Introduction to International Law

“Inter-national” law, which Jeremy Bentham defined (in 1786) as the rules governing sovereign nations, is now a bit different than in Bentham’s day.

First, it is no longer restricted to ‘foreign relations’ matters. It is no longer just about, for example, the rules governing the treatment of diplomats. International law is a curriculum that extends to virtually all the topics that national laws address. It covers topics that will remind first year law students of contracts, torts, criminal law, property, and even civil procedure. The law of inter-state treaties resembles (but is not identical to) contracts. The customary rules about when or how states are responsible for internationally wrongful acts (that is, actions that breach international law) look something like torts. Criminal charges brought against individuals for violations of the Geneva Conventions (consisting of war crimes), for crimes against humanity, genocide, or other crimes defined by treaties (e.g., certain acts of terrorism), whether brought in national court or international criminal courts, contain ideas (and remedies) inspired by national criminal laws. International investment treaties protect the property of foreign investors; some 20 human rights instruments protect the property of human beings, including a state’s own nationals; and a substantial number of international agreements protect intellectual property. Over 20 international courts and tribunals now exist – which means that concepts of jurisdiction comparable to those studied in U.S. civil procedure – are also relevant.

Second, ‘inter-national’ law is no longer limited to ‘inter-state’ law. The entities governed by and affecting the content of international law have expanded beyond states—as have the sources of international obligation. Today, international law—once consisting solely of a limited number of treaties, vague rules of custom, and difficult to find general principles of law drawn from the comparative study of the laws of many nations—including many of the actions and pronouncements of a number of other actors. Hundreds of inter-governmental organizations, including those of the UN system, affect the content of international law or help to interpret it. International ‘law-making’ actors, although still primarily states, now include the World Bank and bureaucrats within them, international judges and arbitrators, sub-units within states (such as the state of California), and ‘hybrid’ public/private organizations such as the International Organization for Standardization and non-profit multi-stakeholder entities such as ICANN.

As is suggested by the table of contents in the assigned casebook, although there are aspects of this course that will remind students of other first year classes, other parts of the subject matter are unique. International law has its own set of sources of law and its own tools that attempt to get or others to comply with it. Unlike U.S. law, it operates without the benefit of a ‘legislature’ explicitly delegated authority to make rules for the world, no single executive branch or executive agency, no hierarchically superior international court that engages in “judicial review” for the world. Neither the UN Charter nor any other instrument operates like a ‘constitution’ for the world. Although UN peacekeepers are given discrete tasks, there is no world police force to enforce the peace – or international criminal law. But while the international legal system operates without a judicial, executive, legislative, or administrative branch, parts of it take on functions that resemble each of those. Many claim that even without
a world government, ‘global governance’ exists. To confuse matters further, although it is often called “public international law,” some parts of international law govern the relations of private parties, such as multinational corporations.

As all this suggests, international law provides a different perspective on what “law” is. The first nine weeks of this course, covered in this part of the syllabus, will focus on the basic sources of international law, the actors involved in making, interpreting or enforcing those sources, and especially on the international legal process and what distinguishes that process from the way national laws get made and enforced. This part (covering parts of chapters 1-6 of the casebook) will also address how the international legal process plays out within the U.S. legal system. It will introduce, in short, what some call ‘U.S. foreign relations law.’

Given the range of potential sub-topics within international law in which all of these aspects (the norms, actors, process identified in the casebook’s subtitle) can be explored, international law courses must be selective with to the sub-regimes they can introduce. This year, students in the course will get to vote on which four topics will be addressed in the remaining part of the class. Those choices include human rights (chapter 7 of the casebook), international humanitarian law (chapter 8), international criminal law (chapter 9), law of the sea (chapter 10), international environmental law (chapter 11), international trade and investment law (chapter 12), use of force (chapter 13), and terrorism (parts of chapter 14). Once students vote on which topics they would like to address, the second part of the syllabus will be issued.

Course Details

This is intended to be a practical course that happens to dabble in theory as necessary. Its goal is to provide the tools to practice in the field and solve real world problems with an international lawyers’ tools and vocabulary.

