

**The George Washington University
Elliot School of International Affairs**

IAff 290.16 International Law
Semester 2, 2008

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Classes will be held in 1957 E Street, Room 213 at 1810-2000.

[2] Course Description:

International Law and Transnational Threats

In remarks to the 79th annual meeting of the American Law Institute in May of 2002, then Justice Sandra Day O'Connor said, "Understanding international law is no longer just a legal specialty" but "a duty we all share". Although she was speaking to lawyers, globalization makes her remarks applicable to all of us. We live in an interdependent world that makes events in far off lands applicable to each and every one of us in one way or another.

Another view was expressed by Secretary of the Department of Homeland Security, Michael Chertoff. "International law is being used as a rhetorical weapon against us," Homeland Security Secretary Michael Chertoff, a former federal appellate judge, said in a speech to the Federalist Society, a conservative policy group. . . . "What we see here is a vision of international law that if taken aggressively would literally strike at the heart of some of our basic fundamental principals -- separation of powers, respect for the Senate's ability to ratify treaties and ... reject treaties," Chertoff said.

Throughout this course we will attempt to reconcile these two views. To do so, requires an agile mind and a full comprehension of the fact that international law was never intended to be static. We examine these seemingly conflicting views through the lens of contemporary transnational threats.

This course is not about transnational threats *per se*, it is about how the international legal regime may, can or does affect them. This is a course on international law, but one premised on the assumption that the student already has a grasp of contemporary transnational threats. We will begin with the foundations of International Law and proceed through its development to the present day with a general focus on how International Law does or does not meet contemporary needs. Along the way, we will assess the impact of international norms of behavior in context of conflict, crime, terrorism and related threat matters. This class will briefly touch on private international law, which is largely commercial but it will concentrate on public policy, international relations and the business of nations.

You will find that international law is a curious hodge-podge of logic, custom and agreement, but you will also find that the concept of sovereignty intervenes in a way that makes some aspects of the discipline illogical. More than that, you will find that international law revolves around geography – i.e., the physical dimension of a nation-state. Why nations have gone to war over scraps of land of little value, or why nations hold on to far-flung islands of no commercial value, harkens back to international efforts that were designed to avoid conflict but, instead, often promoted it. A sense of history will go a long way toward understanding why international law is as it is, and what, if anything, might be expected of it with respect to transnational threats in a post-Cold War era.

Because there are no international law texts that adequately present issues that deal with the broad array of transnational threats, selected readings on the issues and legal cases related to international law will be provided electronically.¹ Since the threat regime is dynamic, many of the readings and student reports will be contemporary articles – likely unknown until near time for the class. You will receive the readings (by e-mail) for each class approximately one week in advance. A few of the readings are United States Supreme Court cases that contain principles of international law and a couple of these are quite difficult to muddle through. Do not expect to quickly read these and grasp either the facts or the principles.

[3] Goal of Course and Course Overview

Students who complete this class should be able to:

- Comprehend the political and social bases for the organization of the world political order as it exists today;
- Evaluate the uses of both customary international law and formal international law and apply them to contemporary threat issues;
- Evaluate the importance of international law in the mission of the warfighter;
- Analyze the impact of sovereignty on international terrorism, organized crime and public corruption;
- Analyze the dynamics of threat regimes and evaluate role international law can, or cannot play in meeting contemporary threats;
- Analyze contemporary threats to determine whether international norms are undergoing an evolution.

[4] Grade Computation

¹ NOTE: If you are using a GWU e-mail account you will be well advised to get a g-mail, hotmail or other account as the GWU accounts are small and you will most likely miss e-mails of class readings due to a full mailbox.

Attendance and Participation	20%
Classroom presentation	20%
Research Paper	60%

Notes on Grades

- This is a seminar, not a lecture class. Student participation is essential; students will be expected to arrive on time and to have completed the readings.

- This class will be largely discussion based on analyzing events that give rise to issues in International Law. There will be some lecture, but most discussion will proceed from readings, some of which may be very contemporary which means they may not be available until after the class is in session.

- There will be a number of court cases included in the readings. These are not meant for the student to learn court procedure; rather they are used to illustrate that courts do reach for international law in evaluating disputes — both between private parties and between nations.

- The class presentation will be a topic approved by the professor and relevant to the topic being discussed the night of the presentation. If possible you may be able to pick the night for the presentation and, therefore, the topic area, but that may not always be possible.

- The research paper is just that. It is not an opinion paper. Facts must be documented and conclusions must flow from the facts. Communications skills are vital to success in any endeavor so your paper will be viewed from the vantage point of its persuasiveness. Citations must be footnotes, not end notes, and must be full citations to the authority, not references to an author cited in a bibliography.

