

## International Law and International Politics (2012)

A Graduate Seminar taught in the Department of Political Science and Northwestern Law School  
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Scholars and practitioners recognize that international law and international legal institutions are increasingly important in international politics. The study of international law is also an intellectual arena for theoretical innovation. This seminar examines contemporary scholarship regarding international law and 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*

*Most readings will be available on blackboard. We will read a number of chapters of the book below, so please purchase this book. Special thanks to Mark Pollack and Jeffrey Dunoff for allowing us to read page proofs of their forthcoming book on International Law and International Relations.*

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

### *Assignments & Evaluation*

**Participation (30%)** includes:

- **Five short reflection papers.** These papers should be 1-2 pages in length, addressing a particular issue or question in the reading that you find interesting or applying a reading from the week to the topic of your research paper. The papers are a chance for you to directly engage the readings of the week. Papers will receive either a "+", "√" or "-" which will be calculated into the final participation grade. I prefer if you send the papers the day before. If we get them by 7pm Monday, 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.

**Research paper (70%)- 18-25 pages,** The topic to be selected in consultation with Professor Alter. 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 papers. Please talk with me, if this is of interest.

## *Schedule and reading assignments for seminar*

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### **Part I: The Concept of Law**

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

*In law, lawyers used to debate whether international law should even be considered “law.” In political science, we ask what is distinct about legal rules? We want to try to figure out what, if anything, is distinct about international law as 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. Hart is the classic jurisprudential perspective on the content of international law—does this help us think about the distinct nature of international law? Goldsmith & Posner consider customary law, Arend distinguishes law from other types of rules, and Shaffer and Pollack distinguish hard and soft law. Is the form of international law politically important?*

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.

H. L. A. Hart The Concept of Law. *Excerpted in Beck, Arend and Vander Lugt p. 75-92.*

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.

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

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)

#### Recommended reading:

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

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

*This set of readings takes three very different approaches to answering this question. 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? We read an IR article on compliance to think about the interaction of micro and macro forces in encouraging state compliance with international law.*

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)

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)

## Part II: Conceptualizing the influence of International Law: Contending Approaches

### Week 3: Law and Economic Approaches

The first two readings are paradigmatic law and economics approaches to thinking about international law. The second two readings move beyond. Abbott & Snidal are open-minded rationalists, and Leff is critiquing the fundamental premises in law and economics approaches.

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

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

Abbott, Kenneth, and Duncan Snidal. “Law, Legalization and Politics: An Agenda for the Next Generation of IL/IR Scholars” in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013)

#### Recommended Reading:

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 worth a read]

### Week 4: International Law as it Transforms Domestic Politics

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)

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

Jutta Brunnée and Stephen J. Toope “Constructivism and International Law” in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013)

Goldsmith, Jack L., and Eric A. Posner. 2005. *The limits of international law*. Oxford; New York: Oxford University Press. Chapter 8

## **Week 5: Liberal international Law Theory**

Liberalism is a major paradigm in international relations theory. Does it have something unique to say about the influence of law in international relations? Moravcsik’s chapter is at pains to show that liberalism has a theory of international law. Think, however, about Simmons’s theory from last week. Do we need values in the story of how international law works? Reus-Smit rejects Moravcsik’s efforts, arguing that liberal positivist approaches cannot create a theory of politics because they have expunged morality from the theory. Tesón brings Kantian morality back in, with the result of a rather different liberal international legal theory. As always, Goldsmith and Posner reject liberalism’s approach by noting that cosmopolitan values can’t really work globally.

Andrew Moravcsik “Liberal Theories of International Law” in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013)

Tesón, Fernando R. (1992): The Kantian Theory of International Law. In: *Columbia Law Review*, 92(1): 53–102.

Reus-Smit, Christian 2001: The Strange Death of Liberal International Theory, in: *European Journal of International Law* 12(3): 573-594

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

Moravcsik A (1995) Explaining International Human Rights Regimes: Liberal Theory and Western Europe. *European Journal of International Relations* 1(2): 157-189. (skim this application of liberal theory)

Recommended Reading:

Slaughter, Anne-Marie (1995): International Law in a World of Liberal States. In: *European Journal of International Relations*, 6(4): 503–538.

## **6-International Law and Habermasian Approaches of Communicative Action (German IR Theory Debates)**

*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.*

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

Ratner, Stephen “Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation” in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013)

Goodman, Ryan and Jinks Derek (2004) “How to Influence States: Socialization and International Human Rights Law” 54 (3) *Duke Law Journal*, 621-703.

