973), Gabcikovo (1997), Techt v. Hughes (1920))
- DM Lissitzyn, *The International Load Line Convention Case*, 61 American Journal of International Law 895 (1967) (excerpts)
- DM David Kennedy, *Chart: The Structure of Sources Doctrine*

II. The Background Architecture of Public International Law

Topic 3: The Entities

Statehood and Recognition

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

Sovereignty and Sovereign Rights

- DM The Antelope 23 U.S. (10 Wheaton) 66 (1825)
- DM American Banana v. United Fruit (1909)
- DM Corfu Channel (1949) (excerpts)
- DM Richard Ashley and R.B.J. Walker, *Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies*, 34 International Studies Quarterly 367-416 (1990) (excerpts)
- DM Karen Knop, *RE/Statements: Feminism and State Sovereignty in International Law*, 3 Transnational Law & Contemporary Problems 293 (1993)

II. The Background Architecture of Public International Law

Topic 4: The Entities

Individuals and Other “Entities”

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

International Criminal Law: Individual Responsibility

- DHMS 1306-1313 (background on international criminal law)
- DM Martti Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook for United Nations Law 1-36 (2002)

II. The Background Architecture of Public International Law

Topic 5: The Powers

Jurisdiction

- DHMS 755-761 (jurisdiction defined, overview of principles)
761-762, 767-776 (the territorial principle and “effects”-based jurisdiction, Alcoa (1945), Hartford Fire (1993))
780-784 (Helms-Burton Act, sanctions)
793-796 (passive personality, Yousef (2003))
798-802 (protective principle, Vasquez-Velasco (1994))
804-815 (universality principle, Pinochet (1999), Yousef (2003))
- DM Robert Malley, Jean Manas and Crystal Nix, *Constructing the State Extra-territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 Harvard Law Review 1273 (1990) (excerpts)
- DM Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 University of Pennsylvania Law Review 311 (2002) (excerpts)

II. The Background Architecture of Public International Law

Topic 6: The Powers

Territory

- DHMS 376-398 (acquisition, Palmas (1928), “uti possidetis juris”, Burkino Faso v. Mali (1986))
- DHMS 1384 (El Salvador v. Honduras (1992))
- DM Nathaniel Berman, *The Quest for Rationality: The Recent Writing of Thomas Franck*, 35 NYU Journal of International Law and Politics 339 (2003)

International Territories

- DM Nathaniel Berman, *Legalizing Jerusalem Or, of Law, Fantasy, and Faith*, 45 Catholic University Law Review 823-835 (1996)

Law of the Sea: Architecture and Regulation

- DHMS 1372-1379 (introduction, basic principles: freedom and commonage, status of the treaty, the concept of “zones”)
- DM David Kennedy, International Legal Structures, *Nomos* 201-245 (1987) (excerpts)

II. The Background Architecture of Public International Law

Topic 7: The Powers

Conflicts

- DHMS 851-859 (jurisdictional immunities)
- DM Schooner Exchange v. McFaddon, 11 U.S. 116 (1812)
- DM American Banana v. United Fruit (1909)
- DHMS 835-836 (conflicts of jurisdiction)
- DM US v. Bank of Nova Scotia (1983) (excerpts)

II. The Background Architecture of Public International Law

Topic 8: Mobilizing the Architecture: Claims and State Responsibility

- DHMS 498-502 (general principles of State responsibility)
532- 541 (countermeasures, retorsion, reprisal)
- DM France v. US Air Services (1978) (excerpts)
- DM Lillich and Paxman, *Injuries to Aliens Occasioned by Terrorist Activities*, 26 American University Law Review 217 (1977) (excerpts)
- DM W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Houston Journal of International Law 3 (1999)

III. The Architecture in History

Topic 9: Before Modernity

1648-1815

- DM David Kennedy, *Primitive Legal Scholarship*, 27:1 Harvard International Law Journal 1 (1986) (excerpts)
- DM Emerich de Vattel, The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns (1916) (Charles G. Fenwick translation of the 1758 French edition) (excerpts)

1815-1914

- DM The Antelope 23 U.S. (10 Wheaton) 66 (1825)
- DM Henry Wheaton, Elements of International Law: with a Sketch of the History of the Science, Carey, Lea & Blanchard (1836) (excerpts)
- DM Henry Wheaton, Elements of International Law, Little, Brown, and Company (1866) (excerpts)
- DM Annelise Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 Harvard Law Review 723 (1993) (excerpts)

