



## Reversing Field: What Can International Law Teach International Relations?

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International lawyers increasingly cross disciplinary boundaries. Indeed, interdisciplinary approaches to scholarship have become so prominent that ESIL's upcoming 10<sup>th</sup> anniversary conference will be devoted to this theme. In highlighting the diverse ways that international lawyers build "bridges to other fields and disciplines," ESIL's leadership invites reflection on an increasingly important element of the discipline's professional self-consciousness.

To be sure, the turn to other disciplines has triggered controversy. Perhaps the most passionate attacks on interdisciplinarity have centered on the "international law/international relations" (IL/IR) literature. Indeed, IL/IR has not developed as a truly interdisciplinary field, but instead has primarily involved the application of IR theories and methods to the study of international legal phenomena.<sup>1</sup>

As a result, some international lawyers have rejected the turn to international relations. A "gentle" critique suggests that IL/IR contains a rule-skepticism and antiformalism that is corrosive of rule-of-law values.<sup>2</sup> A harsher critique claims that IL/IR represents, methodologically, a form of colonial conquest of law and, politically, "an American project that cannot but buttress the justification of American empire."<sup>3</sup> We believe that, instead of rejecting IL/IR, a more constructive response to asymmetrical intellectual influence is to shift the intellectual terms of trade. With this goal in mind, this short

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<sup>1</sup> Jeffrey L. Dunoff & Mark A. Pollack, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 3* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013)

<sup>2</sup> See, e.g., MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2002); Jan Klabbers, *The Bridge Crack'd: A Critical Look at Interdisciplinary Relations*, 23 *INT'L REL.* 119 (2009).

<sup>3</sup> KOSKENNIEMI, *supra* note 2.

essay outlines some potential gains of “reversing field” and applying international legal theory and knowledge to IL/IR inquiries.

IR scholars often dismiss IL theory for devoting undue attention to unenforceable legal rules and insufficient attention to the practical realities and inevitable tradeoffs that drive international affairs. In short, IL is seen as excessively formalist. From a perspective informed by recent developments in international legal theory, these claims are deeply ironic. In fact, by failing to account for what lawyers know about international law, IR scholars themselves often embrace a type of unwitting formalism that narrowly equates international law with the black-letter rules of international treaties, legal interpretation with the rulings of international courts, and international law’s impact with formal compliance with the provisions of ratified treaties. In so doing, we suggest, much contemporary IR scholarship is insufficiently attentive to the practical realities and theoretical complexities of the international legal order – a deficiency that can and should be addressed through greater attention to international legal scholarship, and through genuinely interdisciplinary research.

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IR scholars have enriched our understanding of treaty design, judicial behavior, and whether and when states comply with the rules and norms of international organizations they choose to join. In this sense, IR scholarship has made great strides, addressing the making, interpretation, and execution of international law. Nevertheless, much IR work in each area is marked by formalistic and outdated understandings of international law, and would be substantially advanced by paying more attention to international legal thought.

IR theorists use a variety of approaches to international law, and we cannot address all of them in this short comment. For illustrative purposes, consider a leading “rationalist” approach to international law making found in the political science literature – the rational design project. This approach seeks to explain when and how states design international treaties, arguing that states rationally select distinct design features – including dispute settlement mechanisms and various flexibility provisions such as escape clauses, exit clauses, and limited duration – in response to different types of cooperation problems.<sup>4</sup> This is a remarkably promising agenda, but it has so far been applied to only a limited number of design features, thus far ignoring other features, such as remedies, that are of clear importance to states and have been widely studied by legal scholars.

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<sup>4</sup> Barbara Koremenos, Charles Lipson, and Duncan Snidal, *The Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001). For applications to the design of dispute settlement and flexibility provisions in international legal agreements, see Barbara Koremenos and Timm Betz, *The Design of Dispute Settlement Procedures in International Agreements*, in Dunoff and Pollack, *supra* note 1, at 371; and Laurence R. Helfer, *Flexibility in International Agreements*, in Dunoff and Pollack, *supra* note 1, at 175.