Reus-Smit, Christian (2007): *The politics of international law*. Cambridge: Cambridge Univ. Press, 1-44

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

### **A la carte weeks to choose from:**

We have three more weeks—you can choose what we focus on. Below are the choices with updated readings.

### **Week 7. International Law and War Crimes**

Security may an issue area where we expect international law and international legal institutions to be least effective. This week considers whether and what international legalization contributes to the issue of deterring or dealing with war crimes. Shklar was written in another era, when the only model we had was the Nuremberg/Tokyo trials. Bass and Osiel were written before the advent of the ICC, but when it was clear which way the winds were blowing. The ICC was created in 2001; Snyder and Vinjamuri’s article came out shortly thereafter. What, if anything, seems different now that there is an international criminal court? Do these theories need updating? What would updating look like?

Shklar, Judith *Legalism: Law, Morals, and Political Trials*, Cambridge: Harvard University Press (1964) (p. 111-181).

Bass, Gary Jonathan. 2000. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton, N.J.: Princeton University Press. (p. 8-36)

Osiel, Mark *Mass Atrocity, Collective Memory and the Law*. (New Brunswick: Transaction Publishers, 1997) Chapter 7 “Constructing Memory with Legal Blueprints” and chapter 8 “Making Public Memory Publicly”

Snyder, Jack and Vinjamuri, Leslie “Trials and Errors: Principle and Pragmatism in Strategies of International Justice” *International Security*, Vol. 28, No. 3 (Winter 2003/04), pp. 5–44

### **Week 8: The Law of Regional Integration: The EU as Model or Exception**

This session thinks about the EU law as an example or an exception in international law. I am well known for studying EU law as a system of international law, and there are solid reasons to do so (in particular, there are actually at least 11 replicas of the EU around the world). We would learn what about the EU is unusual, and whether lessons from the EU travel to other dimensions of international law and to EU copies (eg regional integration systems).

K. J. Alter. "The European Court and Legal Integration: An exceptional story or harbinger of the

future?" In *Oxford handbook of law and politics*, edited by K. Whittington, D. Keleman and G. Caldiera. Oxford: Oxford University Press, 2008.

K. Alter and L. Helfer. "Nature or nurture: Judicial lawmaking in the European Court of Justice and the Andean Tribunal of Justice." *International Organization* 64, no. 4 (2010): 563-92.

K. J. Alter. *The European Court's Political Power Across Time and Space* Northwestern University School of Law Scholarly Commons 2009.

William Phelen *What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime*

J. Alvarez. "The new dispute settlers: (half) truths and consequences." *Texas International Law Journal* 38 (2003): 405-44.

*Optional:* K. J. Alter. "The Global Spread of European Style International Courts." *West European Politics* 35, no. 1 (2012): 135-54.

## 9. Legitimacy and International Law

We end by examining what we know about legitimacy in international relations. The Bodansky article captures the state of the field. Hurd applies international relations paradigms to the question, and Buchanan approaches the question from the perspective of moral theory. The final article doesn't really fit, except that it considers what political science is adding to the study of international law.

Bodansky, Daniel "Legitimacy in International Relations" in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013).

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

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"

Hafner-Burton, Emilie, Victor, David G. and Lupu, Yonatan "Political Science Research on International Law: The State of the Field" 106 *American Journal of International Law* 47-97 (2012)

### ***A la carte weeks to choose from:***

We have three more weeks—you can choose what we focus on. Here are some options, but let me know if there are other topics that interest you. I would update the readings more, so the readings listed below might change.

### **A. International Law and Bourdiesian Approaches (French sociological approaches)**

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

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.

Teles, Stephen M. 2009. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton: Princeton University Press. (Intro, Conclusion and we'll divide up the chapters on the federalist movement and law and economics)

## **B. On Compliance**

This week would look at the debate regarding compliance as a dependent variable.

Raustiala, Kal. "Compliance & Effectiveness in International Regulatory Cooperation." *Case Western Reserve Journal of International Law* (2000). (p. 387-427 only)

Martin, Lisa L. "Against Compliance" in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013).

Zurn, M. and C. Joerges (2004). *Law and Governance in Postnational Europe- Compliance Beyond the Nation State*. Cambridge, Cambridge University Press.

