



INSTITUT DE HAUTES
ÉTUDES INTERNATIONALES
ET DU DÉVELOPPEMENT
GRADUATE INSTITUTE
OF INTERNATIONAL AND
DEVELOPMENT STUDIES

International Law

Academic year 2021-2022

The Foundations of International Law

DI132 - Autumn - 6 ECTS

Monday 14h15 - 16h00

Course Description

This course, compulsory for 1st year MIL students, will address the existence, evolution and functions of the international legal system, the different approaches, methods and theories of international law as well as the content and implication of key concepts of the discipline, such as sovereignty, effectiveness, legality vs legitimacy, among others.

> PROFESSOR

[Marcelo Kohen](#)

[Office hours](#)

> ASSISTANT

[Himanil Raina](#)

[Office hours](#)

Syllabus

Organization and evaluation of the course

This is a compulsory course. It is organized in sessions where participants are expected to intervene. Students must read and study the main materials (essential readings and primary sources) before each class. Studying the supplementary readings is highly recommended. Class participation will be taken into consideration for purposes of final grading.

The final exam will consist of two questions. The main one, a development of a general question covered during the semester. Students will have the possibility to choose one among three different proposed questions. A second short question will be common to all. The general question will count for 80% and the short common question 20%.

The course is exclusive to first year IL Master students. The main working language will be English, but students can participate during discussions and produce the exam in both English and French.

Outline of lectures

Session 1

20 September

Introduction and presentation of the course

A. International law: a unique legal system

1. International law as a legal system
 - a) Notion of a system
 - b) Requisite elements for its existence
 - c) A 'primitive' law?
 - d) Social function of law in general and of international law in particular

Readings

- G. Abi-Saab, "Cours général de droit international public", in *Collected Courses of The Hague Academy of International Law*, vol. 207 (1987), pp. 33-126.
- J. Crawford, "Chance, Order, Change: The Course of International law", in *Collected Courses of The Hague Academy of International Law*, vol. 365 (2013), pp. 139-146.
- M. Koskenniemi, "What is International Law For?", in M.D. Evans (ed.), *International Law*, 5th edn., pp. 363-372.
- M. Virally, "Sur la prétendue primitivité du droit international", in M. Virally, *Le droit international en devenir : Essais écrits au fil des ans* (IUHEI, 1990), pp. 91-101.

Further Readings

- J. Combacau, "Le droit international : bric-à-brac ou système ?", in *Archives de philosophie du droit*, vol. 31 : le système juridique (1986), pp. 85-105.
- A. D'Amato, "Is International Law Really 'Law'?", in *North Western University Law Review*, vol. 79 (1984-1985), pp. 1294-1314.

Session 2

27 September

B. Some particular features of international law

1. Is it possible to have a law of coordination rather than subordination?
 - a) H.L.A. Hart: a legal order based on primary rules
 - b) Hans Kelsen: a legal order based on constraint (wars/reprisals)
 - c) George Scelle's 'dédoublement fonctionnel'
2. Existence of obligations
3. Consequences of the non-respect of international obligations

4. Existence of secondary rules (based on the work of H.L.A. Hart)?
5. Legal scope of 'self-interpretation'

Readings

- H. L. A. Hart, *The Concept of Law* (Clarendon Press, 1961), pp. 77-89 (Law as the Union of Primary and Secondary Rules); pp. 208-232 (International Law) (also available in French).
- H. Kelsen, "Théorie du droit international public", in *Collected Courses of The Hague Academy of International Law*, vol. 84 (1953), pp. 13-15 (La sanction); pp. 31-44 (Les sanctions du droit international) / H. Kelsen, "The Essence of International Law", in K. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law: Essays in Honor of Leo Gross* (Schenkman Publishing, 1968), pp. 85-92.
- G. Scelle, "Le phénomène juridique du dédoublement fonctionnel", in *Rechtsfragen der Internationalen Organisation - Festschrift für H. Wehberg* (V. Klostermann, 1956), pp. 324-342.
- M. Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart", in *European Journal of International Law*, vol. 21 (2011), pp. 967-995.

