

INTERNATIONAL SECURITY LAW

Fall 2008 — Professor Barry Kellman

There will be 12 class meetings. In addition, with regard to paper preparation, each student will have two private meetings with Professor Kellman to: (1) discuss topic selection, outline, and approach; and (2) review the first draft.

The following information pertains to reading assignments for each class.

Classes 11 and 12 will be devoted to discussion of student papers.

CLASS 1 International Security Law – Oxymoron or Holy Grail?

Realism and Transnationalism: Competing Visions for International Security (Canestaro - BU Int'l L. J., 2007): The international system appears to be increasingly bifurcated, with economic-financial dealings regulated by international law and international rules on military-security issues of diminishing relevance.

Peace Through Law: The Failure of a Noble Experiment (Delahunty and Yoo – U. Mich L. R., 2008): The international legal system should adopt a rule that balances allowable use of force that benefits the international system and prohibiting aggression that harms it. Collective security as expressed in the UN Charter should not ban almost all uses of force, as it does now, but instead permit intervention beyond self-defense that addresses threats to international peace and security, and only if the Security Council approves.

The Use of Force and Contemporary Security Threats- Old Medicine for New Ills? (Weiner - Stanford L. R., 2006): International law rules and international institutions established by the U.N. Charter are ill-suited to meeting contemporary security threats. While many commentators and policymakers advance new doctrines to expand the entitlement of states to use force unilaterally in self-defense, the UN system of rules and standards is flexible enough to allow states to meet emerging threats to international security.

CLASS 2 Nuclear weapons control 1 – Role of the U.N. and the ICJ Decision

The Failure of the UN Atomic Energy Commission: An Interpretation, Edward Shils, 15 Chi. L. R. 855, (Summer 1948): The unwillingness of most States in the Atomic Energy Commission to continue is the result of the growing conviction that the Soviet Union does not want an effective international control scheme established....The general deterioration of relations between the Soviet Union and the United States led to the conviction that even if an agreement could be achieved within the Commission on the control system itself, the mutual confidence required for its effective establishment and operation would be lacking.

The New International Atomic Energy Agency, Bernard Bechhoefer and Eric Stein, 55 Mich. L. R. 747, (Apr. 1957): The IAEA is unique among international organizations. It combines two functions: the positive function of seeking "to accelerate and enlarge the contribution of atomic energy to peace, health, and prosperity, throughout the world" and the negative function of insuring, "so far as it is able, that assistance provided by it or at its request or under its supervision or control, is not used in such a way as to further any military purpose."

"Disarmament Commission," International Organization, Vol. 9, No. 1, (Feb. 1955):
Traces diplomatic negotiations in mid-1950s concerning prohibition of weapons of mass destruction.

Political and Security Questions: Report of the Disarmament Commission and conclusion of an international convention (treaty) on the reduction of armaments and the prohibition of atomic, hydrogen, and other weapons of mass destruction, International Organization, Vol. 9, No. 1, (Feb. 1955), pp. 57-93:
From its 685th meeting on October 11 through its 702d meeting on October 27, the Political and Security Committee of the General Assembly considered jointly two items referred to it: "Regulation, limitation, and balanced reduction of all armed forces and armaments: report of the Disarmament Commission" and "Conclusion of an international convention (treaty) on the reduction of armaments and the prohibition of atomic, hydrogen, and other weapons of mass destruction."

Safeguarding Atoms for Peace Mason Willrich, 60 Am J. Int'l L. 34, (Jan. 1966):
Since 1945, the number of nations possessing nuclear weapons has increased five times and stockpiles of nuclear weapons have increased thousands of times. The IAEA has adopted a revised system of "safeguards" to ensure that the materials, facilities, and equipment utilized in civil nuclear research and power programs are not diverted to any military purpose. This article describes and analyzes the salient legal aspects of the revised IAEA system of safeguards.

International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, (1996):
"There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such [but] ... the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, ... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."

CLASS 3 Nuclear weapons control 2 – Cuban Missile Crisis & Superpower Arms Control

The Cuban Missile Crisis: Case Study, Richard Ned Lebow, Columbia International Affairs Online, (August 2000)

Inside the Cuban Missile Crisis, Peter Kross, Military History, (Nov. 2006), pp. 30-36:
The Soviets had never before transferred any of their small missile force from their own territory to any of the Warsaw Pact allies, let alone Cuba. Decades later, many historians believe that the Cuban Missile Crisis is at least as rooted in U.S. election politics as in any nuclear ambitions of Soviet Premier Nikita Khrushchev.

