International Law and International Politics (2016)

A Graduate Seminar taught in the Department of Political Science and Northwestern Law School
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Office Hours: Wednesdays 1:30-3:30

This seminar focuses on contemporary scholarship regarding international law as it intersects with international relations. The topic of international law is a place to study the interaction of material, power and normative forces, and a place where one can employ all of the newest methods and approaches in political science. The new international law scholarship is being built in an unusually interdisciplinary fashion. We will be reading work that builds on economic theories, sociological theories, and traditional international relations approaches. We will also be examining questions of broad interest within political science and sociology--the social construction and influence of norms in international affairs, the importance of murky issues like legitimacy and fairness in shaping public perceptions and actor behavior, and how institutions of international law including international treaties and international courts implicitly and explicitly shape the international political process and state behavior.

Reading Materials
Required readings are the minimum essential to do well in the class and will form the basis of class discussions and the participation grade. Reading hard copies is generally a better way to absorb the material, thus I recommend that you print out hard copies while retaining an electronic copy on your computer. Supplementary readings are not mandatory, but they will enhance your understanding of the material and are recommended for the field exam in international relations.

Most readings will be available on Canvas. We will read a number of chapters of the book below, so please purchase this book. I recommend an inexpensive used copy on Amazon.


Assignments & Evaluation
Participation (30%) includes:

- Three short reflection papers on the weeks of your choice, submitted in Canvas. These papers should be 2-3 pages in length, engaging the group of readings with either the question of the day, or a subject that interests you. Papers will receive either a “+”, “✓” or “-“ which will be calculated into the final participation grade. I prefer if you post the papers the day before. If I get them by 7pm Wednesday, I can read the paper before class.

- Regular in class participation. As with all graduate seminars, the expectation is that you to come to each class prepared to discuss the readings for the week. This does not mean that you read every word of every reading. Use your time strategically, figuring out the
main points of all the readings as well as similarities and contrasts between the arguments made by different authors.

Research paper 18-25 pages OR two short exam style papers (70%):

**Research paper - Due during exam week:** I want this paper to be useful to you, thus we will find a way to mix your interests with the general topic of the seminar. The final paper will be due during finals week some time. You are also welcome to team with another member of the course to submit a co-written paper, and if law is part of your dissertation, we can focus on a dissertation prospectus. Please talk with me about what makes the most sense for you.

**Or**

**Two exam style short papers on the literature - Due the Monday after the class session:** Write a ten-page paper that addresses in greater depth the question of the day. The paper should explicitly engage the readings for the week. Make sure you answer the question by providing your own argument. The paper should also engage each author’s answer to the question, critiquing or building upon the readings as you defend and develop your own argument. You can submit a short paper that elaborates on your reflection paper. If you select this option, you must complete two exam style papers over the term.

### Schedule and reading assignments for seminar

#### Part I: The Concept of Law

**Week 1: Is International Law as law Distinct?**

| Question of the day: Is the form of international law politically relevant? |

Legal scholars used to debate whether international law should even be considered law, because as a formal matter international law requires domestic ratification to become legally binding, and even then international law is often not enforceable. This debate has been replaced by the new Legal Realism, discussed by Bodansky. Political scientists tend to accept at face value claims that international law is legally binding. For political science, the question is ‘what is distinct about legal rules”? We want to try to figure out what, if anything, is distinct about international law as law. Arend distinguishes law from other types of rules. I have also assigned the introduction to a book by Brunee & Toope, which explains how lawyers think about law. The standard definition of legalization as a phenomenon comes from the 2001 special issue of IO. Finnemore & Toope critique this account for failing to consider the distinctness of legal norms. We also need to know about important concepts in IL- Soft law v. hard law, and customary law. Goldsmith & Posner consider the customary law category, which as IR style realists, they dislike because it is not negotiated or defined by states. Their goal in this chapter is to, as much as possible, narrow and limit customary international law.

**Required Reading**

1. *Types of rules, legal and otherwise*


2) *Debate on international legalization*-- are lawyers and political scientists debating the same thing? Abbott, Kenneth W.; Keohane, Robert O.; Moravcsik, Andrew; Slaughter, Anne-Marie; Snidal, Duncan (2000): The Concept of Legalization, *International Organization*, 54 (3): 401–419.


**Recommended reading**

Hans Morgenthau *Politics Among Nations*- his discussion of international law

Hedley Bull *The Anarchical Society*- his discussion of what are “rules” and how they are made, and his discussion of international law.

