

# INTERNATIONAL LEGAL ORDER

FALL 2012

MEETING TIMES: TUESDAYS AND THURSDAYS 10:25:00 AM – 11:40 AM, ROOM 305

## Course Summary

International Legal Order (“ILO”) is an introductory course on the foundations of international law. It should be of interest to those students wishing to understand the philosophical, historical, and political origins of international law, or what was often called “the law of nations.” Relying on close readings in political and legal theory, the course provides students with the background ideas necessary to make and criticize today’s international legal arguments, whether they are in the context of the laws of war or the laws of trade. However, while the course gives students a broad set of tools to be used in analyzing the contemporary nature of international law, the materials do not address special topics in the international legal system. Consequently, students interested in studying the doctrinal law of institutions like the World Trade Organization or the regulatory designs of environmental law regimes like the Kyoto Protocol, should look to courses specializing in these sorts of current issues.

## Abstract

This section provides a more detailed discussion of the course’s ambitions. It is intended as a guide for use throughout the semester.

This course studies the history and theory of international law, from roughly the Reformation through World War II, and has three broad goals. The **first** is to introduce students to the **structure of classic international legal argument**. This involves the study of jurisprudential grammar—the argumentative moves that can, and cannot, sufficiently produce claims about the binding nature of international rules. The **second** goal is to analyze an ongoing contradiction between two competing images of international law. The first image is of a **relatively anarchic world of free and equal sovereign states**. The second image is of a **relatively ordered world of hierarchical powers**, where some states enjoy legal privileges that others clearly do not. The **third** goal is to situate these ideas—(1) legal grammar and (2) legal hierarchy—in historical perspective. This historical perspective is not causal, not social, not comprehensive. 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 the binding nature of international law, and emphasize the complicity of international law in a global hierarchy.***

Substantively, some of 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? Methodologically, the course materials begin with the use of Aristotelian theory 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 jump ahead to the seventeenth century and the birth of liberal political philosophy, and the application of that philosophy to international law scholarship 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, 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 Geneva, San Francisco, and Bretton Woods, and the postwar emergence of international economic law, international human rights, and international criminal law.

The course devotes two classes to an introduction, which are followed by three units. The first unit covers “universal” or “pre-liberal” visions of international law (1500-1648), the second unit covers “classical” or “traditional” international law (1648-1914), and the third unit begins a discussion of “modern” international law (1914-1950) that is completed in the separate course on contemporary International Law. After these three units, the course concludes with a final class on the use and importance of historical narrative as a style of normative argument.

ILO is the first in a sequence of courses offered here at CU dedicated to the jurisprudential foundations of the international legal system. These courses explore a critical history of present-day international legal ideas, institutions, and the practices of global governance, and generate questions about an experimental future. The broad questions examined are of two types. First are diachronic questions regarding the politics of international law and international lawyers: How has international legal argument been used as a means for the freedom of sovereign peoples? How has international legal argument undermined the value of freedom in an effort to establish an imperial order? How has the contest between freedom and order distributed wealth and resources among the more and less “developed” nations? These questions are examined chronologically, beginning with the European conquest of the New World and ending with a look at a near future in which the very term “International Law” has become an anachronism. The second group of questions is synchronic and structural: What is the language of international legal argument? What was it like when it was still under the heavy influence of Aristotle? How did it change after Hobbes and Vattel? In the “classic” grammar, how does international legal argument mediate its contradictory patterns of justification? Do these contradictions survive in the arguments of modern and contemporary international lawyers? What might the language of international law become in a world of global governance?

ILO covers a broad range of materials that end around World War II. This course does not substitute for the contemporary course on International Law, which deals primarily with the development of international legal doctrine in the twentieth and twenty-first centuries. In fact, ILO has been designed to precede the International Law course. That said, International Law is a stand-alone course, and does not require ILO as a prerequisite. For those students interested in focusing on the history and theory of international law, I recommend you take my courses in International Legal Order, International Law, and the advanced course, Global Law and Global Governance.