- The bulk of the readings will be contemporary articles, to include news media so availability to much of the required readings will be only week-by-week and will be e-mailed to you. Experience indicates that you should not use your GWU.EDU address for receipt of the readings due to the size of data permitted in those accounts. You should get a separate g-mail, hotmail, yahoo or similar account for this.

- The research paper must be on an approved and narrowly defined topic relevant to one of the threat regimes studied. A narrowly defined topic might be, for example, “Piracy in the Malacca Straits” whereas “Piracy in the Twenty-First Century” would be too broad. Similarly, “Public Corruption Impedes Iraqi Reconstruction” would be acceptable, but “Public Corruption in Unstable States” would be too broad.

[5] Reading List: This course is taught by applying principles of international law to contemporary events. Therefore, the only readings certain to be required are those listed below in the Course Schedule. You will note that these are mostly United States Court cases. As noted above, international law is part of United States law; therefore, principles of international law articulated in these cases will be a major foundation for many of the learning objectives of this course. The readings listed below will be significantly supplemented on a weekly basis.

[6] Course Schedule

Week I: What is International Law?

- A. Why does it exist?
- B. Where does it come from?
- C. How do you know what it is?
 - 1. Custom
 - 2. Agreement
 - 3. Writers
 - 4. Judicial Decisions
 - 5. Other

Week I discussion topics: Territorial Seas
Peace of Westphalia
War and Peace
International Commerce
Diplomacy

Readings: U.N. 2007 Report on Threats (resource for the course)

CLASS OBJECTIVES:

1. To comprehend the reasons that international law exists
2. To be able to analyze the factors that lead to creation of international law
3. To be able to analyze contemporary events and apply the lessons of historical reasoning that made up, or rejected, attempts to build international law.

ISSUES FOR CONSIDERATION:

1. How has the community of nations treated the “commons,” e.g., the high seas and navigable waterways?
2. Why have national borders always been considered the guarantor of security?

Week II: Sovereignty and World Order

- A. The principle of sovereignty
- B. Enforcement
- C. Self-defense/Use of Force

Readings: *The Paquete Habana*, 175 U.S. 677 (1900)
Missouri v. Holland, 252 U.S. 416 (1920)

CLASS OBJECTIVES:

1. To comprehend the principle of sovereignty and what it means in an era of transnational threats.
2. To analyze the international legal concepts of self-defense and use of force.
3. To evaluate the utility of international law in effecting peaceful relations.
4. To apply jurisdictional regimes and related theories to contemporary threats.

ISSUES FOR CONSIDERATION:

1. How does international law affect the tactical commander?
2. Why do nations always present their actions in terms of international law?
3. What is the responsibility of nations to their nationals?

Week III: Sovereignty and World Order, State Obligations

- A. Territory
- B. Nationality and passive Personality Jurisdiction
- C. Long Arm Jurisdiction
- D. State Responsibility
- E. International Organizations

Readings: U.S. v. Pink 315 U.S. 203 (1942)
United States v. Guy W. Capps, Inc. 204 F.2d 655 (4th Cir. 1953)

Week IV: The Threat Regime

- A. International Law and transnational threats?
 1. If you could adopt a legal regime to address transnational threats, would you structure it as you understand the current regime of International Law to exist?
 2. Are the current threats amenable to regulation by International Law?
- B. Working within the structure of International law, as it exists, what measures would be appropriate to meet transnational threats?
- C. Is International Law being employed effectively?
 1. By the international community?
 2. By the United States?

Readings: Banco Nacional de Cuba v. Sabbatino 376 U.S. 398 (1964)

CLASS OBJECTIVES:

1. To evaluate the utility and failings of international law in meeting contemporary threats to national security;
2. To analyze transnational jurisdictions of nations;
3. To evaluate the apparent need for war crimes courts.

ISSUES FOR CONSIDERATION:

1. Are international tribunals more effective, or less so, than national courts?
2. Should nations assert jurisdictions over their nationals wherever they are?
3. Should nations assert jurisdiction over individuals who cause harm to their nationals?

Week V: Weapons of Mass Destruction

- A. What was the effect, if any, on international stability?
 1. Nuclear proliferation
 2. Weapons trade
 3. Migration
 4. Former client states
 5. Organized Crime
- B. What was the effect, if any, of international crime?
- C. Has International Law met any of the problems?

Readings: Convention on Offenses Committed on Aircraft
Other readings TBD

CLASS OBJECTIVES:

1. To analyze whether, in an era of advancing technology, agile transportation and open borders, the spread of weapons and precursor materials be controlled within acceptable limits?
2. To analyze whether weapons proliferation affects international stability and, if it does, whether international law offers solutions?
3. To evaluate whether Weapons of Mass Destruction should be a unique regime of international law.

