

## International Law

Academic year 2020-2021

### History and Theory of International Law -

*The Canon and its Critics*

DI019 - Printemps - 6 ECTS

### Course Description

This course operates at the nexus of public international law, politics of international law, history of legal and political thought, and intellectual history. It aims at deepening our understanding of international law by exploring the intellectual foundations of contemporary international law. Without knowledge of the origins of international law and the various theoretical approaches in its regard, today's prevailing concepts and principles are hard to understand and alternatives for the future are difficult to grasp.

Each week, we read texts by historic as well as contemporary scholars – from Erasmus, Vitoria, Grotius, Hobbes, Leibniz, Kant, and Hegel, to the early twentieth century scholars, such as Hans Kelsen, Hersch Lauterpacht and Nicolas Politis, to today's 'post-modernist' or critical legal scholars, such as Anthony Anghie, Duncan Kennedy, Martti Koskenniemi and Anne Orford, and their critics. We will discuss core concepts such as accountability; just war; balance of power; sovereignty; individual rights and duties; but also examine how the history of colonialism helps us understand what is currently happening in the sphere of 'Big Data' or to engage with TWAIL critique of international law (B.S. Chimni) more in-depth. We will then end this course with a discussion of the responsibility of the international lawyer today.

This course combines both a lecturing and a seminar style of teaching.

The course runs in the Spring Semester of 2021. Four hours of teaching a week (due to Covid-19 crisis).

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### > PROFESSOR

[Janne Nijman](#)

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TBA

## Syllabus

*Please note that due to the Covid-19 crisis classes start late March for the sake of hybrid teaching; as such, it is most likely I am allowed to travel.*

### Compulsary literature

- Richard Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* (Oxford University Press, 1999);
- The readings as indicated in this Syllabus' course outline (see moodle).

### Course requirements

Assessment for this course will be based on two reaction papers (20%) and a final paper (80%). The first reaction paper should be written in response to one of the first six sessions, the other to one of the other seven sessions. The reaction papers have a maximum of 1750 words. They shall engage critically with one or more of the readings of the chosen sessions and shall be sent by email before midnight of the Sunday preceding the week of the sessions to both the professor and the teaching assistant. The final paper of a maximum of 5000 words, shall be sent by May 28th, 2021, before midnight.

Further instructions regarding the final paper will be provided during the semester.

Class participation is expected and valued as an important way of learning about our discipline, i.e. public international law. Class discussions are meant to savour texts together and to enjoy intellectual exchange – as such, they are an important factor in making this course a success. So please feel encouraged by the fact that class participation is not part of the grading.

### Course outline

#### 1. General Introduction of the Course: the 'Turn to History' in International Law

29 March 2021, 12.15h – 14h, room ??

- Jacques Lévy et Emmanuelle Tricoire, Quentin Skinner: "Concepts only have histories", *EspacesTemps.net*, Laboratory, 2007 | Mis en ligne le 23 November 2007. URL : <https://www.espacestemps.net/en/articles/quentin-skinner/>
- Martti Koskenniemi, Histories of International Law: Significance and Problems for a Critical View, *Temple International and Comparative Law Journal*, 27 (2) 2013, pp. 215-240.
- Janne Nijman, *An Enlarged sense of possibility. Seeking change by doing history* (OUP, forthcoming) – ACIL WP 2020-05.
- Lauren Benton, Beyond Anachronism: Histories of International Law and Global Legal Politics, *Journal of the History of International Law*, 21 (2019) 7-40.
- Liliana Obregón, Peripheral Histories of International Law, *Annual Review of Law and Social Science* (2019) 437-451