Howse, Robert, and Rudi Teitel. 2010. Beyond Compliance: Rethinking Why International Law Really Matters. *Global Policy* 1(2): 127- 35.

Skim:

Goldstein, Judith H., Douglas Rivers, and Michael Tomz. 2007. Institutions in International Relations: Understanding the Effects of GATT and WTO on World Trade. *International Organization* 31 (Winter):37-67.

Davis, Christina L. 2012. *Why Adjudicate? : Enforcing Trade Rules in the Wto*. Princeton N.J. ; Oxford: Princeton University Press. Chapter 6: Evaluating Effectiveness of Adjudication

## **C. Where has all the power gone? Remnants of Realism**

A discussion of power dimensions in international law.

Carr, Edward Hallett. *The Twenty Years' Crisis*. London: Macmillan & Co, 1951. (On the falsities of the Harmony of Interests p. 41-62, 80-88)

Steinberg, Richard "Wanted Dead or Alive: Realism in International Law in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013)

Thompson, Alexander "Coercive Enforcement of International Law" in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013)

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

Hurd, Ian "The strategic use of liberal internationalism: Libya and the UN sanctions, 1993-2003." *International Organization* 59, no. Spring (2005): 495-526.

## D. Legitimacy and International Law

Bodansky, Daniel "Legitimacy in International Relations" in Jeffrey L. Dunoff and Mark A. Pollack eds *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press: 2013).

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

Franck, Thomas (not sure which piece, but either *The Power of Legitimacy among Nations* or Thomas M. Franck's *Fairness in International Law and Institutions* (1995)

## E. The Adjudication Revolution

This week examines the third dimension of legalization, how 'delegation' of oversight of law enforcement influences international relations.

Alter, Karen J. 2013. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton: Princeton University Press. Chapters 2, 3 & 4

Helfer, Laurence. 2013. The Effectiveness of International Adjudicators. In *Oxford Handbook on International Adjudication*, edited by Cesare Romano, Karen J. Alter and Yuval Shany. Oxford: Oxford University Press.

Stone Sweet, Alec. 1999. Judicialization and the Construction of Governance. *Comparative Political Studies* 32(2): 147-84.

Davis, Christina L. 2012. *Why Adjudicate? : Enforcing Trade Rules in the WTO*. Princeton N.J. ; Oxford: Princeton University Press. Chapter 6: Evaluating Effectiveness of Adjudication & Conclusion

## G: Law as a Tool of Institutional Change

Mahoney, James, and Kathleen Thelen. 2010. *Explaining Institutional Change: Ambiguity, Agency, Power*. Cambridge Cambridge University Press. Chapter 1.

Halliday, Terence C. 2009. The Recursivity of Global Norm-making. *Annual Review of Law and Social Science* 5.

An-Na'im, Abdullahi. 2002. *Cultural Transformation and Human Rights*. London: Zed Publishers. Chapter 1.

Alter, Karen J. (under review). *Altering Politics: International Courts and the Construction of International and Domestic Politics*. In *Constructed Interests: The Process of Political Representation in a Global Age*, edited by P. Hall, W. Jacoby, J. Levy and S. Meunier.



**Option H: Transnational Systems of Law-- Roman, Church Based, Islamic, Legal families etc**

This session would look at systems of law that transcend borders, trying to think about theoretical and conceptual issues that arise by virtue of these systems. The legal families literature thinks about how similar systems operate differently in different contexts. We might also include readings about how islamic law and roman law worked as transnational systems of law.

**Option I: The Law of regional integration: The EU as Model or Exception**

This session would think about EU law as an example or an exception in international law. I am well known for studying EU law as a system of international law, and there are solid reasons to do so (in particular, there are actually at least 11 replicas of the EU around the world). We would learn what about the EU is unusual, and whether lessons from the EU travel to other dimensions of international law and to EU copies (eg regional integration systems).

**Option J: Nonstate actors and International Law**

International law gives legal rights to nonstate actors. How is this reality changing international and domestic politics? We would read about rights mobilization by nonstate actors, and different ways in which nonstate actors can use international legal mechanisms. This topic is wider than a focus on human rights as it also discusses corporate rights in today's international legal system.

**Option K: Lawfare-- or politics through law**

This section would read about current studies of lawfare-- instrumental use of law as a means of politics-- and how lawfare is on the rise in comparative and international politics today.