Further Readings

- G. Abi-Saab, "Interprétation et auto-interprétation: Quelques réflexions sur leur rôle dans la formation et la résolution du différend international", in U. Beyerlin, M. Bothe, R. Hofmann, and E-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt* (Springer Verlag, 1995), pp. 9-20.
- G. Abi-Saab, "De la sanction en droit international: essai de clarification", in *Theory of International Law at the Threshold of the 21st Century: Essays in Honor of K. Skubizewski*, (Kluwer Law International, 1996), pp. 61-79.
- T. Ruys, "Sanctions, retortions and counter-measures: concepts and international legal framework", in L. van der Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Edgar Elgar, 2017), pp. 19-51.

Session 3

04 October

C. Evolution of international law in time: an overview

1. *Ius gentium*: international law?
2. *Res Publica Christiana*
3. The post-Westphalian State
4. European public law
5. The long process of universalisation

Readings

- S.C. Neff, "A Short History of International Law", in M. Evans (ed.), *International Law*, 5th edn. (Oxford University Press, 2018), pp. 3-27.
- M. Koskenniemi, "Histories of International Law: Significance and Problems for a Critical View", in *Temple International and Comparative Law Journal*, vol. 27(2) (2013), pp. 215-240.

Session 4

11 October

D. Post-Cold War international law of 'globalisation': a paradigm shift in the international legal system?

1. The transformations of contemporary international law
 - a) The emergence of new actors
 - b) The process of norm-creation
 - c) The content of fundamental principles
 - d) The exercise of the "executive" function
 - e) International jurisdiction
2. Universalisation, internationalisation and globalisation

Documents

- Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA resolution 2625 (XXV), 24 October 1970

Case law

- *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: *I.C.J. Reports 1949*, p. 174.

Readings

- H. Charlesworth, "Law-Making and Sources", in J. Crawford and M. Koskenniemi (eds.), *Cambridge Companion to International Law* (Cambridge University Press, 2012), pp. 187-202.
- M.G. Kohen, "Internationalisme et mondialisation", in Ch.-A. Morand (ed.), *Le droit saisi par la mondialisation* (Bruylant, 2001), pp. 107-130.
- F. Mégret, "Globalisation", in *Max Planck Encyclopedia of Public International Law* (2009).
- A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press, 2016), Chapter 2.
- O. Schachter, "The Decline of the Nation-State and its Implications for International Law", in *Columbia Journal of Transnational Law*, vol. 36 (1998), pp. 7-23.

Further Readings

- 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 University Press, 2014) 766-810.
- P. Weil, "Towards Relative Normativity in International Law?", in *American Journal of International Law*, vol. 77 (1983), pp. 413-442.
- B. Simma and A.T Muller, "Exercise and limits of jurisdiction,' in J. Crawford and M. Koskenniemi(eds.), *Cambridge Companion to International Law* (Cambridge University Press,2012), pp. 187-202.

Session 5

18 October

E. Law between unity and fragmentation

1. Self-contained regimes
2. The uniformisation of national laws
3. So-called "third laws"
4. Extraterritoriality of laws
5. Universal/international criminal justice

Documents

- Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yearbook of the International Law Commission*, 2006, vol. II(2) (Also available in French).

Readings

- P.M. Dupuy, "A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law", in *European Journal of Legal Studies*, vol. 1 (2007), pp. 25-41.

Further Readings

- B. Simma and D. Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", in *European Journal of International Law*, vol. 17 (2006), pp. 483-529.
- B. Simma, "Universality of International Law from the Perspective of a Practitioner", in *European Journal of International Law*, vol. 20 (2009), pp. 483-529.

F. The constitutionalisation of international law

Readings

- J. Crawford, “Chance, Order, Change: The course of international law”, in *Collected Courses of The Hague Academy of International Law*, vol. 354 (2013), vol. 365, pp. 322-342.
- P.M. Dupuy, “L’unité de l’ordre juridique international. Cours général de droit international public”, in *Collected Courses of The Hague Academy of International Law*, vol. 297 (2002), pp. 215-244.
- B. Fassbender, “Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order”, in J. Dunoff and J. Trachtman (eds.), *Ruling the World? : Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), pp. 133-147.

Further Readings

- P.M. Dupuy, “Ultimes remarques sur la ‘constitutionnalité’ de la Charte des Nations Unies”, in R. Chemain and A. Pellet (eds.), *La Charte des Nations Unies, constitution mondiale?* (Pedone, 2006), pp. 219-232.