## 2. Spanish scholastic Francisco de Vitoria (c. 1486-1546): *ius gentium* in the context of Spanish imperialism

31 March 2021, 8.15h – 10h, room ??

- Richard Tuck, *The Rights of War and Peace*, pp. 1-15, 51-77.
- Thomas Aquinas, *Secunda Secundae* Question 40.1 'Whether it is always a sin to wage war?', excerpt from *Summa totius Theologiae* (c.1273/4), e.g. included in *Aquinas Political Writings* Cambridge Texts in the History of Political Thought (CUP), available online. 3 pp.
- Francisco de Vitoria, the two famous lectures from his *Relectiones Theologicae* XII (c. 1537-9) collected in a volume of 'The Classics of International Law' series published by the Carnegie Institute of Washington, edited by James Brown Scott.
  - On the De Indians Lately Discovered (c. 1538), pp. 115-162.
  - On the Law of War Made by the Spaniards on the Barbarians, pp 163-174.
- Antony Anghie, Francisco De Vitoria and the Colonial Origins of International Law, 5 *Soc. & Legal Stud.* (1996) 321-336.
- Nick Couldry and Ulises A. Mejias, Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject, *Television & New Media* (2018) 1–14.

## 3. Northern Humanist Hugo Grotius (1583-1645): human nature and *ius gentium* (1)

12 April 2021, 12.15h – 14h, room ??

- Hugo Grotius, *De Jure Belli ac Pacis* (The Law of War and Peace) (1625), excerpts from the translation published together in a volume of 'The Classics of International Law' series published by the Carnegie Institute of Washington, edited J. Brown Scott.
  - Prolegomena; pp. 9-30.
  - Book I, chs. 1 and 2.4; pp. 31-57
  - Book II, ch. 20, sections 40-44.4; pp. 504-510.
- Richard Tuck, *The Rights of War and Peace*, pp. 78-108.
- Janne Nijman, Grotius' *Imago Dei* Anthropology: Grounding *Ius Naturae et Gentium*, *International Law and Religion*, edited by Martti Koskenniemi, Monica García-Salmones, and Paolo Amoroso (OUP, 2017), pp. 87-110.
- Camilla Boisen, Grotius and Empire. On Andrew Fitzmaurice 'Sovereignty, Property and Empire 1500 – 2000' *GROTIANA* 2015, 28-39.

## 4. A Grotian Tradition?

14 April 2021, 8.15h – 10h, room ??

- Hersch Lauterpacht (1946), 'The Grotian Tradition in International Law', in (ed) *British YearBook of International Law*, (OUP) pp. 1–53
- Hersch Lauterpacht, On Realism, especially in International Relations (1953), in *E. Lauterpacht, International Law: being the Collected Papers of Hersch Lauterpacht* Vol. 2., pp. 52-66.
- Renée Jeffery, Hersch Lauterpacht, the Realist Challenge and the 'Grotian Tradition' in 20th-Century International Relations, 12(2) *European Journal of International Relations* (2006),

pp. 223–250.

- Martti Koskenniemi, '[Imagining the Rule of Law: Rereading the Grotian 'Tradition'](#)', *European Journal of International Law*, Volume 30, Issue 1, February 2019, pp 17–52
- Janne E. Nijman, 'Grotius' 'Rule of Law' and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword', *European Journal of International Law*, Volume 30, Issue 4, December 2019

## 5. Th. Hobbes (1588-1679) and GW Leibniz (1646-1716): human nature and *ius gentium* (2)

19 April 2021, 12.15h – 14h, room ??

- Thomas Hobbes, *Leviathan* (1651), Part I, Ch 13-15 and Ch 30 (last paragraph).
- Richard Tuck, *The Rights of War and Peace*, pp. 16-50 and 109-139.
- Noel Malcolm, Hobbes' Theory of International Relations, in Noel Malcolm, *Aspects of Hobbes* (2003), pp. 432-456.
- G.W. Leibniz, Praefatio to the *Codex Iuris Gentium* (1693), in *Leibniz Political Writings* (CUP 1972, 1988), pp. 165-176.
- Janne Nijman, A Universal Rule of Law for a Pluralist World Order: Leibniz's Universal Jurisprudence and His Praise of the Chinese Ruler, in Carty & Nijman (Eds.), *Morality and Responsibility of Rulers: Chinese and European Early Modern Origins of a rule of law as justice for world order* (OUP, February 2018), pp. 222-244.