### Readings

There are no reading assignments on the first and last day of class. Some of the readings in the syllabus are italicized. These readings are provided for background, and you will not be held responsible for them in class or on the exam. However, whatever is covered in class lectures is fair game, including class discussions of background materials. Please notice that some particular page numbers are also italicized. Each assignment is followed by a sample of “focus questions” intended to assist you in indentifying the most relevant portions of the readings.

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.”

### Participation, Exam, and Grading

Although this is a three-hour lecture course, it will at times feel much like a seminar, and the class will depend heavily on class discussions as we read through the texts together. My expectation is that every student will participate in all class discussions, and final grades reflect that expectation. A take-home exam will be distributed on Tuesday, December 11.

### Law School Absentee Policy

Due to the cumulative character of this course, attendance is critical. Each class builds on the prior classes, creating a single thread that accumulates throughout the semester. One consequence of this pedagogical approach is that absences can create substantial confusion in terms of moving forward with the material. Compounding this, it is common to hear from students that their understandings of the readings are often quite different after class discussions. The upshot: don't miss class.

§3-3-1 Absences: Colorado Law requires regular and punctual class attendance of all students. Absence or lateness by a student for more than 20% of the total number of classes or lectures in any course shall be cause for the instructor to levy on the student a grade penalty the instructor deems appropriate, up to and including the assignment of a failing grade. Nothing in this rule prohibits an instructor from rewarding by enhanced grades students whose attendance, preparation, and participation exceed what is required.

## **Introduction**

The two classes in this introduction are intended to provide the student with a basic familiarity with some of the vocabulary of international legal argument. This vocabulary includes (i) the sources of international law, including treaties, custom, and general principles; (ii) the question of how international law is understood to induce compliance in sovereign states, or how international law is “binding”; (iii) the idea of the analogy between individuals living in domestic society and sovereign states living in international society, known as the “domestic analogy.” We will also examine how the vocabulary of international legal argument has a binary structure, and see how arguments that defy that structure are hard-pressed to be identified as international law at all. We will see the main themes of these two classes present themselves throughout the course.

Assignment 1 – What Is International Law?

- **DAVID BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW (2002) pp. 1-10, 24-45**
- ***Filartiga v. Pena-Irala*, 630 F.2d 876 (2<sup>nd</sup> Cir. 1980) (Sections I and II)**

Focus Questions

Bederman

1. How does Bederman define contemporary international law?
2. What are the basic anxieties for international lawyers?
3. What was important about the Peace of Westphalia?
4. How does Bederman characterize international law?
  - a. What is the purpose?
  - b. What are the sources?
  - c. Who are the players?
5. What are the “general principles” of international law?
6. What are the elements of customary law?
7. How might treaty and custom conflict?

Filartiga

1. What are the sources of the “Law of Nations”?
  - a. *Where* are the sources?
  - b. *When* are the sources?
2. How do treaty law and customary law interact in the court’s reasoning?

Assignments 2 – What Is Not International Law?

- **ALASDAIR MACINTYRE, AFTER VIRTUE ([1981] 2008) pp. 1-11**
- **MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT ([1989] 2005) pp. 16-23, 58-69**

Focus Questions

MacIntyre

1. What is the trouble with moral discourse? Why is the trouble so hard to identify?
2. What are three characteristics of moral disagreement?
3. What is the paradox?
4. How is history important for MacIntyre? What are the limits of “academic history”?

Koskenniemi

1. What does Koskenniemi mean by “apology” and “utopia”? How are these concepts related to the need for normativity and concreteness in international law?
2. How are the notions of “apology” and “utopia” related to Bederman’s discussion about the central anxiety of international law?
3. How is international law a reflection of the liberal theory of politics?
4. What are the two basic assumptions of the liberal theory of politics?
5. What are ascending and descending arguments? How do they relate to one another?
6. What does it mean to talk about the “structure” of international legal argument? What is “style”?

# **I. Universal Law (1500-1648)**

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. The Unit begins with a brief introduction to Aristotelian ethics, the intellectual foundation for most forms of international legal argument operating at this time.

