



Workshop

Recent Research in the History of Public International Law

Ghent University, Friday 23 May 2014
Faculty of Law - Legal History Institute



“Pax Optima Rerum” - Allegory on the Peace of Utrecht, 1713
(Bibliothèque nationale de France, Estampes, Collection Michel Hennin, tome 85, 7443-7508)

I. Program

Registration and Coffee (08:45)

(Meeting Room)

Welcome (09:30)

(Auditorium B)

Prof. dr. D. Heirbaut, President of the Department of Jurisprudence and
Legal History (Ghent)

Introduction (09:45)

Dr. Frederik Dhondt (Ghent)

Session 1: The Old Regime and the Law of Nations (10:00-12:30)

“An assessment of legal humanist methodologies in the sphere of
international law”

Drs. James Mearns (KULeuven/Research Foundation Flanders)

“Free ship – Free good”. Evolution and contest of a legal principle via
intercultural conflicts on the oceans”

Dr. Magnus Ressel (Johann Wolfgang Goethe-Universität Frankfurt)

“Prize Courts and International Law”

Dra. Shavana Musa (Tilburg University)

Lunch break (12:30-13:30)

"Mos Trajectensis ? The Law of Nations and Diplomatic Practice after the Peace of Utrecht (11 April 1713)" (13:30-14:20)

Dr. Frederik Dhondt (Ghent)

Session 2: 1789-1815 as a turning point ? The Revolutionary Wars, the Congress of Vienna and their effects on inter-state relations and constitutions (14:20-16:00)

“The Birth of the Westphalian Order: 1789-1815 as turning point towards abstract states and equality in international legal practice and doctrine?”

Dr. Raymond Kubben (Tilburg University)

"Friedrich Gentz et le droit à l'intervention armée"

Dr. Raphael Cahen (LMU München/Aix-Marseille)

Coffee break
(Meeting Room)

**Session 3: The 19th century transformation of international law
(16:15-17:55)**

“The legal dynamics of British imperialism (1815-1860)”

Dra. Inge Van Hulle (KULeuven/Research Foundation Flanders)

“The Use of Force in the Nineteenth Century – Reflections on the Origins and the Reproduction of the ‘Indifference’-Narrative in Contemporary Legal Doctrine ”

Dra. Agatha Verdebout (ULB)

Conclusion (17:55)

Prof. Dr. Randall Lesaffer (Tilburg University/KUleuven)

II. Context

Legal history has mostly been that of private law, with a focus on roman and canon law as the common intellectual matrix of European lawyers. Public law within the state was constructed as an exception to principles of private law (Loughlin). As a collection of rules governing the vertical exercise of power, the history of public law bordered on political philosophy (Israel) and intellectual history (Skinner/Ottmann), a characteristic applicable to public international law as well (Armitage). The law covering relations between sovereign states can thus be seen as a specific reading of diplomatic history (Grewe), on the one hand, or as an application of general natural law ideas, blended with private law analogies (Lauterpacht), on the other.

It is tempting to fall into skepticism on the mere possibility of binding rules between sovereign states. Virtually, since the Stone Age, the fundamental international state of anarchy between independent political entities has not been lifted (Van Caenegem). When it comes to Great Power politics, no superstate or “Civitas Maxima” (in the terms of Christian Wolff) can coerce trespassers or enforce norms and principles. Scant references to recent situations of deadlock within the Security Council (Syria, Iraq) can suffice. Yet, this renders the instrumental use of legal history for contemporary lawyers even more relevant. Dilemmas of just war (Mattei/Rech/Whitman), equality (Simpson) or hegemony in international society (Clark), arbitration (Morgenthau), neutrality (Neff), maritime law, sources of international law or multilateral diplomacy have their historical pedigree in the state system of Europe (Lesaffer/Osiander) and outside (Kolb). Big authors of canon law, humanist doctrine, Enlightenment or positivist 19th century scholarship (Anghie/Sylvest) contain a useful arsenal of argumentation (Scott). The enduring success of an author like Vattel in US case law and foreign office discourse learns that a good argument in public international law is not judged on its age or origin (Chetail).

