

International Law

Academic year 2019-2020

The Law of Nations in the 21st Century

DI117 - Autumn - 6 ECTS

Tuesday 16h15 - 18h00

Course Description

The purpose of this class is to acquaint students with the basic principles of international law and its contemporary practice. It explores the structure of the international legal system and addresses questions about the purposes of international law and the changing priorities that that may or may not be observed when different branches of this law collide. The course will cover the ground in Brierly's "The Law of Nations", relying on the revised 7th edn. It questions some of the assumptions we make about the subjects of international law and suggests that adjustments to our thinking have to be made if we want international law to remain relevant to tackling contemporary issues in the 21st century. The basic principles of international law concerning, among others, the sources of international law, statehood, territory, jurisdiction, the law of the sea, immunities, treaties, peaceful settlement of disputes and the recourse to force will be covered.

> PROFESSOR

[Andrew Clapham](#)

[Office hours](#)

> ASSISTANT

Alfredo Crosato

[Office hours](#)

Syllabus

Evaluation

The final evaluation will consist of a written exam. It will be on 17 December from 16.00 to 18.00.

- Students will have two hours to answer the questions.
- There will be one essay question and one case study where students will be asked to write a legal opinion. Both questions should be answered.
- Bilingual dictionaries are allowed (not legal dictionaries).
- The answers may be written either in English or in French.

Readings and support materials:

Required readings for each session are listed below and are available on the moodle or in the library. Please consult moodle regularly as additional materials may be uploaded there.

The main course materials consist of:

- *Brierly's Law of Nations: An Introduction to the Role of International law in International Relations*, 7th edn. (Oxford: Oxford University Press, 2012) (available in hard copy and as an e-book through the library; some copies are available through Alfredo Crosato at 20 CHF). Translations into Chinese are also available.
- J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012).
- M. D. Evans (ed.), *International Law*, 5th edn. (Oxford: Oxford University Press, 2018).
- J. Klabbbers, *International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2017).
- S. R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015).
- Handouts that will be distributed to students before each class.

Key books which can be used to supplement the required readings include:

- A. Aust, *Handbook of International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2010).
- B. Çali, *International Law for International Relations* (Oxford: Oxford University Press, 2010).
- J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn. (Oxford: Oxford University Press, 2012).
- E. Decaux, *Droit international public* (Paris: Dalloz, 2018).
- S. D. Murphy, *Principles of International Law*, (St Paul MN: Thomson West, 2018).
- A. Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 8th edn. (London: Routledge, 2019).
- M. N. Shaw, *International Law*, 8th edn. (Cambridge: Cambridge University Press, 2018).

You may also find it helpful to consult the online Max Planck Encyclopedia of Public International Law available through the Graduate Institute's subscription at www.mpepil.com.

The following pieces may also be of interest:

- The special Symposium on 'Method in International Law' in 93(2) *American Journal of International Law* (1999), particularly the article by S. R. Ratner and A.-M. Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', 291-302.
- A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press: 2016).

Outline of lectures

Part 1: General Introduction to the Course (Tuesday, 17 September)

Required readings:

- Brierly (7th edn.), Preface and new preface to the 7th edition and Chapter 1.
- S. Neff, 'A Short History of International Law', in M. D. Evans (ed.), *International Law*, (Oxford: Oxford University Press, 2018) 3-27.

Case: [Shooting down of US drone by Iran](#). We will discuss some legal issues regarding this situation and the subsequent events by way of a 'warm up'.

Additional readings:

- D. Bethlehem, 'The Secret Life of International Law', 1(1) *Cambridge Journal of International and Comparative Law* (2012) 23–36.
- M. W. Janis, 'International Law?', 32 *Harvard Journal of International Law* (1991) 363-372.
- M. Koskenniemi, 'What is International Law For?', in M. D. Evans (ed.), *International Law*, 5th edn. (Oxford: Oxford University Press, 2018), Chapter 2.

Part 2: The Basis of Obligation (Tuesday, 24 September)

Required readings:

- Brierly (7th edn.), Chapter 2, sections 1-4.
- ILC's [work on customary international law](#).
- G. Gaja 'General Principles in the Jurisprudence of the ICJ', in M. Andenas *et al.* (eds.), *General Principles and the Coherence of International Law* (Leiden: Brill, 2019).

Additional readings:

- H. Charlesworth, 'Law-making and Sources', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 187-202.
- J. Klabbbers, *International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2017), Chapter 2.
- H. Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2019).
- ILC's work on [general principles of law](#).

Part 3: The Basis of Obligation (continued) including international law in national courts (Tuesday, 1 October)

Required readings:

- Brierly (7th edn.), Chapter 2, sections 5-8.
- K. W. Abbott and D. Snidal, 'Hard Law and Soft Law in International Governance', 54 *International Organization* (2000) 421-456.
- J. Klabbbers, *International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2017), Chapter 16.

Case law:

- *Jones et al v DPP*, House of Lords, [2006] UKHL 16.

Additional Readings:

- Roberts, '[Comparative International Law? The Role of National Courts in Creating and Enforcing International Law](#)', 60 *International & Comparative Law Quarterly* (2011) 57-92.

