

6-22-2021

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### Recommended Citation

Abebe, Daniel; Chilton, Adam; and Ginsburg, Tom (2021) "The Social Science Approach to International Law," *Chicago Journal of International Law*. Vol. 22: No. 1, Article 4.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol22/iss1/4>

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# The Social Science Approach to International Law

Daniel Abebe\*, Adam Chilton† & Tom Ginsburg‡

## Abstract

*For over a hundred years, scholars have argued that international law should be studied using a “scientific” approach. Throughout the twentieth century, however, the most prominent methods used to study international law primarily consisted of different theoretical and analytical claims about how international law should be developed, interpreted, and critiqued. It is only in the first two decades of the twenty-first century that the conventional social science approach to research—identifying a specific question, developing hypotheses, using a research design to test those hypotheses based on some form of qualitative or quantitative data, and presenting conclusions, all while acknowledging the assumptions upon which these conclusions are based and the level of uncertainty associated with the results—became widely used by scholars of international law. International law research using the social science approach has been notably more normatively restrained, empirically informed, and skeptical than past international law scholarship. This Essay describes the rise of the social science approach and advocates for its continued adoption.*

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## I. INTRODUCTION

At the start of the twentieth century, in 1908, the *American Journal of International Law* (*AJIL*) published an article by Lassa Oppenheim titled “The Science of International Law: Its Task and Method.”<sup>1</sup> In the article, Oppenheim argued that there was a distinctive science of international law, but that too many students of the subject went to “work without a proper knowledge of the task of our science, without knowing how to make use of the assertions of authorities, and without the proper views for the valuation and appreciation of the material at hand.”<sup>2</sup> Oppenheim further argued that there are seven “tasks to which our science must devote itself . . . : Exposition of the existing rules of law, historical research, criticism of the existing law, preparation of codification, distinction between the old customary and the new conventional law, fostering of arbitration, and popularization of international law.”<sup>3</sup> After discussing how each of these tasks could be addressed scientifically, Oppenheim concluded by arguing that there was only one appropriate method to apply to those tasks—what he dubbed the “positive method”—which he claimed, “can successfully be applied only by those workers who are imbued with the idealistic outlook on life and matters.”<sup>4</sup>

At the end of the twentieth century, in 1999, *AJIL* hosted a symposium on the then-prevailing methods to study international law.<sup>5</sup> The organizers, Professors Steven Ratner and Anne-Marie Slaughter, began by noting that there had been major developments in the science of international law in the nine decades since the publication of Oppenheim’s article.<sup>6</sup> Most notably, they argued that the scope of international affairs regulated by international law had expanded dramatically, and at the same time, the scope of methods used to study international law correspondingly dramatically expanded.<sup>7</sup> The Symposium then highlighted seven methods that the organizers believed to “represent the major methods of international legal scholarship” at the time: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics.<sup>8</sup> Prominent scholars associated with each of these methods wrote essays explaining

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<sup>1</sup> L. Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 AM. J. INT’L L. 313 (1908).

<sup>2</sup> *Id.* at 314.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 355.

<sup>5</sup> Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291 (1999).

<sup>6</sup> *Id.* at 291.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 293.

their approach and its value.<sup>9</sup> The organizers specifically asked each scholar to apply their method to analyze the same open question in international law: what is the responsibility of individuals for human rights violations in non-international armed conflicts?<sup>10</sup> Although a few of the methods highlighted by the Symposium quickly fell out of favor,<sup>11</sup> other prominent methods were excluded,<sup>12</sup> and at least one of the world's most prominent international law scholars pointedly refused to participate.<sup>13</sup> The Symposium can still be seen as a snapshot of common approaches to international law roughly twenty years ago.

Although there were certainly major changes in the study of international law in the ninety-one years between Oppenheim's article and Ratner and Slaughter's Symposium, it is remarkable that they share two core assumptions about the purpose of international law research. First, neither project considered

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<sup>9</sup> *Id.* at 298.

<sup>10</sup> *Id.* at 295.

<sup>11</sup> For example, as far as we can identify, the only published articles that have mentioned or referenced the New Haven School since 2000 described the approach but did not actually use it themselves. See Halil Rahman Basaran, *Sovereign Immunity, Quo Vadis?*, 27 N.Y. INT'L L. REV. 1, 18–19 (2014); Christian Lee González, Note, *Law As A Means to Human Flourishing: Law, Morality, and Natural Law in Policy-Oriented Perspective*, 14 INTERCULTURAL HUM. RTS. L. REV. 289 (2019). One article claims that there is a New-New Haven School: Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007). For classic papers using the New Haven approach, see Myres S. McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952); HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* (1992). In contrast, "International Legal Process" was a label that evolved out of the eponymous school in American legal thought and is still deployed today. See, e.g., Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999). For example, since 2010, 284 articles on Westlaw have used the term "International Legal Process," as of mid-May 2021. See WESTLAW, <https://www.westlaw.com/SharedLink/a985462a609647a581444c0a221f03bc?VR=3.0&RS=cb1t1.0>. Classic studies include ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE ROLE OF LAW* (1974) and ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

