

## International Law Department

Academic year 2020 - 2021

## International Law Theories

**DI034 - Autumn - 6 ECTS**  
**Mondays 14:15-16:00 (S5)**

## Course Description

This course focuses on different approaches to thinking about international law (e.g. New Haven school, critical legal studies, law and economics, 'Third World' approaches, Marxism, constitutionalism, etc.). What international lawyers do in their various capacities as scholars, judges or advocates is affected by their vision of the law and of their profession. At a time of perplexity about the role of law in international relations, to revisit the main frames and different discourses which shape international law scholarship should contribute to a greater awareness of the importance of legal methodology from both a theoretical and practical perspective. Students will be asked to engage in the discussion and reflect upon their own way of thinking about the law and about their future profession.

## > PROFESSOR

[Andrea Bianchi](#)

[Office hours](#)

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## > ASSISTANT

[Hiruni Alwishewa](#)

[Office hours](#)

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## Syllabus

### Class requirements

- *Reaction papers*: participants are required to submit 6 weekly reaction papers (out of the 13 thematic sessions) to the reading assignments. These short papers should not be a summary of the readings. They should rather contain the personal reaction to and reflection on all the reading materials. Reaction papers will be the basis for class discussion. They should not exceed 500 words, and they shall be submitted by e-mail to the Professor and to the assistant before midnight on the Saturday before the class. Reaction papers will not be graded but they are a mandatory requirement of the course.

- *Final paper*: participants in the seminar will be required to write a final paper (maximum of 3,000 words), which appraises critically a case or situation from the perspective of any one of the discussed theories. The case or situation will be distributed to the students at the last class on 14 December and should be submitted by e-mail to the Professor and the assistant one week later (on Monday 21 December). The final paper will account for 100% of the final grade. The paper will be evaluated on the basis of the following criteria: i) general capacity to frame and analyse the legal issues underlying the

case/situation against the background of one of the theories/methods discussed during the course; ii) capacity to argue and comment from the chosen theoretical perspective; iii) relevance of the chosen arguments to the discussion or appraisal of the case/situation.

- Participation, Readings and Reading Materials: participants are expected to attend the course either in classroom or online and to participate actively in the discussion. To participate actively, students are expected to do the readings assigned below. Further readings can be found at the end of each section of the required text: A. Bianchi, *International Law Theories*, Oxford University Press (2016). A copy of *International Law Theories* can be purchased from Hiruni Alwishewa for CHF 25 at P1-755 before class or during her office hours. The other required readings are available on Moodle.

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### **Session 1 – Different Ways of Thinking about International Law**

**21 September**

A. Bianchi, 'Different Ways of Thinking about International Law', in *International Law Theories* (2016) 1-20.

I. Scobbie, 'A View of Delft: Some Thoughts About Thinking About International Law', in M. Evans (ed), *International Law* (4th ed. 2014) 53.

S. R. Ratner and A. M. Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', 93 *AJIL* (1999) 291.

\_\_\_\_\_, 'The Method Is the Message', 93 *AJIL* (1999) 410.

F. Rodell, 'Goodbye to Law Reviews – Revisited', 48 *Va. L. Rev.* (1962) 279.

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### **Session 2 – Traditional Approaches**

**23 September**

**\*Exceptionally on Wednesday, 12h15-14h00 in S5\***

A. Bianchi, 'Traditional Approaches', in *International Law Theories* (2016) 21-43.

\_\_\_\_\_, 'Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v Italy*' 4 *Journal of International Dispute Settlement* (2013) 457.

*South West Africa Case* (Liberia and Ethiopia v. South Africa), Preliminary Objections, ICJ Reports (1962) 319 (Joint Dissenting Opinion of Judges Spencer and Fitzmaurice) at 466 and *South West Africa Case* (Second Phase), Preliminary Objections, ICJ Reports (1966) paragraphs 49-50; 89-91.