*Comparing IL & IR* Jeffrey Dunoff and Mark Pollack “Reviewing Two Decades of IR/IL Scholarship: What we have learned and what is next” in Dunoff and Pollack Eds *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012): Conclusion p. 626-653. *(if you are looking for paper & dissertation topics, I would look at the Intro & Slaughter’s article as well).*


**Optional**

Pure law readings about the sources of IL- This is the official answer-- in case you want to understand a bit more about the law IL in a Nutshell & Law of Nations- the chapter on the sources of IL *(on canvas)*

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**Week 2: How does law influence individuals?**

**Question of the Day:** Why does anyone follow the law? Should the answer of why people follow the law be different from the answer of why states follow the law?

The advantage of looking at individuals is that it helps us identify micro mechanisms of law compliance. With these three different views, you can begin to see how the different methodologies approach understanding the normative influence of law. Can we scale up from the individual to think about how international law matters in international relations? The first four
readings are about domestic law—and in particular Ellickson and Tyler are classics. If you want to think about law and politics, you need to have read both of these.

Required Reading

Focus on parts I, II, IV, V

Tom Tyler: *Why People Obey the Law*- Part II on Legitimacy and Compliance (p 19-70)

Recommended reading

Chayes, Abram. 1974. *The Cuban Missile Crisis: International Crises and the Role of Law*. New York: Oxford University Press. [This is the sort of classic that is constantly being reinvented—meaning students make Chayes argument thinking they have said something new. He had unparalleled access to the data, and the analysis is top notch.]


Debates about compliance with IL focus on the motivation of states in following the law.


**Week 3: International Law and the International System**

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<th>Question of the day: How is international law constituting and transforming the international system?</th>
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This week we try to figure out if and how international law constitutes the international system. Atzili suggests that international law creates border fixity, and that border fixity has fundamentally shaped international relations. Krasner examines sovereignty, inscribed in domestic law but surely also defended by the notion of border fixity. Viola et al look at the reality of sovereign inequality, which is arguably ignored by the fiction of state sovereignty. Does Viola et al’s argument contradict or challenge Krasner?

The last two readings break from the state-centric ontology of the first 3 readings. Klabbers wants to think harder about how international law regulates non-state actors. Is his law-based challenge a fundamental problem for the IR-Sovereignty perspective? Alter talks about how slow change evolutionary processes created by legal practice contribute to transformations of the state system. Does her argument about systemic change challenge the IR arguments that are about continuity?

Required Reading

Steven Krasner “The Persistence of State Sovereignty” in “The Evolution of International Law


Maybe put in Gruber?


Optional reading: EJIL Talk! Discussion of Klabber’s article.

Recommended Reading
Hans Morgenthau Politics Among Nations- his discussion of international law
Hedley Bull The Anarchical Society- his discussion of what are “rules” and how they are made, and his discussion of international law.

Week 4: Beyond State Centrism: How Non-State Actors Contribute to the Making and Meaning of International Law

Question of the day: IR scholarship focuses on the choices and actions of states. But if law is made and changed by actors other than states, what does this mean for international law and international relations?

These readings are each rather long, so skim as needed. Each is mapping a broader set of actors involved in the creation and application of international law. Focus on pulling out how these actors are shaping what international law is, what it means, and the effect of international law in international relations. Meierhenrich’s article is the introduction to a 2 volume analysis of the practices within the ICC. Brunee & Toope have a more constructivist understanding of how practicing international law makes law and shapes obligation. This “practice” turn is increasingly popular—are these two authors saying the same thing? Halliday & Shaffer are trying to get beyond IL, to talk about transnational legal orders. Their TLO category is made and used by a broad range of actors, which is how it fits in this week’s theme. The excerpted parts of Alter discusses 3 models of how IL might be shaping IR, and my hybrid approach moves beyond state-centrism. Do the readings together substantiate Alter’s claims about the post-realist world of IL (realist in the IR sense of the word)?

Required reading

Jutta Brunée and Stephen Toope Legitimacy and Legality in International Law: An Interactional Account (Cambridge University Press, 2010). “An Interactional Theory of International Legal Obligation” (Chapter 2)
Part II: Conceptualizing the influence of International Law: Contending Approaches

We are focused in this part of the course on the mechanisms through which law is influencing politics. We actually already began this conversation in week 4, when we considered that nonstate actors can influence the making, meaning and implementation of international law.

Week 5: Law and Economic Approaches

Question of the Day: What are the advantage and costs of conceptualizing IL as a simple problem solving device of states? What are the advantages and costs to viewing IL’s contributions only in terms of the benefits that accrue to states?