The Cuban Missile Crisis Revisited, Joseph S. Nye, et al, Foreign Affairs, (Fall 1987), pp. 171-88:
The Cuban missile, the only nuclear crisis we have experienced, remains the great laboratory in which to study the art of crisis management. Unfortunately, the "dove" and "hawk" positions respectively are that there are many lessons, chiefly emphasizing the need for flexibility, managerial precision, and caution in the face of great danger, or there are no lessons, because the nuclear danger of 1962 was almost surely imaginary, a function of a failure to comprehend the pivotal significance of a favorable military balance for the United States. The need is for more "owlish" thinking that splits the difference between these two extremes.

The Cuban Missile Crisis, John Swift, History Review, (March 2007), pp. 6-11:
The world was fortunate that the greatest crisis of the Cold War arose in 1962; Kennedy and Khrushchev had days to consider their position and think through their options. At a later date, when technological advances

had made missile launch times shorter and submarines quieter and when decisions could be made in minutes, the consequences could easily have been catastrophic.

Excerpts from Robert McNamara's remarks at Moscow screening of movie "Thirteen Days," available at: http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=696&prog=zgp&proj=znpp&zoom_highlight=Robert+McNamara: Now, what's the lesson of all this? The indefinite combination of human fallibility and nuclear weapons will lead to destruction of nations....And, therefore, the Canberra Commission, which included a Russian member, and I have urged that our ultimate objective should be to move to eliminate nuclear weapons.

The Soviet-Cuban Quarantine and Self-Defense, Myres MacDougal, Editorial Comment Section, AJIL, Vol. 57, No. 3 (July 1963), pp. 602-04: Until mankind achieves a better organized world, the task which confronts free peoples is that of clarifying and applying a conception of international self-defense which will serve their common interests in minimum order without imposing upon them paralysis in the face of attacks from community members who don't genuinely accept the principle of minimum order.

Law and the Quarantine of Cuba, Abram Chayes, Foreign Affairs (April 1963), pp. 550-557: The U.S. State Dept. argued that the U.S. quarantine of Cuba during the 1962 missile crisis, as authorized by the Organization of American States, was consistent with Art. 53, para. 1 of the UN Charter allowing regional self-defense because cold-war rivalries were prohibiting the UN Security Council from fulfilling its obligation under the Charter to maintain international peace and security, which obligation thus naturally fell upon organizations like the OAS.

Defensive Quarantine and the Law, Leonard C. Meeker, AJIL, Vol. 58, No. 3 (July 1963), pp. 515-524: Makes the Chayes argument in slightly different terms.

Bargaining in the Shadow of Violence: The NPT, IAEA, and Nuclear Non-Proliferation Negotiations, Arsalan M. Suleman, 26 Berkeley J. Int'l L. 206, (2008): This article applies dispute systems design principles to analyze the NPT as a dispute system for nuclear proliferation concerns, and examines three case studies of non-proliferation negotiations - North Korea, Iran, and Pakistan - to see how negotiations were influenced by legal endowments and the shadow of violence.

CLASS 4 Prohibitions against chemical and biological weapons

Chemical

Biotechnology and chemical weapons control, Mark Wheelis, Pure Appl. Chem., Vol. 74, No. 12, pp. 2247–2251, (2002), available at: <http://www.iupac.org/publications/pac/2002/pdf/7412x2247.pdf>: Biotechnology is revolutionizing the way new drugs are discovered, from a substantially empirical art to a rational, predictive process in which targets of drugs are selected on the basis of known physiology, then ligands that can bind to these targets are designed. The same process could be used to identify promising new chemical weapons (CW) agents, which would be synthesized from unscheduled precursors. Biotechnology thus has the potential of fueling CW proliferation and also aid the development of novel nonlethal chemical agents, the development of which could have a number of negative consequences for CW control.

A Genealogy of the Chemical Weapons Taboo, Richard Price, International Organization, (Winter 1995), pp. 72-103: This article examines the sources of the CW taboo and investigates whether there are any grounds to suspect that the norm proscribing the use of CW differs from past restraints on other weapons—restraints that over time have yielded to the ineluctable embrace of technology. Neither of the usual answers to the CW conundrum—namely, the view that CW are militarily useless and the assumption that the taboo is simply

explained by the physical characteristics—suffices to provide a full satisfactory account of how CW have been de-legitimized.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Organization for the Prohibition of Chemical Weapons, available at: http://www.opcw.org/docs/cwc_eng.pdf: Signed in 1993 and entered into force on April 29, 1997 the convention augments the Geneva Protocol of 1925 for chemical weapons and includes extensive verification measures such as on-site inspections. It does not cover biological weapons. The convention is administered by the Organisation for the Prohibition of Chemical Weapons (OPCW), which conducts inspection of military and industrial plants in all of the member nations as well as working with stockpile countries.