Next to these questions of dialogue between contemporary public international law and its long tradition, the similarity of state behaviour across time offers opportunities to blend historical and legal research, in order to uncover the operation of the law, “the brewing of international law” (Crawford), or the consolidated core set of implicit assumptions when lawyers counsel their political masters (Bourdieu). The game of diplomacy is played by legal rules, constructed and referred to in practical legal argumentation. The essential, minimal function of the Law of Nations is one of conferring legitimacy to political compromise, rendering concessions acceptable

through their conformability to common references or inter-state reciprocity and consent. Comparative studies over time, and thus an active dialogue between specialists of different periods, are greatly facilitated by recurring theoretical discussions (Koskenniemi 2005).

Finally, the emergence of transformative ambitions in international law, aiming to modify society through the imposition of liberal and providential values (Jouannet), *sensu stricto* pertaining to the internal legal order, has brought the individual on the forefront in both practice and theory (Hafner). As a militant lawyer (Koskenniemi 2001), as a victim of interstate conflict, or as a litigating actor before international jurisdictions.

The Ghent Workshop offers the opportunity to engage in a dialogue with young researchers from Belgium, the Netherlands, France and Germany, presenting their work in progress for discussion in three arena's.

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III. Abstracts

Session 1

James Mearns

This paper seeks to reconcile the methodological approach of Francois Hotman with the substance of his doctrine on the law of nations. It considers first the works where Hotman's thoughts on the law of nations are to be found. It then outlines the substance of Hotman's doctrine on the topic, before going on to assess whether his contribution is in any way more substantial than that of his predecessors and the ways in which his own approach to the topic resembles or is different from theirs. Questions of genre will be considered: 'legal diatribe or essay?', along with the role of rhetoric and history in developing a legal argument. Is it appropriate to classify Hotman's narrative tendencies as Ramist? What are his specific concerns and why might these particular questions, such as what to do with a city which has been captured in war (Quaestio 5 from the 'Quaestiones Illustres') and whether faith should be kept with the enemy have been particularly appropriate against the background of France's civil wars during the last half of the sixteenth century.

Magnus Ressel

According to a historical legend it were the Barbary Corsairs who first accepted the principle of “Free Ship – Free Good” on the oceans. In my talk I want to explore this in more detail, point out the fundamental flaw of such an argument and elaborate and substantiate it out to a more complex and contextualized analysis.

While it was considered a legitimate act of the authorities of the Early Modern Era to issue “Lettres de marque” to corsairs in order to do damage to the enemies sea-borne trade, the freedom of movement of neutral ships was a contested issue during the Early Modern Age. If they carried war-materials for the enemy, they were usually regarded as “good prize”; yet, the term could be interpreted quite extensively. Even more difficult was the question whether the neutrals had the right to ship goods of the enemy and thus maintain his trade-lines.

Nowhere was this ‘juridical’ question more delicate than in the Mediterranean between Europeans and the four Maghreb-states. These Southern European waters were an area where the so-called Barbary corsairs from Northern Africa operated in

large numbers and took hundreds, over the years up to thousands, of European ships. For the Northern Europeans this was a great problem; yet on the whole it remained manageable for each single political entity as long as the principal competitors also suffered. If everybody sailed with the same danger or safety, nobody lost or won too much ground in the area. In these times rather simple measures sufficed to protect one's own shipping. A strategy often resorted to by all Northern-Europeans was the formation of convoys, especially between 1620 and 1720. This certainly caused a rise in the costs of transportation but it was an easily enforceable pragmatic measure that served well as long as no better alternative was at hand. Peace-treaties between the Northern powers and the Barbary corsairs certainly would have been the better alternative but only if the clause "Free Ship – Free Good" was included. Without this explicit permission, i.e. if the corsairs had the right to take away the goods from nations at war from neutral ships, the advantage of neutrality got lost and thereby the peace-treaty was emptied of any practical use.

