

International Law

Academic year 2019-2020

Fundamental Principles of International Law

DI120 - Spring - 6 ECTS

Tuesday 16h15 - 18h00 (S3)

Course Description

Starting with the notion of fundamental principles and their place in the international legal system, this seminar will cover the content, scope and practice of the fundamental principles: prohibition of the use of force, self-determination, [non-]intervention, territorial integrity, good faith, peaceful settlement of disputes, and their interaction. Uses and abuses of those principles (ie self-defence, secession) and current controversial concrete cases will be discussed.

> PROFESSOR

[Marcelo Kohen](#)

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> ASSISTANT

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Participation, Readings and Evaluation:

Students are expected to participate actively in the discussion. To participate actively, they are expected to do the readings assigned below. Primary sources are privileged and considered essential. Doctrinal readings are suggested for each session, but students are free to choose some of them or others. Free research is highly encouraged. Students are expected to make their own appraisal of the different questions at issue.

Two methods of evaluation are proposed: the presentation of a research paper or an exam at the end of the course. In both cases, participation in class will count for the final grade. The paper will have a maximum extension of 7'000 words, footnotes included. The exam will consist of a choice of one out of three different topics (counting for 80% of the grade) and a common short question (counting for 20% of the grade). Students can use the two working languages of the Institute, both for the discussions and for the paper or the exam. The evaluation will take into account not only the knowledge of primary sources but also, and most importantly, the capacity of legal reflection.

Syllabus

SESSION N° 1

TUESDAY 18 FEBRUARY

Introduction: Presentation of the course

A. The place of fundamental principles in the system of International law

1. International law as a legal system
2. Fundamental principles and fundamental values
3. Characteristics of fundamental principles
4. Content and distinction from related concepts
 - a) General principles and fundamental principles
 - b) Fundamental principles and *jus cogens*
 - c) Fundamental principles and “fundamental rights of States”
5. Evolution of the existence and content of fundamental principles
6. Fundamental principles of all times and fundamental principles of contemporary international law

Readings

- ABI-SAAB, Georges, “Cours général de droit international public”, *Collected Courses of the Hague Academy of International Law*, 1987, vol. 207, pp. 328-331.
- CASSESE, Antonio, “The fundamental principles governing international relations”, in A. Cassese, *International Law*, Oxford, Oxford University Press, 2005, pp. 46-68.
- DUPUY, Pierre-Marie, “L'unité de l'ordre juridique international : cours général de droit international public (2000)”, *Collected Courses of the Hague Academy of International Law*, 2002, vol. 297, pp. 236-244.
- KOHEN, Marcelo G., “The Court’s Contribution to Determining the Content of Fundamental Principles of International Law”, in G. Gaja and J.G. Stoutenburg (eds.), *Enhancing the Rule of Law Through the International Court of Justice*, Leiden, Boston, Nijhoff, 2014, pp. 139-150.
- VON VERDROSS, Alfred, “Les principes généraux du droit dans la jurisprudence internationale”, *Collected Courses of the Hague Academy of International Law*, 1935, vol. 52, pp. 198-206.

SESSION N° 2

TUESDAY 25 FEBRUARY

B. Where to find (or not) the fundamental principles and follow their (possible) evolution

1. Customary Law
2. The Covenant of the League of Nations
3. The Montevideo Convention on the Rights and Duties of States
4. The Charter of the United Nations
5. The ILC Articles on the Rights and Duties of States
6. The Friendly Relations Declaration (Resolution 2625 (XXV) of the UN General Assembly)
7. The Helsinki Final Act of the Conference for the Security and Cooperation in Europe of 1975
8. The Charter for a New Europe of the CSCE of 1990
9. Regional Instruments: the Pact of the League of Arab States, the Charter of the Organization of American States, the Charter of the Organization of African Unity and the Constitutive Act of the African Union

Documents

- *Covenant of the League of Nations* (1919), Preamble & Articles 1, 8, 10-13, 15-16, 20-24.
- *Seventh Conference of American States, Convention on Rights and Duties of States adopted by the Seventh Conference of American States* (1933), Articles 3-5, 8-11.
- *Charter of the United Nations* (1945), Preamble & Articles 1, 2, 33-38, 39, 51, 55, 73-78, 103.