Session 6

25 October

G. Theoretical conceptions of international law

1. Natural law v. positivist law approaches: *vetera* and *nova*

Readings

- D. Anzilotti, *Cours de droit international* (L.G.D.J., 1999), pp. 41-48 (Chapitre I. Conception du droit international).
- H. Grotius, *The Rights of War and Peace* (Liberty Fund, 2005), pp. 75-132 (also available in French).
- H. Kelsen, *Pure Theory of Law*, translation from the second edition (revised and enlarged) German Edition by Max Knight, Berkeley (University of California Press), pp. 70-81; pp. 193-195; pp. 320-347 (Also available in French).

Further Readings

- R. Ago, “Droit positif et droit international”, in *Annuaire français de droit international*, (1957), pp. 14-62.
- P. Weil, “Le droit international en quête de son identité. Cours général de droit international public”, in *Collected Courses of the Hague Academy of International Law*, vo. 237 (1992), pp. 66-81: (Section IV: Le fondement du droit international).
- *Case of the SS Lotus, Judgment of 7 September 1927, PCIJ Series A., n° 9*, p. 4.

2. Projects for peace through the Law

Readings

- I. KANT, *Perpetual Peace: A Philosophical Essay*, transl. M. Campbell Smith (George Allen & Unwin Ltd., 1903), pp. 107-142 (only the articles, not the commentary thereto. Also available in French).
- H. Kelsen, *Peace through Law* (The University of North Carolina Press, 1944), pp. 3-9 and 127-140.

Further Readings

- R.J. Dupuy, "L'illusion juridique: réflexions sur le mythe de la paix par le droit", in *Guy Ladreit de Lacharrière et la politique juridique extérieure de la France* (Masson, 1989), pp. 245-257.

3. Theories of negation and their contemporary variants

- a) An antecedent: Rousseau
- b) The Hegelian conception of international law
- c) Contemporary theories: 'Realists', 'Policy oriented'

Readings

- R. Aron, *War and Peace: A Theory of International Relations* (Transaction Publishers, 2003), pp. 703-736 (also available in French).
- G. Hegel, *Elements of the Philosophy of Right* (Cambridge University Press, 1991), §321-340 (also available in French).
- M.S. McDougal, and M.W. Reisman, "International Law in a Policy-oriented Perspective", in R. St. J. Macdonald, *The Structure and Process of International Law: Essays in Legal Philosophy. Doctrine and Theory* (Nijhoff, 1983), pp. 103- 129.
- H.J. Morgenthau, "Positivism, Functionalism, and International Law", in *American Journal of International Law*, vol. 34 (1940), pp. 260-284.

Session 7

01 November

4. International approaches based on Critical Legal Studies

Readings

- D. Kennedy, "A New Stream of International Law Scholarship", in *Wisconsin International Law Journal*, vol. 7 (1988-1989), pp. 1-49.
- M. Koskenniemi, "The Politics of International Law", in *European Journal of International Law*, vol. 1 (1990), vol. 1, pp. 4-32.

Further Readings

- A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016), pp. 135-162.

- M. Koskenniemi, “The Politics of International Law—20 Years Later”, in *European Journal of International Law*, vol. 20 (2009), pp. 7-19.

5. Marxism and international law

Readings

- Ch. Chaumont, “Cours général de droit international public”, in *Collected Courses of The Hague Academy of International Law*, vol. 129 (1970), pp. 333-380.
- G. Tunkin, “General Course of Public International Law. International Law in the International System”, in *Collected Courses of The Hague Academy of International Law*, vol. 147 (1975), pp. 9-22.

Further Readings

- E. Korovine, “La République des Soviets et le droit international”, in *Revue générale de droit international public*, vol. 37 (1925), pp. 292-312.
- Ch. Miéville, “The Commodity-Form Theory of International Law”, in S. Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge University Press, 2008), pp. 92-132.

6. Third World and international law

Readings

- G. Abi-Saab, “The Third World and the Future of the International Legal Order”, in *Revue égyptienne de droit international*, vol. 29 (1973), pp. 27-66.
- B.S. Chimni, “Third World Approaches to International Law: a Manifesto”, in *International Community Law Review*, 2006, vol. 8, pp. 3-27.

