

The Fletcher School of Law & Diplomacy

The International Legal Order

(Law 200)

Syllabus

Professor Glennon

Fall, 2009

THE EMERGENCE OF INTERNATIONAL LAW

1. Evolution

- a. History of international law [xix-xxx]
- b. The doctrine of sources [55-58]
- c. J.L. Brierly, "The Origins of International Law" in *The Law of Nations: An Introduction to the International Law of Peace* (6th ed., Sir Humphrey Waldock, ed., Cambridge 1984) 1-40.
- d. H.L.A. Hart, *The Concept of Law* (Oxford 1961) 89-96.
- e. Robert J. Beck, Anthony Clark Arend & Robert D. Vander Lugt, "Natural Law" in *International Legal Rules* (Oxford 1996) 34-37.
- f. Ram Prakash Anand, *International Law and the Developing Countries* (1987) 17-19, 34-36, 44-45.

THE ROOTS OF INTERNATIONAL LAW

2. Naturalism

- a. Plato, "The Allegory of the Cave," excerpt from *Republic*.
- b. Cicero, *De Republica* III, xxii, 33, Loeb Classical Library ed. at 211.
- c. The Declaration of Independence.
- d. Abraham Lincoln, speech at Independence Hall, Philadelphia, Feb. 22, 1861.
- e. Abraham Lincoln, reply, seventh debate, Alton, Illinois, Oct. 15, 1858.
- f. The Battle Hymn of the Republic, Julia Ward Howe.
- g. Lon Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," 71 HARV. L. REV. 630, 633, 646, 655, 660 (1958).
- h. Immanuel Kant, *The Philosophy of Law* (1796)(Hastie tr. 1887).

- i. John Rawls, "The Veil of Ignorance," in *A Theory of Justice* (Harvard 1971) 136-142.
- j. Edgar Bodenheimer, "Author's Preface to the Chinese Edition," *Jurisprudence*, Aug. 11, 1987.
- k. Nicholas Wade, "Is 'Do Unto Others' Written in Our Genes?," *N.Y. Times*, Sept. 18, 2007.
- l. J.L. Brierly, "The Origins of International Law" in *The Law of Nations: An Introduction to the International Law of Peace* (6th ed., Sir Humphrey Waldock, ed., Cambridge 1984) 49-56.
- m. Steven Pinker, *The Blank Slate* (appendix)(2003).
- n. Rebecca Goldstein, *Incompleteness: The Proof and Paradox of Kurt Gödel* (2005) 164-168.
- o. Oliver Wendell Holmes, dissenting opinion in *Abrams v. United States* (1919)(excerpt).

3. Positivism

- a. Legal positivism [43-44]
- b. Voluntarism and Positivism [57-58, n. 1]
- c. Positivism and Its Critics [76, n. 1]
- d. Hans Kelsen, *Pure Theory of Law* 62-69 (California 1967) and [20].
- e. Oliver Wendell Holmes, "The Path of the Law" in *The Essential Holmes* (Richard A. Posner, ed., Chicago 1992) 169-170; 237.
- f. Oliver Wendell Holmes, "Natural Law" in *The Essential Holmes* (Richard A. Posner, ed., Chicago 1992) 180-184.
- g. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (excerpts).
- h. John Hart Ely, "Natural Law," in *Democracy and Distrust* (1980) 48-54.
- i. Michael J. Glennon, *Limits of Law, Prerogatives of Power* (2001), 169-176.
- j. Cormac McCarthy, *The Road* 90-93 (2006).

4. Pragmatism

- a. Sovereignty and obligation [8, nn. 1, 2]
- b. Ralph Waldo Emerson, "Self Reliance" (1841)(excerpt).
- c. Friedrich Nietzsche, *Beyond Good and Evil* in *Basic Writings of Nietzsche*, (Walter Kaufmann, ed., Modern Library 1992) §§ 29, 32, 34, 108, 116, 132, 174, 186, 190, 201, 202 and 259.
- d. Stanley Fish, "Condemnation without Absolutes," *N. Y. Times*, Oct. 15, 2001.
- e. Edmund Burke, *Reflections on the French Revolution*, Excerpts, ¶¶ 3, 5, 12 & 13 (Nov., 1790).
- f. Thomas Hobbes, *Leviathan*, Chapter XIII, "Of the Natural Condition of Mankind As Concerning Their Felicity and Misery."
- g. Garrett Hardin, "The Tragedy of the Commons," 162 *Science* 1243-1248 (1968).
- h. International law and national interest; Friedmann; and notes [16-17, n. 1]