<sup>12</sup> For example, the Symposium ignored approaches that were vital at the time, chiefly Marxism and the just-emerging Third World Approaches to International Law (TWAAIL). This was noted at the time in a letter from Henry Richardson to the editors. Henry J. Richardson, III, *Letter to the Editor*, 94 AM. J. INT'L L. 99, 99 (2000) (expressing disappointment that perspectives of "people of color" were not represented). See generally B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (1st ed. 1993) (articulating an integrated Marxist approach to international law); James Thuo Gathii, *TWAAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011) (tracing TWAAIL's contemporary origins in the late 1990s). See also James Thuo Gathii, *The Promise of International Law: A Third World View*, Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law (June 25, 2020), <https://perma.cc/26YB-5KAZ> (arguing that international law scholars need to go outside the current beltway of the discipline).

<sup>13</sup> The *AJIL*'s designated representative of critical legal studies, the eminent Finnish scholar Martti Koskenniemi, completely refused to answer the question posed, and characterized the whole horse-race exercise as reflecting "the logic of consumer capitalism." Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 352 (1999).

the possibility that the “science” of international law should be a conventional social science. Instead, both projects mainly conceived of “methods” as a set of assumptions and theoretical claims that should be leveraged by scholars trying to understand international legal obligations.<sup>14</sup> Second, both projects viewed international legal scholarship as an enterprise focused on studying the substantive obligations of international law. That is, both projects understood the tasks of international legal scholarship to be writing about how international law should be developed, interpreted, and critiqued. Using the distinction made famous by H.L.A. Hart, both projects primarily adopted an “internal” view of international law—that is, an approach that, whether descriptive or normative, is at its core a doctrinal exercise—as opposed to an “external” view of international law—that is, an approach that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world.<sup>15</sup>

In the first two decades of the twenty-first century, both of these assumptions have been cast aside as a new generation of international legal scholars have applied conventional social science methods to study external questions about international law. By conventional methods of social science, we refer to a research approach that involves clearly stating a research question, developing hypotheses, using a research design to test those hypotheses based on some form of qualitative or quantitative data, and presenting conclusions, all while acknowledging the assumptions upon which they are based and the level of uncertainty associated with those results. By external approach, we mean that instead of arguing about topics like the best way to interpret treaties, these scholars have studied topics like why countries sign treaties or the effect that signing treaties has on behavior. These scholars have spent less time arguing about topics like the merits of realism or constructivism, and more time arguing about topics like the best way to empirically assess whether human rights treaties improve human rights outcomes.

In this Essay, we document the rise of the social science approach to international law, explain the basics of the method, and advocate for its continued adoption. Our goal is to explain and advocate for an existing approach to researching international law that focuses on testing hypotheses about how international law works in practice. We endorse the study of external questions about international law. But by describing the social science approach to international law, we do not intend to restart a new debate about terms, labels, or

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<sup>14</sup> See Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 3 (2012) (“The tendency, until recently, for international legal scholarship to be aloof to empirical methods is reflected in the concept of ‘method’ used in the *AJIL*’s 1999 *Symposium on Method in International Law*. Not one contribution in the symposium addressed method in a social science sense, suggesting a significant gap between legal and social science scholarship. Rather, the alternative ‘methods’ all involved theoretical and analytical claims.”).

<sup>15</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* (1st ed. 1961).

schools. We are quite happy, in fact, that researchers in this field no longer have to expend any time figuring out if they would like to be known as a realist, constructivist, or some other “-ist.” Instead, our intent with writing this Essay is to hopefully complete the move away from these kind of labels by pointing out that it is possible to be an international law scholar without committing oneself to any assumptions, theories, or philosophies beyond those required of any other social science researcher.

Before continuing, it is important to clarify the scope of our argument. First, we are not the first to document the emergence of this line of international law scholarship. Simply put, this line of research is not a well-kept secret; it has been published by leading scholars in prominent journals for at least twenty years.<sup>16</sup> Moreover, the basic outlines of the social science approach to international law were discussed at least as early as 2005 when Jack Goldsmith and Eric Posner called for a “New International Law Scholarship,”<sup>17</sup> and the research produced by this movement has been the subject of several review essays.<sup>18</sup> Over the last few years, the trend towards social science research of international law has continued, but in addition to the quantity of scholarship increasing, so has the quality. There have been major projects to collect and code new datasets of the contents of international law,<sup>19</sup> as well as to incorporate research methods that make the causal

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<sup>16</sup> To provide a sense of the relative weights of these different fields over time, we looked at Certificates of Merit given by the American Society of International Law for books published since 1990. Each year, the Society gives three awards: (1) for a “preeminent contribution to creative scholarship”; (2) in “a specialized area of international law”; and (3) for “high technical craftsmanship and utility to practicing lawyers and scholars.” *Honors and Awards*, AM. SOC’Y INT’L L., <https://perma.cc/73SQ-5EZA>. For example, in 2020, in addition to the volume on feminist judgements, other Certificates of Merit were given to a technical volume that provides an internal view of the Convention on the Rights of the Child and a volume on the treatment of international organizations using the analogy to states. Our categorization of the books earning the awards since 1990 suggests that 15 of 96 have been awarded to projects that are social science in nature. *Past Recipients*, AM. SOC’Y INT’L L., <https://perma.cc/LL8X-ZZ6C> (categorization of recipients’ work on file with authors).

