



TWAILR: Reflections~28/2021

Teaching Three Canons of International Law

*Mark Fathi Massoud**

This essay reflects on more than a decade of teaching international law from an interdisciplinary perspective. I have taught the subject to undergraduates and law students in the US and Canada. Central to my pedagogy is encouraging students to engage with diverse theoretical approaches to the field.

The fundamental question driving my course is the following: to what extent does international law affect the behavior of states and the lived experiences of the poor? For instance, does Article 2(4) of the United Nations Charter, which calls on states to refrain from using force to settle their disputes, actually stop states from invading one another?¹ Or what difference do human rights programs make on refugees' lives?² A person's education, training, socio-economic background, and political views can guide their responses to these questions. For this reason, course readings come from an interdisciplinary group of authors in law, politics, anthropology, history, economics, socio-legal studies, and critical theory.

I have so far taught international law in this interdisciplinary manner to more than one thousand students. My goal has been to empower them with knowledge that they can succeed. I have spent most of my teaching career at the University of California, Santa Cruz, which the US government designates a minority serving institution. The UC Santa Cruz motto is 'the original authority on questioning authority.' The activist Angela Davis spent much of her career at UC Santa Cruz. The university opened one of the world's first feminist studies departments about fifty years ago, and a Santa Cruz professor coined the term 'queer theory' more than thirty years ago.³ The majority of Santa Cruz students identify as nonwhite. Many are also, like me, immigrants to the US and in the first generation of their families to attend university.

I invite my students to learn that the field of international law has no dominant canon. To master the field, students learn different empirical and theoretical approaches. Each approach offers its own distinct canon that sometimes overlaps and sometimes critiques the others. With that foundation, students become capable of arguing for themselves the circumstances under which each canon fails,

*Mark Fathi Massoud is Director of Legal Studies and Professor of Politics and Legal Studies, University of California, Santa Cruz (USA).

¹ Joel Westra, *International Law and the Use of Armed Force: The UN Charter and the Major Powers* (Routledge, 2007).

² Mark Fathi Massoud, 'Do Victims of War Need International Law? Human Rights Education Programs in Authoritarian Sudan' (2011) 45:1 *Law & Society Review* 12.

³ David M. Halperin, 'The Normalization of Queer Theory' (2003) 45:2-4 *Journal of Homosexuality* 3393.

succeeds, or converges with other views. I categorize these canons into three: formalist, realist, and critical.

Approaching International Law

I first studied international law in the early 2000s as a law student. Nearly a decade later, as a new professor preparing to teach the subject for the first time, I reviewed my notes from the class and studied everything else I could read. I realized that the professor who had taught me had privileged realism and rational choice theory. As a student I had not appreciated this limitation. As a new teacher I felt that I had been deceived.

Rational choice is a political theory that explains that people seek outcomes that maximize their interests, however they define those interests.⁴ For instance, a person who has acted kindly to another person is presumed to have done so out of the warm glow they feel when being altruistic. Applying this version of rational choice theory to international law – where states are legal persons – can paint a grim picture of international relations. For example, the United States may give more foreign aid to countries only where it advances US counter-terrorism, narcotics, or trade policies. In the ancient and imposing words of the Athenian general invading the island of Melos, “The strong do what they can, and the weak suffer what they must.”⁵

When I learned about Third World, feminist, and other heterodox approaches to international law after law school, I decided to expose my students to these perspectives. I wanted them to engage with the field’s theoretical plurality. The three categories – formalist, realist, and critical – are broad, overlapping, and non-exhaustive. The terms are themselves limited, imperfect, and contested. But they form a starting point for students in a fast-paced academic term to see that multiple perspectives exist in our field.

I teach each framework separately to help my students understand and evaluate each perspective on its own merits. They then apply the key principles animating each framework to actual events and hypothetical scenarios in the practice of international law. For example, how would each approach explain the failure of the 1997 Kyoto Protocol (in which 38 industrialized nations set greenhouse gas emissions limits) and the diplomatic strategies behind the 2015 Paris Agreement (in which nearly 200 countries made carbon reduction pledges)?

