**International Lawmaking**

**Selected Problems**

Peking University Graduate School of Law

**Syllabus**

15 September 2021 – 29 December 2021

**Wednesdays, 13:00 -15:00**

(except the first class on 15 September, which is 18:00-20:00)

**Professor: Dr. Shinya Murase**

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**Professor Emeritus, Sophia University, Tokyo; Visiting Professor at PKU;**

**Member of the UN International Law Commission (ILC);**

**Member of the Institut de Droit International (IDI)**

* The course is open to those who are interested.
* To register, please go to the following link:   
  <https://www.wjx.top/vm/Q9vREOZ.aspx>
* The program on the first day (Wednesday, 15 September 2021, 18:00-20:00) is a special lecture on “Epidemics and International Law”, which is given as part of the PKU Global Law Faculty Lecture Series. The lecture will be given via Tencent meeting. Please go to the following link (<https://meeting.tencent.com/s/NGqFnYhgSjeV>) or search meeting ID: 116 370 626.
* This course is given in English. [The content and the order of lectures are subject to change.] The course will also be given via Tencent meeting. The link of the meeting room will be given through email upon successful registration of the participants.

Teaching Assistant (TA) for the course: Ms. Zhou Yitong, Email address [zhouyitong@pku.edu.cn](mailto:zhouyitong@pku.edu.cn), mobile phone number (+86) 15810105261. The TA will arrange class reporters for each session.

**Basic Reading Materials**

1. 村瀬信也『国際立法―国際法的法源論』（秦一禾訳）中国人民公安大学出版社、2012年 (Get a UBS copy from TA) (参照：陳一峰「国際造法問題的理論再造：評・村瀬信也『国際立法—国際法的法源論』」中国社会科学院国際法研究所『国際法研究』(2014.01) pp.122-128)
2. S. Murase, *International Law：An Integrative Perspective on Transboundary Issues,* Sophia University Press, 2011. (Get a copy from TA)
3. The additional teaching material is indicated in this syllabus or will be uploaded on the course website.
4. For Documents of the UN International Law Commission, see: <http://legal.un.org/ilc/index.shtml>
5. For ICJ judgments and advisory opinions, see: <http://www.icj-cij.org/docket/index.php?p1=3>
6. For PCA decisions, see: <http://www.pca-cpa.org>
7. For ITLOS decisions, see: <https://www.itlos.org>
8. Collection of treaties and judicial decisions, as necessary.

**Week-by-Week Topics**

**Week 1 (Wednesday, 15 September 2021, 18:00-20:00)**

1. **PKU Global Law Faculty Special Lecture: “Epidemics and International Law”**

* Basic Reading:Shinya Murase, “Epidemics and International Law”,  *Yearbook of the IDI*, Vol. 81, pp. 37-150;

<https://www.idi-iil.org/app/uploads/2021/05/Report-12th-commission-epidemics-vol-81-yearbook-online-session.pdf>

* To register, Click the link to join the meeting or to add it to your meeting list:  
  <https://meeting.tencent.com/s/NGqFnYhgSjeV>
* Please send your name and affiliation to the following email address: [intlawmaking2021@163.com](mailto:intlawmaking2021@163.com)

**International Lawmaking**

**PART ONE: Sources of International Law**

**Week 2 (Wednesday, 22 September 2021, 13:00 -15:00)**

1. **Introduction**

**Key points**

1. Life of Shinya Murase in brief: How I became an international lawyer
2. International law as a profession; Friendship as the basis of the profession; My alibi as a professor
3. Integrating Theory and Practice in international law (consistency matters!)
4. The Purpose of the study on the sources of international law; For what do we study the Sources of international law?: Filling the gaps (*lacuna*) in international law through “interpretation” of *lex lata* (law as it exists)
5. International lawmaking for *lex ferenda* (law as it ought to be)
6. Unilateral Measures based on domestic law: Opposability
7. **Murase’s focus**
8. Look for **Niches**: Treaties ***and*** Custom; Trade ***and*** Environment, etc.
9. Look at **Grey areas** of Law: **Opposability** between legality and illegality