<sup>17</sup> Jack Goldsmith & Eric A. Posner, Response, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463 (2006).

<sup>18</sup> For reviews of empirical literature on the effectiveness of international law, see Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010); Shaffer & Ginsburg, *supra* note 14; Emilie M. Hafner-Burton, *A Social Science of Human Rights*, 51 J. PEACE RES. 273 (2014); Kevin L. Cope & Cosette D. Creamer, Response, *Disaggregating the Human Rights Treaty Regime*, 56 VA. J. INT’L L. 459 (2016); Adam S. Chilton, *Experimentally Testing the Effectiveness of Human Rights Treaties*, 18 CHI. J. INT’L L. 164 (2017); Kevin L. Cope, Cosette D. Creamer & Mila Versteeg, *Empirical Studies of Human Rights Law*, 15 ANN. REV. L. & SOC. SCI. 155 (2019); Adam Chilton & Katerina Linos, *Preferences and Compliance with International Law*, THEORETICAL INQUIRES L. (forthcoming 2021).

<sup>19</sup> See, e.g., BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* (2016).

estimates produced by this research more credible.<sup>20</sup> Our goal is, thus, not to identify new trends that have not previously been documented; instead, it is to more fully describe and justify this social science approach than prior efforts.

Second, we do not believe the social science approach is the *only* useful way to study international law. Instead, there are many other valid approaches to studying international law, many of which we have previously used ourselves. Social science approaches to international law should instead be understood as one way to do research that scholars should embrace when appropriate to the research question at hand.

Third, the social science approach to researching international law is not a single method. Instead, scholars have used many methods taking a social science approach to international legal scholarship, including the use of large-N observational data,<sup>21</sup> text analysis,<sup>22</sup> survey experiments,<sup>23</sup> field experiments,<sup>24</sup> and qualitative field research.<sup>25</sup> However, although the research designs and data used by these methods differ, the basic approach to research used by all these methods—defining research questions, developing hypotheses, using data to test those hypotheses, etc.—is the same.

Fourth, we are not unbiased observers of the trends we are describing. We all have a background in international law and political science, and we are thus advocating for the continued use of the methods that we have used throughout our academic careers.

This Essay proceeds in three parts. Section II provides a thumbnail sketch of the developments in international legal scholarship during the twentieth century that set the stage for the social science approach to become more prominent in the twenty-first century. Section III then describes the basics of the social science

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<sup>20</sup> See, e.g., Weijia Rao, *Domestic Politics and Settlement in Investor-State Arbitration*, J. LEGAL STUD. (forthcoming).

<sup>21</sup> See, e.g., Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When the United States Complies with WTO Rulings*, 39 YALE J. INT'L L. 201 (2014); Pierre-Hughes Verdier & Erik Voeten, *Precedent, Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389 (2014); Pierre-Hughes Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514 (2015); Julian Nyarko, *Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113 AM. J. INT'L L. 54 (2019).

<sup>22</sup> See, e.g., Julian Nyarko & Jerome Hsiang, *Conforming Against Expectations: The Formalism of Non-Lawyers at the WTO*, 48 J. LEGAL STUD. 341 (2019); Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. J. INT'L L. 357 (2020).

<sup>23</sup> See, e.g., Adam S. Chilton, *The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study*, 15 CHI. J. INT'L L. 110 (2014); Anton Strezhnev, Beth A. Simmons & Matthew D. Kim, *Rulers or Rules? International Law, Elite Cues and Public Opinion*, 30 EUR. J. INT'L L. 1281 (2019).

<sup>24</sup> See, e.g., Michael G. Findley, Daniel L. Nielsen & J.C. Sharman, *Using Field Experiments in International Relations: A Randomized Experiment of Anonymous Incorporation*, 67 INT'L ORG. 657 (2013).

<sup>25</sup> See, e.g., GALIT A. SARFATY, VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK (2012).



approach to research and explains several ways this approach differs from prior efforts to study international law. Section IV concludes.

## II. A THUMBNAIL HISTORY OF RECENT INTERNATIONAL LEGAL SCHOLARSHIP

Many articles have documented the evolution of international law scholarship, and a full accounting is beyond the scope of this Essay. But, broadly speaking, since Oppenheim's call for greater scientific rigor in the study of international law in 1908, there have been two main sources of influence on the evolution of scholarship in this area: (1) the real-world problems that international law was asked to address and (2) broader research trends in the academy. These real-world problems generated new questions and debates that social science research methods were suitable to answer, and the broader research trends in the academy integrated international legal scholarship more directly with the empirical revolutions taking place across relevant fields, including international relations and public law. We discuss each of these trends in turn.