B. Simma and A. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View', 93 *AJIL* (1999) 302-308.

H. Thirlway, 'Reflections on *lex ferenda*', 32 *Neth. Y.B. Int. Law* (2001) 3.

P. Weil, 'Towards Relative Normativity in International Law', 77 *AJIL* (1983) 413.

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### **Session 3 – Constitutionalism and Global Governance**

**28 September**

A. Bianchi, 'Constitutionalism and Global Governance,' in *International Law Theories* (2016) 44-71.

- J. Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009) 1.
- \_\_\_\_\_, 'Constitutionalism Lite?', 1 *International Organizations Law Review* (2004) 31.
- A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 579.
- N. Krisch and B. Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order', 17(1) *EJIL* (2006) 1.

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#### **Session 4 – Marxism**

**5 October**

- A. Bianchi, 'Marxism', in *International Law Theories* (2016) 72-90.
- S. Marks, 'Introduction', in S. Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (2008) 1.
- \_\_\_\_\_, 'False Contingency', 62 *Current Legal Problems* (2009) 1.
- A. Carty, 'Marxism and International Law: Perspectives for the American (Twenty-First) Century', 17 *Leiden Journal of International Law* (2004) 247.
- C. Miéville, 'The Commodity-Form Theory of International Law: An Introduction', 17 *Leiden Journal of International Law* (2004) 271.

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#### **Session 5 – The New Haven School**

**12 October**

- A. Bianchi, 'The New Haven School', *International Law Theories* (2016) 91-109.
- M. S. McDougal, 'Law as a Process of Decision: a Policy-Oriented Approach to Legal Study', 1 *Natural Law Forum* (1956) 53.
- W. M. Reisman, S. Wiessner and A. R. Willard, 'The New Haven School: A Brief Introduction', 32 *Yale Journal of International Law* (2007) 575.
- M. E. O'Connell, 'New International Legal Process', 93 *AJIL* (1999) 334.
- H. H. Koh, 'Transnational Public Law Litigation', 100 *Yale Law Journal* (1991) 2347.

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#### **Session 6 – International Relations and Social Science Methodologies**

**19 October**

- A. Bianchi, 'International Relations and Social Science Methodologies', *International Law Theories* (2016) 110-134.
- J. Brunnée and S. Toope, 'International Law and Constructivism, Elements of an Interactional Theory of International Law', 39 *Columbia Journal of Transnational Law* (2000-2001) 19.
- J. L. Dunoff and M.A. Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue' in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 3-32.

\_\_\_\_\_, 'Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next', in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 626-661.

G. Shafer, T. Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *AJIL* (2012) 1.

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### Session 7 – Critical Legal Studies and the New Stream

26 October

A. Bianchi, 'Critical Legal Studies and the New Stream', *International Law Theories* (2016) 135-162.

D. Kennedy, 'Legal Education and the Reproduction of Hierarchy: A Polemic Against the System', in D. Kennedy (ed.), *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (A Critical Edition)*, (2003) 9.

\_\_\_\_\_, 'When Renewal Repeats: Thinking Against the Box', in Wendy Brown and Janet Halley (eds.), *Left Legalism/Left Critique* (2002) 373.

M. Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990) 4.

N. Purvis, 'Critical Legal Studies in Public International Law', 32 *Harvard International Law Journal* (1991) 81.

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### Session 8 – The Helsinki School

2 November

A. Bianchi, 'The Helsinki School', *International Law Theories* (2016) 163-182.

M. Koskenniemi, 'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law', 65 *Modern Law Review* (2002) 159.

\_\_\_\_\_, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007) 1.

\_\_\_\_\_, 'The Politics of International Law – 20 Years Later', 20 *EJIL* (2009) 7.

\_\_\_\_\_, 'Histories of International Law: Significance and Problems for a Critical View', 27 *Temple International and Comparative Law Journal* (2013) 215.

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### Session 9 – Feminism

9 November

A. Bianchi, 'Feminism', *International Law Theories* (2016) 183-204.

H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613.