Those interested in deeper study of topics that may be introduced in this course – from the law of the WTO to human rights – are likely to find specialized international law courses on those topics in NYU’s exceptionally rich international law curriculum. This course does not substantially overlap with (or substitute for) any of those courses. At the same time, taking a basic international law survey course such as this before taking specialized courses in, for example, human rights, international trade, or international investment, is a good idea.

The required texts for purchase for this class are Dunoff, Ratner, & Wippman, International Law: Norms, Actors, Process (4th ed. 2015) (henceforth DRW) (be sure to purchase the 4th edition of the casebook) and Sean D. Murphy, Principles of International Law, (2nd edition 2012) (henceforth “Murphy”). Although this is an introductory course, it will emphasize the real practice of international law, especially for those practicing within the United States—whether with respect to work at law firms, within government, as general counsel to multinational corporations, or a lawyer working for an NGO. The course will stress the need to work with the primary tools of international law, including particular treaties, to be able to make arguments on both sides and in all the venues that international lawyers practice. Most of those primary materials can be found and downloaded off of the DRW website at https://www.law.umich.edu/facultyhome/drwcasebook/Pages/default.aspx. That website substitutes for a documentary supplementary text; apart from supplementary documents (some of which will be part of the required readings) it includes “updates” for material after the casebook went to press. To the extent the updates correspond to pages assigned in the casebook, students are also required to read them. Students should bring to
class or otherwise have available whatever documents from this textbook website are included in the assigned readings as these may be needed to follow class discussions. Other supplementary materials from the casebook website or elsewhere that are required reading will be indicated in the syllabus and can usually be found on the courseweb. The casebook website above should not be confused with the course website for this class under NYU Classes which contains this syllabus and under “resources” other assigned readings as well as the professor’s powerpoints. The latter will be posted to the courseweb after these are used in class. Some of the prior exams given in this class also appear under “resources” in NYU Classes.

Learning Outcomes:

(1) To identify and be able to work with the basic sources of international law, particularly treaties, customary law, and general principles.
(2) To understand contemporary challenges to those traditional sources and the use of alternative ‘soft’ norms.
(3) To identify the legal characteristics, responsibilities and duties of the basic actors in international law, particularly states and inter-governmental organizations such as those of the UN system.
(4) To understand how international law develops, is interpreted and enforced, that is, the international legal process.
(5) To understand how international law and the international legal process interacts with U.S. constitutional law, that is, to be introduced to U.S. foreign relations law.
(6) To work through practical problems using the sources and vocabulary deployed by international lawyers.

Course Evaluation

Final grades will be based on a four and ½ hour open book examination as well as points, at the professor’s option, for class participation. Class attendance is essential to success in this class. Students who anticipate needing to be absent for more than a single class should probably not take this course.

Office Hours and Problem-Solving Sessions

The teaching assistants for this class, both of whom are seasoned veterans of the course, are Jackson Gandour (jurg484@nyu.edu) and Erica Ma (hm1848@nyu.edu). They, along with Prof. Alvarez, will hold regular office hours. Prof. Alvarez’s office hours will be posted on his door (VH 325) from week to week; students should sign up in advance at the times indicated to avoid conflicts. Students in this course are encouraged to come by at least once during office hours early in the semester for a get acquainted visit. Mr. Gandour and Ms. Ma will be conducting 6 optional problem-solving sessions throughout the semester. These will include coverage of old exam questions. The last session will consist of a review of last year’s final exam. While attendance at those problem-solving sessions is optional, students are strongly urged to attend.
Books on Course Reserve:


Ian Brownlie, *Principles of Public International Law* (various editions)

Lori Damrosch, et. al, *International Law: Cases and Materials* (various editions)


Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (various editions)

Syllabus

PART I

Part A: Introducing International Law

Class 1: Introducing the Sources and Content

Readings:
Murphy, Chapter 1 (pp. 3-30)
DRW, Preface and Table of Contents
ASIL, 100 Ways (2018 edition), available at https://www.asil.org/resources/100Ways