To give an example, if Dutch ships carried Spanish goods towards Italy the North-African corsairs usually regarded these ships as legitimate targets since they were helping the arch-enemy. Once the Dutch conceded the right to inspect their ships to the Barbary-corsairs in order to obtain a peace-treaty, this caused grave damage to the Dutch Mediterranean trade because Spaniards or Italians immediately switched to Hanseatic ships. The latter not being at peace with the Barbary states gave them in this specific case a competitive advantage since South-European merchants could thus be sure of the defense of their goods by the Northern Germans who in case of an attack of the corsairs also defended themselves against slavery. This constellation caused the absolute necessity for the European sea-powers to wrench the acceptance of the principle "Free Ship – Free Good" from the Muslim corsairs. Yet this was impossible for the corsairs to concede, being completely dependent on preying on European ships, a concession of this endangered their sheer survival. War was the only possible consequence and thus we see the 17th century filled incessantly with squadrons of the European sea-powers attacking the Barbary corsairs in order to bring them to their heels and accept the principle "Free Ship – Free Good".

In the presentation I intend to highlight the first occurrence of the principle, the subsequent 'debate' (i.e.: wars) about this, the final acceptance of the principle by the corsairs and the following diffusion into international maritime law. I also want to

point out some misunderstandings and wrong conception of the evolution of this principle which can be found to this day in the relevant literature.

Shavana Musa

Prize courts in the early modern period were distinct institutions vested with the authority to deliberate and decide upon issues of prize, namely ships and goods, seized upon the high seas during times of war. Despite each European nation having their own prize jurisdictional body, it was an innate belief, as was wholeheartedly agreed that the jurisdiction of each and every prize body in Europe would be determined by the law of nations and not the domestic law of the home country. This was therefore an institution that applied international laws and was the epitome of what Wheaton later referred to as ‘the most important practical branch of the law of nations’.

Indeed the narrative here is not as simple and as straightforward as the aforementioned statement would dictate and the political contexts and sovereign inclinations would be, on occasion, enough for certain powers to stray from the law of nations on issues concerning prize. This paper will thus seek to highlight precisely the divergences and convergences of powers from the law of nations in the seventeenth century, concluding on this point that in essence, a mere commonality of principle did not necessarily form a uniform rule to regulate the general practice. The paper will also seek to establish the esteemed recognition that this institution was bestowed upon it, from each of the differing European nations and their respective relationships. Hopefully though, this paper will, in the end, show that the laws and practices of the prize courts at this time made a substantial contribution to international law, much more than it is often given credit for.

Frederik Dhondt

In my PhD, I developed and tested the hypothesis that legal arguments are the key to understand the stability in the European international system after the Peace of Utrecht (11 April 1713), which simultaneously ended the continent-wide War of the Spanish Succession (1701-1712/1713) and the bloody long seventeenth century. Consecutive guarantee treaties consolidated the separation of the crowns of France and Spain, and installed multilateral treaty compromises as the cornerstone of diplomatic reasoning. Legal historians have so far refrained from tackling the vast archival sources produced by diplomats and bureaucrats. Published treaties and doctrinal reflections offer but a fragmentary view. In an anachronistic backward-

projection of current public international law, interactions between sovereigns are reduced to the mere unilateral pursuit of interest.

More generally, constantly changing allegiances and breaches of treaties tend to disqualify the study of Ancien Régime international relations. Yet, even in these seemingly hard cases, jurists could claim the monopoly of legitimacy in all situations where an all-out military conflict was not a practical option. As such, they were indispensable to the conduct of international relations. In this talk, I will present the case of the War of the Polish Succession (1733-1738), which counts as a traditional example of a “phoney war”, staging senescent generals and months of inactivity against the background of secret bilateral diplomacy and a game of musical chairs between wiggled nobles in palaces.