**Readings**

1. **S. Murase, “International Law as a Profession”** (Statement at the 50th ILC International Law Seminar, July 2014)(mimeograph)
2. Friendship is the basis of our profession:

<https://s-murase.blog/2017/09/02/friendship/>

My alibi as a professor:

<https://s-murase.blog/2017/08/16/a-professor-as-a-profession/>

1. Tips for graduate students:

<https://s-murase.blog/2019/10/13/meeting-with-doctoral-students-at-pku/>

Tips for Jessup students:

<https://s-murase.blog/2017/09/02/friendship/>

1. Book (1) from ‘Basic Reading Materials’, Chap.1, Sec 2.
2. Cases on *lacuna* in law: *The Lotus* (PCIJ 1927); *Nuclear Weapons* (ICJ 1996); *Kosovo’s Unilateral Declaration of Independence* (2010).
3. Cases on Opposability: *Fisheries Jurisdiction* case (UK v. Iceland, ICJ 1974); See also Murase’s English textbook (2), pp. 214-308.
4. S. Murase, “Eulogy for Professor Alexander Yankov” (2021)

https://s-murase.blog/2019/11/17/obituaries-at-ilc-professor-alexander-yankov/

1. S. Murase, “Eulogy for Professor/Judge James Crawford” (2021) https://s-murase.blog/2021/08/17/eulogy-for-professor-james-crawford/
2. **Sources of International Law**

**Key points**

1. Different Meanings of “Sources”
2. Material and Formal Sources: Dialectic Relationship between the two
3. Treaties and Customary International Law, and their Interrelationship
4. “Hard” Law and “Soft” Law
5. From Sources of International Law to International Lawmaking

**Readings**

1. Book (1) from ‘Basic Reading Materials’, Chap.1, Sec.1.
2. Relevant cases: *Asylum* (ICJ 1950), *North Sea Continental Shelf* (ICJ 1969).

**Questions to be discussed**

1. Are there any other sources of International Law that should be considered?
2. What is the meaning of the study on the Sources of International Law?

**Week 3 (Wednesday, 29 September, 13:00 -15:00)**

1. **Applicable Law of ICJ** (judicial sources)

**1.1 Article 38 (1) of the Statute of ICJ**

**Key points**

1. International conventions;
2. International custom;
3. The general principles of law;
4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

**Readings**

1. Book (1) from ‘Basic Reading Materials’,Chap.2, Sec.1.
2. Stefan Talmon, “ICJ and Customary International Law”.
3. Relevant cases: *North Sea Continental Shelf* (1969); *Tunisia v. Libya Cont. Shelf* case (ICJ 1982).

**Questions to be discussed**

1. Norm-creating character of treaties?
2. How many States’ consent do we need for ascertaining Customary Law?
3. How many years do we need for a Customary Norm to be created?

**1.2 Article 38 of the Vienna Convention on the Law of Treaties**

**Key points**

1. Article 38 as an exception to *pacta tertiis* rule
2. Meaning of the phrase “recognized as such” in VCLT Article 38

**Readings**

1. Book (1) from ‘Basic Reading Materials’, Chap.2, Sec.2
2. Relevant case: *Obligation to Prosecute or Extradite* (Belgium v. Senegal) ICJ 2012.

**1.3 Other Sources**

1. Soft Law

**(No class on 6 October, which is a holiday in China.)**

**Week 4 (Wednesday, 13 October, 13:00 -15:00)**

1. **Implementation of International Law by Domestic Law and Courts**

**Key points**

1. Relationship between International Law and Domestic Law

* Monism (supremacy of domestic law v. supremacy of international law)
* Dualism
* Theory of coordination

1. Adoption of Treaties into Domestic Law
   * Incorporation
   * Transformation
2. Adoption of Customary International Law into Domestic Law

* Incorporation
* Transformation

1. “Legal effect” v. “Applicability” of international law in domestic law (courts)