I hold debates over the approaches, both in-person and online. I gather quotes from news articles and ask students to pinpoint each speaker’s perspective. In-class simulations – around, for instance, a realist take on South Sudan’s secession from Sudan, a feminist lens into the Syrian refugee crisis, or a postcolonial perspective on the NATO-led military intervention in Libya – also give students the opportunity to apply diverse approaches and respond to problems. Below I explain further how I understand and teach formalist, realist, and critical approaches.

Formalist Approaches

⁴ Rational choice or realist approaches to international law are themselves diverse and include Eric Posner and Jack Goldsmith, *The Limits of International Law* (Oxford University Press, 2005) and Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008).

⁵ Thucydides, *History of the Peloponnesian War*, Book V, Chapter 17.

Formalist approaches are largely concerned with the formal instruments of international law and the legal obligations that states obey. Teaching legal instruments and obligations is an attempt to ensure that students bound for legal careers learn how to apply the rules of international law. In formalist approaches, law is a narrow set of institutions, texts, and interpretations. International law limits arbitrary power and promotes the development of the rule of law when nations comply with it.⁶

Students learn that many political and legal factors motivate nations to obey international law. In the words of Louis Henkin, ‘Almost all nations observe almost all principles of international law...almost all of the time.’⁷ International legal rules originate from either natural law (for instance, ethics, norms, and fundamental ideas of humanity) or positive law (for instance, affirmative or past actions of states, like treaties or customary international law), sometimes both.⁸ When I tell students that the subjects of international law are state actors (nation-states and intergovernmental groups like the European Union, UNESCO, the International Court of Justice, and the Arab League), and that these state actors are the primary actors in international law, I inform them that I am teaching a formalist approach. I also explain to students that formalist approaches generally understand non-state actors to be secondary in normative authority to states. Non-state actors include human beings who have nationality and citizenship, or who can experience statelessness (not having any citizenship) and displacement. Other non-state actors include thousands of local and global non-governmental organizations across the global political spectrum, from Amnesty International to the National Rifle Association.

Realist Approaches

Realist approaches to international law are largely concerned with power. Like their formalist counterparts, realists understand that international law exists largely to constrain the behavior of states. But realists typically see – and sometimes directly advocate – that states break those rules to achieve their interests.⁹ Realist approaches to international law build upon rational choice or realist approaches to international relations.¹⁰ They contrast with formalist approaches in their focus on the politics of international law rather than on its rules and instruments.

Realist approaches generally argue that state actors make decisions that maximize self-interest. At the extreme, some realist scholars argue that state actors should not feel bound to rule-following or even to moral obligations outside their borders. International law, then, does not limit state power as much as it is limited by state power.¹¹ Realist arguments, I tell students, denounce what realists view as formalists’ excessive preoccupation with rules and procedures. Unlike formalist approaches that explain how law can and should limit state behavior, realists debate whether international law constrains state actions. That is, for many realist approaches international law emerges when states pursue their own self-interested policies globally. This argument is sobering, particularly for my most

⁶ Formalist approaches generally include authoritative casebooks, textbooks, and hornbooks, such as Sean D. Murphy, *Principles of International Law* (West, 2018); Malcolm N. Shaw, *International Law* (Cambridge University Press, 2017); John P. Grant, *International Law Essentials* (Edinburgh University Press, 2010); Antonio Cassese, *International Law* (Oxford University Press, 2005); and Lori Fisler Damrosch, Louis Henkin, Oscar Schachter, and Hans Smit, *International Law: Cases and Materials* (West, 2001).

⁷ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 1979). See also Harold Hongju Koh, ‘Why Do Nations Obey International Law?’ (1996–1997) 106 *Yale Law Journal* 2599.

⁸ Murphy (2018) 11–15.

⁹ Goldsmith and Posner (2005).

¹⁰ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Macmillan, 1977).