A first layer of analysis concerns declarations of war and alleged just reasons from the contending parties (France, the Emperor and Empire, Russia). Publicly uttered legal arguments appealed to shared conceptions of justice, were an indispensable part of diplomatic conversation and served to mobilize public opinion. Moreover, the horse-trading which rendered the war’s outcome famous, was built on implicit premises developed in treaty practice during the preceding decades. Second, legal arguments did not only confer legitimacy on sovereign decisions, but constituted the privileged vector consensus. The military campaigns on the “Polish Succession” mark the apogee of a long-standing discussion on a legal question by excellence, involving treaty law, imperial law, feudal law and municipal autonomy. The Peace Preliminaries of Vienna (3 October 1735) ended a quarrel whereby Imperial jurists had stood virtually alone in the European diplomatic community, arguing for the primacy of Imperial norms over the Treaty of the Quadruple Alliance (2 August 1718). Arguments invoked by the antagonists on the Italian stage (Spain, Savoy-Sardinia, Tuscany, the Papacy) dated back to previous conflicts, had been invoked at multilateral conferences and had as such been the object of mutual theorizing exercises, as well as several “publick treaties” in the 1720s. The reshuffle of Italian territories to the benefit of Spain was the direct prolongation of a verbal quarrel. Finally, the Maritime Powers’ neutrality reflected a desire to safeguard British and Dutch trade, as well as the Southern Netherlands’ integrity. Yet, in the previous decade, Westminster and Versailles had teamed up as mediators between Spain and the Emperor. Their mutually fostered discourse served as a vector to reconnect with France, imploring a multilateral solution.

Session 2

Raymond Kubben

Despite severe debates at the end of the 1990s and early 2000s, the "Westphalian Myth" remains persistent. Many textbooks on international relations and international law still claim that the "Treaty of Westphalia" inaugurated the emergence of the modern states system based on sovereign and equal states. Many scholars have debunked this myth. Close scrutiny has revealed that the structural principles of autonomy and plurality already existed at the European level whereas the principle of equality and the abstract nature of states were not there yet in 1648. It has also revealed that the myth results to a large extent from confusion between the international significance of the peace settlement and its parts that address the constitutional framework of the Holy Roman Empire. Part of the failure of the criticisms of the "Westphalian Myth" to grasp wider audiences is that they do not offer alternative stories about the historical origins of the present world order. Benno Teschke, among some others, stands out as an exception, but even his alternative is hardly more than an attempt to uphold the Marxist view of history in which 1789 rather than 1648 is the crucial turning point towards modernity.

Even without adopting Teschke's Marxist orientation, an argument can be made for 1789-1815 being the real turning point towards the modern states system based on sovereign equality and consisting of abstract states. Both in international practice and in international legal doctrine evidence can be found to sustain the position that it was at the time of the French Revolutionary Wars the international order "came of age." In my contribution of the Ghent workshop I will examine some of this evidence relating to several ideas for papers I am to work on in the following year(s). The first aspect concerns the presentation of treaty parties in treaty practice as evidence for the emergence of an abstract concept of the state in international practice. The second concerns a confrontation of the general definitions of the law of nations provided in international legal doctrine with elaborations on the subjects of that law in the same works, revealing a struggle to match the concept of the state with practice where remnants of feudalism still abounded and the new phenomenon federal states had to be dealt with. Finally, I will shortly address the phenomenon of "state-making peace", that is, the creation of completely new territorial states by (peace) treaties during the French Revolutionary and Napoleonic Wars as well as at the Vienna Congress.

Raphael Cahen

(pending)

Session 3

Inge Van Hulle

A study that focuses on British state practice of imperialism (1815-1860) and on the individuals that created it invariably stumbles on the problem of the ‘man on the spot’. Who is he and what could his importance be to the history of international law? The ‘man on the spot’ is a term first used by historians. In the context of legal history, he could be described as an individual who reacts to local circumstances, hereby “creating” international law, and who is either an agent of the state who oversteps the boundaries of his official powers or a non-state actor without official powers who nonetheless decides to act on behalf of the state. A clear example is the case of Captain William Fitzwilliam Owen who set out from Cape Colony in 1821 on behalf of the British Crown to conduct a geographical survey of the East coast of Africa. Having had no legal training and in breach of his official orders, he concluded a treaty of cession in 1823 with the kings of Mapoota and Temby in the area of Delagoa Bay, whereby the sovereignty over the area was transferred to the British Crown. Captain Owen’s actions became highly contentious: it was unclear whether the native tribes had understood the treaty and whether Delagoa Bay itself did not in fact belong to Portugal. The treaties set in motion decades of legal discussions between Britain and Portugal on the rights of sovereignty over the area of Delagoa Bay, finally culminating in the Delagoa Bay arbitration of 1875. This paper argues that while the ‘man on the spot’ is often overlooked by legal historians focusing on legal doctrine, his role cannot be ignored when examining state practice. Awarding attention to the man on the spot as a ‘creator’ of international law does not only shed new light on state practice, but will also help to illustrate the relativity of some of the legal theories that are based on it.