Despite its strengths, moreover, rational design scholarship, like much other IR scholarship, explicitly equates international law with black-letter treaty law. International lawyers will immediately recognize that the focus on treaties provides a substantially incomplete account of contemporary methods of law-making, which includes not only customary international law, but also judicial precedent, global administrative processes, and various non-consensual lawmaking processes.

Custom remains important in many foundational areas, including sovereign immunity, state responsibility, territorial sovereignty, the limits of extraterritorial regulation, and numerous other areas where no multilateral treaty exists. Custom is also critical in newly emerging areas – ranging from Internet freedom to nanotechnology to cyberwarfare, where treaties have not yet been negotiated – and may not be, given the realities of a diverse, multipolar world. Thus, a substantial legal literature assesses the content, utility and normative desirability of customary international law. Most recently, international lawyers have vigorously debated other dimensions of custom, such as whether states can exit from customary rules, the conditions under which states choose to ‘codify’ customary norms, and the factors that induce states to create custom rather than soft law.<sup>5</sup> To be sure, IR scholars such as Charles Lipson, Kenneth Abbott and Duncan Snidal have analyzed the choice of soft rather than hard law, and constructivists have explored the emergence of international norms and ‘norm cascades’; yet none of these approaches captures the sequence of claim and counter-claim, and the interaction of *opinio juris* and state practice, that renders custom distinct from soft law or from non-legal international norms. Custom therefore represents another area where IL scholarship can enrich IR, by illuminating important legal processes ripe for political analysis but thus far largely ignored by political scientists.

Of course, once enacted, legal rules do not announce their own meaning or apply themselves. Thus, legal interpretation and application lie at the heart of every legal order. IR approaches to legal interpretation center on international courts, and in particular on (i) the design of dispute settlement bodies and (ii) the determinants of judicial behavior, with an emphasis on judicial independence. In so doing, however, standard IR approaches to interpretation elide important institutional and doctrinal realities familiar to international lawyers.

As an institutional matter, most IR approaches – including particularly dominant rationalist approaches – adopt a substantially underinclusive view of the actors engaged in legal interpretation. In fact, notwithstanding the proliferation of international courts and litigation, most legal interpretation continues to occur outside international courthouses, including at an increasingly large and diverse cluster of committees, councils, and review, oversight, and audit mechanisms – not to mention an even larger universe of less formalized fora. Thus, as in IR studies of law making, an impoverished understanding of the legal landscape produces a research agenda that is marked by significant blind spots and lacunae.

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<sup>5</sup> For representative examples, see, e.g., See *Symposium*, 21 DUKE J. COMP. & INT’L L. 1 (2010); Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995 (2012); Laurence R. Helfer and Ingrid Wuerth, *Custom in the Age of Soft Law* (unpublished manuscript, on file with author).

Moreover, many IR writings on international courts seek to explain judicial outcomes – did the court rule in favor of X or Y? – in terms of external factors, such as state power or the national and geopolitical biases of judges. These “external” approaches to judicial outcomes largely ignore “internal” factors such as legal reasoning and discourse, interpretative strategies, and other factors associated with law’s inner logic – factors that have traditionally preoccupied legal scholars. IR’s failure to engage with legal interpretation *per se* constitutes a significant oversight that compromises its ability to understand and evaluate the role and impact of international courts.<sup>6</sup>

Perhaps more importantly, IR approaches often assume implicitly that international law is a set of unambiguous legal rules with which states either do or do not comply. International lawyers of virtually all theoretical and methodological stripes, by contrast, reject conceptualizations of law as a set of fixed categories that clearly distinguish permissible from impermissible conduct. Instead, the discipline has by now internalized the indeterminacy critique, e.g., that legal rules are typically susceptible to more than one reasonable interpretation, and therefore cannot, by themselves, definitively resolve concrete legal controversies. Substantial debate exists over the implications of the indeterminacy critique, but at a minimum it surely problematizes the large body of IR work that foregrounds *compliance* as a central marker for determining international law’s impact.

