POL438: INTERNATIONAL LAW

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Course Materials

- Antonio Cassese (2005), *International Law*, 2nd ed. (Oxford University Press)
- Ruti Teitel (2011), *Humanity's Law* (Oxford University Press)
- Christine Gray (2008), *International Law and the Use of Force* (Oxford University Press), 3rd ed.

Course Learning Outcomes

Students who take this course will be able to:

- Describe what "international law" is and what it is not
- Identify the sources of international law
- Explain the interaction of international law development and various international relations theories (especially Realism, Liberalism, and Constructivism)
- Identify and summarize key cases of international law
- Evaluate what role, if any, international law has played in constraining the use of force by states
- Analyze the function of international law in a variety of contemporary international issue areas and its role in the future of the international community

Course Objectives

The study of international law is not new. A historical examination of international law would require starting in the Roman Republic over 2,000 years ago. The "law of nations," as it was called then, has evolved into today's "international law" and looks very different from its earlier manifestations. Globalization has brought diverse societies into relatively constant contact with one another, while the horrors of the 20th century have demonstrated what can happen if these contacts are not regulated by some general principles and norms.

Despite some criticism and skepticism about the nature and role of international law, Professor Louis Henkin is correct when he states that "it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." This makes the study of both the content and creation of international law crucial to fully understanding international relations as they are practiced today and in the future.

Thus, our objective in this course, broadly speaking, is twofold. First, we will examine current international law to understand what it is that States observe. This will entail learning the content of these principles, but also understanding why States observe these principles in the absence of centralized institutions that can effectively apply sanctions for violations of the law. More specifically, we will take several weeks to look at one particular principle of international law: the prohibition of the use of force. Especially in the wake of the US invasions of Afghanistan and Iraq, it is essential to understand the laws of war, whether the US (and other actors) observed these laws, and the legal arguments made to justify breaches.

Second, we will examine the creation of international law – in short, why we have the current set of laws. Again, we spend several weeks examining the role of power in establishing the current set of principles and laws observed today. In addition, we will look at how, once established, these rules can act as restrictions on the power that created them. These topics are especially important as we consider what new rules may evolve, why, and the impact they will have on the actions and behaviors of States and individuals in the future.

At a minimum, international law is an effective, efficient, and useful mechanism for solving problems, preventing problems, and changing undesirable behavior. To that end, a better understanding of the nature and content of international law will serve to make the world more just, more safe, and a place where each human being can realize his or her own potential.

Course Grading

The following is the breakdown of how the final grade will be determined:

25%	Exam #1
30%	Final Exam
20%	Case summaries
10%	Briefs
15%	Attendance and Participation

The final exam will be cumulative.

Attendance and Participation

Attendance is very important in a core course since this is a discussion class. Attendance is 7% of the total grade and will be calculated in the following manner:

# of classes missed	Attendance grade
0-1	7
2	6
3	5
4	4
5	3
6	2
7	1
8	0
9	dropped from course

Participation is a subjective measure of the how involved in class discussions a student is. Quantity does not impress me as much as quality – the student who just talks to be heard better have something that adds to the discussion. However, everyone should participate and 8% of the total grade will be a subjective judgment of how well you added to class discussions. **Warning: as in a law school class, I will call on people during class to answer questions, so be prepared!!!**

Briefs

There will be several assigned briefs in this class. These are due when they are due. **No late briefs will be accepted**. Essentially, in a brief you will be asked to apply the principles and laws learned in the course to specific world events given by the instructor.

I encourage you to **work together in groups**, even though every person's work must be their own. Some people will catch things others will miss – you can help each other more than I can help you sometimes. Make sure *you* understand the briefs before you turn them in.

Warning: the more I get the impression that the class is not reading the material as it should, the more briefs will be given. Save yourself more work down the road by doing the reading and coming to class prepared to discuss it.

Case Summaries

Several of the court cases listed in the schedule of readings below have three asterisks (***) in front of them. Each student will turn in a one-page case summary for that particular case on the day it is scheduled to be read. The professor will provide a template (and in some cases other information) that the brief should follow.