* “Self-Executing” treaties and customary international law

**Readings**

1. Book (1) from ‘Basic Reading Materials’, Chap.2, Sec.3.
2. **Murase, *International Law* (English), Chap. 14, pp. 377-387.**
3. T. Kitamura, “Japanese Supreme Court Judgment in the so-called ‘Kokaryo’ Case”, *Chinese Journal of International Law,* vol.7 (3), 2008, pp. 713-720. <http://chinesejil.oxfordjournals.org/content/7/3/713.full?sid=155d67f0-27b2-48e7-bced-dee0cfe80c32>
4. Nisuke Ando, “The Khoka-Ryo Case and International Law: A Critique of the Japanese Supreme Court Decision,” *Japanese Yearbook of International Law*, Vol. 53 (2010) pp. 1-18.
5. Relevant case: *Kokaryo (Guanghualiao) Dormitory* Case.

**Questions to be discussed**

1. What are customary international rules to determine the relevant issues such as the status of the “de-recognized State”? Assuming that the dormitory belongs to China, how can she make a legal claim under international law? Could we go to ICJ?
2. **China’s system regarding adoption of international law**

**Key points**

1. Monism/Dualism?; Adoption or Transformation?
2. Treaty-making power in China? Recognition of customary international law?
3. Domestic law effect and applicability of treaties and customary international law?

**Readings**

1. Congyan Cai, “International Law in Chinese Courts during the Rise of China”, *American Journal of International Law,* Vol. 110, 2016, pp. 269-288.
2. Li Zhaojie, “Effect of Treaties in Domestic Law: Practice of the People's Republic of China”, 16 *Dalhousie L.J.* 62-97 (1993).

**PART TWO: International Law Commission**

**Week 5 (Wednesday, 20 October, 13:00 -15:00)**

1. **Basis of the International Lawmaking**

**Key points**

1. History of International Lawmaking
2. The Hague Peace Conferences of 1899 and 1907
3. International Lawmaking under the League of Nations (1930 Hague Codification Conference)
4. International Lawmaking under the United Nations
5. UN Convention on the Law of the Sea (1982)
6. A Future Convention on the Law of the Atmosphere?
7. One Belt, One Road

**Readings**

1. Book (1) from ‘Basic Reading Materials’, Chap.3, Sec.1.
2. Murase, An Observation on China’s Initiative of One Belt, One Road (manuscript).

**Week 6 (Wednesday, 27 October, 13:00 -15:00)**

1. **Overview of the International Law Commission (ILC)**

**Key points**

1. History
2. Membership
3. Topic Selection
4. Drafting, Adoption, Post-adoption Process

**Readings**

1. **S. Murase, “China’s Early Contribution to International Lawmaking with Particular Focus on the Role of Dr. Liang Yuen-li”, *PKU International & Comparative Law Review* (forthcoming, 2022)** (manuscript)**.**
2. S. Murase, “Eulogy for Professor James Crawford” (2021)
3. Book (1) from ‘Basic Reading Materials’, Chap.3, Sec.2.
4. C. Tomschat, “International Law Commission: An Outdated Institution?”, *German Yearbook of International Law*, vol. 49 (2006), pp. 77-105.
5. **S. Murase, “Remarks on the Working Method of the Commission,” ILC 70th Anniversary Workshop, July 2018, Geneva** (manuscript)**.**

**Questions to be discussed**

1. Do we still need ILC today? Any “reason d’être”?
2. Any Need for Reform?
3. **Codification and Progressive Development of International Law**

**Readings**

1. Donald McRae, “Interrelationship of Codification and Progressive Development in the Work of the International Law Commission,” *Kokusaiho Gaiko Zassi* (The Journal of International Law and Diplomacy), Vol. 111, No. 4, 2013, pp. 75-94.