¹¹ Guzman (2008) adopts a rational choice approach to argue that international law shapes the preferences of states.

idealistic or progressive students. But they also understand its political importance because examples abound of leading politicians – centrist prime ministers, populist presidents, and strong dictators – who all seem to put national or personal interests above global order.

Critical Approaches

Critical approaches are a broad category of theories and ideas concerned with the consequences of power on people's lived experiences. In the US, where I have spent most of my career, critical approaches to international law draw in part on the critical legal studies movement, which connects law to the struggles of social movements 'to create a more humane, egalitarian, and democratic society.'¹²

While concerned with marginalized and under-served groups, critical legal studies also failed to amplify voices from those groups. Further critiques have emerged from critical race, feminist, postcolonial and queer studies,¹³ as well as from New Approaches to International Law (NAIL)¹⁴ and Third World Approaches to International Law (TWAAIL).¹⁵

Like realist approaches, critical approaches unsettle 'traditional' scholarship in international law.¹⁶ Critical approaches depart from formalist and realist views by focusing on subaltern persons, ideas, and histories.¹⁷ Some critical scholars argue that international law is rooted in Western racial capitalism, or the systemic extraction by white persons of economic value from nonwhite persons.¹⁸ TWAAIL scholars, for instance, argue in part that the field of international law grew at the expense of colonized nations and Indigenous communities.¹⁹ These people and places have been at best sidelined or, at worst, left out, in global politics. But their resistance to international law has shaped the development of the field itself. Critical scholarship uncovers that history of exclusion to demonstrate the elitist or imperial foundations of international law.²⁰ I encourage students to understand the ways international law is shaped by those who have resisted disempowerment. For instance, I teach how sexual and gender minorities in Myanmar who are largely invisible in national politics have used human rights discourses to gain confidence, resist social norms, and recruit and retain activists.²¹

I complement these discussions with readings and lectures on feminist and queer critiques of formalist, realist, and TWAAIL approaches. These critiques expose a gendered and heteronormative status quo, and they overlap with much of the work of contemporary TWAAIL scholars. Feminist critiques in particular have argued that the structure and content of international law privilege men, setting aside

¹² Duncan Kennedy and Karl E. Klare, 'A Bibliography of Critical Legal Studies' (1984) 94:2 *Yale Law Journal* 4610, at 461.

¹³ Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) *Connecticut Law Review* 117.

¹⁴ Ntina Tzouvala, 'New Approaches to International Law: The History of a Project' (2016) 27:1 *European Journal of International Law* 2153; see also José María Beneyto and David Kennedy (eds.), Justo Corti Varela and John Haskell (assistant eds.) *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press, 2012).

¹⁵ Makau W. Mutua, 'What is TWAAIL?' (2000) *ASIL Proceedings* 318.

¹⁶ Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27:5 *Third World Quarterly* 7393, at 739

¹⁷ B. S. Chimni, 'The World of TWAAIL: Introduction to the Special Issue' (2011) 3:1 *Trade, Law and Development* 159.

¹⁸ Nancy Leong, 'Racial Capitalism' (2013) 126:8 *Harvard Law Review* 21516, at 2151.

¹⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

²⁰ Antony Anghie, 'LatCrit and TWAAIL' (2012) 42:2 *California Western International Law Journal* 3110.

²¹ Lynette Chua, 'The Vernacular Mobilization of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement' (2015) 49:2 *Law & Society Review* 2992.

women's concerns and failing to address violence against women.²² Queer critiques explain that violence and subjectivity constitute what is 'normal,' with 'heterosexual ordering...taken for granted' in the underlying composition of international law.²³ It can be challenging to discuss the rules, power, and practice of international law, and the stories of the subaltern and the radical, all while ensuring that different approaches enjoy a similar emphasis in the classroom. I address these challenges by scrutinizing and putting into practice each of the approaches that students learn.

Putting Canons into Practice

In exposing students to multiple theoretical approaches, an interdisciplinary international law course illuminates the malleable nature of international law and how different people use it – promoting its authority or denying its power – to achieve their political goals. As a legal order, international law performs multiple, competing functions. And it matters in an increasingly globalized world. It serves the interests, and seeks to limit the actions, of state actors. International law is also a political rhetoric of the oppressed, and a foundation for activism and resistance.