Agatha Verdebout

International law textbooks generally teach that the prohibition of the use of force is a product of the First and Second World Wars and that prior to the twentieth century States could hence freely resort to arms. This belief is still so firmly anchored in most internationalists’ minds that some have not hesitated to qualify any attempt to dispute

it as “absurd”. Several elements tend, however, to call this traditional narrative – sometimes referred to as the “indifference” narrative – into question. Among these are notably the fact, on the one hand, that, even in the nineteenth century, States usually felt the urge to legally justify their use of armed force and, on the other hand, that the vast majority of the legal doctrine of the time considered that international law did impose some limitations on both resort to war and armed intervention. Why and how did the indifference narrative then manage to impose itself as the commonly accepted and shared representation of the use of force in nineteenth century? With the recent turn to history, several authors have started to challenge this traditional view but the question of its origins has not yet been investigated. The proposed paper therefore wishes to explore this problematic, and fill this lacuna. In other words, the aim of the research is to deconstruct the narrative of indifference, trying to understand the underlying causes of (or motivations for) its sprouting and its rooting in international legal scholarship.

In doing so, the research will equally shed some light on the inner discontinuities, ambiguities and contradictions of the discourse of the indifference of classic international law to the use of force. It is, in fact, troubling to notice that two narratives of indifference actually coexist. Some authors consider that both war and armed intervention were fully admissible prior to the adoption of the Pact of the League of Nations in 1919. Others contrarily assert that the use of force was already outlawed in the nineteenth century but only in its lesser form – that is to say intervention. As the normativists have rightly underlined, this last hypothesis leads to the disconcerting consequence that small violations of foreign territory would have been strictly prohibited while massive and hostile aggressions tolerated. How does those two visions reconcile with each other and with the nineteenth century’s doctrinal views?

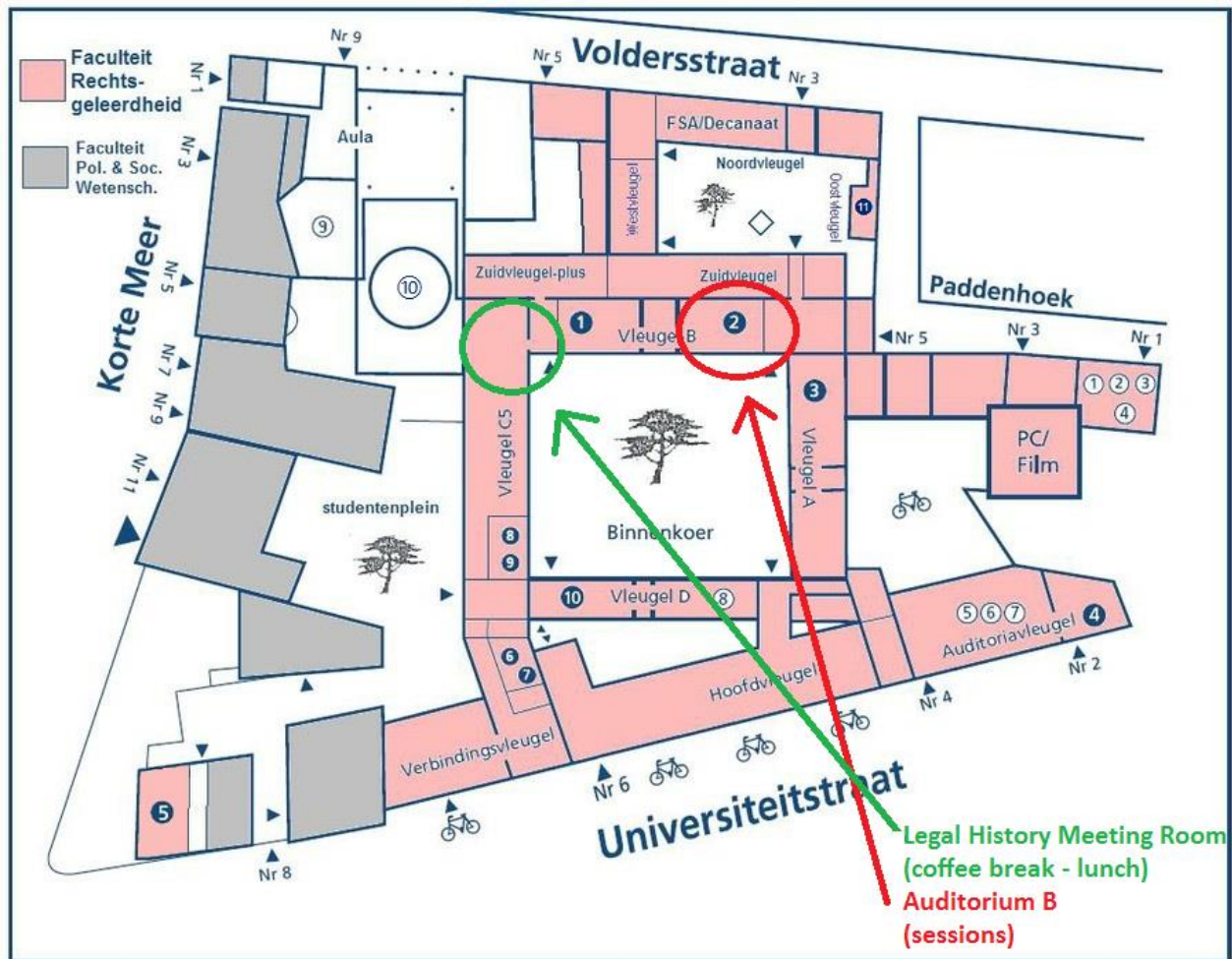
From a methodological perspective, and as may be inferred from the above, the study will essentially consist in a critical appraisal of the doctrine. Considering that the first traces of the indifference narrative can be found in the writings that followed World War I, our analysis material will be composed of the literature on the use of force and its history dating from 1919 to the present day. In that respect, our study is at the crossroads between an intellectual and cultural history of international law. It, indeed, aspires to trace the itinerary of a particular idea or representation of the history of international law while, in the meantime, dismantling it.