**Week 7 (Wednesday, 3 November, 13:00 -15:00)**

1. **ILC Topic (1): Identification of Customary International Law**

**Key points**

1. Background of the topic
2. Definition and Constituent Elements of Customary International Law
3. Usefulness of the topic

**Readings**

1. ILC Report 2016, Chapter V.
2. Official Records of the General Assembly at its Seventy-third Session, Supplement No. 10(A/73/10), Report of the International Law Commission, Seventieth session, 2018, (ILC Report 2018), Chapter V, pp. 117-156. Murase’s comments in 2012, 2013, 2014, 2015, 2016 and 2018 <https://s-murase.blog/2019/11/17/murase-comments-on-customary-international-law-at-ilc-2012-2018/>.
3. ILA London Statement on the Formation of Customary International Law, 2000, Conference Report London 2000.pdf.
4. Stefan Talmon, “Determining Customary International Law: The ICJ’s Methodology and the Idyllic World of the ILC,” EJIL Talk!, 3 Dec. 2015. http://www.ejiltalk.org/ determining-customary-international-law-the-icjs-methodology-and-the-idyllic-world-of-the- ilc/.
5. Roberto Ago, “Positive Law and International Law”, American Journal of International Law, Vol. 51, No. 4, 1957, pp. 691-733.
6. Ditto, “Science juridique et droit international”, *Recueil des cours*, Vol. 90, 1956, p. 849, pp. 928-940.
7. Maurice H. Mendelson, “Formation of International Law and the Observational Standpoint”, (Appendix to the First Report of the International Committee on the Formation of Rules of Customary International Law), in ILA, Report of the 63rd Conference(Warsaw, 1988), p. 941.
8. Maurice H. Mendelson, “The Formation of Customary International Law”, *Recueil des cours*, Vol. 272, 1998, pp. 157-410;
9. Michael Reisman, “International Incidents: Introduction to a New Genre in the Study of International Law”, *The Yale Journal of International Law,* Vol. 10, No. 1, 1984, pp. 1-20.

**Questions to be discussed**

1. Usefulness of the topic
2. Methodology: Citation of academic literature
3. Final form: Conclusions

**Week 8 (Wednesday, 10 November, 13:00 -15:00)**

1. **ILC Topic (2): Subsequent Agreement and Subsequent Practice in Treaty Interpretation**

**Key points**

1. Background of the topic
2. Identification of Subsequent Agreements and Practice
3. Evolutionary Interpretation

**Readings**

1. Official Records of the General Assembly at its Seventy-third Session, Supplement No. 10(A/73/10), Report of the International Law Commission, Seventieth session, 2018, (ILC Report 2018), Chapter IV, pp. 11-116; Murase’s comments 2013, 2014, 2015, 2016 and 2018.
2. Murase’s paper on the “Pathology of Evolutionary Interpretation”.

**Questions to be discussed**

1. Usefulness of the topic
2. Assessment of Evolutionary Interpretation
3. Final form: Conclusions

**Week 9 (Wednesday, 17 November, 13:00 -15:00)**

1. **ILC Topic (3): Peremptory Norms (*Jus Cogens*) of International Law**

**Key points**

* 1. Are there really *jus cogens* norms in international law?
  2. *Jus Cogens* in the Law of Treaties and Law of State Responsibility
  3. Examples of *jus cogens* norms

**Readings**

1. ILC Report, 2019, Chapter V), pp. 141-208. Murase’s comments. https://s-murase.blog/2019/11/17/murase-comments-on-jus-cogens-at-ilc-2016-2019/

**Questions to be discussed**

1. Does international law have a hierarchy?
2. Does *Jus Cogens* have the same meaning in the Law of treaties and in the Law of State Responsibility?
3. Final form: Conclusions

**Week 10 (Wednesday, 24 November, 13:00 -15:00)**

* + 1. **ILC Topic (4): Provisional Application of Treaties**

**Key points**

1. Background of the topic
2. Usefulness of the topic

**Readings**

1. ILC Report 2018, Chapter V; Murase’s comments in 2013, 2014, 2015, 2016 and 2018; ILC Report 2021, Chapter V.

Yukos Universal Limited (Isle of Man) v. The Russian Federation,

UNCITRAL, PCA Case No. AA 227 <https://pca-cpa.org/en/cases/61/>

**Questions to be discussed**

1. Usefulness of the topic
2. Domestic Constitutions on Ratification

**Week 11 (Wednesday, 1 December, 13:00 -15:00)**

1. **ILC Topic (5): General Principles of Law (GPL)**

**Key points**

1. **What are GPLs? Are they domestic law principles or do they include the principles in treaties and customary international law?**
2. **Is GPL a “source of international law”? (Draft Conclusion 1) If so, in what sense the term “source” is used here?**