### A. Real-World Problems

In the United States, international legal scholarship has been closely linked with legal practice, at least since Secretary of State Elihu Root founded the American Society of International Law in 1906.<sup>26</sup> Perhaps even more so than other disciplines within the legal academy, scholarship and advocacy were mutually reinforcing in international law scholarship. Advocates would write academic articles supporting litigation positions, and in many cases in the explicit interest of their national governments. As a result, international legal scholarship has been closely influenced by key events in international affairs.

Since 1908, the international community has experienced three major transformational moments, after which it has turned to law to solve problems. Those moments followed major global conflict: World War I, World War II, and the Cold War. After each of these conflicts, new international agreements were drafted, and new international institutions were established. Each set of new agreements and institutions was greeted with hope, but soon politics intervened again, and expectations were diminished.

First, after World War I, the League of Nations was established along with the Permanent Court of International Justice. These institutions consolidated an earlier round of developments that began with the Hague Peace Conference of 1899 and reflected a new optimism that international organizations could help secure peace. War was outlawed by the Kellogg-Briand Treaty in 1928, reflecting

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<sup>26</sup> *ASIL History*, AM. SOC'Y INT'L L., <https://perma.cc/Y5TK-2RJZ>.

great faith in the power of law to help states beat swords into plowshares.<sup>27</sup> We know, of course, how this era of liberalism ended. It was pilloried by E.H. Carr in his classic *The Twenty Years' Crisis*, which was published just as the world descended again into war.<sup>28</sup>

Second, in the aftermath of World War II, new problems of international organization came to the fore. Notably, the United Nations was established, and almost immediately, it became the repository of many hopes for a more peaceful future. The Bretton Woods institutions—the World Bank and the International Monetary Fund—were established to stabilize the international monetary system, the General Agreement on Tariffs and Trade was promulgated to regulate international trade, human rights discourse flowered, and the Geneva Conventions were revived and expanded to codify the laws of war. Many international legal scholars actively participated in the drafting of these agreements and the establishment of these organizations. In fact, the law of international organizations emerged as a distinct field.<sup>29</sup> Additionally, the emergence of new nations in the process of decolonization led to important debates on sovereignty and the role of capital. It is worth noting that, despite the initial hope during this period, by the mid-1960s, international lawyers often expressed frustration at the inability of law to constrain power.<sup>30</sup>

Third, the aftermath of the Cold War marked a new era for international relations, and for international legal scholarship as well. American hegemony and the end of the Cold War breathed new life into international institutions, just as it had at the end of World War II and, to a lesser extent, World War I. The U.N. Security Council's formal authorization of the first Iraq war, the most significant military conflict that had occurred since the Korean War, suggested that the U.N. Charter's collective security regime might have some new life.<sup>31</sup> Enthusiasts of globalization produced a whole series of new agreements to facilitate trade, including the institutionalization of the World Trade Organization.<sup>32</sup> The European Union's integration project, which had been revitalized by the 1987

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<sup>27</sup> OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

<sup>28</sup> *See generally* EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS: 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1st ed. 1939).

<sup>29</sup> *See generally* Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1 (1994); G. G. Fitzmaurice (Special Rapporteur), *Law of Treaties*, [1956] 2 Y.B. INT'L L. COMM'N 104, 108, U.N. Doc A/CN.4/101 (describing four constituent elements of international organizations). To be sure, international organizations had existed well before World War II, but their number and scope expanded dramatically thereafter. Madeline Herren, *International Organizations 1865–1945*, in OXFORD HANDBOOK INT'L ORG. (Jacob Katz Cogan, Ian Hurd & Ian Johnstone, eds., 2016).

<sup>30</sup> *See generally* WOLFGANG FRIEDMANN, *LAW IN A CHANGING SOCIETY* (1964).

<sup>31</sup> S.C. Res. 678 (Nov. 29, 1990).

<sup>32</sup> Richard Steinberg, *The Uruguay Round: A Legal Analysis of the Final Act*, 6 INT'L Q. 1 (1994).

Single European Act, deepened with the 1992 Maastricht Agreement.<sup>33</sup> A network of bilateral investment treaties began to expand toward the end of the decade. Together, this meant the rapid legalization of international economic life.<sup>34</sup>

During the 1990s, a desire to respond to mass atrocities also led to the development of new international institutions. The ad hoc criminal tribunals for Rwanda and former Yugoslavia presaged developments of “hybrid” efforts in Cambodia, Sierra Leone, and Lebanon. And the 1998 Rome Statute set up a permanent International Criminal Court with jurisdiction over citizens of states that had not consented to the agreement.<sup>35</sup> Meanwhile, new efforts at nation-building and trusteeship involved the U.N. deeply in problems of administration, in which it managed states coming out of conflict.<sup>36</sup>