"The Chemical Weapons Ban: Facts and Figures, Organization for the Prohibition of Chemical Weapons," Organization for the Prohibition of Chemical Weapons, available at: <http://www.opcw.org/factsandfigures/index.html#participation>

The History of the Prohibition of the Use of Chemical Weapons in International Humanitarian Law, Nebojsa Raicevic, *Facta Universitatis, Law and Politics*, Vol. 1, No 5, 2001, pp. 613 – 631

Chemical weapons and international humanitarian law, International Committee of the Red Cross, available at: http://www.cicr.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_chemical_weapons?OpenDocument: Website offering general information about the Chemical Weapons Convention and articles on the humanitarian aspects of chemical weapons control.

Chemical and Biological Weapons Chronology, Federation of American Scientists, available at: <http://www.fas.org/nuke/control/bwc/chron.htm>: Chronology of developments in chemical and biological weapons control from the U.S. renunciation of chemical weapons in 1969 to the entry into force in 1997 of the Chemical Weapons Convention.

Chemical Weapons: Who Has Chemical Weapons? Come Clean WMD Awareness Program, available at: <http://www.comeclean.org.uk/articles.php?articleID=12>: Offers list of countries likely to possess chemical weapons as of 2003.

Chemical & Biological Weapons Resource Page, James Martin Center for Nonproliferation Studies, available at: <http://cns.miis.edu/research/cbw/index.htm>: Contains tens of links to different articles and studies, many of which are region-specific, of chemical and biological weapons from the past decade.

Biological

Notes from a BWC Gadfly, Barry Kellman, *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science*, (September 2006), pp. 231-236: The BWC process has become preoccupied with long-standing disputes and entrenched dogmas that are, ultimately, unimportant. The only question of significance is whether the BWC Review Conference will make even a marginal contribution to reducing dangers associated with biological weapons.

Globalizing Biosecurity, *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science*, Ronald M. Atlas, Judith Reppy (March 2005) pp. 51-60: A harmonized international regime that enhances biosecurity is needed to reduce the risk of bioterrorism. Like other security regimes, this will entail mutually reinforcing strands, which need to include: enactment of legally binding control of access to dangerous pathogens, transparency for sanctioned biodefense programs, technology transfer and assistance to developing countries to jointly advance biosafety and biosecurity, global awareness of the dual-use dilemma and the potential misuse of science by terrorists, and development of a global ethic of compliance. This effort must be

undertaken collectively, utilizing the international and regional institutions that already have a role to play in providing safety and security.

CLASS 6 Weapons in Space & Missile Defense

Towards a New Regime for the Protection of Outer Space as the "Province of All Mankind, David Tan, 25 Yale J. Int'l L. 145, (Winter 2000): While the precise definition of the "province of all mankind" may be unclear, the very nature of the outer-space environment demands special recognition by the international community as a whole - that it must be transmitted in a substantially unimpaired state to future generations.... In balancing delicate political and economic interests, the protection of the outer-space environment from pollution would best be achieved by the adoption of a Framework Convention on the Protection of the Space Environment and the establishment of an International Space Agency.

Prevention of an Arms Race in Outerspace, Lloyd Axworthy, A Disarmament Agenda for the 21st Century: DDA Occasional Papers, No. 6, UN Disarmament Commission, (Oct. 2002), available at: <http://disarmament.un.org/DDApublications/op6art9.pdf>: A look at space on the UN agenda in the security context, as well as its peaceful uses and role in sustainable development, States' views, and proposals for a ban on space weaponization, and US space weaponization plans. We will then explore prescriptions for prevention, including the space sanctuary concept and a prohibition on space weapons, taking into consideration commercial interests and the civil society support necessary to prepare the way for a space weaponsization plan.

The Final Frontier: The Laws of Armed Conflict and Space Warfare, Jackson Maogoto and Steven Freeland, 23 Conn. J. Int'l L. 165, (Winter 2007): This article applies the laws of war to the emerging phenomenon of space weaponization and the increasing likelihood in the next few decades of space becoming a battleground. This predicament requires new ways of thinking and legal regulation, considering that the existing principles of the Laws of Armed Conflict (LOAC) are primarily focused on air, land and terrestrial warfare.