- ILC, *Draft Declaration on Rights and Duties of States* (1949).
- UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Resolution 2625 (XXV) (1970).
- Conference on Security and Co-operation in Europe (CSCE), *Final Act of Helsinki* (1975), 'Declaration on Principles Guiding Relations between Participating States'.
- Conference on Security and Co-operation in Europe (CSCE), *Charter of Paris for a New Europe* (1990).
- *Pact of the League of Arab States* (1945), Articles 2, 5-8.
- *Charter of the Organization of American States* (1948), Preamble, Articles 1-3, 10-29.
- *Charter of the Organization of African Unity* (1963), Preamble, Articles 2-3, 5-6.
- *Constitutive Act of the African Union* (2000), Preamble, Articles 3-4.

Case Law

- *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, paras. 187-193 and 264.

SESSION N° 3

TUESDAY 3 MARCH

C. Some alleged “principles” that are not so

1. The “principle of sovereignty”
2. The right of States to conservation
3. The “fundamental right of States to survival”
4. The principle of effectiveness in international law

Readings

- KOHEN, Marcelo G., “The Notion of State Survival in International Law”, in L. Boisson de Chazournes and Ph. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, pp. 293-314.
- JELLINEK, Georg, *L'Etat moderne et son droit. Première Partie : Théorie générale de l'Etat*, trad. française par Georges Fardis et al., Paris, LGDJ, 2005, pp. 509-545.
- Kelsen, Hans, “Théorie générale du droit international public. Problèmes choisis”, *Collected Courses of the Hague Academy of International Law*, 1932, vol. 42, pp. 207-209.

Further Readings

- TUCKER, Robert W., “The Principle of Effectiveness in International Law”, in *Law and Politics in the World Community. Essays on Hans Kelsen's Pure Theory and Related Problems in International Law*, Berkeley and Los Angeles, University of California Press, 1953, pp. 31-48.

SESSIONS N° 4, 5 AND 6

TUESDAY 10, 17 AND 24 MARCH

D. The prohibition of the use of force between theory and practice

1. Prohibition of the use of force: evolution and content
2. The exception of self-defence
 - a) Conditions for its exercise
 - b) Anticipatory, preventive and pre-emptive self-defence

3. From humanitarian intervention to the responsibility to protect
4. Use of force and international terrorism: theoretical problems and practice
5. Use of force and nuclear weapons: between threat and deterrence
6. Use of force and UN Security Council authorization
7. "Implicit" or "ex-post facto" Security Council authorization
8. Use of force to pursue "the objectives of the international community"

Documents

- UN General Assembly Resolution 377 (V) (1950)
- UN General Assembly Resolution 3314 (1974)
- UN Security Council Resolution 1160 (1998)
- UN Security Council Resolution 1199 (1998)
- UN Security Council Resolution 1203 (1998)
- UN Security Council Resolution 1244 (1999)
- UN Security Council Resolution 1368 (2001)
- UN Security Council Resolution 1373 (2001)
- UN Security Council Resolution 1377 (2001)
- UN Security Council Resolution 1441 (2002)
- UN Security Council Resolution 1452 (2002)
- UN Security Council Resolution 1455 (2003)
- UN Security Council Resolution 1483 (2003)
- UN Security Council Resolution 1500 (2003)
- UN Security Council Resolution 1511 (2003)
- UN Security Council Resolution 1701 (2006)
- UN Security Council Resolution 1860 (2009)
- UN Security Council Resolution 1866 (2009)
- UN Security Council Resolution 1973 (2011)
- UN Security Council Resolution 2249 (2015)
- UN General Assembly, *A more secure world: Our shared responsibility, Report of the High-Level Panel on Threats, Challenges and Change, A/59/565* (2004).
- UN General Assembly, *Implementing the Responsibility to Protect. Report of the Secretary-General, A/63/677* (2009).

Case Law

- *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, paras. 187-211 and 226-238.
- *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports 2003, paras. 43-79.
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, paras. 86-87 and 138-139.
- *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, paras. 141-49.

Readings

- CORTEN, Olivier, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*, Oxford, Portland, Hart, 2010, pp. 50-125 ("Use of Force" and "Threat of Force"); pp. 126-197 (Non-State Actors); pp. 348-400 (Intervention Authorised by the UN Security Council: The Problem of Presumed Authorisation); pp. 401-494 (Self-Defence) (Also available in French).

- KOHEN, Marcelo G., "The Use of Force by the United States after the End of the Cold War and Its Impact on International Law", in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law*, Cambridge, Cambridge University Press, 2003, pp. 197-231.
- KOHEN, Marcelo G., "Recours à la force et valeurs universelles", in Società Italiana di Diritto Internazionale, *Ordine internazionale e valori etici*, Naples, Ed. Scientifica, 2004, pp. 27-41, and also B. Delcourt, D. Duez and E. Remacle (eds.), *La guerre d'Irak. Prélude d'un nouvel ordre international?*, Bruxelles, P.I.E.-Peter Lang, 2004, pp. 63-76.
- WEDGWOOD, Ruth, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence", *American Journal of International Law*, 2003, vol. 97, pp. 576-585.