Optional Background:

- DM David Kennedy, *International Law in the Nineteenth Century: History of an Illusion*, 17 Quinnipiac Law Review 99-136 (1998)

III. The Architecture in History

Topic 10: The Turn to Modernism: 1914-1945

- DM Alejandro Alvarez, *The New International Law*, Grotius Society 35-51 (1929)
- DM Philip Jessup, *The Functional Approach as Applied to International Law*, Third Conference of Teachers of International Law (1928)
- DM Robert Redslob, *The Problem of Nationalities*, Grotius Society 21-32 (1931)
- DM Detlev Vagts, *International Law in the Third Reich*, 84 American Journal of International Law 661 (1990) (excerpts)

III. The Architecture in History

Topic 11: Modern International Law Extended and Contested: 1945-2000

- DM Hans Kelsen, *Lecture III: International Law and the State, Law and Peace in International Relations* (1942) (excerpts)
- DM Corfu Channel (1949) (excerpt)
- DM Myres McDougal, *Law and Power*, 46 American Journal of International Law 102 (1952)
- DM Oscar Schachter, *Dag Hammarskjold and the Relation of Law to Politics*, 56 American Journal of International Law 1 (1962)
- DMHS 1-36 (nature of international law)
- DM David Kennedy, *Tom Franck and the Manhattan School*, 35 NYU Journal of International Law and Politics 397 (2003)

Optional background:

- DM David Kennedy, *The International Style in Post War Law and Policy*, 1 Utah Law Review 7 (1994)

IV. New Thinking: Adjudication

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

- DM Harold H. Koh, *Transnational Legal Process*, 75 Nebraska Law Review 181 (1996)
- DHMS 652-660 (Henkin, SOSA v. Alvarez-Machain (2004)), 667-675 (Sabbatino (1964)) 679-685 (Missouri v. Holland (1920))
- DM David Kennedy, *Receiving the International*, 10 Connecticut Journal of International Law 1 (1994)
- DM Annelise Riles, The Network Inside Out, The University of Michigan Press (2000) (excerpts)

IV. New Thinking: Adjudication

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

- DHMS 582-587, 638-641 (ICJ, jurisdiction, other international courts and tribunals)
- DM US v. Iran (1979)
- DHMS 598-610 (Nicaragua v. US (1984))
- DM Jose E. Alvarez, *Judging the Security Council*, 90 American Journal of International Law 1 (1996)
- DM Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 American Journal of International Law 715-767 (2008)

IV. New Thinking: Adjudication

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

- DM Wilhelm Ropke, *Economic Order and International Law*, 86 Recueil des Cours 203 (1954 II) (excerpts)
- DM Philip Allott, *New International Law: The First Lecture of the Academic Year*, in Colin Warbrick et al, Theory and International Law: An Introduction, British Institute for International and Comparative Law 107 (1992)

Human Rights

- DHMS 956-961, 975-988 (introduction to human rights)
- David Kennedy, The Dark Sides of Virtue, Princeton University Press Chapters 1 and 2 (2004)

Environmental Protection

- DM Philippe Sands, *Part Two and Three*, Greening International Law, New Press xxx-xxvii (1994)
- DHMS 1486-1502 (general principles, Trail Smelter (1941), Chernobyl)
- DM Richard Falk, *Environmental Protection in an Era of Globalization*, 6 Yearbook of International Environmental Law 3-7, 24-25 (1995)
- DM Peter M. Haas, *UN Conferences and Constructivist Governance of the Environment*, 8 Global Governance 73 (2002)

V. New Thinking: Administration and Execution

Topic 15: Statecraft and Diplomacy.