1/22	*Reference re Secession of Quebec* (1998)
1/24	*The Tinoco Claims Aribtration* (1923)
1/27	*Island of Palmas Case* (1928)
1/29	*Banco Nacional de Cuba v Sabbatino* (1964)
1/31	*Reparation for Injuries Suffered in the Service of the UN* (1949)
2/3	*The Lotus Case* (1927)
	Legality of the Threat or Use of Nuclear Weapons (1996)
2/5	*North Sea Continental Shelf Cases* (1969)
	Reservations to the Convention on Genocide (1951)
2/7	*Nuclear Tests Case* (1974)
2/10	*Filartiga v Pena Irala* (1980)
2/12	*US v Alvarez-Machain* (1992)

3/3	*Gabcikovo-Nagymaros Project* (1997)
3/7	*Nicaragua Case* (1986)
	Kadic v Karadzic (1995)
3/17	*Prosecutor v Tadic* (1995)
3/24	*Nicaragua Case* (1986)
3/30	*Oil Platforms Case* (2003)
	Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)
4/14	*Ex Parte Pinochet* (1999)
4/16	*Prosecutor v Jean-Paul Akayesu* (1999)
4/23	*US v Fawaz Yunis* (1991)
4/28	*The Trail Smelter Case* (1941)
	Gabcikovo-Nagymaros Project (1998)

INTERNATIONAL LAW – SCHEDULE OF READINGS

PART I: FOUNDATIONS OF THE INTERNATIONAL COMMUNITY

SECTION A: FUNDAMENTAL PRINCIPLES

1/14 Introduction

1/15 Cassese 1, "The Main Legal Features of the International Community," 3-21

- Louis Henkin (1995), *International Law: Politics and Values*: 4-5
- John Austin (1832), *The Province of Jurisprudence Determined*: 133, 201
- Hans Kelsen (1967), *Pure Theory of Law*: 215-17
- Louis Henkin (1979), *How Nations Behave*: 25-26, 320-21
- Louis Henkin (1979), *How Nations Behave*: 89-90, 92-95, 97-98

1/17 Cassese 2, "The Historical Evolution of the International Community," 22-45

- Louis Henkin (1995), *International Law: Politics and Values*: 8-11
- Philip Allott (1990), *Eunomia: New Order for a New World*: 416-19
- Richard Falk (1992), *Explorations at the Edge of Time*: 198-213
- W Michael Reisman (1990), "International Law after the Cold War," *American Journal of International Law* 84(4): 859-64

1/20 No Class (Martin Luther King, Jr. Day)

1/22 Cassese 3, "The Fundamental Principles Governing International Relations," 46-68

- "Friendly Relations Declaration," UN General Assembly Resolution 2625
- ***Reference re Secession of Quebec* (1998), Supreme Court of Canada

SECTION B: INTERNATIONAL LEGAL SUBJECTS

1/24 Cassese 4, "States as the Primary Subjects of International Law," 71-80

- UN Security Council Resolution 217
- Domingo E Acevedo (1993), "The Haitian Crisis and the OAS Response," in Lori Damrosch, ed., *Enforcing Restraint*: 119-20, 123, 132-33
- ****The Tinoco Claims Arbitration* (1923)
- *Salimoff & Co. v Standard Oil of NY* (1933), NY Court of Appeals
- "Statement of the United States on Withdrawal of Recognition from Government of the Republic of China (Taiwan)" (1979)
- *Conference for Peace in Yugoslavia Arbitration Commission Opinion No. 9* (1992)

1/27 Cassese 5, "The Spatial Dimensions of State Activities," 81-97

- ****Island of Palmas Case* (1928), Permanent Court of Arbitration
- *Legal Status of Eastern Greenland Case* (1933), PCIJ
- *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (1986), ICJ
- Steven Ratner (1996), "Drawing a Better Line: *Uti Possidetis* and the Borders of New States," *American Journal of International Law* 90: 590-91

1/29 Cassese 6, "Limitations on State Sovereignty," 98-123

- ****Banco Nacional de Cuba v Sabbatino* (1964), US Supreme Court
- *The Second Hickenlooper Amendment* (1964)
- Louis Henkin (1967), "Act of State Today: Recollections in Tranquility," *Columbia Journal of Transnational Law* 6: 178-82

- Frederick A Mann (1973), "International Delinquencies before Municipal Courts," in *Studies in International Law*: 378-80

1/31 Cassese 7, "Other International Legal Subjects," 124-50

- ***Reparation for Injuries Suffered in the Service of the UN* (1949), ICJ (361-68)
- Ramesh Thakur and William Maley (1999), "The Ottawa Convention on Landmines," *Global Governance* 5: 273, 280-85
- Paul K Wapner (1995), "Politics Beyond the State: Environmental Activism and World Civic Politics," *World Politics* 47: 311-13, 318, 320, 329
- Sol Picciotto (1999), "What Rules for the World Economy?" in Ruth Mayne and Sol Picciotto, eds., *Regulating International Business*: 6-7
- *Case Concerning the Barcelona Traction, Light and Power Company* (1970), ICJ

