

International Law

Academic year 2019-2020

Situating International Law

DI110 - Autumn - 6 ECTS

Tuesday 10h15 - 12h00

Course Description

International law does not exist in a vacuum. It is a product of particular historical and ideological circumstances, and it creates effects in the world only through interaction with its societal and political context. This course will situate international law in this context. It will focus on examples of concrete international legal norms and institutions to help us understand how they have come about, what structures, actors, and ideas lie behind them, what impact they have in the world, and who benefits and who loses from them. The course seeks to familiarize us with literature about international law in related disciplines – history, politics, sociology, anthropology - and it will introduce different theoretical perspectives, ranging from approaches grounded in rational choice and constructivist international relations to critical legal studies, Marxism, postcolonialism and feminism. The course is designed to provide an overview over different ways of reading and studying international law and to enable students to develop their own approach to the field.

> PROFESSOR

[Nico Krisch](#)

[Office hours](#)

> ASSISTANT

Aliki Semertzi

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Syllabus

The course will be taught in an interactive way, and its success depends on all students being well prepared for, and ready to participate in, each session.

The plenary sessions will be accompanied by tutorials, the dates of which will be announced at the beginning of the semester.

Throughout the course, students will have to write two response papers on selected readings and complete a final take-home exam which will run from 18 December (12noon) to 24 December (12noon). The grade will consist of: a 20% component for each response paper, a 40% component for the final exam, and a 20% component for participation.

Readings

The course does not use a particular textbook; the materials for the course will be available on Moodle. Please do also explore the literature beyond the required readings; it is only through

engaging with scholarship and practical materials on your own initiative that you will develop your own take on international law and its context.

Required readings are marked with an asterisk (*). The reading list below is provisional and subject to change as the course progresses. Readings will normally be made available two weeks before each session.

Structure (indicative, not final)

1. Introduction (17 September)

In this session, we will begin to explore the guiding questions of the course. We will look at the recent judgment of the International Court of Justice in the Marshall Islands cases and try to understand what was at stake here – doctrinally, normatively, politically, historically. Was this a legal judgment? Or was it, as some critics say, power politics in robes? What does our ambivalence about this tell us about the workings of international law more generally? And why did the Marshall Islands bring this case in the first place? We will discuss this on the background of Martti Koskenniemi's classical article, "The Politics of International Law", which argues that international law is caught in an oscillation between apology and utopia that leaves it essentially indeterminate. Is this true? What are the consequences?

Required readings

*ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), Judgment of 5 October 2016, [here](#)

*Koskenniemi, Martti. "The Politics of International Law." *EJIL* 1 (1990): 4–32.

Further readings

Wendell Holmes, Oliver. "The Path of the Law." *Harvard Law Review* 10 (1897): 457–78.

Voeten, Erik. "International Judicial Behavior." In *The Oxford Handbook of International Adjudication*, edited by Cesare P. R. Romano, Karen J. Alter, and Chrisanthi Avgerou, 550–68. Oxford: Oxford University Press, 2014.

Dunoff, Jeffrey L., and Mark A. Pollack. "The Judicial Trilemma." *American Journal of International Law* 111, no. 2 (April 2017): 225–76.

2. Interventions (24 September)

This session will use the example of the prohibition on the use of force to explore approaches stemming from different disciplinary and theoretical backgrounds. When we think about intervention in international law, what is our starting point? Is it the deals struck by sovereign rulers, or the suffering of people in war, or yet the suffering of people oppressed by dictators? Are we interested in rules we can expect compliance with, or ones that express deeper justice? And what do these questions look like from different points in time and space? Who thinks what about the rules on the use of force? And, more concretely: what does this all mean for thinking about intervention in Syria?

Required readings

*Henderson, Christian. "The UK Government's Legal Opinion on Forcible Measures in Response to the Use of Chemical Weapons by the Syrian Government" *International and Comparative Law Quarterly* 64 (2015): 179–96 – read pp. 179-92.

*Byers, Michael. "Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change." *Journal of Political Philosophy* 11, no. 2 (2003): 171–190.

*Acheson D, 'Remarks' in Robert J Beck, Anthony Clark Arend and Robert D Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (Oxford University Press 1996), pp. 107-8

*Wight, Martin. "An Anatomy of International Thought." *Review of International Studies* 13, no. 3 (1987): 221–27.