IV. Practical Details

Venue: Ghent Faculty of Law, Universiteitstraat 4, 9000 GHENT (Belgium)

Auditorium B (number 2 on the map, Wing B, Inner Courtyard).

Legal History Institute Meeting Room: Wing C5, Ground Floor.



The workshop is open to all interested members of the academic staff, external researchers or students. Please notify your presence to Mrs. Karin Pensaert, secretary (Karin.Pensaert@UGent.be).

**Workshop on the History of Public International Law
Ghent, 23 May 2014 – Bio-Bibliographical Details**

Dr. Raphael Cahen (Ludwig-Maximilians-Universität München/Université Paul Cézanne Aix-Marseille)



Raphaël Cahen studied Law, History and Political Ideas at the University Paul Cézanne, the Ludwig-Maximilians-Universität and the Università degli studi di Perugia. After obtaining a Master Degree on History of institutions and political ideas featuring a thesis upon W.A. Rehberg and E. Brandes's political Ideas, he embarked on a Phd-thesis under the joined supervision of Prof. Dr. Henning Ottman (LMU) and Prof. em. Dr. Michel Ganzin (University Paul Cézanne), entitled *The political thought of Friedrich Gentz (1764-1832), Post-Enlightenment thinker and Actor of the renewal of the European order in the time of Revolutions*.

He has also been teaching and employed in various centres of researches such as the Max Planck Institute for European Legal History in Frankfurt am Main, the University of La Rochelle, the LMU in Munich or Aix-Marseille University. His research focus is on history of political thought and history of international relation and international law.

Selected bibliography:

R. CAHEN. "The correspondence of Frederick von Gentz: The Reception of Du pape in the German-speaking World" in R. LEBRUN & C. ARMENTEROS (eds.). *Joseph de Maistre and his European Readers: From Friedrich von Gentz to Isaiah Berlin*. Leiden, New York, Köln, Brill, 2011, pp. 85-111.

R. CAHEN & T. LANDWEHRLÉN. "De Johann Gottfried Herder à Benedict Anderson: retour sur quelques conceptions savantes de la nation". In : *Sens public, Revue internationale*, 2010-2011. 19p.