Questions for class discussion:
1. Based on the above readings, what is “international law”?  
2. Who makes international law? For what purpose?
3. How do the 100 Ways and the 50 Ways relate to the theoretical approaches to international law discussed in Chapter 1 of Murphy? How would a “legal realist” (perhaps a political scientist) explain why states comply with the many rules reflected in the 100 Ways? Do the 50 Ways merely identify the many reasons states have to avoid complying with international law or do they suggest other theoretical perspectives?
4. Based on the 100 Ways, what do you think international lawyers do? If a law firm says it practices “international law,” what do you suppose it means? What are the likely tasks or roles of a government lawyer who practices international law?
5. Why do you think that the American Society of International Law, during its 100th anniversary, put out a document like the “100 Ways”? 
6. Prof. Alvarez wrote the 50 Ways in response to the original version of the 100 Ways issued in 2006. Can you think of contemporary additions to his 50 Ways that reflect current events?

Optional Reading:
“The Future of Our Society,” at http://www.law.nyu.edu/sites/default/files/ECM_PRO_065314.pdf (speech given by Prof. Alvarez when he first distributed his “50 Ways”)

Class 2: The Unique Nature of International Law

Readings:
Remedies DRW, pp. 3-31
Also skim the UN Charter’s Preamble, and the UN Charter, Chapters I-II and VI-VII)(see documents section of the DRW website cited above for text of the UN Charter, at https://www.law.umich.edu/facultyhome/drwcasebook/Pages/default.aspx).
Class Discussion:

Answer the questions at DRW, pp. 15 and 22. Does the UN Charter help to answer some of the questions posed in the DRW readings? Does the UN Charter require the parties in these two cases to resolve their disputes peacefully? Does the UN Charter anticipate that the parties to these disputes use a particular method to solve their disputes? Does the UN Charter contemplate that the UN Secretary-General should act as a judge or arbiter of inter-state disputes? If not, why did the parties in the Rainbow Warrior incident turn to the Secretary-General to resolve their dispute? How do you suppose resort to the Secretary-General differs from going to the International Court of Justice (ICJ) (as in the Libya-Chad case)? Why do you think that Libya and Chad went to the ICJ to resolve their dispute? What would make those governments comply with the judgment issued by that Court?

Based on the assigned readings for this class, how would you describe how parties to international disputes use international law to resolve their disputes? Based on the two problems discussed in the text, how would you say international law gets “enforced”?

Part B: The Sources of International Law

Class 3: The Mechanics of Using and Interpreting Treaties

Readings:
Murphy, Chapter 3, sec. A (Treaties)(pp. 77-top of 92)
The Vienna Convention on the Law of Treaties, Articles 1-18, 24-64 (see casebook website under documents)

Class Discussion:

This class introduces this important source of international law by looking at some of the rules for handling treaties in the Vienna Convention on the Law of Treaties (VCT).

Use the VCT articles above to answer the following questions:
1. What exactly is a “treaty” for purposes of the VCT? Can states conclude a legally binding agreement that is not subject to the VCT? Can states enter into a binding commitment that is not a treaty?
2. How do states bind themselves to a treaty?
3. Can states ever withdraw from a treaty and if so, do they have to give notice to other treaty parties prior to withdrawing?
4. What happens when a state’s treaty obligations and its domestic (or national) law conflict? Which prevails as a matter of international law? Does it matter for this purpose if the conflicting national law is the state’s constitution?
5. Look carefully at Articles 31 and 32. How does one interpret a treaty? What precisely does the interpreter of a treaty (like a national or international court judge) look to in deciding what a treaty means? What is included in “context”? Where do find the “object and purpose” of a treaty? Can interpreters of a treaty take into account its negotiating history, that is, what the respective state parties said in the course of negotiating the treaty? Do you think that treaty interpreters should be as free to examine that negotiating history as U.S. judges are with respect
to the interpretation of a statute passed by Congress? Do you think that the VCT rules for interpreting a treaty should apply in the same way to all treaties, including the UN Charter?
6. Can a state seek to get out from a treaty obligation . . . because the underlying circumstances have changed? Because the state was originally economically coerced into entering the treaty? Because it was forced to conclude the treaty by force? Because another party to the treaty breaches it first?
7. How exactly do states enforce their treaty commitments vis-à-vis each other?
8. Note that the VCT rules are merely ‘default rules.’ Parties to particular treaties can always negotiate around the VCT rules. If so, what function do the VCT rules serve?