Assignment 3 – The Intellectual Foundation of “Pre-Liberal” International Law

- **PIERRE MANENT, AN INTELLECTUAL HISTORY OF LIBERALISM (1995) PP. 3-19**
- **ALASDAIR MACINTYRE, AFTER VIRTUE ([1981] 2008) PP. 51-55, 60-61**
- *Jaques Barzun, From Dawn to Decadence (2000) pp. 3-11*
- *Aristotle, The Nicomachean Ethics (Terence Irwin, ed. 1999) xiii, xv-xx, Book I Ch 4, Book I Ch 7, Book IV Ch 3, Book X Ch 9*
- *Aristotle, The Politics and the Constitution of Athens (Stephen Everson, ed. 1996) xix-xxiv, Book I Sections 1 and 2, Book VII Sections 2*

Focus Questions

Manent

1. What are the circumstantial and structural aspects of what Manent calls the theologico-political problem?
2. What was so special about the idea of monarchy?
3. Contrast Manent’s “theories of emancipation.” Why was Aristotle so easy for the Church to commandeer?
4. How did Machiavelli “transform the good”?

MacIntyre

1. Describe the sequence of (i) man as he is, (ii) man tutored through ethics, (iii) man as he should be.
2. How does MacIntyre’s view of contemporary moral language relate to Aristotle’s Ethics?
3. How do liberal arguments relate to Aristotelian notions of human nature?



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

- David Kennedy, *Primitive Legal Scholarship*, 27 Harv Int’l L. J. 1, 1-12, 95-98 (1986)
- Francisco Vitoria, “On the American Indians,” *in* *Political Writings* ([1539] Anthony Pagden & Jeremy Lawrance, eds. 2008) pp. xiii-xvii, 233-235, 239-240, 250-264, 277-292

Focus Questions

Kennedy

1. What is Kennedy’s argument about the relationship between the three styles of international legal argument?
2. How is his argument related to issues of historical continuity in legal scholarship?
3. What does a primitive legal argument look like?
4. In a primitive legal argument, what is the source of normative authority?

Vitoria

1. What are the means of “just title” in the New World?
2. In Vitoria’s discussion, identify the interactions of positive, natural, and divine law.
3. Can positive law ever contradict natural or divine law?
4. What distinguishes natural from divine law?

Assignments 5 – Making a “Law of Nations” – Vitoria’s Right to War II

- **David Kennedy, Primitive Legal Scholarship, 27 Harv Int’l L. J. 15-40 (1986)**
- **ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005) Chapter 1**

Focus Questions

Kennedy

1. What is the relationship between morality and law in Vitoria’s writings? How is this related to Vitoria’s use of sources of authority?
2. Why is the national/international distinction problematic?
3. How does Vitoria’s notion of the sovereign relate to a public/private distinction?
4. What does Vitoria’s “Just War” doctrine reveal about justice in international order? What makes a war “just”? Can two sides of a war both be acting in accordance with what is “just”?

Anghie

1. What is the “classic” problem of international law? Why is the “classic” problem the wrong problem?
2. How can Angie’s work relate back to Aristotle and notions about human nature and the purpose of law and ethics?
3. Is there a conflict between Anghie and Kennedy’s projects? If so, how would you reconcile it?

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, 18-30, 42-46 (1946)**
- **Ileana Porras, Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ De Iure Praedae—The Law of Prize and Booty, Or “On How to Distinguish Merchants from Pirates,” 31 Brooklyn J. Int’l L. 741, 741-748, 756-766, 770-792, 802-804 (2006)**

Focus Questions

Lauterpacht

1. According to Lauterpacht, why is Grotius so important? Why is Grotius often thought of as the “father” of international law?
2. Why does Grotius’ work capture the fundamental aspects of international law?
3. Why is natural law essential to international law? Where does it come from?
4. What is the “nature of man”? How is it relevant to international law?
5. Who are the subjects of international law? How is this related to the domestic analogy?

