INTERNATIONAL LEGAL ORDER

Fall 2009

Meeting Times: Tuesdays and Thursdays 1:00 PM – 2:15 PM, Room 304

1. Course Description

The purpose of this course is to study some of the most influential international law scholarship from the fall of Imperial and Ecclesiastical dominance in the wake of the Renaissance and Reformation up through the end of World War II and the birth of the United Nations system. Although this is a course with a great deal of interest in history, it should nevertheless not be confused for a traditional history class. Instead of marching through a slow, evolutionary trajectory suggesting particular causes and effects, we will ask how particular people pursued their projects given their special political, social, and cultural contexts. The purpose, as a result, is not to sketch a possible timeline inasmuch as provide a map of potentially available arguments about international legal order.

Similarly, this course should not be confused for an examination of contemporary international law and policy. Although we will cover the “early modern” period (1918-1950) of international legal thinking, it leaves for the courses on Public International Law, International Economic Law, Conflicts of Law, and Comparative Law the task of examining the logic of the law as it lives today. Nevertheless, International Legal Order (ILO) provides useful historical and theoretical contexts for those courses, and to that end, it is a recommended (but not required) gateway course for the rest of the international legal curriculum. I do not presume that you have any prior knowledge of international law or international relations.

More specifically, some the central questions explored in the course are: (1) Since the “discovery” of the New World, what has been the relation between the laws of war and commerce? (2) How have international lawyers used the concepts of “civilization” and “nation” to generate the positivist idea of the sovereign state? (3) How have international lawyers historically justified the binding nature of international legal norms? (4) What is the relation between Classical Liberalism and International Law? (5) How does the history of international law lend itself to the notion of renewal?

The method of the course is chronological, beginning with the first attempts in the Sixteenth and Seventeenth centuries to provide legal rationales for the colonization by the Spanish of the Americas, and Dutch arguments in support of the right to economic growth as a justification for war. We then examine the debates over the seminal importance of the Peace of Westphalia in 1648, the birth of liberal political philosophy in the writings of Thomas Hobbes and John Locke, and the articulation of liberal international legal theory in the Eighteenth Century. The course then shifts gears and heads past the French Revolution of 1789 and towards the projects of international lawyers and judges in the Nineteenth Century. The prominent themes of this period include slavery, colonialism, nationalism, the establishment of the international legal profession, and philosophical debates over the bases of obligation in the international legal order. After World War I, the course addresses the turn to functional jurisprudence, the establishment of international institutions at

The course has three central units, and begins with a couple of introductory classes.

The Introduction will hopefully do two things. First, it will introduce some contemporary views on the state of the discipline, including questions regarding the identity, structure, and nature of international law. Second, it will provide a few long-view examples of international legal history. This will give students a sense of the basic elements of the story that will slowly unfold over the course of the semester.

Unit One ("Universal Law") pivots round the writings of two of the most influential pre-liberal, or "primitive" writers on international law: Francisco Vitoria (1483-1536) and Hugo Grotius (1583-1645). One of the central themes is that these early scholars did not think about problems of authority and sovereign conflict in anything like the ways that they would be conceived later on by the classicists and moderns. Indeed, we will see that these writers tended to define the international legal order in universal terms, and when the possibility of "sovereign" conflict might have arisen, sovereignty was defined in such a way as to make conflicts of authority inconceivable. This theme is developed first in Vitoria's articulation of a new way to conceptualize the Spanish conquest of the New World, and then in Grotius' arguments establishing a fundamental right to commerce at the base of the concept of the Sovereign. In both cases, the rights of colonialism and commerce find their realization in the doctrine of just war.

Unit Two ("Classical International Law") begins in 1648 and the watershed moment of the Peace of Westphalia, generally regarded as the birth of classic ideas about international law. A central theme in this unit picks up on the moment when liberal political philosophy cast its shadow on the international legal order. The concept of the state of nature, the "domestic analogy," and the need to reconcile the notion of free and equal sovereigns with an ordered society has its beginnings in this period. After referencing some of these ideas in the work of Emerich Vattel (1714-1767), the Unit looks at how liberalism shows up in the U.S. Supreme Court's early jurisprudence dealing with sovereign independence and slavery. The Unit then shifts across the Atlantic, and examines the 1815 "break" after the end of the Napoleonic wars, the 1871 "break" with the Vattelian model in the work of the international lawyers associated with the newly formed International Law Institute, and the eventual and anti-climactic dominance of positivism and its attendant relationship with European colonialism at the end of the Nineteenth Century.