**Readings:** ILC Report 2019, Chapter IX, pp.329-339; Murase’s comments in 2019: <https://s-murase.blog/2019/11/17/murase-comments-on-general-principles-of-law-2019/>;

Murase Comments in 2021: <https://s-murase.blog/2021/08/17/464/>

**Week 12 (Wednesday, 8 December, 13:00 -15:00)**

1. **ILC Topic (6): Crime against Humanity**

**Key points**

1. Background of the topic
2. Is there a need for this topic in view of the fact that the ICC Statute already covers this crime?

* Policy elements (widespread and systematic attacks)
* Legal persons’ responsibility
* Definition of Gender and LGBT

**Readings**

1. ILC Report 2017, Chapter IV.
2. Murase’s comments in 2015, 2016 and 2017.
3. **ILC Topic (7): Immunity of State Officials from Foreign Criminal Jurisdiction**

**Key points**

1. Background of the topic
2. Immunity *ratione personae*
3. Immunity *ratione materiae*
4. Exceptions to Immunity

**Readings**

1. Special Rapporteur’s Fifth Report; ILC Report 2017, Chapter VII.
2. Murase’s comments 2012, 2013, 2014, 2015, 2016, 2017 and 2018.
3. Relevant cases: *Pinochet* Case (House of Lords, UK); *Arrest Warrant* Case (ICJ, 2001).

**Questions to be discussed**

1. Is it proper for the ILC to grant immunity to those members of the Troika who have committed serious international crimes?
2. Compare Article 27 of the ICC Statute with ILC Draft Articles.
3. Draft Article 7 on Exceptions to Immunity (pro or con?)

**Week 13 (Wednesday, 15 December, 13:00 -15:00)**

1. **ILC Topic (8): Protection of Persons in the Event of Disasters**

**Key points**

1. Background of the topic
2. Usefulness of the topic

**Readings**

1. ILC Report 2016, Chapter IV.
2. Murase’s comments in 2011, 2012, 2013 2014 and 2015.

**Questions to be discussed**

1. Responsibility to protect (R2P)?
2. How can we make the topic more useful? How do you think of the idea of elaborating a Model SOFA for Relief Activities?

**2. ILC Topic (10): Sea-Level-Rise and International Law** (Study Group)

**Week 14 (Wednesday, 22 December, 13:00 -15:00)**

1. **ILC Topic (9): Protection of the Environment in relation to Armed Conflict**

**Key points**

1. Relationship between Law of Armed Conflict *(jus in bello)* and IEL
2. Provisions of ENMOD Convention and Additional Protocols
3. The Notion of “Long-term, Widespread and Significant” Harm

**Readings**

1. ILC Report 2019, Chapter VI, pp. 209-296.s

**Week 15 (Wednesday, 29 December, 13:00 -15:00)**

1. **ILC Topic (11): Protection of the Atmosphere**

**Key points**

* 1. Inclusion of the topic: 2013 Understanding
  2. Definition of the Atmosphere
  3. Scope of the topic
  4. Basic principles: Obligation of States, Sustainable and Equitable
  5. Utilization of the Atmosphere; Geo-engineering
  6. International Cooperation
  7. Interrelationships with other fields of international law
  8. Implementation. Compliance and Dispute Settlement

**Readings**

1. ILC Report 2018, Chapter VI, pp. 157-200.
2. ILC Report 2021, Chapter IV.
3. My ancestral traces:

https://s-murase.blog/2019/11/29/my-ancestral-traces/

1. S. Murase, “Samurai versus Farmer”, letter to my son, 31 July 2021: https://s-murase.blog/2021/08/17/samurai-versus-farmer/

**Questions to be discussed**

1. Is protection of the atmosphere a “common concern of humankind”?
2. Is there any need for a comprehensive framework convention?
3. Future International Lawmaking on the Atmosphere