Porras

1. What is Porras’ critique of the conventional idea that public international law is about constraining war and private international law is about facilitating trade?
2. How does Grotius legitimize the Dutch taking of the Santa Catarina?
3. What are the logical steps Grotius uses to demonstrate the necessity of trade?
4. How is Grotius’ discussion of trade different from Vitoria’s?
5. How does Grotius justify the Dutch merchants’ actions in relation to rules governing private war?
6. What is the role of “human nature” in his argument? What is the providential doctrine of commerce?

## II. Classical International Law (1648-1914)

Unit Two (“Classical International Law”) begins with the writings of Thomas Hobbes 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 the desire for an ordered society has its beginnings in this period. This is also a time where the concept of a standard of civilization and the use of international law as a tool of imperialism and domination also picks up speed, culminating at the end of the Nineteenth Century. Consequently, this Unit is divided into two parts. The first, “Classic Liberalism and Early Positivism,” tracks the emergence of liberal individualism and social contract theory as predicates for thinking about international legal order. After referencing some of these ideas in the work of Emer de Vattel (1714-1767), the first Part looks at how liberalism shows up in the U.S. Supreme Court’s early jurisprudence dealing with sovereign independence and slavery. In the second part, “Classic Liberalism and the Standard of Civilization,” the materials shift across the Atlantic and examine the 1815 “break” after the end of the Napoleonic wars, the steady emergence of a racialized and oppressive international law, and the eventual and anti-climactic dominance of legal positivism just before World War I.

## A. CLASSIC LIBERALISM & EARLY POSITIVISM (1650-1825)

### Assignment 7 – The Intellectual Foundation of Classic Liberal International Law

- ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975) PP. 5-6, 63-84
- THOMAS HOBBS, THE LEVIATHAN ([1651] MICHAEL OAKESHOTT, ED., 1947) PP. 80-86, 93-94, 109-113

#### Focus Questions

##### Unger

1. How does the liberal conception of human nature and value differ from Aristotelian ethics?
2. What are the natural and positivist aspects of this conception of liberalism?
3. What do all men need?
4. Why is the individual central to liberal philosophy? What role does the individual play in the concept of subjective value?
5. How are values and rules different?

##### Hobbes

1. What is “man” as he exists in the state of nature?
2. Why is the natural right to pursue the individual will problematic?
3. What is the solution to the problems posed by the pursuit of the individual will?
4. From where does the legitimacy of the sovereign come?

Assignment 8 – The Peace of Westphalia – A Constitutional Moment?

- **Leo Gross, The Peace of Westphalia 1648-1948, 42 Am. J. Int'l L. 20 (1948) pp. 20-26, 26-41**
- **Stephane Beaulac, The Westphalian Model in Defining International Law: Challenging the Myth, 8 Aust. J. Int'l Legal Hist. 181 (2004), pp. 181-186, 188-198, 198-213**

Focus Questions

Gross

1. What about the Peace of Westphalia marks it as a shift from one era to another?
2. How does the Peace reflect a theory of how international law binds its subjects?
3. According to Gross, what is the purpose of international law?
4. How does the legacy of the Peace of Westphalia hinder this purpose?

Beaulac

1. What is the traditional narrative of the Peace of Westphalia? Why is it a myth?
2. How do the following aspects of the Peace of Westphalia support Beaulac's thesis:
  - a. religious freedom
  - b. territorial settlements
  - c. treaty making powers
3. If the standard narrative of the Peace of Westphalia is a myth, what is Beaulac's alternative understanding about the meaning or importance of the Peace?

Assignment 9 – Vattel's Liberal Theory of International Law

- **MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005) PP. 71-72, 89-94, 106-122**
- **EMER DE VATTEL, THE LAW OF NATIONS ([1758]) BELA KAPOSSY & RICHARD WHATMORE, EDS. 2008) PP. IX-XII, 5-20, 67-79**

Focus Questions

Koskenniemi

1. What is the paradox of liberal theory and how is it mediated?
2. According to Koskenniemi, what are the descending and ascending aspects of Vattel's description of voluntary law?
3. How does Vattel's rejection of an objective theory of justice impact the notion of "just war"?
4. What is the proceduralization of the law of war?