National-Security Law in Outer Space: The Interface of Exploration and Security, Michel Bourbonniere, 70 J. Air L. & Com. 3, (Winter 2005): The ability of a state to use outer space in its civil, commercial, and military dimensions, is gaining in importance. In recent conflicts, space capabilities have proven to bring an asymmetrical advantage to military operations. This article describes and analyzes the international instruments that regulate the national-security concerns of states in outer space.

The New Age of Space Law: The Outer Space Treaty and the Weaponization of Space, Adam G. Quinn, 17 Minn. J. Int'l L. 475 (Summer 2008): National defense, global communications, an ever growing commercial space industry, international flights, and the internet all depend on satellites orbiting in outer space. These satellites make obvious first targets for any space arms race. The Outer Space Treaty is the last defense against weaponization of space, making it one of the most crucial treaties at this time.

Disarmament Committee Approves Text Reaffirming Urgency of Preventing Outer Space Arms Race, Need for Reinforcing Existing Legal Regime," available at: <http://www.un.org/News/Press/docs/2006/gadis3334.doc.htm>: The General Assembly would reaffirm the importance and urgency of preventing an arms race in outer space. The Assembly would further reaffirm that the existing legal regime applicable to outer space did not guarantee the prevention of such an arms race, and that there was a need to consolidate and reinforce that regime, with the Conference on Disarmament playing the primary role in negotiating a multilateral agreement or agreements on the issue.

United Nations Treaties and Principles on Space Law, United Nations Office for Outer Space Affairs, available at: <http://www.unoosa.org/oosa/en/SpaceLaw/treaties.html>: International legal principles provide for non-appropriation of outer space by any one country, arms control, the freedom of exploration, liability

for damage caused by space objects, the safety and rescue of spacecraft and astronauts, the prevention of harmful interference with space activities and the environment, the notification and registration of space activities, scientific investigation and the exploitation of natural resources in outer space and the settlement of disputes.

Report of the Legal Subcommittee on its forty-seventh session, held in Vienna from 31 March to 11 April 2008, UN Office for Outer Space Affairs, available at:

http://www.unoosa.org/pdf/reports/ac105/AC105_917E.pdf: Discusses 1) status and application of the five United Nations treaties on outer space; 2) information on the activities of international intergovernmental and non-governmental organizations relating to space law; 3) matters relating to the definition and delimitation of outer space and the character and utilization of the geostationary orbit, including consideration of ways and means to ensure the rational and equitable use of the geostationary orbit without prejudice to the role of the International Telecommunication Union; 4) review and possible revision of the principles relevant to the use of Nuclear; and 5) power sources in outer space.

An effective way to prevent an arms race in outer space: The early negotiation and conclusion of an international legal instrument," A Disarmament Agenda for the 21st Century, Qiao Zonghuai, DDA Occasional Papers, No. 6, UN Disarmament Commission, (Oct. 2002), available at:

<http://disarmament.un.org/DDApublications/op6art8.pdf>: It is imperative to conclude an international legal instrument devoted to preventing the weaponization of and an arms race in outer space. The Conference on Disarmament should re-establish an Ad Hoc Committee on PAROS to negotiate and conclude an international legal instrument.

Law Versus Power on the High Frontier: The Case for a Rule-Based Regime for Outer Space, Nina Tannenwald, 29 Yale J. Int'l L. 363, (Summer 2004): If conflict over the use of space, or even actual conflict in space, is to be prevented or significantly constrained by general agreement, the international community will need to agree on permitted activity in space and more refined arrangements for distributing the benefits of that activity. Such a regime would be in the strong interest of commercial, scientific, and military support constituencies worldwide. Without such agreement, space will largely be shaped by the short-term interests of power rather than the long-term interests of law.

Space weapons, the urgent debate, William Marshall, et al, Journal on Science and World Affairs, Vol. 1, No. 1, (2005), pp. 19-32, available at: http://www.scienceandworldaffairs.org/PDFs/MarshallEtAl_Vol1.pdf: The challenge is to find a way of managing space that avoids the 'tragedy of the commons', whereby the pursuit of individual rationality by every state leads to a collectively worse outcome for everyone. The costs and gains of space weapons must therefore be addressed in a comprehensive and balanced debate.

