GLOBAL LAW AND GOVERNANCE  
PROFESSOR DAVID KENNEDY  
FALL 2017

Course Description:
This course explores a range of legal disciplines which purport to explain how we are governed globally and 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 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. 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.

Readings:
All materials are available in the distributed materials and should be available on the course website.

Optional: You may also wish to have a look at one or more of the following books. They are available at the bookstore. You may purchase them, if you wish:


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

   Topic 3: Sources: Special Problems and Responses to Lotus

   Topic 4: The Entities:
   Statehood and Recognition
   Sovereignty and Sovereign Rights

   Topic 5: Post-1945 Judicial Rule-making

   Topic 6: The Entities
   International Criminal Law: Individual Responsibility

   Topic 7: The Powers
   Jurisdiction

   Topic 8: The Powers
   Territory
   International Territories

   Topic 9: Mobilizing the Architecture: Claims and State Responsibility

III. THE ARCHITECTURE IN HISTORY

   Topic 10: Before Modernity
   1648-1815
   1815-1914

   Topic 11: The Turn to Modernism: 1914-1945


IV. NEW THINKING: ADJUDICATION
Topic 13: National Courts in a Transnational Legal Process and Questions of Reception

Topic 14: Law and Politics: Legal and Political Perspectives

V. NEW THINKING: CONSCIOUSNESS

Topic 15: Consciousness as Governance: Rulership and the Power of Ideas
  Human Rights
  Environmental Protection

VI. NEW THINKING: ADMINISTRATION AND EXECUTION

Topic 16: 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 17: International Institutions
  League of Nations, the United Nations and a History of Reform
  Leadership as Governance: The Secretary General

Topic 18: Administration as Governance
  Global Administrative Law

VII. NEW THINKING: LEGISLATION

Topic 19: Regulation and Private Ordering

VIII. NEW THINKING: THEORIES OF THE WHOLE

Topic 20: Constitutionalism, Systems Theory, Legal Pluralism and Fragmentation

Topic 21: Neocolonialism: Center / Periphery Relations (Structures of Domination)

Topic 22: Distributional Analytics

IX. GLOBAL GOVERNANCE IN ACTION: WAR AS AN INTERNATIONAL LEGAL INSTITUTION

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

“Introduction to the Study of International Law”, pp. xiii-xv;
“Historical Introduction”, pp. xvii-xxix; and “Summary of Contents”,


David Kennedy, Chart: Intellectual History

II. THE BACKGROUND ARCHITECTURE OF PUBLIC INTERNATIONAL LAW

TOPIC 2: THE NORMS

Custom

Article 38 of the Statute of the International Court of Justice


The Paquete Habana (1900) 175 U.S. 677


The Case of the S.S. Lotus, (1927) Permanent Court of International Justice, P.C.I.J. (ser. A) No. 10 (1927) (excerpts)

Nuclear Weapons, 1996 (summary)

TOPIC 3: SOURCES: SPECIAL PROBLEMS AND RESPONSES TO LOTUS
The Report of the Study Group of the International Law Commission on Fragmentation of International Law (excerpts on *jus cogens*)


Legal Status of Eastern Greenland (Denmark v. Norway) (1933)
Permanent Court of International Justice, P.C.I.J. 1933 (ser. A/B) No. 53 at 71 (1933) (excerpts)

Nuclear Tests (Australia v. France) International Court of Justice, 1974, 1974 I.C.J. 253 (excerpts)


Vienna Convention on the Law of Treaties, Articles 61-62


**TOPIC 4: THE ENTITIES: STATEHOOD AND SOVEREIGNTY**


**Statehood and Recognition**

Montevideo Convention on the Rights and Duties of States, 1932, Articles 1-3
Sovereignty and Sovereign Rights

Schooner Exchange v. McFaddon, 11 U.S. 116 (1812) (excerpts)

The Antelope 23 U.S. (10 Wheaton) 66 (1825) (excerpts)

Henry Maine, *The Kathiawar States and Sovereignty* (1864)

American Banana v. United Fruit (1909) (excerpts)

Corfu Channel Case (1949) (excerpts)


**TOPIC 5: POST-1945 JUDICIAL RULE-MAKING**


**TOPIC 6: THE ENTITIES**

International Criminal Law: Individual Responsibility


**TOPIC 7: THE POWERS**

Jurisdiction

Restatement of the Law (Third), the Foreign Relations Law of the United States, sections 402, 403 and 404