Vattel

1. What is the image of the sovereign? What does it have to do with the domestic analogy?
2. How is this sovereign both similar to and distinct from the liberal "individual"?
3. Why is the difference between the individual in the state of nature and the sovereign necessary?
4. What is "necessary law"? How does it bind the sovereign? What kind of right does it create?
5. What is "voluntary law"? From what normative assumptions is voluntary law derived?
6. What laws are deduced from the need for states to establish a society of states?
7. What is a "perfect right"? How is it related to the difference between internal and external laws?

Assignments 10 & 11 – Classical Jurisdiction in the United States

- ***Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)**
- ***LaJeune Eugenie*, 26 F Cas 832 (Mass 1822) (skip pp. 13-16, 21-22)**
- ***The Antelope*, 23 U.S. 5 (1825) (focus on pp. 45-48, skim pp. 49-52)**

Focus Questions

Schooner Exchange

1. What is presumed in the concept of territorial jurisdiction?
2. Identify the ascending and descending arguments in Marshall's decision.
3. What is so important about sovereign "dignity"? How does it relate to jurisdiction?
4. In what circumstances are sovereign rights waived?
5. Why is the distinction between public and private vessels important?

La Jeune Eugenie

1. What does Story envision as the role of the judge?
2. What are the sources of international law?
3. What is necessary for a rule to be part of international law?
4. What does the court have jurisdiction to do?
5. Identify the ascending and descending arguments in Story's decision.

The Antelope

1. What does Marshall envision to be the role of the judge?
2. Why is the slave trade not prohibited by the law of nations?
3. What is the role of general consent in the law of nations with regard to the slave trade?
4. What role is sovereign equality playing in Marshall's argument?
5. Identify the ascending and descending arguments in Marshall's decision.



## B. CLASSIC LIBERALISM & “THE STANDARD OF CIVILIZATION” (1815-1914)

### Assignment 12 – From Equality to Hierarchy

- Charles Mills, *The Racial Contract* (1997) pp. 1-7, 19-31
- Gerry Simpson, *Great Powers and Outlaw States* (2004) pp. 67-69, 76-82, 93-102, 102-115, 227-253
- Eric Hobsbawm, *The Age of Revolution* (1962) pp. 1-4
- Gerrit Gong, *The Standard of Civilization* (1984) pp. 3-21

### Focus Questions

#### Mills

1. What is the purpose of thinking about white supremacy, or racism, as a political system?
2. Who are the parties to the Racial Contract? Is the Racial Contract real? How so?
3. Why is the Racial Contract understood to be global whereas the Social Contract is national?
4. What happened to the old dichotomy of Christian/Heathen? What was it translated into?
5. What is the connection between law and the Racial Contract?

#### Simpson

1. What are the elements of legalized hegemony?
2. How is legalized hegemony something other than power politics?
3. What are the two liberalisms?
4. What is Simpson’s project? What is he arguing about the “new” liberalism?

### Assignment 13 – Positivism and Imperialism

- **Lassa Oppenheim, The Science of International Law: Its Task and Method, 2 Am J Int'l L 313 (1908), pp. 313-319, 326-336**
- **LASSA OPPENHEIM, INTERNATIONAL LAW (1912) PP. 8-11, 30-35, 108-111, 116-118, 140-147**
- *ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005) PP. 32-40, 52-65*
- *Benedict Kingsbury, Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law, 13 European Journal of International Law 401 (2002) pp. 402-405*

### Focus Questions

#### Oppenheim – Science

1. What are the tasks of the positivist international lawyer?
2. How is Grotius characterized?
3. What was the role of natural law for Grotius and how does it fit into Oppenheim's vision of the progression of international law?
4. What is the positivist "method"?
5. What is legal science?

#### Oppenheim – International Law

1. Who are the subjects of international law?
2. What is the scope of international law?
3. What governs relations between a member of the international community and a non-member?  
What kind of law does this resemble?
4. What are the criteria for statehood?