PART II: CREATION OF INTERNATIONAL LAW

SECTION A: SOURCES

2/3 Cassese 8, "International Law-Creation: Custom," 153-69

- *Statute of the ICJ*, Article 38
- ***The Lotus Case* (1927), PCIJ
- ***Legality of the Threat or Use of Nuclear Weapons* (1996), ICJ
- *Asylum Case* (1950), ICJ

2/5 Cassese 9, "Treaties," 170-82 (and opinio juris)

- ***North Sea Continental Shelf Cases* (1969), ICJ
- *Nicaragua Case* (1986), ICJ
- Jack L Goldsmith and Eric A Posner (2005), *The Limits of International Law*: 23-26
- ***Reservations to the Convention on Genocide* (1951), ICJ
- *Jesse Lewis Claim* (1910), Claims Arbitration
- Eduardo Jimenez de Arechaga (1978), *International Law in the Past Third of a Century*: 42-48

2/7 Cassese 10, "Other Lawmaking Processes," 183-97

- Frederick A Mann (1957), "Reflections on a Commercial Law of Nations," *British Yearbook of International Law* 33: 20, 34-39
- Wolfgang Friedmann (1964), *The Changing Structure of International Law*: 197
- *The Diversion of Water from the Meuse Case* (1937), PCIJ
- *Corfu Channel Case* (1949), ICJ
- ***Nuclear Tests Case* (1974), ICJ

SECTION B: CONFLICTING OR COMPLEMENTARY HIERARCHIES?

2/10 Cassese 11, "The Hierarchy of Rules in International Law," 198-212

- Humphrey Waldock (1962), *General Course on Public International Law*: 49-53
- *Human Rights Committee General Comment No. 24* (1994)
- Ian Sinclair (1984), *The Vienna Convention on the Law of Treaties*: 222-24
- ***Filartiga v Pena Irala* (1980), US Court of Appeals

2/12 Cassese 12, "Implementation of International Rules in National Systems," 213-38

- *The Paquete Habana* (1900)
- Louis Henkin (1987), "The Constitution and United States Sovereignty," *Harvard Law Review* 100: 867-78
- *US v Belmont* (1937), US Supreme Court

- ***US v Alvarez-Machain* (1992), US Supreme Court
- Harold Hongju Koh (1998), "Bringing International Law Home," *Houston Law Review* 35

SECTION C: DOES POWER DETERMINE NORMS?

2/14 Jack L Goldsmith and Eric A Posner (2005), *The Limits of International Law*, ch. , 23-43

- Lori Damrosch (1997), *Enforcing International Law through Non-Forcible Measures*: 19-22, 24
- Richard Falk (1964), "The Adequacy of Contemporary Theories of International Law," *Virginia Law Review* 50: 249-50
- Hans Morgenthau (1985), *Politics Among Nations*: 312
- JL Brierly (1963), *The Law of Nations*: 100-02

2/17 Michael Byers (1999), *Custom, Power and the Power of Rules*, chs. 4 & 6, 53-74, 88-105, 216-21

SECTION D: DO NORMS CONTSRAIN POWER?

2/19 Teitel 1-2, "The Faces of Humanity," 3-33

- Alexander Wendt (1992), "Anarchy is What States Make of It," *International Organization*

2/21 Teitel 3, "An Emerging Transnational Legal Order," 34-72

2/24 Teitel 5, "Protecting Humanity," 105-38

2/26 Teitel 6 and 9 "Humanity Law and the Discourse of Global Justice," 139-64, 216-25

2/28 Exam #1

SECTION E: COMPLIANCE AND ENFORCEMENT

3/3 Cassese 13, "International Wrongful Acts and the Legal Reaction Thereto," 241-77

- *Barcelona Traction Case* (1970), ICJ
- *Rainbow Warrior Case* (1990), France-New Zealand Arbitration Tribunal
- ****Gabcikovo-Nagymaros Project* (1997), ICJ

3/5 Cassese 14, "Promoting Compliance with Law and Preventing or Settling Disputes," 278-95 and Byers 11, "Conclusions," 204-21

- *UN Charter*, Articles 2(3), 33(1-2), 34-38
- *Statute of the ICJ*, Articles 34-38