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

- DM Ruth Wedgwood, *Unilateral Action in a Multilateral World*, in S. Patrick and S. Forman (eds), Multilateralism and U.S. Foreign Policy: Ambivalent Engagement, Rienner 167-189 (2001)

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

- DM Judith Bello, *The WTO Dispute Settlement System Understanding: Less is More*, 90 American Journal of International Law 416 (1996)
- DM David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10:2 American University Journal of International Law and Policy 671 (1995)
- DM Jackson and Davey, *International Economic Relations and the Law*, Legal Problems of International Economic Relations, West Publishing Company 1-4 (1995)

V. New Thinking: Administration and Execution

Topic 16: International Institutions

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

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

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

Leadership as Governance: The Secretary General

- DM Oscar Schachter, *Dag Hammarskjold and the Relation of Law to Politics*, 56 American Journal of International Law 1 (1962)
 - DM David Kennedy, *Leader, Clerk or Policy Entrepreneur? The Secretary General in a Complex World*, in Simon Chesterman (ed), Secretary or General?: The Role of the United Nations Secretary General in World Politics, Cambridge University Press 158-181 (2006)
- You may wish to consider a couple of pieces I have written on international institutions: David Kennedy, *A New World Order: Yesterday, Today and Tomorrow* 4:X Transnational Law and Contemporary Problems 330 (1995), and David Kennedy, *The Move to Institutions*, 8 Cardozo Law Review 841 (1987)

V. New Thinking: Administration and Execution

Topic 17: Administration as Governance

- DM David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 Sydney Journal of International Law 5-28 (2005)

Global Administrative Law

- DM Kingsbury, Krisch, Stewart and Wiener, *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15-61 (2005)
- DM Amy Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33:2 Law and Social Inquiry 503-562 (2008)

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

- David Kennedy, The Dark Sides of Virtue, Princeton University Press Chapter 6 (2004)
- DM David M. Trubek and Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, 11:3 European Law Journal 343-364 (2005)
- DM Burkard Eberlein and Dieter Kerwer, *New Governance in the European Union: A Theoretical Perspective*, 42:1 Journal of Common Market Studies 121-42 (2004)

VI. New Thinking: Legislation

Topic 18: Regulation and Private Ordering

- DM Dan Danielsen, *Corporate Power and Global Order*, in Anne Orford (ed), International Law and its Others, Cambridge University Press 85-99 (2006)
- DM John Braithwaite and Peter Drahos, *Neoliberalism or Regulatory Capitalism?*, Regulatory Capitalism: How it Works, Ideas for Making it Work Better, Edward Elgar 1-31 (2008)
- DM Dan Danielsen, *Local Rules and a Global Economy: An Economic Policy Perspective*, 1 Transnational Legal Theory 49-68 (2010)

VII. New Thinking: Theories of the Whole

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

- DM Gunter Teubner and Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Michigan Journal of International Law 999-1045 (2004)
- DHMS 36-41 (fragmentation of international law)
- DM Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission (2006) (excerpts)
- DM David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 NYU Review of Law and Social Change 641 (2007)

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

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

- David Kennedy, The Dark Sides of Virtue, Princeton University Press Chapters 4 and 9 (2004)
- DM Wolfgang Friedmann, The Changing Structure of International Law, Stevens & Sons 365-381 (1964)
- DM David Rieff, A Bed for the Night: Humanitarianism in Crisis, Simon & Schuster 1-25 (2002)

Case Study: Refugees and the UNHCR

- David Kennedy, The Dark Sides of Virtue, Princeton University Press Chapter 7 (2004)
- DM Alex Cunliffe and Michael Pugh, *UNHCR as Leader in Humanitarian Assistance: A Triumph of Politics Over Law?*, in Nicholson and Twomey (eds), Refugee Rights and Realities, Cambridge University Press 175-199 (1999)

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

Topic 21: “The Law of Armed Conflict,” “Humanitarian Law,” the “Laws of War” or “jus in bello”

- DM David Kennedy, *Lawfare and Warfare (Draft)*, in Cambridge Companion to International Law, Cambridge University Press (forthcoming 2010)
- DM Sigmund Freud, Thoughts for the Times on War and Death (1919)
- DM Cohn, C. *Sex and Death in the Rational World of Defense Intellectuals*, 12:4 Signs 687-718 (1987)
- DHMS 1276-1296 (law of war, control of weapons)

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

Topic 22: The Law of Force and the Use of Force: Modern War and Modern Law

- DM Clausewitz, On War 101-122, 399-410 (1832)
- DM Foucault, Discipline and Punish: The Birth of the Prison, Vintage Books 1-31 (1979)
- David Kennedy, Of War and Law, Princeton University Press Introduction, Chapters 1 and 3 (2006)