*Luban, David. "Just War and Human Rights." *Philosophy & Public Affairs* 9, no. 2 (1980): 160–81.

*Rodogno, Davide, 'European Legal Doctrines on Intervention and the Status of the Ottoman Empire within the "Family of Nations" Throughout the Nineteenth Century' (2016) 18 *Journal of the History of International Law* 5-41

Further readings

Berman, Nathaniel, 'Intervention in a "Divided World": Axes of Legitimacy' (2006) 17 *EJIL* 743
Hakimi M and Cogan JK, 'The Two Codes on the Use of Force' (2016) 27 *European Journal of International Law* 257

Orford, Anne. *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*. Cambridge University Press, 2003.

Walzer M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 2006)

Mearsheimer JJ, 'The False Promise of International Institutions' (1994) 19 *International Security* 5

Franck TM, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States' (1970) 64 *The American Journal of International Law* 809

John Baylis, 'International and Global Security', in Baylis, John, Steve Smith, and Patricia Owens, eds. *The Globalization of World Politics: An Introduction to International Relations*. Seventh Edition. Oxford, New York: Oxford University Press, 2016, pp. 238-252 (other chapters in that volume provide good introductions to international relations in general).

3. Founders, Contexts, Periods (1 October)

In this session, we will explore some of the foundations of IL, or what have long been assumed to be foundations. We will focus especially on the figure of Hugo Grotius, often seen as one of the 'founding fathers' of international law. What precisely did he found, though? And what drove him to write the scholarly work that secured his reputation over centuries? We will focus especially on the principle of the freedom of the seas and the 17th century debate about it. This will lead us into broader questions about the history of international law and the way we organize and understand it.

Required readings

*Tuck, Richard. *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. Oxford University Press, 2001, ch. 3 (pp. 78-108)

*Grewe, Wilhelm G. *The Epochs of International Law*. Walter de Gruyter, 2000, introduction (pp. 1-29).

*Koskeniemi, Martti. "Histories of International Law: Dealing with Eurocentrism." *Rechtsgeschichte*, no. 19 (2011): 152–76.

Further readings

Nijman, Janne E. "Images of Grotius, or the International Rule of Law beyond Historiographical Oscillation." *Journal of the History of International Law* 17, no. 1 (August 11, 2015): 83–137 – *read pp. 83-103*

Ittersum, Martine Julia Van. "Hugo Grotius: The Making of a Founding Father of International Law." *The Oxford Handbook of International Legal Theory* (A. Orford and F. Hoffmann, Eds.), June 2, 2016, 82–100.

Anghie, Antony. "Francisco De Vitoria and the Colonial Origins of International Law." *Social & Legal Studies* 5, no. 3 (September 1, 1996): 321–36.

Koskeniemi, Martti. "Vitoria and Us." *Rechtsgeschichte - Legal History* 22 (2014): 119–38.

Neff, Stephen C. *Justice among Nations: A History of International Law*. Harvard University Press, 2014.

Braudel, Fernand. *Civilization and Capitalism, 15th-18th Century, Vol. III: The Perspective of the World*. University of California Press, 1982.

Keene, Edward. *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*. Cambridge University Press, 2002.

Fassbender, Bardo, Anne Peters, Simone Peter, and Daniel Högger, eds. *The Oxford Handbook of the History of International Law*. Oxford University Press, 2012.

Pitts, Jennifer. "International Relations and the Critical History of International Law." *International Relations* 31, no. 3 (September 1, 2017): 282–98.

Vadi, Valentina. "International Law and Its Histories: Methodological Risks and Opportunities." *Harv. Int'l LJ* 58 (2017): 311.

4. The Making of International (Economic) Law (8 October)

This session will explore contemporary processes of international law-making, using the example of international economic law. Who pulls the strings here, and how? Which actors are central, which peripheral? How do these processes reflect and reinforce power relations? Which sets of ideas prevail? This will allow us to engage with rational choice accounts of international cooperation as well as constructivist and Marxist approaches.