Further Readings

- Abi-Saab, “The Newly Independent States and the Rules of International Law: An Outline”, in *Howard Law Journal*, vol. 8 (1962), pp. 95-121.
- B.S. Chimni, “Customary International Law: A Third World Perspective”, in *American Journal of International Law*, vol. 112 (2018), pp. 1-46.

H. International Legal Methodology

Readings

- O. Corten, *Méthodologie du droit international public* (Université libre de Bruxelles, 2009), pp. 19-83.
- Ch. De Visscher, “Méthode et système en droit international”, in *Collected Courses of The Hague Academy of International Law*, vol. 138 (1973), pp. 75-79.
- M. Koskenniemi, “Methodology of International Law”, in *Max Planck Encyclopedia of Public International Law* (2001).

Further Readings

- M. Sørensen, “Principes de droit international public. Cours général”, in *Collected Courses of The Hague Academy of International Law*, vol. 101 (1960), pp. 5-15.

Sessions 9, 10 and 11

15, 22 and 29 November

I. Some basic notions

1. Sovereignty and its place in the existing international legal system
 - a) An obsolete notion?
 - b) New content?

Readings

- M.G. Kohen, “Is the Notion of Territorial Sovereignty Obsolete?”, in M.A. Pratt and J.A. Brown (eds.), *Borderlands under Stress* (Kluwer, 2000), pp. 35-47.
- M. Koskenniemi, “What Use for Sovereignty Today?”, in *Asian Journal of International Law*, vol. 1 (2011), pp. 61-70.
- M. Virally, “Une pierre d’angle qui résiste au temps. Avatars et pérennité de l’idée de souveraineté”, in *Les relations internationales dans un monde contemporain* (IUHEI, 1977), pp. 179-195.

Further Readings

- A. Pellet, “Histoire du droit international : irréductible souveraineté ?”, in G. Guillaume (ed.), *La vie internationale* (Hermann, 2017), pp. 7-24.
- A. Peters, “Humanity as the Alpha and Omega of Sovereignty: a Rejoinder to Emily Kidd White, Catherine E. Sweetser, Emma Dunlop and Amrita Kapur”, in *European Journal of International Law*, vo. 20 (2009), pp. 569-573.
- Kevin Jon Heller, “In Defense of Pure Sovereignty in Cyberspace”, forthcoming in *International Law Studies* (2021)

2. The relationship between legality and effectiveness

- a) Proposed functions of effectiveness:
 - Jellinek: *Die normative Kraft des Faktischen*
 - Kaufmann: “*Wer kann, darf!*”
 - Kelsen: efficiency of the legal order
 - Marxist approaches: the balance of power

b) The relationship between fact and law

Readings

- G. Jellinek, *L'Etat moderne et son droit. Première Partie : Théorie générale de l'Etat*, French translation by Georges Fardis et al. (LGDJ, 2005), pp. 509-545.
- H. Kelsen, "Théorie générale du droit international public. Problèmes choisis", in *Collected Courses of The Hague Academy of International Law*, vol. 42 (1932), pp. 207-209.
- R.W. Tucker, "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* (University of California Press, 1953), pp. 31-48.

Further Readings

- E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus sic Stantibus. Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriffe* (Mohr, 1911, pp. 150-159.
- J. Salmon, "Les contradictions entre faits et droit en droit international", in *Estudios de Derecho Internacional en Homenaje al Profesor Miaja de la Muela*, vol. I (Tecnos, 1979), pp. 337-350.

3. Confusing the efficiency of law with its existence/transformation

4. The role of consent in international law

5. Law and values: legality and 'legitimacy'

- a) The 'unlawful but legitimate' argument
- b) Radbruch's formula
- c) Transgression: is there a need for legal justification?

Case Law

- European Court of Human Rights, *Case of Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, (in particular paragraphs 22; 47-48 and 109-114).

Readings

- R. Falk, "Legality and Legitimacy: The Quest for Principled Flexibility and Restraint", in D. Armstrong, T. Farrell and B. Maiguashca (eds.), *Force and Legitimacy in World Politics* (Cambridge University Press, 2005), pp. 33-50.
- M.G. Kohen, "Recours à la force et valeurs universelles", in Società Italiana di Diritto Internazionale, *Ordine internazionale e valori etici / International Order and Ethical Values*, VIII Convegno Verona, Napoli (Ed. Scientifica, 2004), pp. 27-41.