Further Readings

- ANTONOPOULOS, Constantine, "Force by Armed Groups as Armed Attack and the Broadening of Self-Defence", *Netherlands International Law Review*, August 2008, vol. 55, issue 2, pp. 159-180.
- CORTEN, Olivier, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*, Oxford, Portland, Hart, 2010, pp. 495-549 (Humanitarian Intervention) (also available in French).
- TAMS, Christian J., "The Use of Force against Terrorists", *European Journal of International Law*, 2009, vol. 20, pp. 359-397.
- PELLET, Alain, "La guerre du Kosovo – Le fait rattrapé par le droit", *Forum du droit international*, 1999, n° 1, pp. 160-165.
- FRANCK, Thomas M., "Terrorism and the Right of Self-Defense", *American Journal of International Law*, 2001, vol. 95, pp. 839-843.
- KOHEN, Marcelo G., "L'emploi de la force et la crise du Kosovo: vers un nouveau désordre juridique international", *Revue belge de droit international*, 1999, vol. 32, n°1, pp. 122-148.
- REISMAN, W. Michael, "The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment", *Collected Courses of the Hague Academy of International Law*, 2012, vol. 351, pp. 303-322.
- VAN STEENBERGHE, Raphaël, "Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward ?", *Leiden Journal of International Law*, 2010, vol. 23, n°1, pp. 183-208.

SESSIONS N° 7, 8 AND 9

TUESDAY 31 MARCH, 7 AND 21 APRIL

E. The right of peoples to self-determination

1. From the principle of nationalities to the principle of self-determination
2. Peoples, minorities, indigenous peoples
3. Holders of the right
4. Content of the right: internal and external self-determination
5. Self-determination and decolonization
6. Self-determination and boundaries
7. Self-determination and secession

Documents

- UN General Assembly Resolution 1514 (XV) (1960)
- UN General Assembly Resolution 1541 (XV) (1960)
- UN General Assembly Resolution 2625 (XXV) (1970)

- UN General Assembly Resolution 61/295 (2007)

Case Law and Other Decisions

- *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, (in particular pp. 27-32, paras. 42-52).
- *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12, (pp. 29-37, paras. 48-74).
- *Frontier Dispute (Burkina Faso/Mali)*, Judgment, ICJ Reports 1986, p. 554 (in particular pp. 564-567, paras. 19-26).
- *East Timor*, Judgment, ICJ Reports 1995, p. 90 (in particular pp. 95-104, paras. 11-33).
- *Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Reports 2004, p. 136 (In particular pp. 171-172, para. 88; pp. 181-184, paras. 115-122; p. 197, para. 149; p. 199, paras. 154-160).
- *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403 :
 - (in particular paras. 79-84 of the Advisory Opinion)
 - See also the Separate Opinion of Juge Koroma.
- *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019.
- Conference on Yugoslavia Arbitration Commission, Opinion N°2, 11 January 1992, 92 ILR 167, and Opinion N° 3, 11 January 1992, 92 ILR 170 (also available in French).
- Supreme Court of Canada, *Reference Re Secession of Quebec*, 20 August 1998, par. 2, 20-23 and 106-156, available at: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/fr/item/1643/index.do> (in English and French).

Readings

- CHRISTAKIS, Théodore, "The State as a "Primary Fact": some Thoughts on the Principle of Effectiveness", in M. G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge, Cambridge University Press, 2006, 138-170.
- D'ARGENT, Pierre, "Kosovo: Vouloir être ne viole pas le droit international", *Journal des tribunaux*, 2011-1, n° 6419, pp. 2-6.
- KOHEN, Marcelo, "Introduction", in M. Kohen (ed.), *Secession. International Law Perspectives*, Cambridge, Cambridge University Press, 2006, pp. 1-20.
- KOHEN, Marcelo G., "Sur quelques vicissitudes du droit des peuples à disposer d'eux-mêmes", in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, Bruxelles, Bruylant, 2007, pp. 961-981.
- KOHEN, Marcelo and DEL MAR, Katherine, "The Kosovo Advisory Opinion and UNSCR 1244: A Declaration of 'Independence from International Law'? ", *Leiden Journal of International Law*, 2011, vol. 24, n° 1, pp. 109-126.