Assignment 14 – Case Study: The Ottoman Empire and the Crimean War

- **THE TREATY OF PARIS (MARCH 30, 1856)**
- **GERRIT GONG, THE STANDARD OF CIVILIZATION (1984) PP. 106-119**
- **JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS ([1883] 2005) PP. 101-103, 113-125**
- *MS ANDERSON, THE EASTERN QUESTION 1774-1923 (1966) PP. 114-132*

Focus Questions

The Treaty of Paris

1. What is the effect of Article VII? Does the Ottoman Empire enter the Family of Nations under this provision?
2. What values and assumptions are expressed in Article IX?

Gong

1. According to Gong, did the Ottoman Empire enter the Family of Nations in the Treaty of Paris?
2. How does Gong frame the question of the status of the Ottoman Empire?
3. What is the relationship between law and politics? Is international law independent (at all) from politics?

Lorimer

1. According to Lorimer, did the Ottoman Empire enter the Family of Nations?
2. What is Lorimer's project? How does he characterize the task of international law and the international lawyer? What is the "method" of international law?
3. What are the five types or forms of recognition?
4. How does recognition operate between and amongst different communities?
5. What is different or unique about Christianity that makes only Christian nations capable of plenary recognition?
6. What does Lorimer's description of Christianity reveal about his understanding?
7. Is Lorimer making a classic liberal international legal argument?

*Assignment 15 – Case Study: China and the Opium War*

- **Teemu Ruskola, Canton is not Boston, 57 Am. Q. 859 (2005)**
- **Caleb Cushing’s Abstract and Discussion of the Treaty of Wanghia, January 24, 1845**

Focus Questions

Ruskola

1. How did sovereign equality operate in the East?
2. What is the nature of American imperialism? How is it related to extraterritorial jurisdiction?
3. How does this argument relate to Anghie’s concept of the dynamic of difference and the relationship between international law and imperialism?

Cushing

1. How does Cushing characterize the classic image of exclusive jurisdiction?
2. What is the rationale for sovereign equality amongst Christian nations?
3. How does Cushing explain the fact that the US had previously submitted to Chinese jurisdiction?
4. What is the “standard” that Cushing is applying to China in determining whether it is within the Family of Nations?
5. Is Cushing making a liberal argument? Are there both ascending and descending aspects to his argument? How does anti-pluralism and pluralism relate here?

Assignment 16 – Case Study: African Partition and the Berlin Conference

- **MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS (2002) PP. 98-132**
- **Makau Matua, Why Redraw the Map of Africa? A Moral and Legal Inquiry, 16 Mich. J. Int'l L. 1113, 1113-1137 (1995)**
- *ERIC HOBSBAWM, THE AGE OF EMPIRE (1987) PP. 56-73*
- *RONALD ROBINSON, "THE CONFERENCE IN BERLIN AND THE FUTURE IN AFRICA, 1884-1885," IN BISMARCK, EUROPE, AND AFRICA (STIG FORSTER, WOLFGANG MOMMSEN, AND RONALD ROBINSON, EDS. 1988) PP. 1-32*
- *FINAL ACT OF THE BERLIN CONFERENCE (1885)*

Focus Questions

Koskenniemi

1. How does Koskenniemi characterize the "standard of civilization"?
2. How does the standard of civilization relate to both natural and positive law?
3. How was the Final Act of the Berlin Conference a legal instrument? What purposes did it serve?  
What work is sovereignty doing in the Act?

Matua

1. Was the partitioning of Africa legal?
2. Were African communities "states"? Why is "statehood" not enough?
3. Why is recognition so important and what are the different forms it can take?
4. Is Matua making a primarily legal or political argument?
5. How does Matua characterize the idea of self-determination? Is it good or bad?

### **III. Modern International Law (1914-1950)**

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 and formal distinctions behind.

## A. AFTER POSITIVISM COMES FUNCTIONALISM

### Assignment 17 – The Arrival of International Institutions

- **GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES (2004) PP. 132-159**
- *THE COVENANT OF THE LEAGUE OF NATIONS (1924)*
- *Manley Hudson, The Permanent Court of International Justice, 35 Harv. L. Rev. 245 (1922)*

### Focus Questions

#### Simpson

1. What was so important about 1907? What did it represent with respect to claims about sovereign equality? Legal hegemony?
2. What was the central debate over the Permanent Court of Arbitral Justice?
3. How can the notion of majority rule be squared with the concept of sovereignty?
4. Who do you sympathize with between Barbosa and Scott?