Part 4: The Legal Organization of International Society (Tuesday, 8 October)

Required readings:

- Brierly (7th edn.), Chapter 3.
- C. Binder, '[Uniting for Peace Resolution \(1950\)](#)', in *Max Planck Encyclopedia of Public*

International Law (2017).

- J. Klabbers, 'International institutions', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 228-244.
- C. Kreß, '[On the Activation of the ICC Jurisdiction over the Crime of Aggression](#)', 16 *Journal of International Criminal Justice* (2018) 1-17.

Legal instruments and case law:

- *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ, 11 April 1949.
- The Rome Statute for the International Criminal Court as amended (in particular articles 5-8, 12-18, 27, 53, 38, 61, 66 and 98).
- [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC Pre-Trial Chamber II, 12 April 2019.](#)
- Security Council Resolutions 1970 (2011) and 1973 (2011).

Additional Readings:

- B. de Witte, 'The European Union as an International Legal Experiment', in G. de Burca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012) 19-56.

Part 5: States and other Entities under International Law (15 October)

Required readings:

- Brierly (7th edn.), Chapter 4.
- [EJIL: Talk!](#) and [Opinio Juris](#) blogs on ICJ Advisory Opinion on Kosovo.
- [Who has recognized Kosovo as an independent state?](#)
- 'The UN and the Status of Palestine - Disentangling the Legal Issues', 13 September 2011, *ASIL Insight*, vol. 15, issue 26.
- 'Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State', 7 December 2012, *ASIL Insight*, vol. 16, issue 37.
- [ICC Press Release on the Situation in Palestine, 16 January 2015.](#)
- [ICC Prosecutor's Annual Report on Preliminary Examination Activities – Situation in Palestine \(2018\).](#)

Rebel Groups:

- A. Clapham, 'Focusing on Armed Non-State Actors', in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, (Oxford: Oxford University Press, 2014) 766-810.

Corporations:

- [D. De Vos 'The emerging norm of corporate criminal accountability for international crimes'](#) (2017).
- For civil cases see *Jesner v. Arab Bank* (below under jurisdiction)

Additional readings:

- A. Clapham ['Human Rights Obligations for Non-State Actors: Where Are We Now?'](#), in F. Lafontaine and L. Arbour, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Cambridge: Intersentia, 2019).
- J. Crawford, 'Sovereignty as a legal value', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 117-133.

For the issue of the legal personality of international organizations see the previous discussion of the *Reparations* Advisory Opinion and P. d'Argent, '[Reparation for Injuries Suffered in the Service of the United Nations \(Advisory Opinion\)](#)', *Max Planck Encyclopedia of Public International Law* (2006).

Part 6: The Territory of States and the Jurisdiction of States (Tuesday, 22 October)

Required readings:

- Brierly (7th edn.), Chapter 5 and Chapter 6, sections 1-7.
- J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn. (Oxford: Oxford University Press, 2012), Chapter 8.
- B. Simma and A. Müller, 'Exercise and limits of jurisdiction', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 134-157.

Additional readings:

- M. Benitah, 'Russia's Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS', 8 November 2007, *ASIL Insight*, vol. 11, issue 27, and 2016 *Guardian Article*.
- M. Bothe, 'The Current Status of Crimea: Russian Territory, Occupied Territory or What?', 53 *Military Law and Law of War Review* 99 (2014) 99-116.
- Blog Posts on the [South China Sea Arbitration](#) and its [Aftermath](#), and for the Chinese Critical Study see [here](#).
- [2019 Guardian Article](#) on seabed resources.
- The Strait of Hormuz: see [2019 Guardian Article](#) and [2012 EJIL: Talk! blog](#).

Part 7: Limitations to Jurisdiction of States, including the Question of Human Rights and Extraterritorial Jurisdiction (Tuesday, 29 October)

Required readings:

- Brierly (7th edn.), Chapter 6, section 8.
- J. Klabbers, *International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2017), Chapter 6.

Additional readings:

- [Jaloud v. The Netherlands](#), Judgment, Grand Chamber, ECtHR, 2014.
- [EJIL: Talk! - Jaloud v. the Netherlands](#).
- [Jesner v. Arab Bank](#), Judgment, US Supreme Court, 24 April 2018. □
- [Universal Jurisdiction Law and Practice in Switzerland](#), Open Society Justice Initiative and TRIAL International Briefing Paper, June 2019.

Part 8: Limitations to Jurisdiction (continued) and Questions of Diplomatic Protection and Immunity (Tuesday, 5 November)

Required readings:

- Brierly (7th edn.), Chapter 6, sections 9-11
- J. Klabbers, *International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2017), Chapter 5, particularly pp. 99-105
- S. R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations*

(Oxford: Oxford University Press, 2015), Chapter 6 (sections on immunity, 14-17, 20-26, 34-35), and Chapter 8 (Human Rights for Whom? 16-30).