Further Readings

- MILANO, Enrico, "The Security Council and Territorial Sovereignty: the Case of Kosovo", *International Community Law Review*, 2010, vol. 12, n° 2, pp. 171-189.
- See also the debate in the *Leiden Journal of International Law*, 2011, vol. 25, n°1.
- Written statements in the advisory proceedings relative to the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, [available on the Court's website: www.icj-cij.org] :
 - Written Statement of Switzerland: pp. 15. par. 57 at p. 18 par. 68 and p. 27.

- Written Statement of Serbia, pp. 214-240 and 348-359.
- Written Statement of the United Kingdom of Great Britain and Northern Ireland, pp. 214-240.

SESSION N° 10**TUESDAY 28 APRIL****F. The principle of respect of territorial integrity**

1. Content
2. Scope
3. The interrelation between respect of territorial integrity and the right to self-determination

G. The principle of equal sovereignty of States

1. Equality among unequals
2. Special and preferential treatment

Documents

- UN General Assembly Resolution 68/262 (2014)

Readings

- CORTEN, Olivier, "Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law", *Leiden Journal of International Law*, March 2011, vol. 24, issue 1, pp. 87-94.
- KOHEN, Marcelo G., *Possession contestée et souveraineté territoriale*, Paris, PUF, 1997, pp. 369-379; 418-423.
- KOHEN, Marcelo G., "Article 2, paragraphe 1" in J-P Cot, A. Pellet et M. Forteau (eds.), *La Charte des Nations Unies : Commentaire article par article*, Paris, Economica, pp. 399-416.

SESSION N° 11**TUESDAY 5 MAY****H. The revolution of the protection of human rights**

1. The emergence of the individual as a subject of international concern
2. The evolution of the protection of human rights at the international level

I. The principle of non-intervention

1. Its scope
2. From an alleged right of humanitarian intervention to the "responsibility to protect"

J. Good faith and its limits

1. A fundamental principle and/or a general principle of law?
2. Its importance in international law

Documents

- See sessions 4, 5 and 6:
- UN General Assembly, *A more secure world: Our shared responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, A/59/565 (2004).
- UN General Assembly, *Implementing the Responsibility to Protect. Report of the Secretary-General*, A/63/677 (2009).

Readings

- CANÇADO TRINDADE, A.A., "International Law for Humankind: towards a new jus gentium (II): General Course on public international law", *Collected Courses of the Hague Academy of International Law*, 2005, vol. 317, pp. 269-282.
- DUPUY, P.-M., "L'unité de l'ordre juridique international. Cours général de droit international public", *Collected Courses of the Hague Academy of International Law*, 2002, vol. 297, pp. 413-418.
- VIRALLY, M., "Panorama du Droit international contemporain: Cours général de droit international public", *Collected Courses of the Hague Academy of International Law*, 1983, vol. 183, pp. 123-137.
- KOHEN, Marcelo G., "The principle of non-intervention twenty-five years after the Nicaragua Judgment", *Leiden Journal of International Law*, 2012, vol. 25, pp.157-164.
- EVANS, Gareth, "The Raison d'être, scope and limits of the Responsibility to Protect", in Anne-Laure Chaumette (ed.), *La responsabilité de protéger, dix ans après = The responsibility to protect, ten years on: actes du colloque organisé le 14 novembre 2011 par le CEDIN*, Paris, Pedone, 2013, pp. 19-25.
- PETERS, Anne, "Humanity as the Alpha and Omega of Sovereignty: a Rejoinder to Emily Kidd White, Catherine E. Sweetser, Emma Dunlop and Amrita Kapur", *European Journal of International Law*, 2009, vol. 20, pp. 569-573.
- KOLB, Robert, "Principles as sources of international law (with special reference to good faith)", *Netherlands International Law Review*, 2006, vol. 54, no. 1, pp. 1-36.

SESSION N° 12

TUESDAY 12 MAY

K. The obligation to settle international disputes peacefully

1. Obligations of means and not of result
2. Means of settlement and freedom of choice
3. When is this obligation not respected?
4. Consequences

Documents

- UN General Assembly Resolution 3710 (1982)

Readings

- CASSESE, Antonio, "Promoting Compliance with Law and Preventing or Settling Disputes", in A. Cassese, *International Law*, Oxford, OUP, 2005, pp. 278-295.
- KOHEN, Marcelo G., "Interaction between Diplomatic and Judicial Means at the Initiation of proceedings", in Boisson de Chazournes, L., Kohen, M. & Viñuales, J. (eds.), *Diplomatic and Judicial Means of Dispute Settlement*, Leiden, M. Nijhoff, 2013, pp. 13-24.

SESSION N° 13

TUESDAY 19 MAY

Conclusions

SESSION N° 14

TUESDAY 26 MAY

Exam