ISSUES FOR CONSIDERATION:

1. Are nations responsible for proliferation of weapons by their nationals?

2. Do former colonial powers retain any responsibility to, or for, their former colonies?
3. To the extent that organized crime is engaged in the weapons trade, is international law a help or a hindrance?

Week VI: International Organized Crime/Drug Trade

A. Can International Law meet the threat?

1. Does International Law help, or detract from, law enforcement efforts?
 - a) Sovereignty
 - b) Interpol/Europol
 - c) FBI/Hungarian initiative
2. What else could International Law do to meet the threat?

B. What could an international police force accomplish?

C. Extradition and Mutual Legal Assistance Treaties

Readings: U.S. v. Arjona, 120 U.S. 479 (1887)
Bad Medicine (.pdf)
Mexico's drug cartels (.pdf)
Iraqi corruption (.pdf)

CLASS OBJECTIVES:

1. To analyze the threat to national security, of all nations, of transnational organized crime;
2. To analyze the ability of national remedies to meet the threat of transnational organized crime;
3. To evaluate the utility of international organizations such as Interpol or Europol in meeting the threat of transnational organized crime;

ISSUES FOR CONSIDERATION:

1. What remedy, other than law enforcement can meet the threat of transnational organized crime?
2. How effective is extradition?

NOTE: The rapid spread of international crime since the end of the Cold War is unprecedented in scale, facilitated by globalization and technological advances, and poses a significant challenge to the United States and democratic governments and free market economies around the world. The President has identified international crime as a direct and immediate threat to the national security of the United States. To meet this challenge, the Departments of Justice, State,

and Treasury--working closely with numerous federal agencies--jointly developed a comprehensive national strategy to fight international crime and reduce its impact on Americans. The International Crime Control Strategy, which was released in May 1998, provides a dynamic action plan that serves as a roadmap for a coordinated, effective, long-term attack on international crime. The Strategy's eight overarching goals, supported by implementing objectives, are as follows:

- Extend the first line of defense beyond US borders.
- Protect US borders by attacking smuggling and smuggling-related crimes.
- Deny safe haven to international criminals.
- Counter international financial crime.
- Prevent criminal exploitation of international trade.
- Respond to emerging international crime threats.
- Foster international cooperation and the rule of law.
- Optimize the full range of US efforts.

Week VII: International Terrorism

A. What is terrorism?

1. Is there a legal distinction between domestic and international terrorism?
2. Where does jurisdiction lie over terrorist acts?

B. Has International Law played a role in combating terrorism?

1. Hi-jacking
2. Narco-terrorism
3. Weapons proliferation
4. WMD

C. Has International Law been effective?

1. Has International Law been effectively utilized?
2. Could it have been better, or more often, employed?

Readings: Testimony of M.E. Bowman July 31, 2002
Ex Parte Quirin, 317 U.S. 1
U.S. v. Smith, 18 U.S. (5 Wheat) 153 (1820)
Renditions (CRS .pdf)

CLASS OBJECTIVES:

1. To analyze the confluence of transnational organized crime and international terrorism and evaluate whether there is an international legal regime that addresses these threats adequately;

2. To evaluate the difference between international and domestic terrorism and determine whether separate legal regimes make sense;
3. To analyze whether international terrorism is becoming a universal crime;
4. To evaluate the difficulty of investigating international terrorism in an age of advanced and rapid technological change.

ISSUES FOR CONSIDERATION:

1. What aspects of international law can be said to address terrorism specifically?
2. Is there a distinction without a difference between what we call narco-terrorism and international terrorism?
3. Does weapons proliferation contribute to international terrorism?

Week VIII: Regulating Conflict

A. How effective are current international efforts to regulate conflict? How effective do we want international controls to be?

1. What are the issues of sovereignty?
2. Can International Law accommodate social issues?

Readings: Diggs v. Schultz, 470 F.2d 461

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CLASS OBJECTIVES:

1. To analyze the need to regulate conflict.
2. To comprehend why certain classes of individuals, and only certain classes, are protected by international law.
3. To analyze the mechanisms for resolving conflict and threat situations.

ISSUES FOR CONSIDERATION:

1. When are sanctions effective in resolving conflict?
2. What has the proliferation of nations states meant for conflict avoidance?

Week IX: International Migration, The Environment and Health

- A. Are these really threats?
 - 1. Are the threats legal, social or economic?
 - 2. Does Westphalian law address the problem?
 - 3. What norms of international law address them?
- B. Is there a clash in norms of International Law?
 - 1. Is there an international responsibility for all?
 - 2. How can the law meet the issues?

Readings: The Trail Smelter Case
 Climate Change as a Security Risk (.pdf)

CLASS OBJECTIVES:

- 1. To evaluate whether environment is an issue of sovereignty that could be a potential catalyst for conflict.
- 2. To analyze established international legal theories and apply them to the environment;
- 3. To evaluate whether the proliferation of nation-states has exacerbated environmental threats.
- 4. To evaluate contemporary war-fighting and determine whether a military force in conflict has environmental responsibilities.