Incremental Steps for Achieving Space Security: The Need of a New Way of Thinking to Enhance the Legal Regime of Space, Andrew T. Park, 28 Hous. J. Int'l L. (2006), pp. 871-913:

This Article: 1) identifies the glaring holes in the current legal regime for space and how they came about; 2) understands the major impediments to achieving progress in strengthening the regime; and finally 3) suggests incremental steps of strengthening the legal regime with the end goal of enhancing space security.

CLASS 7 Forceful Intervention in Iraq or Darfur

Darfur, The Authority of Law, and Unilateral Humanitarian Intervention (Vincent, Toledo L.R., 2007):

Legal recognition of unilateral humanitarian intervention would destabilize world order because some member states would instigate ill-motivated hostilities under the guise of humanitarianism, thereby reducing the efficacy and primacy of the UN Charter.

Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention, Christopher Clarke Posteraro, 15 Fla. J. Int'l L. 151, (Fall 2002):

There are international legal implications facing U.S. policymakers as they confront the threat posed by Iraqi support of international terrorism and its pursuit of weapons of mass destruction. The old truism, that international law is not a suicide pact, grows only more forceful in "an age of uniquely destructive weaponry."

From Humanitarian Intervention to the Responsibility to Protect (Evans - Wis. J of Int'l L., 2006):

In the last five years, a new international norm has emerged that may ultimately become a new rule of customary international law with really quite fundamental ethical importance and novelty in the international system. The evolution away from the discourse of humanitarian intervention, which had been so divisive, and toward the embrace of the new concept of the responsibility to protect has been a fascinating piece of intellectual history in its own right.

The Responsibility to Protect and the Crisis in Darfur, (Matthews - BC Int'l L. R., 2008): The legal responsibility to protect is most accurately described as a declaratory principle rather than a binding rule of international law. Still, recent resolutions by the Security Council, particularly those in reaction to the ongoing atrocities in Darfur, Sudan, explicitly invoke R2P while calling for protective actions in accordance with the principle. If the Security Council continues to implement R2P, the principle may crystallize into a binding norm of international law in the foreseeable future.

Self-Defense and the Failure of the UN Collective Security System, Robert J. Delahunty, 56 Cath. U.L. Rev. 871, (Spring 2007): Given that the nations of the world cannot rely on the Charter's collective security system to protect them from attack, they should be relieved of any legal obligation to accept the limits prescribed by Article 51 of the UN Charter when considering the legality of proposed measures of self-defense. Instead, they should be entitled to resume their pre-Charter right of self-defense and even, in light of changed circumstances, to seek to develop more permissive customary norms. Pending a satisfactory solution to the problem of designing an acceptable international regime governing the use of force, the United States' policy of acting "multilaterally if possible, [but] unilaterally if necessary" will and should continue to be followed.

The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism, (Bannon - Yale L. J., 2006): The 2005 UN World Summit agreement—that the international community, acting through the United Nations, bears a responsibility to help protect populations from genocide and other atrocities when their own governments fail to do so—strengthens the legal justification for limited forms of unilateral and regional action (including military action) if the United Nations fails to act to protect populations from genocide and other atrocities. However, the agreement only supports unilateral action in a narrow set of circumstances....[T]he U.S. invasion of Iraq could not have been justified using the Summit agreement.

Ensuring a Responsibility to Protect: Lessons from Darfur, (Anonymous - Human Rights Brief, 2007):

Darfur is one of the first situations where the media and diplomatic communities have invoked R2P, yet the subsequent actions and threats made pursuant to this doctrine have been largely ignored and rebuked by the Sudanese government. This first test of R2P reveals that the responsibility to protect remains an embryonic doctrine that is by no means self-executing and, at present, lacks the dexterity to overcome real world politics. But the R2P doctrine should not be seen as a failure.

Responsibility to Protect: From Document to Doctrine, But What of Implementation? (Hamilton - Harvard

Human Rights J., 2006): This Note considers how the International Commission on Intervention and State Sovereignty's challenge to the traditional notion of sovereignty enshrined in the UN Charter—that there is no

right to "intervene in matters which are essentially within the domestic jurisdiction of any state"—has been responded to.

Rethinking Peace Ops in the 21st Century: The Hope and Promise of African Regional Institutions (Hollywood - Florida J. of Int'l L., 2007): This article considers the ever-increasing role African regional organizations have to play in African conflicts, as UN peacekeeping missions have lost much credibility.... This is a time of great hope and promise for the idea of "African solutions to African problems."