3/7 Cassese 15, "Enforcement," 296-313

- ****Nicaragua Case* (1986), ICJ
- Abraham D Sofaer (1985), "Statement of Legal Adviser of State Department," *Department of State Bulletin* 86: 70-71
- *Western Sahara Case* (1975), ICJ
- ****Kadic v Karadzic* (1995), US Court of Appeals

3/10 No Class (Spring Break)

3/12 No Class (Spring Break)

3/14 No Class (Spring Break)

PART III: THE USE OF FORCE

SECTION A: THE UNITED NATIONS

3/17 Cassese 16, "The Role of the United Nations," 317-38

- *Covenant of the League of Nations* (1919), Art. 16
- *The Kellogg-Briand Pact*
- Louis Henkin (1979), *How Nations Behave*: 137-38
- ***Prosecutor v Tadic* (1995), ICTY

3/19 Cassese 17, "UN Sanctions and Collective Security," 339-53

- *UN Charter*, Arts 39-43
- *Uniting for Peace Resolution* (1950), GA Res 377
- *UN Security Council Resolution 661* (1990)
- *UN Security Council Resolution 678* (1990)
- *UN Security Council Resolution 687* (1991)
- *UN Security Council Resolution 794* (1992)

SECTION B: PROHIBITION OF THE USE OF FORCE

3/21 Gray 1, "Law and Force," 1-23

- John R Bolton (April 5, 1999), "Clinton Meets 'International Law' in Kosovo," *Wall Street Journal* A23
- Thomas M Franck (1970), "Who Killed Article 2(4)?" *American Journal of International Law* 64: 809-10
- Louis Henkin (1971), "The Reports of the Death of Article 2(4) Are Greatly Exaggerated," *American Journal of International Law* 65: 544-45
- Jean Combacau (1986), "The Exception of Self-Defense in UN Practice," in *The Current Legal Regulation of the Use of Force*: 32
- *Nicaragua Case* (1986), ICJ
- Michael Glennon (Jan. 28, 2002), "Preempting Terrorism: The Case for Anticipatory Self-Defense," *Weekly Standard*: 24
- *Oil Platforms Case* (2003), ICJ, Judge Simma in separate opinion

3/24 Gray 2, "The Prohibition of the Use of Force," 24-50

- John R Crook (2005), "The 2004 Judicial Activity of the International Court of Justice," *American Journal of International Law* 99(2): 454-56
- ***Nicaragua Case* (1986), ICJ
- W Michael Reisman (1984), "Coercion and Self-Determination: Construing Charter Article 2(4)," *American Journal of International Law* 78: 643-45
- Oscar Schachter (1984), "The Legality of Pro-Democratic Invasion," *American Journal of International Law* 78: 649-50

3/26 Gray 3, "Invitation and Intervention: Civil Wars and the Use of Force," 51-83

- Lee Feinstein and Anne-Marie Slaughter (2004), "A Duty to Prevent," *Foreign Affairs* 83: 136-49
- Nehal Bhuta (2001), "'Paved with Good Intentions…' – Humanitarian War, the New Interventionism and Legal Regulation of the Use of Force," *Melbourne University Law Review* 25: 843

SECTION C: EXCEPTIONS TO THE PROHIBITION

Subsection 1: Unilateral Exceptions

3/28 Cassese 18, "Unilateral Resort to Force by States," 354-74

3/30 Gray 4, "Self-Defense," 84-119

- *The Caroline Affair* (1906)
- *The 2002 National Security Strategy of the US*
- ***Oil Platforms Case* (2003), ICJ
- ****Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), ICJ

Subsection 2: Collective Exceptions and Peacekeeping

4/2 Gray 5, "Collective Self-Defense," 120-43

- State Department Memo on Legal Basis for the Quarantine of Cuba (Oct. 23, 1962)
- Christopher C Joyner (1984), "Reflections on the Lawfulness of Invasion," *American Journal of International Law* 78: 131
- UN General Assembly Res. (1983)

4/4 Gray 6a, "The UN and the Use of Force," 144-75

4/7 Gray 6b, "The UN and the Use of Force," 176-99

4/9 Gray 7, "Regional Peacekeeping and Enforcement Action," 200-38

PART IV: CONTEMPORARY ISSUES

SECTION A: CONTROLLING VIOLENCE

4/11 Cassese 20, "Legal Restraints on Violence in Armed Conflict," 399-434

- Martens Clause

4/14 Cassese 21a, "The Repression of International Crimes," 435-53

- ***Ex Parte Pinochet* (1999), UK House of Lords
- *Charter of the International Military Tribunal* (1945), Arts. 6, 16
- *The Justice Case (Case No. 3)* (1951), Nuremberg Military Tribunal
- UN General Assembly Res 95 (1946)
- UN Security Council Res 955 (1994)