- i. J.L. Brierly, *The Law of Nations* [26-27].
- j. Oliver Wendell Holmes, "The Path of the Law" in *The Essential Holmes* (Richard A. Posner, ed., Chicago 1992) 160-177.
- k. Jeffrey H. Dunoff & Joel P. Trachtman, "Economic Analysis of International Law," 24 *YALE JOURNAL OF INTERNATIONAL LAW* 1, 31-33 (1999).
- l. G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford 1993) 218-222.
- m. Harry Eyres, "The Heart of Nothingness," *Financial Times*, Nov. 5-6, 2005.*
- n. Richard Rorty, "How Nature Designed Our Universal Sense of Right and Wrong" (Review of Marc D. Hauser), *N.Y. Times*, Aug. 25, 2006.
- o. Edward Rothstein, "Postmodern Thoughts, Illuminated by the Thoughts of a Premodern Tribe," *N. Y. Times*, Jan. 18, 2007.

5. Class discussion: Which of the three perspectives do you prefer?

CUSTOMARY INTERNATIONAL LAW

6 & 7. The elements of customary international law

- a. Recurring questions [59-61]
- b. *The Lotus* (1927) [68-69]
- c. Legality of the Threat or Use of Nuclear Weapons (1996) [77, n. 3; 79-90]
- d. Mohammed Bejaoui, "Poverty of the International Order," in *International Law: A Contemporary Perspective* (Richard Falk, Friedrich Kratochwil & Saul H. Mendlovitz, eds.)(1985) 152-154.

8 & 9. Conceptual problems with customary international law

- e. *Opinio juris* [90-100]
- f. Michael J. Glennon, "Sometimes a Great Notion," *Woodrow Wilson Quarterly* (Fall, 2003).*
- g. Michael J. Glennon, *Limits of Law, Prerogatives of Power* (2001), 37-65.
- h. Jonathan Charney, "Universal International Law," 87 *AJIL* 529, 536-37 (1993).
- i. The problem of the "persistent objector" [100-105]
- j. The National Security Strategy Statement, September 20, 2002.
- k. *Jus cogens* [105-107; 110-112]
- l. Michael J. Glennon, *De l'absurdité du droit impératif*, *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* (2006)(English translation).

THE LAW OF TREATIES

10. The making of treaties

- a. Entangled treaty and custom [122-126; 130-132]
- b. The Vienna Convention on the Law of Treaties [documentary supplement]
- c. Methods of expressing consent to be bound [136-138]
- d. Unilateral statements [292-298]

- e. Non-binding agreements [286-292]
- f. Signatory status [467-470; 473-477]
- g. “Object and purpose” of a treaty [138-140]
- h. The SALT I extension controversy.

11. Reservations

- a. Operation and effectiveness [140-162]
- b. Report of the Senate Foreign Relations Committee, Panama Canal Treaties, Feb. 3, 1978 (excerpt).

12. The observance, interpretation, and application of treaties

- a. *Pacta sunt servanda* [162-163]
- b. Internal law [163-165]
- c. Linda Greenhouse, “Judicial Intent; The Competing Visions of the Role of the Court,” *N.Y. Times*, July 7, 2002, sec. 4, p. 3.
- d. Interpretation [165-166; 170-184]
- e. Michael J. Glennon, *Constitutional Diplomacy* (1990) 124-145; 169-177.
- f. Rights and obligations of third states; obligations *erga omnes* [516-519]
- g. “German Court: No Airline Shootdowns,” *N.Y. Times*, Feb. 15, 2006.
- h. Judgment of the German Constitutional Court, Feb. 15, 2006 (authorisation to shoot down aircraft in the Aviation Security Act held void).