In written assignments, open forums, and class activities, students apply the theories they learn to real-life or hypothetical events. In class, I encourage students to interpret major events in international law – for instance, the entry into force of the Escazú Agreement, the world's first treaty to protect environmental human rights defenders, and the Treaty on the Prohibition of Nuclear Weapons – in the light of the different approaches to international law. I model this technique by pointing out recent news events or inviting students to bring those events to the class's attention. We discuss how scholars adopting different perspectives would interpret those events differently, where they would agree and disagree, and what they each would recommend, get right, or miss entirely.

In one writing assignment, each student must imagine that they are an intern in an intergovernmental organization, for instance the United Nations Development Programme. Their management team asks them to draft a memorandum on a question of international law (for instance, whether to advocate for humanitarian intervention to save the lives of persons displaced by a war between the hypothetical nations of Bigland and Newtopia). Students must consider carefully how to respond to the management team by appreciating the organization's goals. They must also explain to their bosses what realist responses might look like, what formalist perspectives might encourage, and what TWAIL or feminist approaches might want UNDP to consider or reconsider. The format and style of an assignment that mimics a persuasive memorandum to an employer is usually a new form of writing for my students.²⁴ Many of them have found it valuable to develop writing skills relevant to the workplaces that they may enter.

A Principled International Law

Distilling the world of international law into multiple canons rather than into a single set of rules and their critiques is not the most obvious way to teach the subject, especially to me, given that I first

²² Among the foundational articles is Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85:4 *American Journal of International Law* 6135.

²³ Dianne Otto, 'Introduction: Embracing Queer Curiosity' in Dianne Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge, 2017) 1, at 2.

²⁴ Much as I have invited students to write in a new genre, some scholars have re-imagined legal writing entirely. Feminist judgments projects, for instance, have used a feminist lens to rewrite legal judgments. See Loveday Hodson and Troy Lavers (eds.), *Feminist Judgements in International Law* (Hart, 2019).

learned to see the subject wholly through one lens. Adopting a more principled approach means reminding students that every question has multiple answers, that rules change, and that persuasion matters, especially when confronting power. Developing these skills helps people professionally, and in life.

The multiplicity of approaches leaves some students feeling a sense of unease. They have come to me privately, asking me to tell them to which camp I belong, perhaps looking for something unambiguous to believe or some kind of categorical assurance from their professor that one approach is right and the others are wrong. I respond by inviting them, again, to chart in their notebooks the benefits of and overlaps between each persuasive yet imperfect approach.

To allow students to make their own judgments, I do not tell them what I believe, what to believe, or how strongly to believe it. I encourage them to engage. Some students form new opinions about international law, or law in general, during the class. Some leave the class feeling that international law matters because legal instruments and rules matter in their own right. Some leave the class feeling that international law fails to matter because states, especially those holding veto power in the UN Security Council, pursue their own interests anyway. Others feel that achieving social, economic, and racial justice means participating in the development of critical – Third World, feminist, or queer – approaches to the field.

I try to generate shared values and knowledge by teaching different theoretical approaches and the convergences between them. But I struggle with the feeling that some students fit the field of international law into their pre-existing political alignments, values, and ideals. They use what they learned in class to keep them in siloes – seeing perspectives that differ from their own as offensive – rather than to help them appreciate plurality.

Over more than a decade teaching international law, I have empowered students to learn and shape the field themselves. While many scholars, lawyers, and policy officials adopt a single canon, many others switch fluidly among canons as new questions and problems emerge. No approach is perfect, and none is immutable. International law is a living tradition. I encourage my students to try out the various perspectives and to integrate them holistically. In the process they learn how and why specific canons matter to some people and not to others. In making these choices about how to teach, I see students flourish in a way that I could not when I first learned international law. I see my students form a richer understanding of the role of international law in their lives and in the global communities in which we live.