

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.

Goldsmith, Jack L., and Eric A. Posner. 2005. *The limits of International law*. Oxford; New York: Oxford University Press.

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 Bruneau & 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*

Anthony Arend *Legal Rules and International Society* (1999) Chapter 1 The Variety of International Rules

(Skim) Gregory Shaffer and Mark A. Pollack “Hard and Soft Law” in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013) esp p. 207-218

(Skim) Goldsmith, Jack L., and Eric A. Posner. 2005. *The limits of International law*. Oxford ; New York: Oxford University Press. Chapter 1 on customary international law.

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.

Finnemore, Martha, and Stephen Toope. 2001. Alternatives to Legalization: Richer Views of Law and Politics. *International Organization* 55(3): 743-58.

3) *Beyond formalism: Legal realism is not the same thing as IR realism. How do lawyers think about realism? How do lawyers think about international law?*

Daniel Bodansky “Legal Realism and its Discontents” *Leiden Journal of International Law* (2015) 28 (2) p. 267-281.

Jutta Brunée and Stephen Toope *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press: 2010). Introduction

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*).

Critique of Goldsmith & Posner: Raustiala, Kal “Refining the Limits of International Law” 34 Ga. J. Int’l & Comp. L 423-444 (2005-2006)

Connecting current debates to their historical epistemological and philosophical precursors: Gregory Shaffer “New Legal Realist Approach to International Law” and Jacob Holtermann & Mikael Madsen “European New Legal Realism and International Law” *Leiden Journal of International Law* (2015) 28 (2).

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)

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

Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903 (1996) (p. 903-968).

Focus on parts I, II, IV, V

Ellickson, Robert C. 1991. *Order without law: how neighbors settle disputes*. Cambridge, Mass.: Harvard University Press. (Excerpt- 123-137, 185-264, 281-286)

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

Susan A. Bandes & Jeremy A. Blumenthal Blumenthal “Emotion& the Law” *Annu. Rev. Law Soc. Sci.* 2012. 8:161–81.

Recommended reading

Henkin, Louis. 1979. *How Nations Behave*. New York: Columbia University Press.

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.]

Jonathan Mercer “Feeling like a state: social emotion and identity” *International Theory* 6(3) 2014: 515-535

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

Jana von Stein “The Engines of Compliance” in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013)

Simmons, Beth. 2009. *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press. Chapter on compliance.

Week 3: International Law and the International System

Question of the day: How is international law constituting and transforming the international system?

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

Boaz Atzili “Border Fixity and the Transformation of International Relations” *Harvard International Review* [Blog Post](#)

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

and Courts.” Oxford Handbook of Historical Institutionalism, Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, eds (Oxford University Press, 2016: 590-610). Reprinted in: International Politics and Institutions in Time (Oxford University Press, 2016)

Viola, Lora Anne/Snidal, Duncan/Zürn, Michael (2015): Sovereign (In)Equality in the Evolution of the International System. In: Stephan Leibfried/Evelyne Huber/Matthew Lange/Jonah D. Levy/Frank Nullmeier/John D. Stephens (Eds.): The Oxford Handbook of Transformations of the State. New York, NY: Oxford University Press, pp. 237-252.

Maybe put in Gruber?

Karen Alter “The Evolution of International Law and Courts” in “The Evolution of International Law and Courts.” Oxford Handbook of Historical Institutionalism, Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, eds (Oxford University Press, 2016: 590-610). Reprinted in: International Politics and Institutions in Time (Oxford University Press, 2016)

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 Centricism: 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. Bruneé & 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-centricism. 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

Jens Meierhenrich “The Practice of International Law: A Theoretical Analysis” *Law and Contemporary Problems* 76 (1): 1-83. 2013.

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)

Terence Halliday and Gregory Shaffer “Transnational Legal Orders” in Halliday & Shaffer eds *Transnational Legal Orders* (Cambridge University Press, 2015): 3-65.

Karen Alter *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014) 42-67, 335-344

Recommended reading

Greg Shaffer, Manfred Elsig & Sergio Puig “The Extensive (but Fragile) Authority of the WTO Appellate Body” 79 (1) *Law and Contemporary Problems*. 2016.

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

Goldsmith, Jack L., and Eric A. Posner. 2005. *The limits of international law*. Oxford ; New York: Oxford University Press. Intro & Chapter 3.

Ginsburg, Tom, and Richard H. McAdams. 2004. Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution. *William and Mary Law Review* 45(4): 1229-339. **[Read 1276-1287—the Expressive theory-- only!]**

Guzman, Andrew T. 2008. *How International Law Works: A Rational Choice Theory*. Oxford: Oxford University Press. Chapters 2 & 3.

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

Two critiques:

Jens David Ohlin: *The Assault on International Law* (Oxford: Oxford University Press, 2015): Chapters 4: Solving the Prisoner’s Dilemma of International Law. p. 119-153.

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 economics 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

Risse, Thomas (2000), "Let's Argue! Communicative Action in World Politics." *International Organization*, 54(1): 1–40.

Reus-Smit, Christian (2007): *The politics of international law*. (Cambridge University Press, 2007) Chapter 2 & conclusion.