**TOPIC 8: THE POWERS**

**Territory**


**International Territories**


**TOPIC 9: MOBILIZING ARCHITECTURE: CLAIMS AND STATE RESPONSIBILITY**

Commentaries to Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (excerpts to commentaries to Chapter II)


France v. US Air Services (1978) (excerpts)


Chart, *State Responsibility*

### III. THE ARCHITECTURE IN HISTORY

#### TOPIC 10: BEFORE MODERNITY

Note: Please review materials from Topic 4: Schooner Exchange v. McFaddon, the Antelope, American Banana v. United Fruit, Corfu Channel Case


#### TOPIC 11: THE TURN TO MODERNISM: 1914-1945


**TOPIC 12: MODERN INTERNATIONAL LAW EXTENDED AND CONTESTED: 1945-2000**


*Corfu Channel Case (United Kingdom v. Albania)* *International Court of Justice* 1949 I.C.J 4. 22 (excerpt)


Anne Orford, *Rethinking the Significance of the Responsibility to Protect Concept*, *Remarks at ASIL Proceedings* (2011)

John Austin, *The Province of Jurisprudence Determined*, 1832 (excerpts)


**Optional Background:**


**IV. NEW THINKING: ADJUDICATION**
TOPIC 13: NATIONAL COURTS IN A TRANSNATIONAL LEGAL PROCESS AND QUESTIONS OF RECEPTION


TOPIC 14: LAW AND POLITICS: LEGAL AND POLITICAL PERSPECTIVES

United States Diplomatic and Consular Staff in Tehran, United States v Iran, Provisional Measures, Order, ICJ GL No 64, ICGJ 122 (International Court of Justice 1979), 15th December 1979, International Court of Justice (1979)

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) International Court of Justice, 1984, 1984 I.C.J. 392 (excerpts)


Optional Background:


V. NEW THINKING: CONSCIOUSNESS

TOPIC 15: CONSCIOUSNESS AS GOVERNANCE: RULERSHIP AND THE POWER OF IDEAS

Wilhelm Roepke, Economic Order and International Law, 86 Recueil des Cours 203 (1954 II) (excerpts)


Philip Allot, “Remembering Eighty Years of Things Past”, 80th Birthday Dinner Address. Trinity College Cambridge. 8 June 2017

Human Rights


Optional background:


Environmental Protection


VI. NEW THINKING: ADMINISTRATION AND EXECUTION

TOPIC 16: STATECRAFT AND DIPLOMACY

Unilateralism, Bilateralism and ad hoc Arrangements / Multilateral Conferences and Rule-making


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 (2001)

Obama's Nobel Prize Speech (2009)

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


Optional:

David Kennedy, The Dark Sides of Virtue, (Princeton

**TOPIC 17: INTERNATIONAL INSTITUTIONS**

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

P.E. Corbett, *What is the League of Nations?* 5 *British Yearbook International Law* 119 (1924) (excerpts)

Network as Governance


Leadership as Governance: The Secretary General


**TOPIC 18: ADMINISTRATION AS GOVERNANCE**

Global Administrative Law


Experts As Rulers


Optional background:


**VII. NEW THINKING: LEGISLATION**

**TOPIC 19: REGULATION AND PRIVATE ORDERING**


**VIII. NEW THINKING: THEORIES OF THE WHOLE**

**TOPIC 20: CONSTITUTIONALISM, SYSTEMS THEORY, LEGAL PLURALISM AND FRAGMENTATION**


**TOPIC 21: NEOCOLONIALISM: CENTER / PERIPHERY RELATIONS (STRUCTURES OF DOMINATION)**


Balakrishnan Rajagopal, *International Law from Below, Development, Social Movements, and Third World Resistance* Cambridge University Press (2003), 1-23


Optional background:


**TOPIC 22: DISTRIBUTIONAL ANALYTICS**


Optional background:


**IX. GLOBAL GOVERNANCE IN ACTION: WAR AS AN INTERNATIONAL LEGAL INSTITUTION**

**TOPIC 23: “THE LAW OF ARMED CONFLICT,” “HUMANITARIAN LAW,” THE “LAWS OF WAR” OR “JUS IN BELLO”**


The *Oxford Handbook of International Law in Armed Conflict* (Ch.11 The Developing Law of Weapons) (2014) (excerpts)

Sigmund Freud, *Thoughts for the Times on War and Death* (1919)

**TOPIC 24: THE LAW OF FORCE AND THE USE OF FORCE: MODERN WAR AND MODERN LAW**

Clausewitz, *On War* (1832) 101-122, 399-410