The new international agreements and institutions created by these three transformational moments all produced new directions in international legal scholarship.<sup>37</sup> For example, the expansion of international economic law through new trade and investment rules created thriving and technical fields of legal research.<sup>38</sup> Similarly, the expansion of international tribunals created academic research programs like the Project on International Courts and Tribunals, which cataloged some twenty-five international tribunals.<sup>39</sup> Many of these involved what Karen Alter called the “New Terrain” of International Law, in parts of the world far from Europe and North America.<sup>40</sup> These tribunals were of course agents of further legalization and judicialization.<sup>41</sup> In turn, theorists anticipated that

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<sup>33</sup> Finn Laursen & Sophie Vanhoonacker, *The Maastricht Treaty: Creating the European Union*, in OXFORD RSCH. ENCYCLOPEDIA POL. (2019).

<sup>34</sup> Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT’L ORG. 811 (2006).

<sup>35</sup> Rome Statute of the International Criminal Court, arts. 1, 12, July 17, 1998, 2187 U.N.T.S. 90.

<sup>36</sup> See generally SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE BUILDING (2004).

<sup>37</sup> As just one small example, the journal *International Organization* produced scholarship focused on the legalization of world politics to explore how law influenced the activities of international institutions and organizations. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385 (2000); Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000).

<sup>38</sup> See, e.g., Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251 (2006); Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT’L L. 1 (2010); Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261 (2016).

<sup>39</sup> *The Project on International Courts and Tribunals*, in THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Ruth Mackenzie et al. eds., 2d ed. 2010).

<sup>40</sup> See generally KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW (2014).

<sup>41</sup> See generally MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (2002).

judicialization might mean the expansion of governance, with a virtuous cycle of governance by law.<sup>42</sup>

## B. Trends in the Academy

Beyond the impact of these major world events, international legal scholarship was also influenced by developments in adjacent academic subjects and disciplines. As international law became more important, political scientists and international relations theorists became interested in it.<sup>43</sup> During the Cold War period, scholars of the realist school were able to describe international law as “epiphenomenal,” since it did not seem to have much bearing on the major international relations questions of the day.<sup>44</sup> The claim became harder to defend when states were voluntarily legalizing their international relationships at a rapid pace. To understand these developments, scholars turned to newly revived institutionalist approaches in the social sciences and integrated these into law.<sup>45</sup> The institutionalist turn in the social sciences happened just as the fall of the Soviet Union shifted attention away from ideology as the core target of political and sociological analysis, and after the cycle of behaviorism that had dominated some fields in the preceding decades had run its course.<sup>46</sup>

Institutionalism stood for the idea that individual agents were embedded in broader institutional structures and that these structures “mattered,” meaning they shaped outcomes. While various disciplines adopted slightly different approaches to the study of institutions, a concise and influential formulation among economists and political scientists was that institutions demand attention because

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<sup>42</sup> See generally Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. 147 (1999).

<sup>43</sup> Social science approaches to international law initially focused on connecting with international relations theory. This literature featured a set of stylized schools—realist, institutionalist, constructivist—that put forth grand propositions about the possibilities of cooperation. See, e.g., John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139 (1996).

<sup>44</sup> See generally John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SEC. 5 (1994–1995) (describing law as epiphenomenal).

<sup>45</sup> See generally JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999). A fundamental contribution for international law is ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (2d ed. 2005).

<sup>46</sup> Behaviorism had emphasized the study of observable and quantifiable behavior as opposed to formal rules and institutions and tended to focus on the individual decision-maker. One can see traces of this in the New Haven School approach with “decision” as the central explanandum. The focus was on providing a formula for the authoritative international decision-maker to optimize, weighing the various policy-oriented considerations. See generally LASSWELL & MCDUGAL, *supra* note 11.

they are the rules of the game that structure behavior.<sup>47</sup> Whether deployed by political scientists, sociologists, or economists, institutionalism emphasized collective structures, and this represented a paradigm shift away from behaviorism as the object of scientific inquiry. Institutionalism fit easily with law, as a social device that explicitly provides rule of the game, and so spurred much work on international law.

A major development in this field during the 1990s was the development of a liberal school of international relations and international law. Starting with a positive observation about state behavior, namely that liberal states tended to observe their promises to each other, scholars like Anne-Marie Slaughter drew on the economic insight that law served as a commitment device.<sup>48</sup> By providing a way of imposing costs over time, law made promises more credible, and thus more valuable. States that tied their hands through law could cooperate more easily across borders.

This scholarship combined positive and normative analysis and sought to move international law in a direction that was more protective of individual interests and human rights.<sup>49</sup> The North Atlantic Treaty Organization (NATO) bombing of the former Yugoslavia to protect Kosovar Albanians in 1999 was a major development in that it purported to reach into the borders of a sovereign state to protect a persecuted population. Some international lawyers argued that it marked an evolution in the regime governing the use of force.<sup>50</sup> In the words of the Independent International Commission on Kosovo, the invasion by NATO had been “illegal but legitimate.”<sup>51</sup> The next year the Canadian government

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<sup>47</sup> See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (describing an alternative approach to institutionalism in sociology that attacked rational choice theory and sought to focus on social, cultural, and organizational forces that shaped behavior). See THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 45 (describing another approach, historical institutionalism, that traced path dependencies and critical junctures over time).