5. Argument and Strategy in the Making of Human Rights Law (15 October)

In this session we will explore law-making in the area of human rights which poses puzzles for rationalist approaches. Why would states bind themselves to protect individuals in their territories through *international* law? Competing accounts emphasize domestic motivations and transnational discourse. How do they travel from one site of human rights protection to another? Are they similar in human rights courts and international criminal tribunals? We will also try to take a step back and think about the political choices behind the rise of international human rights law. What gets foregrounded, what moves to the background here? What is the price of existing institutions – and envisaged ones, such as a World Court for Human Rights? And what alternatives would there be?

6. Legacies of Colonialism (22 October)

In many accounts of international law, colonialism appears as a thing of the past, overcome through the independence of formerly colonized territories. But postcolonial studies have sensitized us to the continuing cultural, economic and political effects of the colonial endeavour. How does this play out in international law? How did international law accommodate colonialism in its time? How did it put colonial peoples 'in their place'? And where do we see traces of colonialism in the structures and processes of contemporary international law? We will focus on some broader structural issues as well as international humanitarian and investment law as examples.

7. Lawmaking for the Common Good (29 October)

The making of international law is a perennial puzzle for international lawyers, especially when it comes to customary international law and 'soft' law. What are the stakes in this debate? How can it be made effective to tackle common problems? And what does it look like from different vantage points? What does the debate obscure? We will pay special attention to postcolonial and feminist critiques and what alternative imaginations these might point us to, and we will also consider the continuing role of the state in the law-making process in

8. International Law from Below (5 November)

As we have seen in session 3, international law is often imagined from the perspective of powerful actors. In this session, we adopt the opposite perspective. We ask what international law looks like from the perspective of weaker actors – weaker domestic actors as well as weaker states. Is it friend or foe – a resource to use or a straightjacket better removed? Under what circumstances are such actors in a position to influence international law-making processes? How is international law biased against them; how is it implicated in keeping them marginalized? What projects have they undertaken to recalibrate it?

9. International Law on the Ground (12 November)

In order for international law to be effective, it depends on actors – especially domestic state officials – respond to its norms. Even if Louis Henkin once famously stated that "almost all states comply with almost all of international law almost all of the time", there are obvious limitations and some commentators believe that international rules have very little independent compliance pull – in part because it has such weak mechanisms of enforcement. Why and when do states comply then? Who are the compliance constituencies of international law? And what does implementation do to the

content of the norms? We will look especially at the human rights field here, and we will also ask what contribution an anthropological perspective on

10. Power Shifts (19 November)

To many, international law is mostly a product of the powerful, and much of international law is certainly shaped by the distribution of power among states. What then happens to international law when power shifts? How does international law work in different geopolitical constellations? And what might the particular, current shift away from Western hegemony entail? We will look at which models of international law compete here, and can we gauge scenarios for how processes of change might unfold. But we will also think about other power shifts, especially the one from public to private, from states to corporations. What effect does/should this shift have on international law?

11. The Backlash against International Law (26 November)

International law is currently facing a major challenge from different political directions. Right-wing populists regard it as biased towards liberal politics and constraining for their nationalist projects. Left-wing activists, on the other hand, find it biased towards a neoliberal economic model they would rather fight. What is in these challenges? How do they manifest themselves? And how is international law responding to the backlash?

12. The Democratic Challenge (3 December)

International law has increasingly come to be seen as problematic from a democratic standpoint. The growing precision of international norms, coupled with judicialization processes, have constrained domestic democratic processes, and this has led to much critique. Yet other observers see international law as 'democracy-enhancing', as improving on the processes and scope of democratic decision-making. Who is right? What does this disagreement hinge upon? We will explore competing visions of democracy in the global order and try to understand how international law, in its different parts relates to them.

13. International Law and Global Justice (10 December)

In this last substantive session, we will analyze the relation of international law and global justice. Is international law an instrument for realizing global justice, or is it hopelessly inadequate to this task? Does international law satisfy, or fall short of, requirements of global justice? How much do these demand – how much do we owe distant strangers in faraway lands? Do obligations of justice end, or become transformed, at the border? We will explore different approaches to these questions and seek to work out what their implications are, and how international law can, and should, respond to them.

14. Review session (17 December)

In the review session, we will revisit the materials of the course on the basis of student questions as a way of preparing for the exam.