Class 4: Using Treaties: A Case Study

Readings:

DRW, 33- 68; focus on the notes and comments in the casebook at p. 39, 46-47, 56, 65-66. Students should also bring to class or have available the VCT.

Background Reading:
The Convention for the Regulation of Whaling (documents, casebook website)

Class 5: Customary International Law

Background: Murphy, Chapter 3, section B (pp. 92-top of 101)
Read the U.S. Supreme Court decision in The Paquete Habana (see casebook website under “documents”) (in the decision you should read pp. 678-680 (facts) and the court’s consideration of the relevant custom, at mid-p. 686 to 721, including the dissent) (note that these are excerpts from the full opinion, not the short one in the casebook).

This class will use The Paquete Habana decision to introduce customary international law so focus especially on the pages of that decision assigned above, paying close attention to what the Supreme Court considered in determining whether the relevant rule of custom actually existed. The class will address the questions raised in DRW, at pp. 81-83. What evidence does the Supreme Court use in the year 1900 to find international customary law? Do you think the Court did a good job? What evidence do you think the U.S. Supreme Court might use in 2018? Has the standard for finding custom changed in the intervening 118 years? Should it have? Do you think an international court (like the ICJ) would use different evidence to find custom than the U.S. Supreme Court?

Additional background reading:
Report of the International Law Association (ILA) on Customary International Law (see “documents” section for Chapter 2 in the DRW website), focus especially on the definitions section, pp. 8-10, and the sections describing “state practice” at pp. 13-29 and opinio juris at pp. 32-34. Does the ILA suggest that the two parts of custom have equal standing or worth? Are there political implications to how one answers that question?

Class 6: Customary International Law: A Case Study
Murphy, Section on “Recommendatory Resolutions of International Organizations” at bottom of p. 114-116
DRW, Part II, 68- top of 89. Focus on the notes and questions at p. 88.

Are UN General Assembly resolutions legally binding under the UN Charter? (Look at Articles 10-13 of the UN Charter.) If not, were the arbitrations at pp. 84-88 of the casebook wrong to use GA resolutions to help determine the status of customary international law? What exactly is the relationship between G.A. resolutions and custom? If you were a U.S. judge being asked to determine whether a rule of custom existed would you use G.A. resolutions to try to figure that out?

Class 7: Other sources

Murphy, Chapter 3, sections C-F, pp. 101-123
DRW, pp. 89-100; answer questions in DRW, p. 92 and 98.
Damrosch, General Principles and International Criminal Tribunals, pp. 233-top of 238 (courseweb).

Other questions for class discussion:
1. Why do you think that international criminal tribunals often resort to “general principles of law”? Are there risks in using this source of law?
2. Under Art. 38 of the ICJ’s Statute, what is the difference between the views of scholars, judicial opinions, and sources of international law like treaties?
3. What exactly is “soft law”? Note that the ICJ’s Art. 38 makes no mention of ‘soft law.’ Is that concept an oxymoron? Examine the list of “documents” identified in the casebook’s document section under the casebook’s website: can you identify which of these might be “soft law”? What is your criteria for making that judgment? When do you think, as a lawyer, you might make use of “soft law”? What are the objections to using ‘soft law’?
4. Reconsider items 24-30 of Alvarez, “50 Ways.” In what precise ways do the sources of international law empower the powerful?
5. Given the material covered over the past few classes, do you think that Art. 38 of the ICJ’s Statute provides the best or most accurate list of “sources” of international law? If not, how would you change it for the modern age?