<sup>48</sup> See generally JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in PASSIONS & CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134 (1995).

<sup>49</sup> For example, Slaughter supported projects like the International Criminal Court and the doctrine of a Responsibility to Protect, which would justify international intervention as a last resort in situations of mass atrocity. She was a central figure in the formation of the Princeton Principles on Universal Jurisdiction, which promised to hold perpetrators of mass atrocity accountable before national courts. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), <https://perma.cc/S559-TCTM>.

<sup>50</sup> See generally MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001); Ralph Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923 (2001); Emily Schroeder, Note, *The Kosovo Crisis: Humanitarian Imperative Versus International Law*, 28 FLETCHER F. WORLD AFF. 179 (2004); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743 (2000).

<sup>51</sup> THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000).

established the International Commission on Intervention and States Sovereignty, which coined the phrase the “responsibility to protect.”<sup>52</sup>

However, the liberal school’s project began to flounder with the circumstances of the second Iraq war. The idea that liberal states complied with international law was hard to maintain with the American invasion, unsupported as it was by a U.N. Security Council Resolution or any viable claim of self-defense under international law. Instead, it looked like an example of what Detlev Vagts called “hegemonic international law,” in which the sole superpower ignored basic rules of the international legal order.<sup>53</sup>

During this time, several approaches to international legal scholarship that rejected many of the assumptions of past research emerged. Notably, Jack Goldsmith and Eric Posner published *The Limits of International Law*, which argued that international law should be better understood as endogenous to state preferences instead of as an exogenous constraint on state behavior.<sup>54</sup> In a world of independent nation-states, cooperation was possible, but only in response to particular conditions. Using game theory, Goldsmith and Posner laid out these conditions, while arguing against utopian and idealistic views.<sup>55</sup>

A separate set of critiques of prior approaches came from a different academic direction, namely the emergence and expansion of critical legal studies and connected scholarly movements. Critical legal studies was a scholarly movement in American legal academia that became prominent in the late 1970s, utilizing techniques of deconstruction to show the indeterminacy of law. In the case of international law, this was not a particularly hard project. But critical scholars took as their aim some of the liberal pieties about rights and remedies. David Kennedy’s *The Dark Sides of Virtue* was one particularly pointed example.<sup>56</sup> The emphasis was on exposing the internal contradictions of others rather than building up an affirmative program.

Additionally, feminist legal theory began to play an important role in the early 1990s for international lawyers. Hilary Charlesworth, Christine Chinkin, and Shelly Wright applied the general approaches of feminist legal theory to

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<sup>52</sup> INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

<sup>53</sup> Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L L. 843 (2001).

<sup>54</sup> JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

<sup>55</sup> The reaction to Goldsmith and Posner’s book from traditional international lawyers was notably critical. See, e.g., Balakrishnan Rajagopal, *Book Review*, 19 ETHICS & INT’L AFF. 106 (2005); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 54). See generally MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW (2008).

<sup>56</sup> DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

international law, by looking at the actual impact of doctrines on women.<sup>57</sup> They tied the feminine voice to the voice of the non-Western world, with both being examples of what would be called the “subaltern” in other parts of the academy. A number of scholars have followed in articulating a feminist approach to international law.<sup>58</sup> For example, last year’s ASIL Certificate of Merit for Creative Scholarship went to *Feminist Judgments in International Law*.<sup>59</sup> This work is part of a broader line of legal scholarship, rewriting judicial opinions in many areas of law from a feminist perspective.<sup>60</sup> The feminist work originated with a theoretical insight and is clearly a normative project that has had some success, informing several developments in international criminal law.<sup>61</sup>

Another line of critical work emerged with Third World Approaches to International Law (TWAAIL), a field that began to consolidate with the publication of Antony Anghie’s *Imperialism, Sovereignty and the Making of International Law* in 2004.<sup>62</sup> This was a historical look at the deep links between modern international law and European colonialism. TWAAIL scholars focused on international law’s close entwinement with imperialism, arguing that the connection was not just limited to the classical era but is continually being re-enacted today. This is an external view that emphasizes power and history and is increasingly popular: a *TWAAIL Law Review* has just been launched.<sup>63</sup> In this vein, we have also seen a recent push for a Critical Race Theory approach to international law.<sup>64</sup>

There has also been a “historical turn” among other critical scholars. Koskenniemi’s ambitious project is central to this enterprise.<sup>65</sup> Taking international legal argument as his object, Koskenniemi’s two major volumes have laid out a critical history of international law as a “Gentle Civilizer of Nations.”<sup>66</sup>

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<sup>57</sup> Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991).

