

International Law (LAW 248) Fall 2021

Syllabus

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Course Meeting Times and Location

Typically Monday evenings, 7:45-10:40 p.m., in room TBD.

Course Description

This course provides a broad overview of international law, including the ways in which international law is created, the entities to whom it applies, and the mechanisms by which it is enforced, or sometimes not enforced. In teaching a course of this breadth and scope, we do not expect students to learn the huge array of international legal rules on topics ranging from the international law of armed conflict, international trade and investment, the international law of the sea, international aviation, human rights, extradition of fugitive criminals, to the prevention of terrorism, the proliferation of weapons of mass destruction, and more. Instead, we hope you will develop the tools for understanding the rules and process by which lawyers determine the relevant rules of international law and the possible mechanisms by which those rules might be enforced.

Much international legal scholarship highlights the ways in which international law differs from domestic law, notably the absence in the international political system of a single legislative (rule-creating) body, a comprehensive judicial system of courts to interpret and order compliance with those rules, and a powerful executive branch of government and other institutions (e.g., law enforcement personnel and prisons) to compel such compliance. These limitations in the international legal system put a premium on the legal practitioner's ability to identify if there is in fact a legally binding obligation on a State to take or refrain from taking some action, and if there is such an obligation, to identify some way in which that rule might be enforced. Ultimately, our goal is to expand your thinking about international law and its role in the international political system and have you leaving the class thinking like an international lawyer.

Learning Objectives and Outcomes

At the end of the course, you will be able to:

- Identify how international law is formed, evaluate assertions that there is an applicable rule of international law in a particular situation, and then identify the nature and source of that rule (e.g., a rule based in treaty or in customary international law) based on the analytical tools provided in this class;

- Where relevant, evaluate whether and how a particular rule of international law is incorporated as law in the United States' domestic legal system;
- Analyze fact patterns involving cross-cutting international legal concepts (e.g., including principles of "State responsibility") and determine whether there may be mechanisms by which there may be a formal determination and enforcement of relevant international law; and
- Apply these tools and concepts in various specialized areas of international law covered in the second half of this class.

In addition, we hope you will have a more informed appreciation of the role that international law plays in the international political system and both the uses and limitations of international law.

Class Attendance and Preparation

Two of our classes fall on GMU holidays. The class that would be held on October 11 will instead be held on Tuesday, October 12 at the same time. Also note that, as we are practicing lawyers in the Office of the Legal Adviser at the Department of State, it is possible that unanticipated official travel might necessitate rescheduling a class at some point during the semester.

We will take attendance and have a seating chart, to assist us in getting to know you (a challenge in a class that meets only once a week). ASLS academic regulations require regular and punctual class participation and attendance for academic credit to be earned. Those regulations also provide that:

"If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course. A student who is not present for at least 75 percent of a session of the course is absent for that session."

Should a student anticipate the possibility of missing a substantial number of class sessions (e.g., in the case of a serious illness), please immediately contact us and the Assistant Dean, Student Academic Affairs.

The syllabus below lists required and suggested background reading. It is essential that all students read the required readings before class and be prepared to discuss that material in class. Please have these materials at hand during class to facilitate discussion. Please also look on the TWEN site on a regular basis and before you begin to do the reading for a particular week, as it sometimes contains required or recommended reading for particular classes and materials that are not always in the readings listed below. During the course of the semester, we will ask particular students to prepare certain materials and discuss them during class. These assignments will typically also be on the TWEN site for that class. In some cases we may ask students to work in small teams on these presentations. Note that in November, students will prepare in-class presentations

relating to a real-world arbitration between the Philippines and China under the United Nations Convention on the Law of the Sea.

Course Materials

- Required casebook: Carter, Weiner, and Hollis, *International Law* (7th edition).
- Optional document supplement: Weiner and Hollis, *International Law: Selected Documents* (2018). This book is available inexpensively as a used book and is a useful compendium of international agreements. That said, the readings we will use from the supplement will also be posted on the course's TWEN site, so there is no need to purchase the supplement unless you want a collected hard copy.
- Required hornbook: Murphy, *Principles of International Law* (3rd edition). This is a very useful book to have in your personal law library, in addition to providing an excellent overview for use in this class.
- Required and recommended materials other than those in the Carter et al. and Murphy books will be distributed on the course's TWEN site.
- We recommend that you try to be aware of current developments in international law and recommend looking periodically at a blog that covers international legal issues, such as *Opinio Juris* (opiniojuris.org), *Just Security* (justsecurity.org), *Lawfare* (lawfareblog.com), or *EJIL: Talk!* (ejiltalk.org).