In virtually all IR writings in this area, compliance rates are understood as reflecting state behavior that conforms to what international agreements require or prohibit.<sup>7</sup> But if legal rules are not sufficiently determinate to permit a straightforward survey of whether particular behavior conforms to rules, then many IR studies purporting to identify the determinants of compliance are premised on problematic assumptions about the nature of legal rules. Moreover, the standard “behavior in conformity with rules” approach to compliance presupposes that rules are static, and elides the reality that rule application, interpretation and compliance assessments are part of larger legal processes through which legal meaning is both determined and, at times, modified.

Lawyers will also quickly note that law’s indeterminacy does not suggest that compliance is not worthy of scholarly attention, as some political scientists have recently suggested.<sup>8</sup> Rather, it suggests that looking at conformity with rules is only the first step in understanding how international law impacts behavior.

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<sup>6</sup> Among a handful of notable exceptions, see IAN JOHNSTONE, *THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS* (2011) (exploring how law operates through a process of justificatory discourse through interpretative communities); Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals*, in Dunoff and Pollack, *supra* note 1, at 445 (offering typology of interpretation choices courts face and framework explaining interpretative strategies courts employ).

<sup>7</sup> For a survey of this literature, see Jana von Stein, *The Engines of Compliance*, in Dunoff & Pollack, *supra* note 1, at 477.

<sup>8</sup> See, e.g., Lisa L. Martin, *Against Compliance*, in Dunoff & Pollack, *supra* note 1, at 591.

IR scholars have critiqued Lou Henkin's famous dictum that "almost all nations observe almost all principles of international law and almost all their obligations almost all of the time." But they have paid substantially less attention to Henkin's insight that lawyers should "think beyond the substantive rules of law to the function of law, the nature of its influence, the opportunities it offers, the limitations it imposes."<sup>9</sup> Nearly forty years ago, Abe Chayes emphasized that one of international law's central functions is the allocation of authority among various institutional actors – both vertically, among domestic, regional and global actors, and horizontally, among states.<sup>10</sup>

More recently, international lawyers Robert Howse and Ruti Teitel enumerated a number of international law's other effects "beyond compliance," including that (i) international legal norms can impact the ways that policy makers and other elites conceptualize particular problems and conflicts, such as whether an issue involves conflicting interests or claims of right; (ii) international legal norms provide benchmarks for a wide range of private actions, including by multinationals and other transnational actors, even when the relevant norms are not formally addressed to them; and (iii) international legal norms influence the application of domestic law, such as when domestic courts interpret domestic statutes in ways consistent with the state's international legal obligations.<sup>11</sup> In these and other ways, international law affects a diverse range of actors in ways that a narrow focus on compliance as the correspondence of behavior and rules will overlook.

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Given a history of asymmetrical terms of intellectual trade, IL/IR writings operate under a self-imposed handicap. This has imposed a substantial cost. IR scholars' failure to engage with the insights of legal scholarship has led them to focus narrowly on only a few dimensions of treaty design, and to neglect the creation and evolution of customary law almost entirely. It has led them to focus narrowly on the rulings of international courts, while neglecting the broader universe of actors engaged in the politics of legal interpretation. And it has led many of them to narrow their study of international law's effects to formal compliance with treaty rules.

Our goal in this short comment is not to critique IR scholarship as inherently flawed or illegitimate. Indeed, we have argued elsewhere that IR scholars, writing both alone and in collaboration with legal scholars, have made seminal contributions to the study of international law-making, interpretation, and effectiveness.<sup>12</sup> Our aim, instead, is to begin a dialogue over what could be gained by reversing field. We invite others to join us in identifying other ways that international law can enrich international relations. In so doing, we can help produce a more balanced body of interdisciplinary scholarship

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<sup>9</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979).

<sup>10</sup> ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (1974)

<sup>11</sup> Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 *GLOBAL POL.* 127 (2010).

<sup>12</sup> Jeffrey L. Dunoff and Mark A. Pollack, *Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next*, in Dunoff and Pollack, *supra* note 1, at 626.

that can better illuminate the range and reach – the possibilities and limits – of contemporary international law.



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