\_\_\_\_\_, 'Talking to Ourselves? Feminist Scholarship in International Law', in S. Kouvo and Z. Pearson (eds.), *Feminist Perspectives on International Law: Between Resistance and Compliance?* (2011) 17.

C. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence', 8 *Signs* (1983) 635.

D. Otto, 'Feminist Approaches to International Law,' in A. Orford and F. Hoffmann (eds.), *Oxford Handbook of International Legal Theory* (OUP 2016) 488.

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### **Session 10 – Third World Approaches**

**16 November**

- A. Bianchi, 'Third World Approaches', *International Law Theories* (2016) 205-226.
- A. Anghi and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2 *Chinese Journal of International Law* (2003) 77.
- B. S. Chimni, 'Third World Approaches to International Law: a Manifesto', 8 *International Community Law Review* (2006) 3.
- L. Eslava and S Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3 *Trade, Law and Development* (2011) 103.
- K. Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', 16 *Wisconsin International Law Journal* (1998) 353.

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### **Session 11 – Legal Pluralism**

**23 November**

- A. Bianchi, 'Legal Pluralism', *International Law Theories* (2016) 227-245.
- W. Burke-White, 'International Legal Pluralism', 25 *Michigan Journal of International Law* (2004) 963.
- A. Fischer-Lescano, G. Teubner, 'Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004) 999.
- D. Kennedy, 'One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', 31 *New York University Review of Law and Social Change* (2007) 641.
- B. Z. Tamanaha, 'A Non-Essentialist Version of Legal Pluralism', 27 *Journal of Law and Society* (2000) 296.

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### **Session 12 – Social Idealism**

**30 November**

- A. Bianchi, 'Social Idealism', *International Law Theories* (2016) 246-262.
- P. Allott, 'Reconstituting Humanity - New International Law', 3 *EJIL* (1992) 219.
- P. Allott, 'The Concept of International Law', 10 *EJIL* (1999) 31.
- M. Koskeniemi, 'International Law as Therapy: Reading *The Health of Nations*', 16 *EJIL* (2005) 329.

- I. Scobbie, “‘The holiness of the heart’s affection’”: Philip Allott’s theory of Social Idealism’, in A. Orakhelashvili (ed) *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 168.

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### Session 13 – Law and Economics

7 December

- A. Bianchi, ‘Law and Economics’, *International Law Theories* (2016) 263-286.
- J. F. Dunoff and J. Trachtman, ‘Economic Analysis of International Law’, 24 *Yale Journal of International Law* (1999) 1.
- \_\_\_\_\_, ‘The Law and Economics of Humanitarian Law Violations in Internal Conflict’, 93 *American Journal of International Law* (1999) 394.
- A. Thompson, ‘Applying Rational Choice Theory to International Law: The Promise and Pitfalls’, 31 *The Journal of Legal Studies* (2002) 285.
- A. Van Aaken, ‘Behavioral International Law and Economics’, 55 *Harvard International Law Journal* (2014) 421.

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### Session 14 – Law and Literature

14 December

**\*Students will receive the case/situation for the final paper, to be emailed to the Professor and the assistant before midnight, Monday 21 December\***

- A. Bianchi, ‘Law and Literature’, *International Law Theories* (2016) 286-310
- R. Weisberg, ‘Three Lessons from Law and Literature’, 27 *Loy. L. A. L. Rev.* (1993-1994) 285.
- S. Fish, ‘What Makes an Interpretation Acceptable?’ and ‘Demonstration vs. Persuasion: Two Models of Critical Activity’, in S. Fish, *Is There a Text in This Class?* (1980) 338-371.
- I. Scobbie, ‘Rhetoric, Persuasion, and Interpretation in International Law,’ in A. Bianchi, D. Peat and M. Windsor (eds.) *Interpretation in International Law* (OUP 2015) 61
- M. Windsor, ‘Narrative Kill or Capture: Unreliable Narration in International Law’, 28 *Leiden Journal of International Law* (2015) 743.