Methods of Evaluation

Exam: The grade for the class will be based on an open book exam, 240 minutes (four hours) in length, and will consist of short answer questions, short essays, and elaborate “issue-spotting” factual scenarios requiring longer essay-type responses.

Class participation: Instructors have discretion to add or subtract no more than 5 points (one half-step) based on “Classroom Performance.” To encourage active, informed participation during class, we will avail ourselves of this. As noted below, students will be participating on November 15 as advocates for the Philippines and China in a mock arbitration under the UN Convention on the Law of the Sea.

Contacting Us

We anticipate staying after class to answer questions or engage in course-related discussion. We can also be contacted by e-mail and phone:

- Robert Harris: harrisrobert442@gmail.com; 202-262-8047.
- Terra Gearhart-Serna: terralinden@gmail.com; 917-456-7108.

When you email us, please also copy our GMU addresses (rharr16@gmu.edu and tgearha@gmu.edu), so we have a record of the email there.

Course Schedule and Reading

A. Introduction

--Class 1: August 23

Introduction to international law

Please consider the following questions as you do the reading for this class:

- What is law, and what are its origins?
- What are the differences between the international legal system and domestic legal systems? In particular, what are the differences in areas of law-making (legislative functions), enforcement (executive functions), and adjudication (judicial functions) between these systems?
- Do States comply with international law? If so, when and why?
- Why do individuals comply with laws in domestic legal systems? Are reasons for compliance in the international system different?
- What are the costs of non-compliance with international law?

Required reading:

1. Casebook: pp. 1-7 (stop at Question 5), 9-14, 25-40 (introduction to and history of international law), 494-502 (international organizations), 510-522 (the United Nations)
2. Murphy: pp. 35-50 (States, recognition of States, recognition of governments, State succession)
3. TWEN or document supplement: United Nations Charter (quickly skim the preamble and Chapters I, II, VI-VII for general content and structure)

Read quickly and be prepared to discuss in class:

1. TWEN: *International Law: 100 Ways It Shapes Our Lives*. Please see class discussion questions on TWEN.
2. TWEN: *International Law: 50 Ways It Harms Our Lives*

Recommended reading:

1. Murphy: pp. 3-21 (Chapter 1, Foundations of International Law, Sections A-B) [***Important note:*** *As with other instances where we have included portions of the Murphy hornbook in the recommended reading, you do not need to read this material in order to be prepared for class, but the material provides a usefully straightforward overview that may be helpful to lay a groundwork for you to digest the casebook material, and later, to review in preparation for the exam.*]

B. Sources of International Law (The Creation of International Law)

--Class 2: August 30

The law of treaties, part 1: evolution of treaty law; the formation, invalidation, and interpretation of treaties; and *pacta sunt servanda*

Required reading:

1. Casebook: pp. 69-70 (skip “Why do States obey treaties?”), 72-78, (skip Questions), 80-94, 108-113 [**Note:** *As with other lectures going forward, please see TWEN for assigned discussion questions. Students will be asked to address the questions listed there.*]
2. TWEN or document supplement: Vienna Convention on the Law of Treaties (VCLT), arts. 1-18, 26-27, 29, 31-33, 46-53
3. Additional materials on TWEN:
 - The International Law Commission background document on the VCLT (by Karl Zemanek)
 - State Department “Guidance on Non-Binding Documents”

Recommended reading:

1. Murphy: pp. 81-101 (Chapter 3.A, “Treaties”)
2. TWEN: The Case-Zablocki Act
3. TWEN: State Department “Circular 175” Procedure

The law of treaties, part 2: reservations, termination, suspension, and “material breach”

Required reading:

1. Casebook: pp. 98-103, 113-122 (stop before Brexit section) (also, be prepared to discuss questions)
2. TWEN or document supplement: VCLT, arts. 19-23, 54-72
3. TWEN: U.S. reservations, understandings, and declarations with respect to the International Covenant on Civil and Political Rights
4. TWEN: U.S. Statement Before the Human Rights Committee on Its Treaty Practice

--Class 3: September 13 (No class on September 6)

Other sources of international law, part 1: customary international law (CIL)

Required reading:

1. Casebook: pp. 123-138 (CIL)
2. Murphy: pp. 101-112 (Chapter 3.B, “Customary International Law”)

Other sources of international law, part 2: *jus cogens*, general principles, and subsidiary means of determining the law