<sup>58</sup> See generally Karen Knop & Annelise Riles, *Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the “Comfort Women” Settlement*, 102 CORNELL L. REV. 853 (2017); Anne Orford, *Feminism, Imperialism, and the Mission of International Law*, 71 NORDIC J. INT’L L. 275 (2002).

<sup>59</sup> FEMINIST JUDGEMENTS IN INTERNATIONAL LAW (Loveday Hodson & Troy Lavers eds., 2019); see *Honors and Awards*, AM. SOC’Y INT’L L., *supra* note 16.

<sup>60</sup> FEMINIST JUDGEMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter, Clare McGlynn & Erika Rackley eds., 2010).

<sup>61</sup> See, e.g., Navanethem Pillay, *Sexual Violence: Standing by the Victim*, 42 CASE W. RES. J. INT’L L. 459 (2009).

<sup>62</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

<sup>63</sup> TWAAIL: THIRD WORLD APPROACHES INT’L L. REV., <https://perma.cc/E979-HGG5>.

<sup>64</sup> See generally Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1 (2019); Makau Matua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841 (2000).

<sup>65</sup> Anne Orford, *International Law and the Limits of History*, in *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI 297, 297* (Wouter Werner, Marieke de Hoon & Alexis Galan eds., 2017).

<sup>66</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

Anne Orford has similarly sought to approach history from the perspective of a sociologist of knowledge, drawing on Foucault.<sup>67</sup>

Finally, several scholars, including many of those using historical approaches, began to look away from the traditional European roots of international law. Emblematic here is the *Oxford Handbook of the History of International Law*, which importantly sought to decenter Europe in the history of the discipline.<sup>68</sup> Scholars from Asia such as Yasuaki Onuma sought to lay out alternative framings,<sup>69</sup> while other scholars sought to recover how international law was encountered by societies outside the European core. Arnulf Becker Lorca's book *Mestizo International Law* was an important contribution in this regard.<sup>70</sup> This non-Western turn was also embodied in the work of Emilia Justyna Powell on Islamic Law,<sup>71</sup> a major edited volume on the Bandung Conference,<sup>72</sup> and Anthea Roberts' book, *Is International Law International?*, which uses an empirical approach to answer the question decidedly in the negative.<sup>73</sup> And China's rise has given impetus to work articulating a Chinese view of the field, including an English-language *Chinese Journal of International Law*.<sup>74</sup>

As this brief discussion illustrates, broad academic trends—for instance, toward institutional analysis in the social sciences and critical theory in law, and away from Europe in history—have all affected the progression of international legal scholarship.

### III. INTERNATIONAL LAW AS SOCIAL SCIENCE

Both the real-world developments in international relations and the incorporation of theories from other legal subjects and academic disciplines moved international legal scholarship toward social science. As Shaffer and Ginsburg documented almost a decade ago, international law subsequently took an empirical turn, and broad debates about the efficacy of law have been replaced by the study of conditional effects, examining where and when law is effective.<sup>75</sup>

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<sup>67</sup> ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY (forthcoming June 2021).

<sup>68</sup> OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., 2012).

<sup>69</sup> ONUMA YASUAKI, INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD (2017).

<sup>70</sup> ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW (2014).

<sup>71</sup> EMILIA JUSTYNA POWELL, ISLAMIC LAW AND INTERNATIONAL LAW: PEACEFUL RESOLUTION OF DISPUTES (2020).

<sup>72</sup> BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava et al. eds., 2017).

<sup>73</sup> ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017).

<sup>74</sup> CHINESE J. INT'L L., <https://perma.cc/U3BX-J876>. See also CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY (2019).

<sup>75</sup> Shaffer & Ginsburg, *supra* note 14.



In this essay, we go one step further and argue that it is not just the case that international legal research has become increasingly empirical. Instead, a growing body of research treats international law as a subject to be studied using the conventional approach to social sciences.

#### A. The Basics

The basic social science approach to research is based on the scientific method. Simply put, a researcher hoping to gain new knowledge about the world begins by identifying a specific research question. For instance, one research question that has consumed a great deal of attention in international legal circles is whether signing Bilateral Investment Treaties (BITs) leads to increased investment flows between the countries that sign them.<sup>76</sup>

After identifying the research question, the next step is to develop a specific hypothesis that can be empirically assessed. A hypothesis in a social science framework stipulates a possible empirical relationship between two or more variables. For our BITs example, one hypothesis a researcher may be interested in testing is whether signing BITs increases investment flows between the countries that sign them. Alternatively, the hypothesis may put forth a conditional theory in some way. For example, a hypothesis may be that BITs only increase investments when they are signed by large countries with pre-existing investment flows. Relatedly, as part of specifying the hypothesis, the research specifies a null hypothesis (typically that there is no relationship between the variables of interest) and identifies the conditions under which the null hypothesis is rejected. Or, put another way, the researcher identifies the conditions under which the research can claim support for the hypothesis.