This week we examine a major approach to studying international law: Law and Economics. Goldsmith & Posner define a very restrictive range for law to influence politics. Guzman broadens somewhat, allowing reputation to be a meaningful force affecting state behavior. Ginsburg and McAdams allow law to serve an “expressive” role wherein the nature of IL as law gains more relevance. The final reading—Morrow—is using game theory. It is rationalist, but not law and economics. Does Morrow help us get beyond the limits of the law and economics perspective? We then read two critiques. Ohlin critiques Goldsmith & Posner from within the logic of their argument. Leff—a classic—raises fundamental challenges to the way that law and economics scholars assess the value of the law. Leff is a domestic law reading, and almost no IR scholars take these critiques into account.

Required reading


James Morrow Order within Anarchy (Cambridge, 2014) Chapter 1

Two critiques:

Arthur Allen Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451 (1974). [This is a classic critique of the fundamental premises underpinning law and economies approaches. You might need to skim it since the reading this week is heavy, but it
is the best conceptual critique of the law and economics enterprise that I know of. It is well worth a read]

**Week 6: Communicative Action and International Law (German IR Theory Debates)**

**Question of the Day:** International law by its very nature triggers rhetorical politics. This week considers IR/IL debates about communicative action. How is communicative action shaping of international relations?

The first two readings lay out arguments about persuasion as a different mode of influencing international relations. Risse applies Habermas’ conception to international relations. Goodman and Jinks differentiate persuasion and acculturation—do you agree that these are different modes of influence? Reus-Smit locates these arguments in international relations theory, arguing that the modern liberal constitution has made legal justification (procedural justice) a key mode of states. Goldsmith & Posner see limits to persuasion as a mode of political influence. Merry is focused on indicators, which speak in a different way. Is this speech part of communicative action?

**Required Reading**

**Optional recommended reading**
- Berthold Lomfeld “Contract as Deliberation” *Law and Contemporary Problems* (76:1): 1-18. 2013. This is a normative theory article
Week 7: International Law and Bourdieuian Approaches (French sociological approaches)

Question of the Day: How is law a resource the powerful use to promote their agendas? Is the claim about law’s capture by powerful actors undermining of the argument that law and legal fields are autonomous from governments and non-legal interest group control?

Bourdieu is a very particular sociological approach, popular in France and Denmark but not so much elsewhere. In Denmark, Bourdieu’s ideas have been transformed into an empirical method of analysis. This method was implicitly used by Dezalay and Garth, in the two excerpts we read. These scholars incorporate geopolitical factors as part of the larger structure of the law. This is their addition; it does not, strictly speaking, come from Bourdieu. I suggest that you read the applications first (Dezalay & Garth) then my reading notes on Bourdieu. Then step back to read the Dezalay and Madsen adaptation of the method to study international legal fields. Finally, Teles studies the fight within the US legal field, without any of the terminology of Bourdieu. Does Teles’ approach leave something out? The international version of Teles argument is Jens Ohlin The Assault on International Law. I assigned Teles instead because he explains how the conservative legal movement was built. But Ohlin explains how it was deployed to undermine international law in the US (and perhaps more broadly).


Recommended reading:

Jens Ohlin The Assault on International Law Introduction & the Gaming of the Federal Courts

Week 8: International Law as it Transforms Domestic Politics

Question of the Day: Empirical scholars are focused on measuring and understanding how law is shaping domestic and international politics. How is the constructivist enterprise similar or different? Are scholars focused on domestic mechanisms implicitly constructivist?

Bourdieu’s approach helps us understand how power works within legal fields. The polisci domestic politics approach is about the politics outside of legal fields. Is this domestic politics approach the same or different from IR constructivism? The first reading is a classic on how domestic actors invoke norms to influence domestic politics. Alter interjects litigation into the conversation, and contrasts different pathways towards influencing states to respect international law. Contrast these arguments with Brunnée and Toope, and see what you think about Goldsmith & Posner’s dismissal of these theories.


Sally Engle Merry Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago, 2006) Chapter 1


Recommended:


**Week 9: Legitimacy, Authority and International Law**

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Does the legitimacy of international law matter in a politically consequential way? Hurd applies international relations paradigms to the question. His approach fuses authority with legitimacy. Is this conflation necessary? What are the risks of conflating legitimacy and authority? The Levi et al and Alter et al readings provide empirical modes of conceptualizing these categories. They separate the questions of legitimacy and authority. Marmor is responding to the Alter et al framework, bringing legitimacy back into the conversation. Buchanan takes a purely normative approach to try to understand the normative conditions that give rise to “legitimate authority.” Which of the other readings are compatible with Buchanan’s approach to the topic?


Week 10: The Rule of Law- what is it?  Is the ROL possible in international relations?

Question of the Day: To what extent is the rule of law possible for international relations? Answering this question requires you to first define which elements of the rule of law that you are discussing.

These readings focus on the current efforts to promote the ROL globally. We want to consider these efforts, but also reflect back on what we have learned and think about what we might expect from a ROL at the international level.