## 6. Emmerich Vattel (1714-1767) and A Pluralist World Order

21 April 2021, 8.15h – 10h, room ??

- Emer de Vattel, excerpts from *Le Droit des Gens* (1758), in transl. The Law of Nations, in the Classics of International Law Series by J. Brown Scott (Ed.), published by the Carnegie Institute of Washington, 1916.
  - Preface by Vattel pp. 3a-13a,
  - Book I, Introduction and Chs I-IV, pp. 3-27;
  - Book II, Chs 1-4, pp. 113-134.
- Richard Tuck, *The Rights of War and Peace*, pp. 184-96.
- Andrew Hurrell, Vattel: Pluralism and Its Limits. In: Clark I., Neumann I.B. (eds) *Classical Theories of International Relations*, St Antony's Series. Palgrave Macmillan, London (1996), 233-255 [https://doi.org/10.1007/978-1-349-24779-0\\_11](https://doi.org/10.1007/978-1-349-24779-0_11)
- Anthony Anghie, Vattel and colonialism: some preliminary observations, *Vattel's International Law from a XXIst Century Perspective*, V Chetail and P Haggemacher (2011), 237–53.

## 7. Kant (1724-1804), Cosmopolitanism, and International Law

26 April 2021, 12.15h – 14h, room ??

- Immanuel Kant, from H.S. Reiss (Ed.) *Kant Political Writings* (2<sup>nd</sup> edition, CUP 1991)

- Idea for a Universal History with a Cosmopolitan Purpose (1784), pp. 41-53.
- Perpetual Peace (1795), 91-130
- Metaphysik der Sitten (The Metaphysics of Morals) (1797), pp. 164-75.
- Richard Tuck, *The Rights of War and Peace*, pp. 207-225.
- Pauline Kleingeld, On Dealing with Kant's Sexism and Racism, 2(2) *SGIR Review* (2019) 3-22
- Dialogue Borradori/Habermas, in Giovanna Borradori (Ed.), *Philosophy in a Time of Terror. Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago and London, University of Chicago Press, 2003), pp. 25-43.
- Jürgen Habermas, The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society, 15 *Constellations* 2008, pp. 444–55.

## 8. Kant (1724-1804), Anti-Cosmopolitanism, and International Law

28 April 2021, 8.15h-10h, room ??

- Carl Schmitt, "The Concept of the Political", 58 (1) *Archiv für Sozialwissenschaft und Sozialpolitik* (1927), 1–33, in Carl Schmitt, *The Concept of the Political*, University of Chicago Press, 2007, 19-79.
- Seyla Benhabib, Carl Schmitt's Critique of Kant: Sovereignty and International Law, *Political Theory* 2012, pp. 688-713.
- Martti Koskeniemi, International Law as Political Theology: How to Read *Nomos der Erde?*, 11(4) *Constellations* 2004, pp. 492-511.
- Samuel Moyn, Concepts of the Political in Twentieth-Century European Thought, in Jens Meierhenrich and Oliver Simons (Eds.), *The Oxford Handbook of Carl Schmitt* (2017)
- Stanley L. Paulson, Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the "Guardian" Controversy of 1931 in Jens Meierhenrich and Oliver Simons (Eds.), *The Oxford Handbook of Carl Schmitt* (2017)

## 9. G.W.F. Hegel (1770-1831) and international law

3 May 2021, 8.15h – 10h, room ??

- Armin von Bogdandy and Sergio Dellavalle, G.W.F. Hegel (1770-1831), *The Oxford Handbook of the History of International Law*, Bardo Fassbender & Anne Peters (Eds.), (OUP 2012), pp. 1127- 1131.
- G.W.F. Hegel, excerpts from *Philosophy of Right* (1821), tr. T.M. Knox (Ed.), sections 257-259, 321-329, 330-340.
- Sergio Dellavalle, The Plurality of States and the World Order of Reason. On Hegel's Understanding of International Law and Relations, ch 17, in: Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, (OUP 2017), pp. 352-378); available online: <http://www.oxfordscholarship.com> .
- Bertha von Suttner, Universal Peace: From a Woman's Standpoint, *The North American Review* (Jul., 1899), pp. 50-61