ISSUES FOR CONSIDERATION:

- 1. Is the environment a threat regime in the same sense as terrorism or transnational organized crime?
- 2. Do international norms clash in the regime of the environment?
- 3. Is the environment a universal responsibility? If so, how can the community of nations address issues such as air and water pollution?

Week X: Cyber-Crime/Terror

- A. Does traditional International Law adequately address this rapidly developing regime?
 - 1. Consider:
 - a) The medium
 - b) Crime
 - c) Hacking
 - d) Warfare
 - 2. Can customary International Law develop from the cyber arena

B. How does self-defense play against cyber issues?

Readings: Botnets, Cybercrime and Cyberterrorism
Computing and National Security (.pdf)
Terrorist capability for cyber attack (CRS .pdf)

CLASS OBJECTIVES:

1. To analyze established international law and to apply it to cyber threats;
2. To analyze the international regime of lawful self-defense and compare it to the cyber threat;
3. To analyze the cyber threat and apply international legal rationale to determine whether a legal regime has evolved, and if not whether one should evolve;
4. If analysis indicates that no effective legal regime exists to address the cyber threat, to synthesize learned international legal rationale and create a legal regime.

ISSUES FOR CONSIDERATION:

1. Does the development of customary law hold any promise for cyber threats? If so, why is international drug trafficking not a universal crime?
2. Should the Westphalian political order prevail in the cyber world?
3. Is self-defense from cyber attack a military or a law enforcement responsibility?

Week XI: Humanitarian Intervention/State Interference

- A. State interference in the internal affairs of another State?
 1. Under what standards would it be permissible?
 2. Under what standards would it be required?
 3. What authorities exist for interventions?
- B. International interference in the internal affairs of another State?
 1. Under what standards would it be permissible?
 2. Under what standards would it be required?
 3. What authority exists for interventions?
- C. The United Nations
 1. Has it served the purpose for which it was created?
 2. Does International Law address humanitarian needs adequately?

Readings: Defense Horizons – Privatization
Customary Humanitarian International Law (.pdf)
Iraqi refugees and displaced persons (.pdf)

CLASS OBJECTIVES:

1. To apply international practices and determine whether there is an obligation to intervene to prevent genocide or other atrocities;
2. To evaluate the barriers in the political make-up of the world to providing assistance when genocide or other atrocities are being committed and determine whether the legal regime is adequate;
3. To synthesize legal authorities and standards for humanitarian intervention;
4. To evaluate established authorities compared with actual practice and determine whether the United Nations has supra-governmental authority for humanitarian intervention.

ISSUES FOR CONSIDERATION:

1. If humanitarian intervention is permissible, whose obligation is it to intervene?
2. Is intervention best accomplished by the most capable state, a former colonial power or by a regional alliance?
3. Should there be established standards for intervention? If so, how would they be established? What entity would determine whether the standards have been met?
4. In Kosovo, Russia, still a great power, had strong objections to an American presence in the nation. Should there be an international arbiter for differing opinions on intervention?

Week XII: United States Policies, Intelligence and International Law

- A. International intelligence-gathering
- B. Covert Operations
- C. Law Enforcement
- D. Afghanistan I
- E. Afghanistan II
- F. Iraq

Readings: FISA Statute – 2004
CACTION
Insider Espionage (.pdf)

Little v. Barreme 6 U.S. 170 (1804)

CLASS OBJECTIVES:

1. To analyze the extent of, and reasons for, intelligence gathering activities common in the modern world.
2. To apply international legal rationale to covert operations and analyze the current international legal system to determine whether they are consistent with international law;
3. To comprehend the need for intelligence in an environment of transnational threats and to analyze those threats to identify non-traditional intelligence information needs.

ISSUES FOR CONSIDERATION:

1. To what extent does capability to gather information factor in legitimacy.
2. As privacy become a global issue is there a responsibility to guard the privacy of individuals, including that of foreign nationals.
3. How does law enforcement intelligence contribute to the military mission?

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Week XIII: The Contemporary Role of International Law: International Controls

A. Are the needs the same today as they were at the beginning of modern International Law?

1. Are there international needs that were never contemplated in the past
2. If there are new needs, can International Law accommodate them?
3. How can International Law be molded to contemporary needs?

B. How likely is it that International Law will develop in the future according to:

1. Custom
2. Agreement
3. Organization
4. Unilateral action

Readings: In re Yamashita 327 U.S. 1 (1946)
Law Enforcement Technology
The Cleveland Principles of International Law

CLASS OBJECTIVES:

1. To evaluate the extent to which international law, often developed in centuries past, continues to serve contemporary needs;