Required reading:

1. Casebook: pp. 95-98 (*jus cogens*), 138-143 (general principles of law), 143-145 (subsidiary means)

Recommended reading:

1. Murphy: pp. 112-138 (Chapter 3, Sections C-F; note Sections E and F concern categories we will not cover in class or in the exam, but that may be of general interest)

Case study on CIL and the law of the sea

Required reading:

1. TWEN: “CIL Exercise” reading and assigned discussion questions

Allocation of legal authority among States (bases of national jurisdiction)

Required reading:

1. Murphy: pp. 319-338 (Chapter 8, Sections B and C)
2. Casebook: pp. 555-569 (introduction and prescriptive jurisdiction), 615-618 (jurisdiction to enforce and adjudicate public law)

C. Violating International Law: Responsibility and Remedies

--Class 4: September 20

State responsibility: attribution and breach; circumstances precluding wrongfulness; reparations; countermeasures

Required reading:

1. Casebook: pp. 736-740 (stop at the end of the Notes and Questions)
2. TWEN: Commentary on ILC Draft Articles on State Responsibility, “General Commentary” only (first page and a half)
3. TWEN or document supplement: ILC Draft Articles on State Responsibility, read arts. 1-55
4. TWEN: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, 2007 ICJ 43, paras. 377-415 (Section VII of the Judgment)
5. TWEN: *Case Concerning U.S. Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 ICJ 3, paras. 14-27, 56-75
6. TWEN: *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 ICJ 7, skim paras. 15-18, 21-24, read paras. 49-57, 82-87

7. TWEN: *Air Services Agreement Case (France v. United States)* (Dec. 9, 1978), 18 R.I.A.A. 416 (1979), paras. 81-98

Recommended reading:

1. Murphy: pp. 229-251 (Chapter 6, “Rules on State Responsibility”)

Espousal/diplomatic protection

Required reading:

1. Casebook: pp. 729-735 (diplomatic protection), 743-752 (property rights, nationality)
2. TWEN: ILC Draft Articles on Diplomatic Protection (read entirety)

Recommended reading:

1. Murphy: pp. 392-398 (Chapter 10.B, “State Responsibility for Injury to Aliens”)

--Class 5: September 27

International dispute resolution mechanisms: Negotiation, mediation, conciliation, arbitration, and judicial processes (including the International Court of Justice)

Required reading:

1. Casebook: pp. 319-325 (introduction; negotiation, mediation, and conciliation), 385-86 (WTO dispute settlement), 400-413 (international arbitration and investor-state dispute settlement)
2. Casebook: pp. 331-344 (stop before *Certain Norwegian Loans* case), 347-359 (stop before excerpt from *Nicaragua* case on admissibility), 362-370 (*skim* – assessment of the ICJ)

Recommended reading:

1. Murphy: pp. 141-173 (Chapter 4, “International Dispute Resolution,” Sections A-D)

“Tailored” dispute settlement and the 1982 United Nations Convention on the Law of the Sea

Required reading:

1. TWEN: “Tailored” dispute settlement and assigned class discussion questions
2. TWEN or document supplement: UN Convention on the Law of the Sea, arts. 279-299 (read for general content, but note that the compulsory dispute settlement articles will be relevant later in the semester)

D. International Law in U.S. Law

--Class 6: October 4

Treaties in U.S. law

Required reading:

1. Casebook: pp. 173-187 (Art. II treaties; stop at Notes and Questions), 191-218 (the effect of Art. II treaties as domestic law; stop at Notes and Questions), 243-261 (executive agreements)

Recommended reading:

1. Murphy: pp. 289-305 (Chapter 7, Section C)

CIL in U.S. law; presidential foreign relations power; federalism issues

Required reading:

1. Casebook: 281-306 (CIL), pp. 219-241 (presidential foreign relations power; stop at Notes and Questions), 306-307 (federalism)

Recommended reading:

1. Murphy: pp. 255-289 (Chapter 7, Sections A and B)

E. Topics in International Law

--Class 7: Tuesday, October 12 [Note class will be on Tuesday, not Monday, this week.]