### Assignment 18 – A New International Law?

- J.L. Brierly, *The Shortcomings of International Law*, 5 *British Yearbook of International Law* 4 (1924)
- *The Case of the S.S. Lotus* (France v. Turkey), Permanent Court of International Justice (1927) pp.1-20, 25-27

#### Focus Questions

##### Brierly

1. What is Brierly's project? What is the problem of international law? How is the problem of international law related to sovereignty?
2. What are the hurdles to solving the problem?
3. What is problematic about positivism? What alternative is needed?
4. How does Brierly see the classic liberal domestic analogy?

##### The Lotus Case

1. What is the scope of international law? To whom does it apply?
2. What is the nature of international law?
3. Is international law primarily prohibitive or permissive? How does this relate to traditional notions about sovereignty? What is at stake in the distinction?
4. What is the effects theory of jurisdiction?
5. What is the assumed restriction of jurisdiction and from where does this assumption come?
6. Why is this case considered an example of extreme positivism?



## B. AFTER STATES COME PEOPLES: MANDATES & MINORITIES

### Assignment 19 – The Right of Self-Determination

- Antonio Cassese, *The Right of Self-Determination: A Legal Appraisal* (1995) pp. 11-32
- Antony Anghie, *Nationalism, Development, and the Post-Colonial State: The Legacies of the League of Nations*, 41 *Tex. J. Int'l L.* 447, 447-457, 462-463 (2006)

#### Focus Questions

##### Cassese

1. What was the historical origin of the principle of self-determination?
2. In its early manifestations, what was the scope of self-determination?
3. What were the three components of Lenin's implementation of self-determination at the international level?
4. What did Wilson's ideas of self-determination add? How was Wilson's conception of self-determination related to western democratic theory?
5. How were Lenin and Wilson's conceptions of self-determination different?
6. Regarding the Aaland Islands Case, was self-determination understood as an international legal norm? What was the basis of the League's jurisdiction? If the inhabitants of the Aaland Islands were not entitled to self-determination, what kinds of protection were available to them?

##### Anghie

1. What is the relation between the idea of minority rights and classic liberalism?
2. What are the types of mandates created in Article 22 of the League Covenant?
3. How is the mandate system consistent with the standard of civilization? How is it not?
4. On what vision of history does the mandate system rely? What was its goal? Was the goal the same for different types of mandates?
5. How do you think about mandates and minority rights in the context of liberal pluralism and liberal anti-pluralism?

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)
- Robert Redslob, **The Problem of Nationalities**, Grotius Society, (April 16, 1929) pp. 21-32
- ***The Polish Nationality Case***, Permanent Court of International Justice (1923) pp. 6-10

Focus Questions

Berman

1. What is the problem of international law?
2. What is “modernism”? What does modernism reject?
3. How does the concept of modernism apply to international law?
4. In what ways is the Palestine Plan a reflection of new legal modernism?

Redslob

1. What is a nation? Why is it so important to define?
2. What are the barriers to nationalism?
3. What is the solution?
4. Is there a right to: secession? autonomy? minority protection?

Polish Nationality Case

1. What is the central issue?
2. What is Poland’s argument regarding Article 12 and the limits of the League’s power? Who can be a “minority”?
3. How does the Court understand the Minorities Treaty limit Polish sovereignty?

### C. A NEW WORLD ORDER (AGAIN)

#### *Assignment 21 – The United Nations*

- **THE UN CHARTER (1945)** (focus on Articles 1, 2, 4, 10, 13, 18, 23, 24, 27, 39, 51, 55, 77, 78, 92, 103, 104, 105)
- **GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES (2004) PP. 167-179, 254-277**

#### Focus Questions

##### UN Charter

1. What is the purpose of the United Nations?
2. Does the UN support a more egalitarian or more hierarchical ordering of states?
3. What is the purpose of the Security Council? How does the purpose of the Security Council differ from that of the General Assembly? What are some justifications for having permanent membership in the Security Council?