## 10. Nineteenth century international Law: Colonialization, Empire and Eurocentrism

5 May 2021, 12.15h – 14h, room ??

- Richard Tuck, *The Rights of War and Peace*, pp. 226-234.
- Andrew Fitzmaurice, Liberalism and Empire in Nineteenth-Century International Law, *American Historical Review* (2012), pp.122-140.
- Liliana Obregón, Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt, 31 *Leiden Journal of International Law* (2018) 597-615
- Arnulf Becker Lorca, Eurocentrism in the History of International Law, *The Oxford Handbook of the History of International Law*, Bardo Fassbender & Anne Peters (Eds.), (OUP 2012), pp. 1034-1057, available online.
- Janne E Nijman, Marked Absences: Locating Gender and Race in International Legal History, *European Journal of International Law* (2020) <https://doi.org/10.1093/ejil/cha072>

## 11. Renewal in Early 20th century: Alejandro Álvarez, Hans Kelsen and Politis

10 May 2021, 12.15h – 14h, room ??

- L. Oppenheim (1908), The Science of International Law: Its Task and Method, *American Journal of International Law*, 2 (2), pp. 313–56.
- Alejandro Álvarez, 'New Conception and New Bases of Legal Philosophy' (1919) 13 *Illinois Law Review* 25.
- Liliana Obregón, Noted for Dissent: The International Life of Alejandro Álvarez. 19(4) *Leiden Journal of International Law* (2006) 983-1016.
- Hans Kelsen, *Reine Rechtslehre* (1934, 1st ed.), translated by Litschewski Paulson & Paulson, *Introduction to the Problems of Legal Theory* (OUP 1992), sections V.27-30 and Ch IX, sections 49-50, pp. 55-63 and 107-125.
- Nicolas Politis, The Status of the Individual in International Law, in *The New Aspects of International Law* (1928), pp. 18-31.
- Nicholas Tsagourias, Nicolas Politis' Initiatives to Outlaw War and Define Aggression, and the Narrative of Progress in International Law, 23 *EJIL* (2012), pp. 255-266.

*Recommended: Anthony Anghie's 2002 article on the Mandate system.*

## 12. Late 20th and early 21st Century: The Politics of International Law

12 May 2021, 8.15h – 10h, room ??

- Martti Koskenniemi, The Politics of International Law, 1 *EJIL* 1990, pp. 4-32.
- Hilary Charlesworth, Christine Chinkin and Shelley Wright (1991), 'Feminist Approaches to International Law', *American Journal of International Law*, 85 (4), pp. 613–45.
- Andreas Paulus, International Law after Postmodernism: Towards Renewal or Decline of International Law?, 14 *Leiden Journal of International Law* (2001), pp. 727-755.
- Goldsmith & Posner, *The Limits of International Law* (2005), pp 3-17.

- B.S. Chimni (2006), 'Third World Approaches to International Law: A Manifesto', *International Community Law Review*, 8 (1), pp. 3-27.
- Martti Koskenniemi, The Politics of International Law – 20 Years Later, 20 [EJIL](#) 2009, pp 7-19.
- Bala Rajagopal, International law and its discontents: rethinking the Global South. *Proc. Annu. Meet. Am. Soc. Int. Law* (2012) 176–81

See also for Koskenniemi's third EJIL contribution on 'The Politics of International law' – Week 4.

### 13. Presentations of draft final papers

17 May 2021, 12.15h – 14h, room ??

### 14. The Responsibility of the International Lawyer

19 May 2021, 8.15h – 10h, room ??

- Philippe Sands, The Green Light, *Vanity Fair*, May 2008. Available online.
- Martti Koskenniemi, Between Commitment and Cynicism: Outline for a Theory of International Law as Practice, in *Collection of Essays by Legal Advisors of States, Legal Advisors of International Organizations and Practitioners in the Field of International Law* (United Nations, NY, 1999), pp. 495-523 available online.
- Duncan Kennedy, The Responsibility of Lawyers for the Justice of their Cause, 18 *Texas Tech Law Review* (1987), pp. 1157-1163.
- Isabel Feichtner, Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?, 29 *Leiden Journal of International Law* (2016), pp. 979–1000.