13. Invalidity and violation of treaties

- a. Generally [184-186]
- b. Error, fraud, corruption and coercion [526-532]
- c. *Ultra vires* treaties [186-189]
- d. Michael J. Glennon, *Constitutional Diplomacy* (1990) 177-191.
- e. *Jus cogens* [194-200]
- f. Michael J. Glennon, *Limits of Law, Prerogatives of Power* (2001), 40-42.
- g. Breach [207-212]
- h. *Rebus sic stantibus* [218-227]
- i. War between the contracting parties [227-232]
- j. Termination by consent [200-207; n. 215]
- k. State succession [1524-1530]
- l. James Woolsey, “What ABM Treaty?” *Washington Post*, Aug. 15, 2000, at page A23.
- m. Michael J. Glennon, “Yes, There Is an ABM Treaty,” *Washington Post*, Sept. 4, 2000, at page A25.

OTHER SOURCES OF INTERNATIONAL LAW

14. General principles, equity, judicial decisions, and highly qualified publicists

- a. The broad expanse of general principles [233-245; 246-247]
- b. Considerations of equity and humanity [247-254]
- c. Judicial decisions [254-261]
- d. International law scholars [261-264]

- e. Declarations and resolutions of international organizations [265-266; 273-279]

15. *Mid-semester examination*

INTERNATIONAL LAW AND MUNICIPAL LAW

16. Conflicts between statutes and treaties

- a. General principles [652-654]
- b. The last-in-time doctrine [685-692]
- c. Louis Henkin, “*Breard*: Provisional Measures, U.S. Treaty Obligations, and the States,” 92 AJIL 679 (Oct., 1998).
- d. *Diggs v. Shultz*, 470 F.2d 461 (D.C.Cir. 1972).
- e. *U.S. v. P.L.O.*, 695 F. Supp. 1456 (1988).
- f. T. Franck & M. Glennon, “The Last in Time” Doctrine, *United States Foreign Relations & National Security Law* (2nd ed., West 1993) 362-366.
- g. Bruce Ackerman, “The Legality of Using Force,” *N.Y. Times*, Sept. 21, 2002.

17. International law as United States law

- a. International law in the municipal law of other states [742-754]
- b. International law as “law of the land” [654-666]
- c. *The Paquete Habana* (1900) [62-68]
- d. Agora, “The President and International Law,” 80 AJIL 913-937 (October, 1986).
- e. Michael J. Glennon, *Constitutional Diplomacy* (1990) 277-282.
- f. Jordan J. Paust, “*Paquete* and the President: Rediscovering the Brief for the United States, 34 VA.J.INT’L.L. 981 (1994).*
- g. *U.S. v. Alvarez-Machain* (1992) [1187-1196]
- h. Michael J. Glennon, “State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain*,” 86 AJIL 746 (1992).
- i. Ian Fisher & Douglas Jehl, *Italy Denies Any Role in Seizure of Terror Suspect*, N.Y. TIMES, July 1, 2005.
- j. International law in U.S. constitutional interpretation [737-742]

18. Executive agreements and parallel policy declarations

- a. Michael J. Glennon, *Constitutional Diplomacy* 164-191 (1990).
- b. Executive agreements [727-737]
- c. Michael J. Glennon, “The Gulf War and the Constitution,” *Foreign Affairs* 85-86 (Spring, 1991).
- d. Supplemental views of Senators Clark and McGovern, Report of the Senate Foreign Relations Committee, S.Con Res. 56, Oct. 17, 1977.

19. Constitutional limits on treaties

- a. Federalism and other constitutional prohibitions [679-685]

- b. Self-executing and non-self-executing treaties; *Medellin v. Texas* (2008) [692-718]
- c. Letter of Michael J. Glennon to Sen. Joseph R. Biden, Jr., May 15, 2008 regarding *Medellin v. Texas*.
- d. James C. McKinley, Jr., "Texas Executes Mexican Despite Objection," *N.Y. Times*, Aug. 6, 2008.
- e. Limitations concerning subject matter [141, nn. 3, 4]
- f. Interpretation and amendment: Glennon, *Constitutional Diplomacy* (1990) 134-145 (review); [718-723].
- g. Report of the Senate Foreign Relations Committee, Taiwan Enabling Act, March 1, 1979 (excerpt).
- h. Staff memorandum to the Senate Foreign Relations Committee concerning legal and procedural issues related to the SALT II Treaty (undated).