##### Simpson

1. What are the arguments for and against a permanent membership in the Security Council?
2. What are the arguments for and against a standard of membership in the General Assembly?

Assignment 22 – Economic Liberalism and International Law I

- **Wilhelm Roepke, Economic Order and International Law, 86 Recueil des Cours 203, pp. 207-219 (1954)**

Focus Questions

1. What is the relation between law and economics? Is economics independent of law? Does law constitute the market? Do economic pressures generate particular legal regimes?
2. What does Roepke mean that life runs on more than vitamins and refrigerators? Is he suggesting something about the separation between certain spheres of activity?
3. How does Roepke contrast the 19<sup>th</sup> century vision of *laissez-faire* with his own?
4. What is the dominant spirit of the time? Why is it “meta-economic”? Why is it so critical to Roepke’s thesis?
5. What is the central problem of international economics? How is it related to international law?

Assignment 23 – Economic Liberalism and International Law II

- **Wilhelm Roepke, Economic Order and International Law, 86 Recueil des Cours 203, pp. 220-250 (1954)**

Focus Questions

1. What is the universalist-liberal tradition? How is it different from the sort of Hobbesian liberalism that has so enamored international lawyers?
2. Why is the distinction between the market and the state so important?
3. How had the problem of international legal order been solved in the past? Why was the gold standard not political? Why was this so important?
4. From what is classic liberalism under attack? Why is “collectivism” problematic? Why is sovereignty problematic?
5. What are Roepke’s views on private property and sovereignty?

Assignment 24 – Non-State Actors: Individual Rights and Duties

- **HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950) PP. 3-9, 27-47, 114-115**
- **Martti Koskenniemi, Hersch Lauterpacht and the Development of International Criminal Law, Journal of International Criminal Justice, 810-818, 823-825 (2004)**
- *Theodor Meron, Reflections on the War Crimes by International Tribunals, 100 American Journal of International Law 551, 551-560 (2006)*
- *Theodor Meron and Jean Galbraith, “Nuremburg and its Legacy” in International Law Stories (John Noyes, Laura Dickinson, and Mark Janis, eds.) (2007) pp. 21-32*

Focus Questions

Lauterpacht

1. What is Lauterpacht’s argument about the proper subjects of international law? What are the ascending and descending aspects of his argument?
2. What is Lauterpacht’s argument regarding the relationship between rights and duties in law? What role does morality play in his argument?
3. How is the UN Charter in conformity with natural law?

Koskenniemi

1. According to Koskenniemi, what are the four stages of Lauterpacht’s career? What is the significance of this? What are the characteristics of the different stages?
2. According to Koskenniemi, how does Lauterpacht address the following dichotomies: national/international law, law/politics, individual/state?

Assignment 25 – Non-State Actors: International Organizations

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

Focus Questions

1. What are the two main issues?
2. What role does the “needs of the community” play in the court’s decision?
3. What are the descending and ascending aspects of the court’s reasoning regarding the capacity of the UN?
4. How does the court answer the question of whether the UN can bring claims against non-members? What is the role of consent in this argument?
5. Is the ruling consistent with the structure of classic or modern liberal argument? Why or Why not?

# Conclusion

## Assignment 26 – History as Program

- **David Kennedy, The Disciplines of International Law, 12 Leiden J. Int'l L. 9, 88-101 (1999)**

### Focus Questions

1. If we read the history of international law as a narrative, “history as origin” gives us a story with a happy ending: international law has always been progressing, getting better all the time. Does this seem right? Does the story of a pre-liberal, classic, and modern periodization of international law lend itself to a happy ending? Is there even a coherent narrative in there?
2. What is Kennedy suggesting when he says that thinking about “history as progress” gives us a picture of law first moving away from politics, and then from philosophy? What is at stake in the move to pragmatism?
3. What are the imperial implications of thinking about “history as program”? Why does Kennedy think that “history as program” encourages international lawyers to be more concerned with the consolidation of international processes than actually helping real people with real problems?
4. What does a critical history look like? Have you recognized this as a course offering a critical history of international law?