Collective Security and UN Reform: Between the Necessary and the Possible, Thomas M. Franck, 6 Chi. J. Int'l L. 597, (Winter 2006): Looking at the system of collective security set out in the 1945 Charter, there is not much wrong with it that could not be fixed by creative reinterpretation of obsolete norms. ... Yes, retention of the veto may still be both inevitable and even desirable, but rationally indefensible recourse to it has undermined states' willingness to entrust the protection of their national security to the collective system. If that system is to be rescued, the problem of the veto—not the veto as set out in Article 27(3) of the Charter, but as it has erroneously and mendaciously evolved in practice—needs to be redressed.

CLASS 8 The Anti-Terrorism Assault on State Sovereignty

The Changing Character of Sovereignty in International Law and International Relations, Winston P. Nagan, FRSA, and Craig Hammer, 43 Colum. J. Transnat'l L. 141, (2004): There exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. We suggest that the concept be studied using the contextual mapping method articulated by the New Haven School of jurisprudence. We observe tension in applying the concept to developing and developed states, and explore the possibility that sovereignty can be abused. We propose state typologies to explore the concept further and to scrutinize the accommodations of authority and control.

Legality of the United States War on Terror: Is Art. 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-up International War Crimes? Matthew Scott King, 9 ILSA J Int'l & Comp L 457, (Spring 2003): The United Nations needs to understand that a new type of war has developed and, consequently, must provide new flexible guidelines for the legal invocation of Article 51 in the aftermath of a terrorist attack. Until that time comes, forcible state responses, such as those actions taken by the United States, need to be considered legitimate under a broad interpretation of Article 51.

Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks? Vincent-Joel Proulx, 23 Berkeley J. Int'l L. 615, (2005): Even with sovereignty as a factor, the Council's acquiescence in the U.S. strike on Afghanistan can best be explained as a concrete affirmation of the indirect responsibility paradigm in response to a changing global order. It is now an accepted practice for an injured state to accuse a host-state of not preventing excursions into the former state's territory. As a direct consequence of finding another state responsible for terrorism, the aggrieved state can use force to restore peace and security.

The Doctrine of Preemptive Self-Defense (Murphy - Villanova L. R., 2005): The development of the Bush Doctrine in response to the 9/11 attacks, with reference to the war in Iraq, was justified on preemption grounds. This Article examines the Bush Doctrine against the backdrop of the right to self-defense. While the Bush Doctrine seeks to promote the rule of law, its unilateralist disposition threatens to undermine the effectiveness of the UN system and the very rules of law that the Administration purports to cultivate.

CLASS 9 The Security Council as lawmaker? – UNSCR 1373 & 1540

The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the U.N. Charter, David M. Malone, 35 N.Y.U. J. Int'l L. & Pol. 487, (Winter 2003): Through its decisions over the past ten years, the UN Security Council has eroded the foundations of absolute conceptions of state sovereignty and fundamentally altered the way in which many of us see the relationship between state and citizen the world over. The U.N. Charter needs to be seen as a "living tree." Interpretation of what developments may constitute "threats to the peace," interpretation of the terms of Chapter VII of the Charter, and practice under Chapter VII all have evolved significantly in the post-Cold War era without Charter amendment.

The Security Council as World Legislature, Stefan Talmon, 99 A.J.I.L. 175, (Jan. 2005): Legislation by the Security Council could be a powerful instrument for the maintenance of international peace and security. It allows the Council to take a proactive or even preemptive approach to the discharge of its primary responsibility under the Charter – maintaining international peace and security. In practice, however, Council legislation is fraught with problems, the most significant being the lack of clarity of the legislative acts and the question of implementation.

The Security Council as 'Global Legislator': Ultra Vires or Ultra-Innovative? Eric Rosand, 28 Fordham Int'l L.J. 542, (Feb. 2005): The two Security Council resolutions, Resolution 1373 and Resolution 1540, make pragmatic sense as necessary responses by the Security Council to address urgent, global threats. Further, they serve to fill the existing gaps in international law, which, if not addressed, would hinder the international community's ability to tackle these twenty-first century threats.

Do We Need a New Legal Regime After 9/11? Reinventing the Security Council, Michael D. Ramsey, 79 Notre Dame L. Rev. 1529 (July 2004): The problems at the United Nations may allow the United States to act outside the Security Council to counter violations of, and threats to, international security - but no more than that. Actions outside the Council should be tied to (1) failure of the Council to act after an appropriate request, and (2) persistent and unmistakable violations of international security law.

Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism, Eric Rosand, 97 A.J.I.L. 333, (April 2003): Following September 11, 2001, the Security Council took important steps in the fight against terrorism. It condemned global terror and recognized the right to self-defense under Article 51 of the UN Charter in responding forcefully to those horrific attacks. Perhaps its most significant action in this area, however, was adoption of Resolution 1373 which established the Counter-Terrorism Committee (the CTC). This essay reviews the work of the CTC to date, highlighting some of its accomplishments, and then touches upon some of the challenges the CTC will likely confront.

The Security Council Starts Legislating, Paul C. Szasz, 96 A.J.I.L. 901, (Oct. 2002)

With its recent resolution to counter the threat of terrorism, the United Nations Security Council broke new ground by using, for the first time, its Chapter VII powers under the Charter to order all states to take or to refrain from specified actions in a context not limited to disciplining a particular country. Resolution 1373 seems likely to constitute a precedent for further legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.

1540 Committee: Security Council Committee Established Pursuant to 1540 (2004), available at: <http://www.un.org/sc/1540/index.shtml>

Reports by UN Member States on their progress implementing 1540, available at: <http://www.un.org/sc/1540/nationalreports.shtml>

2007 U.S. Action Plan for Intensified Implementation of Resolution 1540 (2004), available at: <http://www.un.org/sc/1540/nationaldocuments.shtml>

"Security Council Extends '1540 Committee' for three years to halt proliferation of mass destruction weapons, encourages States to map out implementation plans," UN Dept. of Public Information, News and Media Division, (April 25, 2008), available at: <http://www.un.org/News/Press/docs//2008/sc9310.doc.htm>: Unanimously adopting resolution 1810 (2008) under the Charter's Chapter VII, the Council decided that the 1540 Committee should intensify its efforts through its work programme to promote full implementation by all States of resolution 1540 (2004). That included compiling information on the status of States' implementation of 1540, outreach, dialogue, assistance and cooperation, and which addressed in particular all aspects of paragraph 1 and 2 as well as paragraph 3 on accountability, physical protection, border controls and law enforcement efforts, and national export and trans-shipment controls including controls on providing funds and services such as export and trans-shipment financing.

Universal cooperation in fight against terrorism, still major threat to peace, needed more than ever, Security Council told, UN Dept. of Public Information, News and Media Division, (Nov. 14, 2007), available at: <http://www.un.org/News/Press/docs//2007/sc9170.doc.htm>: Terrorism remains one of the biggest threats to international peace and security and the cooperation of all in addressing the issue is more than ever necessary.

"Security Council affirms determination to strengthen cooperation aimed at countering nuclear, chemical, biological weapons proliferation: Presidential Statement Follows Day-Long Debate On Ways to Enhance Implementation of Resolution 1540 (2004)," UN Dept. of Public Information, News and Media Division, (February 23, 2007), available at: <http://www.un.org/News/Press/docs//2007/sc8964.doc.htm>

UN Security Council Resolution 1540, U.S. Dept. of State, available at: <http://www.state.gov/t/isn/c18943.htm>: In April 2004, the UN Security Council adopted Resolution 1540, establishing binding obligations on all UN member states under Chapter VII of the UN Charter to take and enforce effective measures against the proliferation of WMD, their means of delivery and related materials. UNSCR 1540, if fully implemented, can help ensure that no State or non-State actor is a source of WMD proliferation. All states have three primary obligations: to prohibit support to non-State actors seeking such items; to adopt and enforce effective laws prohibiting the proliferation of such items to non-State actors, and prohibiting assisting or financing such proliferation; and to take and enforce effective measures to control these items, in order to prevent their proliferation, as well as to control the provision of funds and services that contribute to proliferation.

Enhancing Implementation of UN Security Council Resolution 1540, Allen S. Weiner, et al, Center for International Security and Cooperation, Stanford University, (September 2007), available at: http://cisac.stanford.edu/publications/enhancing_implementation_of_un_security_council_resolution_1540/: UNSCR 1540, as administered by the 1540 Committee, has largely been effective in encouraging states to provide detailed descriptions of the domestic legal authorities and administrative structures they have in place to address the threat of WMD proliferation. Additional progress can and should be made by the Security Council and the 1540 Committee, however, to ensure that the maximum nonproliferation and security benefits that might be produced by UNSCR 1540 are achieved.