20. The constitutional power to terminate treaties

- a. General principles [723-727]
- b. The Shanghai Communiqué (n.b. ¶ 12)(1972).
- c. The ABM Treaty
- d. Michael J. Glennon, *Constitutional Diplomacy* (1990) 134-161 (review).
- e. *Goldwater v. Carter*, 444 U.S. 996 (1979).
- f. Complaint for declaratory relief, *Kucinich v. Bush* (2002).*
- g. Memorandum in support of defendants' motion to dismiss, *Kucinich v. Bush* (2002).

THE SUBJECTS OF INTERNATIONAL LAW

21. Statehood and recognition

- a. What is a state [299-314; notes, 318-320; 338-344]
- b. Termination of recognition [375-376, notes 1, 2]
- c. Report of the Senate Foreign Relations Committee, Taiwan Enabling Act, March 1, 1979.
- d. Criteria, necessity and effect of recognition [348-368]
- e. Michael J. Glennon, "The Archaic Practice of 'Recognition,'" *The Christian Science Monitor*, April 23, 1990.*

22. International organization and the principle of *ultra vires*: sovereignty vs. supranationalism

- a. The United Nations Charter [documentary supplement]
- b. Generally [402-407]
- c. Sovereignty [24-28]
- d. *Ultra vires* acts [420-429]
- e. Report of the Secretary-General's High-level Panel on Threats, Challenges and Change.
- f. Thomas M. Franck, "Collective Security and UN Reform: Between the Necessary and the Possible," 6 *CHI. J. INTL. L.* 597 (2006).

- g. Michael J. Glennon, "Platonism, Adaptivism, and Illusion in UN Reform," 6 CHI. J. INTL. L. 613 (2006).
- h. Michael J. Glennon, *Limits of Law, Prerogatives of Power* (2001), 101-145.
- i. George F. Kennan, *Memoirs: 1925-1950* (1967), 216-219.
- j. Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS (May/June, 2003).

THE LIMITS OF INTERNATIONAL LAW

23. Contemporary perspectives on international law

- a. Overview of methods [42-43; notes, 51-54]
- b. Feminist perspectives [49-50]
- c. Critical legal studies [46]
- d. Note, *Applying the Critical Jurisprudence of International Law To the Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 71 VA. L. REV. 1183 (Oct. 1985).
- e. Anthony Clark Arend, *Legal Rules in International Society* (1999), 67-86, 111-124.
- f. Law and economics [50-51]
- g. International relations theory [47-49]
- h. Makau Mutua, "What Is TWAIL [Third World Approaches to International Law]?" 94 *Proc. Am. Soc. Int'l. L.* 31, 43-34 (2000); [36, n. 2]

24. Law and morality

- a. Thucydides, "Melian Dialogue," in *History of the Peloponnesian War* (Rex Warner, tr., Penguin 1954) 400-408.
- b. Robert Kagan, "Power and Weakness," *Policy Review*, vol. 113, June & July 2002.
- c. Steven Erlanger, "The World; America the Invulnerable? The World Looks Again," *N.Y. Times*, July 21, 2002.
- d. Francis Fukuyama, "Has History Restarted Since September 11?," address to the Center for Independent Studies, Melbourne, Australia, August 8, 2002.
- e. Michael J. Glennon, *Limits of Law, Prerogatives of Power* (2001), 162-168.
- f. Michael J. Glennon, "Terrorism and the Limits of Law," WOODROW WILSON QUARTERLY 12-19 (Spring, 2002).

25. Law and power

- m. George F. Kennan, "Diplomacy in the Modern World," and Dean Acheson, Remarks to the ASIL, in Robert J. Beck, Anthony Clark Arend & Robert D. Vander Lugt in *International Legal Rules* (Oxford 1996) 94-109.
- n. Necessary conditions for effective law (WEF handout, Davos, Jan. 2003).

- o. Thomas M. Franck, "Legitimacy in the International System," 82 AJIL 705 (1988).
- p. Michael J. Glennon, "An American Empire? What's Law Got To Do With It?" WOODROW WILSON QUARTERLY 70-75 (Summer, 2002).*
- q. Pal Wrangé, *Of Power and Justice*, 4 GERMAN LAW JOURNAL 9 (Sept. 2003).
- r. Michael J. Glennon, *Limits of Law, Prerogatives of Power* 181-192 (2001).