4/16 Cassese 21b, "The Repression of International Crimes," 453-62

- *Prosecutor v Tadic* (1996), ICTY
- ***Prosecutor v Jean-Paul Akayesu* (1999), ICTR
- Kofi Annan (1998), "Speech at University of Witwatersrand"
- *Rome Statute of the ICC* (1998), Arts. 6-8, 12-18, 124
- David Scheffer (1998), "Testimony before US Senate Foreign Relations Committee"

4/17 No Class (Easter Recess)

4/21 No Class (Easter Recess)

4/23 Cassese 22, "The International Response to Terrorism," 463-81

- Karl M Meessen (2003), "Unilateral Recourse to Military Force against Terrorist Attacks," *Yale International Law Journal* 28: 341-50
- Roderick D Margo (1977), "The Legality of the Entebbe Raid in International Law," *South African Law Journal* 94: 306
- ***United States v Fawaz Yunis* (1991), US Court of Appeals

- Abraham D Sofaer (1989), "Terrorism, the Law, and National Defense," *Military Law Review* 126: 90-122

4/25 Cassese 19, "The Protection of Human Rights," 375-98

- *Universal Declaration of Human Rights*
- Louis Henkin (1987), "The International Bill of Rights: The Universal Declaration and the Covenants," in *International Enforcement of Human Rights*: 6-9
- *International Covenant on Civil and Political Rights* (1967), Arts. 2, 4, 40-45
- *US Reservations to Its Ratification of the ICCPR* (1992)
- *International Covenant on Economic, Social, and Cultural Rights* (1967), Arts. 16, 19
- Louis Henkin (1979), "International Human Rights as 'Rights,'" *Cardozo Law Review* 1: 438

SECTION B: ECONOMIC ISSUES

4/28 Cassese 23, "The Protection of the Environment," 482-502

- *********The Trail Smelter Case* (1941), UN International Arbitration Awards
- *********Gabcikovo-Nagymaros Project Case* (1998), ICJ
- *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987), Arts. 2, 8
- *Kyoto Protocol to the UN Framework Convention on Climate Change* (1998), Arts. 6, 12, 17
- *Legality of the Threat or Use of Nuclear Weapons* (1996), ICJ
- *ENMOD Convention* (1977), Arts. 1-2

4/30 Cassese 24, "Legal Attempts at Narrowing the North-South Gap," 503-27

5/2 Summing It All Up

FINAL EXAM: MONDAY, MAY 5, 7:30 - 10:00

OUTLINE OF THE COURSE

I. Foundations of the International Community

A. Fundamental Principles

1. Introduction
2. The Main Legal Features of the International Community
3. The Historical Evolution of the International Community
4. The Fundamental Principles Governing International Relations

B. International Legal Subjects

1. States
2. Territory
3. Sovereignty and Its Limits
4. Other Subjects

II. Creation of International Law

A. Sources

1. Custom
2. Treaties and Opinio Juris
3. Other Lawmaking Processes

B. Conflicting or Complementary Hierarchies?

1. A Hierarchy of Rules
2. International Law in National Systems

C. Does Power Determine Norms?

1. Law and Power
2. Power and International Relations

D. Do Norms Constrain Power?

1. Humanity Law?
2. An Emerging Transnational Legal Order
3. Protecting Humanity
4. Human Security

E. Compliance and Enforcement

1. Breaking the Law
2. Compliance
3. Enforcement

III. The Use of Force

A. The United Nations

1. The Role of the UN
2. Collective Security

B. Prohibition of the Use of Force

1. Law and Force
2. Article 2(4)
3. Invited to Intervene?

C. Exceptions to the Prohibition

1. Unilateral Exceptions

a. Unilateral Action
b. Self-Defense

2. Collective Exceptions and Peacekeeping

a. Collective Self-Defense
b. The UN and the Use of Force I
c. The UN and the Use of Force II
d. Regional Peacekeeping

IV. Contemporary Issues

A. Controlling Violence

1. Restraining Violence During War
2. Nuremberg and Its Impact
3. Preventing International Crimes Today
4. Terrorism
5. Protecting Human Rights

B. Economic Issues

1. The Environment
2. Narrowing the North-South Gap
3. Summing the Course Up