Part C: Participants in the International System

Class 8-9: States

Background Reading: Murphy, Chapter 2, section 2 (pp. 33-47)
States: the Basics
For class: DRW, 101-top of 130. Focus especially on notes and questions on p. 109, 126, 127, and 130.
Governmental Change: DRW, p. 130-142.

Read and bring to class:
UN Charter, Arts. 4-6
Montevideo Convention on the Rights and Duties of States, available at http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml

Questions:
What legal benefits does statehood bring? After the United States acquired its independence, did it acquire any legal capacities or powers because it was treated as a “state”? Do all states have a right to be
UN members? The UN Charter mentions (in Art. 1 (2)) the “self-determination of peoples.” What does that phrase mean?

Consider Kosovo’s Declaration of Independence. Are the legal prerequisites for becoming a state (or being recognized as one) the same in the 21st century as in earlier centuries?

Background Documents likely to be mentioned in class (all on courseweb):
- G.A. Res. 68/262 (Crimea)
- G.A. Res. 67/19 (Status of Palestine)
- Kosovo (USG) Letter
- Palestine Declaration (ICC)

Optional Reading:
- Expert Opinions on Palestine filed in the ICC (courseweb)

Class 10: International Organizations (IOs), Non-governmental organizations (NGOs), and International Courts (ICs)

Background: Murphy, Chapter 2, section B (pp. 47-69)
- DRW, 142-167; 169-178. Focus especially on notes and questions on p. 153-54; 156, and 162. (Note the update on the casebook website on the accountability of IOs.)


Questions on the UN Charter and the legal powers that it accords:
1. Why do states establish organizations that can challenge their sovereignty?
2. Does the UN Charter give the UN as an organization “international legal personality”? What rights would that status bring exactly?
3. Do all international organizations have the right to ask the ICJ for an advisory opinion on any subject? Could the World Health Organization, for example, ask the Court whether it is legal for a state to use or to encourage its nationals to use chemical or nuclear weapons? What is the function or purpose of ICJ advisory opinions?
4. Does the Security Council or the General Assembly have the power to “legislate”? If not, how do either of those contribute to the making of international law?

Part D: International Law and (U.S.) Domestic Law

General Note for classes 11-17:
In these classes we address how international law penetrates the U.S. legal system (or fails to do so). This subject, which is covered in depth in NYU courses on U.S. “foreign relations,” addresses the interplay between U.S. law (including the U.S. constitution) and international law. As such, these classes provide something of an introduction to U.S. constitutional law. Since U.S. judges have often been guided by the various editions of the Restatement of Foreign Relations drafted by the American Law Institute, considerable attention will be paid in this section to the last full Restatement, the Third Restatement on Foreign Relations, from 1986, as supplemented by the Fourth Restatement, being published this year. Both are available on course reserve or as e-books.

Class 11: The Limits of the Treaty Power

DRW, pp 192-204 (focus on notes/questions at pp. 200 and 204); DRW, pp. 205- middle of 225 (focus particularly on the notes and questions at pp. 218, 221, and 225). Read and bring to class portions of the

Additional questions for class discussion:
Is the United States a “monist” or a “dualist” state? Based on the excerpts from the constitutions at DRW pp. 210-211, how would you characterize the various states identified? What else would you want to know? Are there any treaties that the United States cannot ratify because of provisions in the U.S. Constitution? Are there treaties that states of the United States cannot enter because of the U.S. constitution?

Class 12: Congressional Executive Agreements and Sole Executive Agreements

Background Reading: Murphy, Chapter 7, sections A: pp. 223-248. DRW, 225- top of 233; focus particularly on notes/questions on pp. 232-33. Also read the three updates on chapter 5 contained in the casebook website: Update on non-self-executing treaties; Note on the allocation of constitutional authority over Foreign Affairs; and Note on Treaty Exit. Also read and bring to class the excerpts from the Foreign Affairs Manual, Circular 175 on the courseweb.

Under U.S. practice, when is the United States likely to enter into an Article II Treaty (subject to Senate consent) as opposed to a Congressional-Executive Agreement or a sole executive agreement? Are these three types of international agreements inter-changeable for purposes of international law? U.S. law?