26. Is international law really law?

- g. John Austin, "The Province of Jurisprudence Determined" (review) [16-17]
- h. Lori Damrosch, "Enforcing International Law" [20-23]
- i. *Norwegian Loans Case, ICJ Reports 1957* (separate opinion of Judge Lauterpacht)(excerpt).
- j. Michael J. Glennon, *How International Rules Die*, 93 GEORGETOWN LAW JOURNAL 939 (2005).
- k. H.L.A. Hart, *The Concept of Law* 208-231 (1961).
- l. Is it binding? [2-9]
- m. Michael J. Glennon, *Limits of Law, Prerogatives of Power* (2001), 145-151.



Schedule. The class meets Tuesday and Thursday from 11:05 a.m. to 12:20 p.m. in room 206 Cabot. Numerical headings in this syllabus each represent one class session. Alphabetically labeled items are readings for that class session. Most classes will consist of lectures and discussion of the readings; consequently, it is important that all readings be completed before the relevant class session.

Readings. Bracketed numerical references in this syllabus are to page numbers in Damrosch, Henkin, Pugh, Schachter & Smit, *International Law: Cases & Materials* (5th ed., West 2009). This book is required. Also required is Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (St. Martin's/Palgrave 1990). The documentary supplement, *Basic Documents Supplement to International Law: Cases & Materials* (5th ed.), by Damrosch, *et al*, is recommended, although many documents are now available on the internet. Items marked with an asterisk are recommended but not required. Two additional books are recommended: James R. Fox, *Dictionary of International and Comparative Law* (Oceana, 3rd ed. 2003), and E. Allen Farnsworth, *An Introduction to the Legal System of the United States* (Oceana, 3rd ed. 1996). Further readings may be added throughout the semester as events unfold; always check Blackboard before class.

Accessing reading materials. All of the materials in this syllabus are available on the Tufts Blackboard site for this course, which is accessible from any computer with an internet browser. The address is <http://crs.ase.tufts.edu>. Go to this course. The materials are saved in Adobe Acrobat files. Most computers already have an Adobe Acrobat Reader installed. If yours does not, it can be downloaded free at www.adobe.com. During the first two weeks of class, students can access the materials on Blackboard as a “guest”; afterwards, a Tufts ID will be required.

Recordings of class sessions. No recordings of any kind may be made of any class session.

Auditors. Auditors are not admitted in this course.

Teaching assistant. The teaching assistant for the course is Matthias Braeunlich, who can assist students having difficulty accessing Blackboard. His email address is Matthias.Braeunlich@tufts.edu.

Lecture outlines. Outlines of each lecture will be available in the relevant Blackboard course document folder shortly before each class. These outlines are provided to make the class easier to follow for students whose native language is not English. They are not a substitute for class attendance.

Communication of class notices. Email messages concerning class information, including further readings, will be sent to each student’s Tufts email address through the Tufts Blackboard. A student who adds the class late should notify Matthias so as to ensure that email communications will be received.

Mid-semester examination. A closed-book examination will be held during a regularly scheduled class period (the 15th class session). It will consist of essay and objective questions.

Final examination. A three-hour, closed-book examination will be held on Tuesday, December 17 at 9:30 in the same room. It will consist of essay and objective questions. No paper is required. A sample essay question and answer are available in the “Documents Folder” on the Blackboard web site.

Bluebook review. Graded mid-semester and final exams are available for review after grades are turned in outside room 250B. Students wishing to do so should see my assistant, Richard Fox. Bluebooks may not be altered or removed from the reviewing area.

Grading and class performance. The letter grade that results from the final examination may be raised one-half letter grade for superior performance in class

discussions. *Recorded grades are raised only for arithmetical or administrative error.* Students are expected to attend all class sessions.

Office hours (room 250B). Office hours are 2:00 to 3:00 on Wednesday, other times by appointment—though if the door is open, as it usually is, feel free to drop in. Appointments may be made with Richard Fox at Richard.Fox@tufts.edu or (617) 627-4319. For conversations about class topics, please stop by rather emailing.

Contact information. Web site: <http://www.fletcher.tufts.edu/faculty/glennon>. Telephone: (617) 627-3941. Email: michael.glennon@tufts.edu.