<http://www.sens-public.org/spip.php?article794>

R. CAHEN. "Frédéric Gentz et les publicistes Français, le droit de la mer en débat (1795-1815)", in P. STURMEL & J. BOUINEAU (dir.). *Actes du colloque « Navires et Gens de mer », Méditerranées*. Paris : l'Harmattan, 2011, pp. 281-307.

R. CAHEN & T. LANDWEHRLÉN. "Retour sur l'appréhension savante de l'identité nationale : des conceptions primordialistes aux analyses modernistes anti-objectivistes". In : J. PINI (dir.). *Identité(s). Actes de la journée de l'École doctorale n°67 Sciences Juridiques et Politiques*. Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2010, pp. 15-28.

R. CAHEN. "Friedrich Gentz on Maritime Law : an Unfamiliar Aspect of Counter-Revolutionary Thought in Napoleonic Europe", in M.J. PRUTSCH & N. DOMEIER, *Inter-Trans-Supra? Legal Relations and Power structure in History*. Saarbrücken, AV Akademikerverlag, 2011, pp. 344-357.

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Dr. Frederik Dhondt (Ghent University)



Dr. Frederik Dhondt obtained the diplomas of Candidate and Master in Law (UGent, 2007), Bachelor and Master in History (UGent/Paris-Sorbonne, 2008) and Research Master in International Relations (Sciences Po Paris, École doctorale, 2009). In September 2013, he defended his Ph.D.-thesis in law entitled *Balance of Power and International Law. European Diplomacy and the Elaboration of International Order, 18th Century and Post 1945* (supervisor: Prof. Dr. D. Heirbaut/UGent), funded by a Ph.D.-Fellowship

of the Research Foundation Flanders (FWO). From 1 October 2013 on, he works as a Post-Doctoral Assistant at Ghent University, where he teaches and pursues his research in the Legal History Institute. His research focuses on legal argumentation in 18th and 19th century European diplomatic sources.

Main publications:

F. DHONDT, “La représentation du droit dans la communauté des diplomates européens des « Trente Heureuses » (1713-1740)”. *Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du Droit/The Legal History Review*. LXXXI (2013), No. 3-4, pp. 595-620.

F. DHONDT, “La culture juridique pratique au Congrès de Cambrai (1722-1725)”. *Revue d'Histoire Diplomatique*. CXXVII (2013), N°. 3, pp. 271-292.

F. DHONDT, “Looking Beyond the Tip of the Iceberg: Diplomatic Praxis and Legal Culture in the History of Public International Law”. In: *Rechtskultur - Zeitschrift für Europäische Rechtsgeschichte/European Journal of Legal History/Journal européen d'histoire du droit* 2 (2013) [Methode der Rechtsgeschichte und ihrer Nachbarwissenschaften beim Umgang mit rechtshistorischen Quellen], pp. 31-42.

F. DHONDT, *Op zoek naar Glorie in Vlaanderen. De Zonnekoning en de Spaanse Successie, 1707-1708* [Standen en Landen/Anciens Pays et Assemblées d'États; Verhandelingen/Collection historique, Belgian Section of the International Commission for the History of Representative and Parliamentary Institutions, vol. CVIII]. Kortrijk: UGA, 2011.

F. DHONDT, “From Contract to Treaty: the Legal Transformation of the Spanish Succession, 1659-1715”. In: *Journal of the History of International Law/Revue d'histoire du droit international*. XIII (2011), no. 2, pp. 347-375.

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Dr. Raymond Kubben



Dr. Raymond Kubben studied law and public administration sciences at Tilburg University (2003). He defended his Ph.D.-thesis on law and power asymmetry in relations between the French and Batavian Republics between 1795 and 1803 –*Regeneration and Hegemony. Franco-Batavian Relations in the Revolutionary Era (1795-1803)* (Leiden: Martinus Nijhoff Brill Publishers, 2011) – at Tilburg in 2009. He presently works as an Assistant Professor at Tilburg Law School (until 31 July 2014). His research focuses on early modern and 19th-century international legal history delving into the connections between international legal doctrine, international legal and diplomatic practice and political and constitutional thought

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