Optional Reading:
U.S. Restatement Fourth (sections to be assigned)

Class 13: Breaching International Law


On the Medellin v. Texas case: who has the better argument Chief Justice Roberts or Justice Breyer? The U.S. has not yet complied with the ICJ’s rulings in the Breard-LaGrand line of cases. Assuming that a future U.S. President were trying to achieve compliance with those ICJ rulings, what exactly could the President alone do to secure compliance with or without the help of the U.S. Congress? President Trump has threatened to withdraw from the NAFTA, a congressional-executive agreement. Does he have the power to do so on his own, without the help of Congress?

Class 14: The U.S., the World Court, and International Remedies

Murphy, Chapter 4, pp. 125-162. (Also recall the prior discussion from chapter one of the casebook on the Rainbow Warrior arbitration and the Libya/Chad dispute at the ICJ.) What would make two states decide to engage in mediation, arbitration, or secure formal adjudication in the ICJ to resolve their disputes? What are the advantages/disadvantages of each of those options? What precisely are the arguments in favor of including more ICJ commitments in future treaties concluded by the United States? Assuming that the U.S. would consider signing onto the “optional clause” of the ICJ, would you advise that it make certain reservations to its submission to the Court’s “compulsory” jurisdiction? What would those be?
Remedies
Murphy, Chapter 6, sections a-e: pp. 201- top of 217.
In August 2001, the International Law Commission, an expert body that reports to the UN General Assembly, released its Draft Articles on the Responsibility of States for Internationally Wrongful Acts. These articles are in the documents section of the casebook website (look under chapter 14: International Law Commission 2001 Draft Articles . . . .). Read and bring to class Articles 1-11 and 29-39 of the ILC’s Articles on State Responsibility. Assuming that these articles correctly indicate the state of customary international law, are they relevant to whether the United States federal government is responsible under international law for the actions of state courts of the United States? Are they relevant with respect to the question of which remedies nations ought to be entitled to once a breach of the Vienna Convention on Consular Relations is shown, that is, to the remedy that ought to have been accorded by the ICJ against the United States in a case like Medellin? Do you agree with the position that the United States took before the ICJ in these cases that, under international law, all that Mexico and Germany are owed is an apology with respect to how their nationals were treated? When, in your view, is an apology not enough?

Class 15: Pursuing International Law Claims in U.S. Courts: The Alien Tort Statute and Corporations

On Corporations:
Murphy, pp. 73-74
DRW, section II at pp. 179-191
Are corporations ‘international legal persons’ under international law? Are they capable of ‘making international law’?

On the ATS:
Murphy: pp. middle of 260-69
DRW, pp. 249-62; focus especially on notes and questions at p. 261.
Note especially the update in the coursebook for the latest word from the Supreme Court on the ATS in Jesner v. Arab Bank.

What is now left of the Filartiga line of cases? What are the prospects for successful ATS claims after the trilogy of Sosa/Kiobel/Jesner? For an ATS claim against a corporation?

Class 17: Closing the Courthouse Door: The Act of State Doctrine and Sovereign Immunity

The Act of State Doctrine

When is the “act of state” doctrine applicable under existing U.S. precedents? When is this defense not available? Why was the act of state doctrine not applicable in the Filartiga case (prior class)?

Sovereign Immunity


What precisely is the rationale for granting states immunity in national courts? How has that rationale changed over time? What triggered the change in the U.S. State Department’s position in the Tate Letter (DRW, p. 319)? When can you successfully sue a foreign state in U.S. court today? Would the answer have been the same in 1926? Why was sovereign immunity not a bar to the claim in Filartiga? Why exactly were the plaintiffs able to sue Argentina in the Weltover case? Was that result consistent with the
decision reached in Saudi Arabia v. Nelson? Why or why not?

Additional Background Reading:
U.S. Restatement Fourth, Foreign Relations (sections to be assigned)

Class 18: Jurisdiction to Prescribe


Additional Background Reading: Murphy, Chapter 8, pp. 271- top of 289 Restatement 4th (sections to be assigned)