Legal instruments and case law:

- [Arrest Warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\)](#), Judgment, ICJ, 14 February 2002.
- [Jurisdictional Immunities of the State \(Germany v. Italy\)](#), Judgment, ICJ, 3 February 2012.
- [Jones and Others v. The United Kingdom](#), Judgment, ECtHR, 14 January 2014.
- [Prosecutor v. Omar Hassan Ahmad Al Bashir](#), Judgment, ICC Appeals Chamber, 6 May 2019.
- Case of [Jamal Khashoggi](#).
- United Nations Convention on Jurisdictional Immunities of States and Their Property (2005).
- ILC's work on [immunity of State officials from foreign criminal jurisdiction](#).

Additional Reading:

- P. Behrens, ['None of their business'?: Diplomatic involvement in human rights](#), 15 *Melbourne Journal of International Law* (2014) 190-227.

Optional viewing:

- [BBC Programme on kidnapping of Umaru Dikko](#).

Part 9: Treaties (Tuesday, 12 November)

N.B. Please bring with you the 1969 Vienna Convention on the Law of Treaties (on paper or downloaded) to class.

Required readings:

- Brierly (7th edn.), Chapter 7.

Legal instruments and case law:

- The 1969 Vienna Convention on the Law of Treaties.
- The ILC's Guide to Practice on Reservations to Treaties (2011).
- Is this 1994 Joint [Declaration](#) by the UK and China a treaty?
- [Russia – Measures concerning traffic in transit](#), WTO Panel Report, 5 April 2019.

Additional readings:

- A. Aust, *Modern Treaty Law and Practice*, 3rd edn. (Cambridge: Cambridge University Press, 2014).
- A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (Oxford: Oxford University Press, 2015).
- R. K. Gardiner, *Treaty Interpretation*, 2nd edn. (Oxford: Oxford University Press, 2017).
- J. Klabbers, *International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2017), Chapter 3.
- ILC's [Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties](#) (2018).

Part 10: International Courts and Non-Judicial Dispute Settlement (Tuesday, 19 November)

Required readings:

- Brierly (7th edn.), Chapter 8.

Additional readings:

- J. G. Merrills, *International Dispute Settlement*, 6th edn. (Cambridge: Cambridge University Press, 2017).
- [Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018.](#)

Part 11: International Responsibility (Tuesday, 26 November)

Required readings:

- J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn. (Oxford: Oxford University Press, 2012), Chapters 25 and 26.

Case law:

- *Question Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ, 20 July 2012.
- *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Joint Application, 4 July 2018.

Legal instruments:

- ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries.

Additional readings:

- J. Klabbbers, *International Law*, 2nd edn. (Cambridge: Cambridge University Press, 2017), Chapter 7.
- Chatham House, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism', 14 November 2016.

Part 12: International Law and the Resort to Force (Tuesday, 3 December)

Required readings:

- Brierly (7th edn.), Chapter 9.
- D. Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors', 106(3) *American Journal of International Law* (2012) 1-8.
- E. Wilmschurst and M. Wood, 'Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"', 107(2) *American Journal of International Law* (2013) 390-395.

Case law:

- *Case concerning armed activities on the territory of the Congo (DRC v. Uganda)*, Judgement, ICJ, 19 December 2005.

Additional readings:

- Security Council Resolution 1973 (2011).
- UK Attorney-General's 2003 opinion regarding the legality of the use of force against Iraq.
- [Report on the Iraq Inquiry – Section 5.](#)
- ILC Final Report on Aggression and the Use of Force (2018).
- [Lawfare blog on cyber-warfare.](#)

Part 13: Resort to Force and Self-Defence: Humanitarian Intervention, R2P, the laws of war, and Self-Defence (Tuesday 10 December)

Required readings:

- UK 2018 position on humanitarian intervention in the context of [the use of force to counter chemical weapons](#).
- C. Gray, 'The Use of Force and the International Legal Order' in M. D. Evans (ed.), *International Law*, 5th edn. (Oxford: Oxford University Press, 2018), Chapter 20.

Additional readings:

- T. Christodoulidou and K. Chainoglou, '[The Principle of Proportionality from a Jus Ad Bellum Perspective](#)', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press 2015) 1187-209.
- A. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defence', 52 *Virginia Journal of International Law* (2012) 483-550, with an updated set of references available at <https://www.lawfareblog.com/who-board-unwilling-or-unable#>.
- A. Roberts, '[Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?](#)', in Ph. Alston and E. Macdonald (eds.), *Human Rights, Intervention and the Use of Force*, (Oxford: Oxford University Press, 2008) 179-213.
- M. N. Schmitt '[The Syrian Intervention: Assessing the Possible International Law Justifications](#)' 89 *Int'l L. Stud. Ser. US Naval War Col.* (2013) 744-756.
- C. Stahn 'Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and What the Law Ought to Be', 19 *J. Conflict & Sec. L.* 25 (2014) 25-48.
- M. Wood, '[International Law and the Use of Force: What Happens in Practice?](#)', 53 *Indian Journal of International Law* (2013) 345-67.
- [The ICRC Customary Rules of IHL](#).

Final Exam (Tuesday 17 December) 16.00-18.00