Goodman, Ryan and Jinks Derek *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, 2013). Chapter 2 (Three mechanisms of social influence)

Sally Engle Merry "Firming up Soft Law: the Impact of Indicators on Transnational Human Rights Legal Orders" in Terence Halliday and Gregory Shaffer eds *Transnational Legal Orders* (Cambridge University Press, 2015): 374-399.

Nicole Deitelhoff, "The discursive process of legalization: Charting islands of persuasion in the ICC case" *International Organization* 63 (2009): 33.

Goldsmith, Jack L., and Eric A. Posner. *The limits of international law*. (Oxford University Press, 2005). Chapter 6 (A Theory of International Rhetoric)

Optional recommended reading

Goodman, Ryan and Jinks Derek *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, 2013). Chapter 3 (Acculturation of States: A Theoretical Model)

Berthold Lomfeld "Contract as Deliberation" *Law and Contemporary Problems* (76:1): 1-18. 2013. This is a normative theory article

McDougal, Myres S., "Law as a Process of Decision: A Policy-Oriented Approach to Legal Study" (1956). Faculty Scholarship Series. Paper 2464.

Gary L. Dorsey "The McDougal-Lasswell Proposal to Build a World Public Order" *American Journal of International Law* 82(1), 1988: 41-51.

Week 7: International Law and Bourdieusian 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).

Dezalay, Yves, and Bryant G. Garth. 2002. *The internationalization of palace wars: lawyers, economists, and the contest to transform Latin American states*. Chicago: University of Chicago Press. 163-85

Dezalay, Yves, and Bryant G. Garth. 2006. From the Cold War to Kosovo: The Renewal of the Field of International Human Rights. *Annual Review of Law and Social Science* 2:231-55.

Madsen, Mikael and Dezalay, Yves "The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law" *Annual Review of Law and Social Science*: 433-52 (2012).

Teles, Stephen M. 2009. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton: Princeton University Press. (Intro, Chapter 6, Conclusion)

Recommended reading:

Bourdieu, Pierre. 1987. Force of Law: Toward a Sociology of the Juridical Field. *Hastings Law Journal* 38 (July):805-853.

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.

Risse, Thomas, Stephen Ropp, and Kathryn Sikkink. 1999. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press. (Intro & Conclusion)

Risse, Thomas, Stephen Ropp, and Kathryn Sikkink. *The Persistent Power of Human Rights* (Cambridge University Press, 2013) (Intro & Conclusion)

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

Goldsmith, Jack L., and Eric A. Posner. 2005. *The limits of international law*. Oxford; New York: Oxford University Press. Chapter on human rights. Also skim chapter on Cosmopolitan values

Goodman, Jinks and Woods eds *Understanding Social Action, Promoting Human Rights* (Oxford University Press 2012) *Introduction*

Recommended:

Alter, Karen J. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton University Press, 2013. Chapter 2: Altering Politics

Simmons, Beth. 2009. *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press. Chapter on compliance.

Week 9: Legitimacy, Authority and International Law

Question of the Day: What is the difference between legitimacy and authority? When we are talking about the law, how do these two ideas fit together?

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?

Hurd, Ian "Legitimacy and authority in international politics." *International Organization* 53, no. 2 (1999): 379-408.

Margaret Levi, Tom Tyler and Audrey Sachs “The Reasons for Compliance with the Law” in Goodman, Jinks and Woods eds *Understanding Social Action, Promoting Human Rights* (Oxford University Press 2012)

Alter, Karen J., Laurence Helfer, and Mikael Rask Madsen. “How Context Shapes the Authority of International Courts.” *Law and Contemporary Problems* 79 (1). 2016

Andrei Marmor “The Authority of International Courts: Scope, Power and Legitimacy” in Alter, Helfer and Madsen Eds *International Court Authority* (forthcoming, Oxford University Press).

Buchanan, Alan “Justice, Legitimacy and Self-Determination: Moral Foundations for International Law” (Oxford University Press, 2004) Chapter 5 “Political Legitimacy” & Chapter 7 “The Legitimacy of the International Legal System”

Recommended readings:

Michael Zurn “Comments on the Authority of International Courts” Alter, Helfer and Madsen Eds *The Authority of International Courts* (Oxford: Oxford University Press) Forthcoming 2017.

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.

Thomas Carothers, “The Rule of Law Revival,” *Foreign Affairs* 77 (1998): 95-106

Stephen Haggard, Andrew MacIntyre, and Lydia Tiede, “The Rule of Law and Economic Development,” *Annual Review of Political Science* 11 (2008): 205–234

John K.M. Ohnesorge “The Rule of Law” *Annual Review of Law and Social Science* Vol. 3: 99-114 (2007)

Francis Fukuyama, “Transitions to the Rule of Law,” *Journal of Democracy* 21, 1 (2010): 33-44

Jose Maria Maravall “The Rule of Law as a Political Weapon” in JoseMaria Maravall & Adam Przeworsky eds *Democracy and the Rule of Law* (Cambridge University Press 2003) p. 261-302