Further Readings

- G. Radbruch, “Gesetzliches Unrecht und übergesetzliches Recht”, in *Rechtsphilosophie* (K. F. Koehler, 1973), pp. 339-349.
- M. Koskenniemi, “Legal Universalism: Between Morality and Power in a World of States”, in S. Cheng, (ed.), *Law, Justice, and Power: Between Reason and Will* (Stanford University Press, 2004), pp. 46-69.
- Ch. Thomas, “The Uses and Abuses of Legitimacy in International Law”, in *Oxford Journal of Legal Studies*, vol. 34 (2014), pp. 729-758.

Session 12

06 December

J. International law’s ‘imperfections’ and the way they are overcome: from the argument of ‘exceptional’ cases to concepts designed to fill gaps and resolve normative conflicts (or to postpone their resolution)

1. International law: a complete system?
2. ‘Hard cases’: ‘exceptional’ cases which escape the application of international law (or in relation to which international law does not offer a solution)?
3. Concepts designed to fill gaps or resolve normative conflicts
 - a) Rules for the resolution of conflict of norms
 - b) The ‘Lotus’ principle
 - c) Equity
 - d) Reasonableness

Case Law

- *Case of the SS Lotus, Judgment of 7 September 1927, PCIJ. Series A., n° 9*, pp. 16-20.
- *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 226-267 (in particular pp. 261-263, paras. 90-97; Declaration of Judge Bedjaoui, pp. 268-274; Separate Opinion of Judge Guillaume, pp. 287-293).
- *Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, Dissenting Opinion of Judge Alvarez, pp. 12-21.
- *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Application instituting proceedings against the Republic of India, 24 April 2014, in particular paras. 1-15.

Readings

- O. Corten, “Reasonableness in International Law”, in *Max Planck Encyclopedia of Public International Law* (2013).
- F. Francioni, “Equity in International Law”, in *Max Planck Encyclopedia of Public International Law* (2013).
- M.G. Kohen, “L’avis consultatif de la CIJ sur la Licéité de la menace ou de l’emploi d’armes nucléaires et la fonction judiciaire”, *European Journal of International Law*, 1997, vol. 2, pp. 336-362.

- R. Dworkin, “Hard Cases”, in *Harvard Law Review*, vol. 88 (1975), pp. 1057-1109.

Further Readings

- M. Chemillier-Gendreau, “L'équité”, in M. Bedjaoui (ed.), *Droit international : bilan et perspectives*, Paris, Pedone, 1991, pp. 283-294.
- O. Corten, “Interprétation du "raisonnable" par les juridictions internationales : au-delà du positivisme juridique?”, in *Revue générale de droit international public*, vol. 102 (1998), pp. 5-44.
- H. Handeyside, “The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?”, in *Michigan Journal of International Law*, vol. 29 (2007), pp. 71-94.
- M.G. Kohen, "L'utilisation du 'raisonnable' par le juge international. Discours juridique, raisons et contradictions - Olivier Corten. Recensé par Marcelo Kohen", in *Annuaire africain de droit international*, vol. 6 (1998), p. 373-381.
- H. Lauterpacht, “Some Observations on the Prohibition of « non liquet » and the Completeness of the Law”, in *Mélanges présentés au professeur J.H.W Verzijl*, The Hague, M. Nijhoff, 1958, pp. 196-221.
- J. Salmon, “Quelques observations sur les lacunes du droit international public”, in *Revue belge de droit international* (1967), pp. 440-458.

Session 13

13 December

K. The application of international law through time

1. Inter-temporal law
2. The critical date

Case Law

- *The Minquiers and Ecrehos case, Judgment of November 17th, 1953: I.C.J. Reports 1953*, pp. 59-60.
- *Island of Palmas (USA/Netherlands)*, Arbitral Award of 4 April 1928, *R.S.A.*, vol. II, pp. 845-846.

Readings

- T.O. Elias, “The Doctrine of Intertemporal Law”, in *American Journal of International Law*, vol. 74 (1980), pp. 285-307.
- M.G. Kohen, *Possession contestée et souveraineté territoriale* (PUF, 1997), pp. 169-191.

Further Readings

- L.F.E. Goldie, “The Critical Date”, in *International and Comparative Law Quarterly*, vol. 12 (1963), pp. 1251-1284.

Exam