Unit Three ("Modern International Law") begins after World War I and examines the Twentieth Century's fascination with institution-building, beginning with the League of Nations, and in particular the League's focus on national and minority groups. The Unit also brings into focus the swift and severe counter-reaction to the perceived hegemony of positivism, and the announcement of a new, functional international law. In so doing, the Unit explores first the debate over the right to self-determination, and then after the birth of United Nations and Bretton Woods systems, the emergence of a modern international economic law and international human rights law. A goal of the Unit will be to use contemporary scholarship to show how the thinkers of this period, ending around 1950, set in motion the modern view of international legal order—a pragmatist and functionalist view that simultaneously (and paradoxically) castigates the classicists for obsessing over formal distinctions, while ultimately proving unable to leave such failed distinctions behind. The
course ends with a look at the use and importance of historical narrative as a style of normative argument.

2. **Readings and Exam**

There is no coursebook for this class. Instead we will be reading selections from books and law review articles, all of which will be available on the TWEN site for the class. The password to the site is “utopia.” If you are interested in purchasing a coursepack with hard copies of all the readings, please contact me.

Although this is a three-hour lecture course, it will at times feel much like a seminar. The class will depend heavily on class discussion as we read through the texts together.

There will be an 8 hour take home exam distributed on Friday, December 11. Grades will be determined by combining examination scores with class participation.
3. Assignments

Introduction

Assignment 1 – What Is International Law?

- Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980)

Assignment 2 – What International Law Is Not

- International Court of Justice, Military and Paramilitary Activities In and Against Nicaragua (1986) paragraphs 183-186, 202-209, 239-245.

I. Universal Law (1500-1648)

Assignment 3 – The Theologico-Political Problem


Assignment 4 – Making a “Law of Nations”: Vitoria’s Right to War

- David Kennedy, Primitive Legal Scholarship, 27 Harv Int’l L. J. 1, 1-12, 95-98 (1986) (16 pages)

Assignment 5 – Making a “Law of Nations”: Vitoria’s Right to War (cont.)


Assignment 6 – Making a “Law of Nations”: Grotius’ Right to Trade

- Hersch Lauterpacht, The Grotian Tradition in International Law, 23 British Yearbook of International Law 1, 18-53 (1946) (36 pages)

II. Classical International Law (1648-1919)

A. FOUNDATIONS (1650-1750)

Assignment 7 – Rise of the Liberals: Hobbes and Locke

• Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005) pp. 71-95 (25 pages)

Assignment 8 – The Peace of Westphalia: A Watershed Moment?


Assignment 9 – Vattel’s Liberal Theory of International Law

• Emerich Vattel, The Law of Nations (1758) (excerpts)
• Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005) pp. 106-122 (17 pages)

B. SOME AMERICAN IDEAS: JOSEPH STORY & JOHN MARSHALL

Assignment 10 – Classical Jurisdiction in the United States

• Schooner Exchange v. McFaddon, 11 U.S. 116 (1812)

Assignment 11 – Jurisdictional Conflicts: The Case of Slavery

• LaJeune Eugenie, 26 f cas 832 (mass 1822)
• The Antelope, 23 U.S. 5 (1825)
C. THE ACTION IN EUROPE

Assignment 12 – The 1815 Break: The Concert of Europe and the New Hegemony


Assignment 13 – The 1871 Break: A New Liberal Conscience


D. POSITIVISM & COLONIALISM

Assignment 14 – The Positivist Distinction Between the Civilized and Uncivilized


Assignment 15 – Sovereign, But Uncivilized: Europe and African Partition

- Final Act of the Berlin Conference (1885)

Assignment 16 – Civilized, But Not Christian: American Jurisdiction in China

- Teemu Ruskola, Canton is not Boston, 57 Am. Q. 859 (2005) (23 pages)
- Caleb Cushing’s Abstract and Discussion of the Treaty of Wanghia, January 24, 1845
III. Modern International Law (1870-1950)

A. AFTER POSITIVISM COMES FUNCTIONALISM

Assignment 17 – The Arrival of International Institutions

- The Covenant of the League of Nations (1924)
- Statute of the International Court of Justice (1929)
- Manley Hudson, The Permanent Court of International Justice, 35 Harv. L. Rev. 245 (1922)

Assignment 18 – A New International Law?

- J.L. Brierly, The Shortcomings of International Law, 5 British Yearbook of International Law 4 (1924) (13 pages)
- The Case of the S.S. Lotus (France v. Turkey), Permanent Court of International Justice (1927) (excerpts)

B. AFTER STATES COME PEOPLES: MANDATES & MINORITIES

Assignment 19 – The Right of Self-Determination


Assignment 20 – The New Nationalism

- Nathaniel Berman, But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law, 106 Harv. L. Rev. 1792, 1794-1808 (1993)
- The Polish Nationality Case, Permanent Court of International Justice (1923) pp. 6-10
C. THE NEW LIBERAL INTERNATIONAL ORDER

Assignment 21 – Bretton Woods


Assignment 22 – The Sovereign Market


Assignment 23 – The United Nations

- The UN Charter (1945) (excerpts)

Assignment 24 – Return of the Just: International Crime


Assignment 25 – From Above and Below: New Subjects of International Law

- The Reparations Case, The International Court of Justice (1949)

Conclusion
Assignment 26 – History as Program