Combining Hierarchical and Soft Modes of Governance: The UN Security Council's Approach to Terrorism and Weapons of Mass Destruction Proliferation after 9/11, Monika Heupel, *Cooperation and Conflict*, Vol. 43, No. 7 (2008): The far-reaching, generic, legally binding obligations imposed on every UN member were unprecedented and indicate a 'hierarchical' approach. Yet, the SC drew extensively upon a range of 'soft' governance modes to support implementation and enhance the legitimacy of its approach. It remains to be seen whether this approach will be the precursor to a future trend. However, its usefulness will depend on whether the SC members will come to an agreement on how to implement 'legislative' resolutions, and

whether non-Council members will be granted greater influence in SC decision-making.

Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR: 1540, Olivia Bosch and Peter Van Ham, eds., Brookings Institution Press, 2007: UNSCR 1540 calls on each state to prioritize and systemize its legal frameworks for curtailing proliferation. Its adoption raises many questions. How are the resolution's provisions being made operational and enforceable? Will 1540 make up for the inadequacies of the existing non-proliferation treaty regimes? Could it, in fact, serve as the foundation for a new system of international governance that effectively stifles proliferation, terrorism, and illicit trafficking?

Class 10 Broadening the Security Agenda: Disease, Poverty, Environmental Sustainability

A More Secured World: Our Shared Responsibility: Report of the Secretary General's High-Level Panel on Threats, Challenges, and Change (Annan - UN 59th Session, 2004), available at:

<http://www.un.org/secureworld>: The UN's founders understood well, long before the idea of human security gained currency, the indivisibility of security, economic development and human freedom. The central challenge for the twenty-first century is to fashion a new and broader understanding, bringing together all these strands, of what collective security means — and of all the responsibilities, commitments, strategies and institutions that come with it if a collective security system is to be effective, efficient and equitable. The case for collective security today rests on three basic pillars. Today's threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats.

Legal and Institutional Responses to Contemporary Global Threats: An Introduction to the U.N. Secretary-General's High-level Panel Report on Threats, Challenges and Change (Shafir - Cal. W. Int'l L. J., 2007):

The report's most notable contributions and recommendations fall within three areas. First, in stark contrast to traditional conceptions of security, the panel offered a broader conception within which it recognized six clusters of threats. Second, the panel sought to make more consistent the criteria for the use of force by the Security Council under Chapter VII, by suggesting that it satisfy tough criteria of both legality and legitimacy. Finally, the panel recommended that the United Nations be made more representative by expanding the Security Council. Neither the second nor the third group of recommendations was adopted.

Recommendations of the Secretary-General's High-level Panel on Threats, Challenges and Change: A Member's Perspective (Hannay - Northwestern J. of Human Rights, 2005):

There were those who pressed us to recognize that international terrorism and the proliferation of weapons of mass destruction were the existential threats of our times and that we should give them absolute priority. There were others who saw poverty, disease, malnutrition, environmental damage, and the instability of states as issues which needed to be addressed before any others. Our conclusion was that neither of these narrow, prioritized approaches was either convincing or viable, nor were parallel attempts to divide threats into those characterized as hard and those characterized as soft. They were not convincing because it became clear that all these threats menaced peace and security, and even more so because it also became clear that they were closely interconnected. Moving on from analysis to prescription, we quickly came to the conclusion that there was an unhealthy and disproportionate focus in many people's minds on military solutions and the use of force.

Global Environmental Threats: Can the Security Council Protect Our Earth? (Knight - N.Y.U.L. Rev., 2005):

In this Note, Alexandra Knight argues that it is legally justified and legitimate for the Security Council, acting under the provisions of Chapter VII, Article 41 of the United Nations Charter, to impose measures to counter regional or global threats to the environment which pose a grave threat to human life and living conditions. While Chapter VII measures also include the use of force, Knight argues that only Article

41 measures - non-military measures like sanctions or interruption of communications - are appropriate to counter environmental threats.

Gregory Meeks, "U.N. Security Council must act preemptively – on climate change," Christian Science Monitor, March 24, 2008, available at: <http://features.csmonitor.com/environment/2008/03/24/un-security-council-must-act-preemptively-%E2%80%93-on-climate-change/>: Unless we act now, and with formidable preemptive force, more of this is what could face the international community. Transcending the Security Council's usual scope of nation-state conflicts, climate change-related conflict will affect all of us with particular devastation to developing countries not represented by the P5. Thus it is incumbent upon the Security Council, which has a responsibility to protect weaker member states, to step up and save the world.