The Use of Force (the *jus ad bellum*)

Required reading:

1. Casebook: pp. 952-987, 994-1004, 1011-21

Recommended reading:

1. Murphy: pp. 573-602 (Chapter 14.A, "*Jus ad Bellum*")
2. TWEN: Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations (Dec. 2016), pp. 8-11 (International Law and the U.S. Use of Military Force)

The Law of Armed Conflict (LOAC) (the *jus in bello*)

Required reading:

1. Casebook: pp. 1053-1066
2. Murphy: pp. 602-618 (Chapter 14.B, “*Jus in Bello*”)

Required viewing: *Eye in the Sky* (2016) (this movie will underpin some of our discussion of LOAC; the movie is available for a small fee from Amazon Video, YouTube, iTunes, and other online services)

Recommended reading (all on TWEN):

1. Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (Dec. 2016), pp. 19-21 (The Law of Armed Conflict and Targeting), 23-24 (Targeting Money and Revenue-Generating Objects), 31-34 (Treatment of Armed Conflict Detainees: sections on Fundamental Treatment Guarantees for Armed Conflict Detainees and The Prohibition on Torture and Ill-Treatment)
2. Excerpts from Harold Koh, Legal Adviser, U.S. Department of State, “The Obama Administration and International Law,” remarks at the annual meeting of the American Society of International Law (March 2010)
3. U.S. Government, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (the “PPG”) (May 22, 2013) (as publicly released)

--Class 8: October 18

Immunities

- Jurisdictional immunity: foreign sovereign immunity
- Diplomatic immunity, foreign official immunity, and head of state immunity
- Immunity of international organizations
- Act of State doctrine

Required reading:

1. Casebook: pp. 641-661, 664-667, 675-683, 691-695, 707-718

Recommended reading:

1. Murphy: pp. 345-370 (Chapter 9, “Immunity from National Jurisdiction,” Sections A-D, stopping after the “commercial activity” exception to sovereign immunity)

International Criminal Law

Required reading:

1. Casebook: pp. 1111-1146 (substantive international criminal law), 1155-1165 (*skim only* – ad hoc tribunals, hybrid tribunals), 1166-1178 (the ICC)

Recommended reading:

1. Murphy: pp. 541-560 (Chapter 13, Sections D-E; Section G on Hybrid Courts may also be of interest)
2. TWEN: The Rome Statute of the International Criminal Court

--Class 9: October 25

The international law of the sea

--*General overview (maritime zones, rights of coastal States vs. other users of the sea, regime of islands, etc.)*

Required reading:

1. Casebook: pp. 823-830 (stop at Notes and Questions), 832-836 (stop at Fisheries Case), 841-42 (Islands; stop before Notes and Questions), 850-860, 869-877
2. TWEN or document supplement: UN Convention on the Law of the Sea (LOS Convention), arts. 2, 3, 5, 7(1), 7(3), 8, 13, 24, 25, 33, 55-58, 76-78, 81, 86-94(1), 95, 121, and 192
3. TWEN or document supplement: LOS Convention, Part XV (dispute settlement provisions), arts. 279-299

Recommended reading:

1. Murphy: pp. 449-467, 469-472 (Chapter 11, Sections A and B)

-- *Maritime boundary delimitation*

Required reading:

1. TWEN or document supplement: LOS Convention, arts. 15, 74, and 83

Case Study on the Continental Shelf: the creation of CIL, its progressive development and codification, and the relationship between CIL and treaties. (*Be prepared to discuss in class the questions on TWEN based on careful reading of the material.*)

Required reading:

1. Available on TWEN

--Class 10: November 1

International law and territorial and maritime disputes in the South China Sea

Required reading: on TWEN

Recommended reading: on TWEN

-- Teams meet to discuss presentations on LOS Convention arbitration. Each team prepares summary arguments (2 pages in bullet form) posted on TWEN site by noon, November 20.

--Class 11: November 8

International human rights law

Required reading:

1. Casebook: pp. 752-777, 783-791, 796-800, 812-814, 821-822
2. TWEN: Assigned questions for students from the Casebook
3. TWEN: Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights (skim each for general content)

--Time allotted for teams to further organize themselves for arbitration hearing

--Class 12: November 15

-- Team Presentations (Philippines v. China)

1. Jurisdiction
2. Merits

-- Discussion (stepping back)

- What bodies of international law are relevant to these disputes?
- To what extent and on what issues is the relevant international law based in treaty or in customary international law?
- Are there available dispute settlement mechanisms available to enable the parties to resolve the various types of disputes?
- What strategy might the Philippines have employed after the decision to maximize the usefulness of the decision?

- What does this problem tell you about the role of international law in the current international political system?

Required reading: on TWEN

Recommended reading: on TWEN

--**Class 13:** November 22

Making sense of public international law: Review

Required reading:

1. TWEN: Review questions and assignments for class discussion
2. TWEN: Template for considering international law problems