Next, the researcher identifies a research design and data that will make it possible to assess the validity of their hypothesis. This research design should ideally make it possible, under a set of clearly articulated assumptions, to provide direct evidence to prove or disprove the hypothesis. For instance, a basic research design that could be used to test the effect of BITs on investments may involve collecting data on bilateral investment flows between all countries over a given period, and then comparing the change in investment between pairs of countries that signed a BIT in a given year to other pairs of countries that did not. That said, a problem with this research design is that evidence that BITs are associated with higher investment flows may not be enough to claim that the BITs cause those higher flows. This is because other factors may have caused both the signing of the BIT and the changes of investment. Ideally then, a research design would make

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<sup>76</sup> See, e.g., Jason Webb Yackee, *Do BITs 'Work'? Empirical Evidence from France*, 7 J. INT'L DISPUTE SETTLEMENT 55 (2016); Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in 2009–2010 Y.B. INT'L INV. L. POL'Y 539 (Karl P. Sauvant ed., 2010).

it possible to rule out the possibility that changes in the outcome of interests were attributable to the phenomena being studied. For instance, a researcher could leverage a natural experiment that changed the legal protection of some BITs but not others in a quasi-random way to see if those changes are associated with increased investment.<sup>77</sup>

It is important to note that there are a wide range of different social science research designs, and correspondingly, a wide range of data that can be used to empirically assess the validity of different hypotheses. For instance, our running example of testing the effects of BITs by looking at data on investment flows could be described as a reduced-form analysis using observational data. But it would be possible to test the effects of BITs in other ways using quantitative data, and it would also be possible to assess the effects of BITs using qualitative data. As one example, a researcher could explore whether corporate executives report that signing BITs influences their decisions on where to invest.<sup>78</sup>

Finally, in addition to stating the results when using the research design, a hallmark of social science research is clearly identifying the assumptions that are required for the conclusions of the analysis to be valid and also explaining the uncertainty of that estimate. In our example, instead of simply saying “BITs do not change investment flows,” a careful social science researcher would want to explain the assumptions implicit in their research design and say how confident they can be in their conclusion based on their evidence.

## B. Some Issues Specific to International Law

There is nothing particularly complicated about importing this basic social science approach to research into the study of international law. That said, the approach does have some differences with many prior approaches to the study of international law that are worth noting.

First, the social science approach typically adopts an “external” view of international law.<sup>79</sup> Any legal field, including international law, has an internal viewpoint, and scholarship plays a role in producing it. In international law, however, the internal viewpoint has continued to play a particularly prominent role. For instance, the role of scholarship is explicitly recognized in Article 38(1)(d)

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<sup>77</sup> See Cree Jones, *Do Enforcement Provisions Promote Investment? New Evidence from a Natural Experiment in the Investment Treaty Network* (Working Paper, 2019), <https://perma.cc/TQL8-N7CU>.

<sup>78</sup> See Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011).

<sup>79</sup> As previously explained, following H.L.A. Hart's distinction, an internal view is one that is addressed to legal decision-makers; it can be descriptive or normative, but is at its core a doctrinal exercise. An external view of law, in contrast, is one that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world. See generally HART, *supra* note 15.

of the Statute of the International Court of Justice, providing that the “teachings of the most highly qualified publicists” can help inform the Court in determining the content of international law.<sup>80</sup> This invites doctrinal scholarship, and its impact is evident in many sub-fields of international law. Treatises and whole journals are devoted to doctrinal developments: the *Journal of International Criminal Law*, for example, focuses on developments in that field, as does the *ICSID Review: Foreign Investment Law Journal*.<sup>81</sup> This is what we might call primary scholarship, designated “positivism” in the *AJIL* Symposium. It is embodied in the work of the International Law Commission, where scholars from various countries come together to “progressively develop” international law.<sup>82</sup> In contrast, scholars using the social science approach to study international law have focused on external questions like why states make international commitments, how international institutions make decisions, and whether international commitments or the decisions of international institutions produce changes in state behavior.

Second, unlike some traditional international law scholarship, the reach and efficacy of international law under the social science approach are not to be assumed but rather are treated as empirical matters to be assessed.<sup>83</sup> This requires that the target of study is not international law as a whole. A research project using the social science approach is unlikely to try and make broad generalizations like “treaties do not change behavior.” Instead, a project would study the influence of specific regimes involving specific countries at specific times.

Third, the social science approach does not adopt a teleology. There is no assumption that the world is shifting in one direction or another over time, either toward compliance or legalism. In this, a social science approach contrasts with some of the more optimistic scholarship of the liberal school of the 1990s. It also does not assume that legalization or judicialization is a one-way street: indeed, two of us recently co-authored a paper on the “Dejudicialization” of international politics.<sup>84</sup> In general, the world may be getting better or worse, but as E.H. Carr

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<sup>80</sup> Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

<sup>81</sup> See J. INT'L CRIM. L., <https://perma.cc/RQ3R-4EGJ>; ICSID REVIEW, <https://perma.cc/3B7W-KWML>.

<sup>82</sup> See U.N. Charter, art 13 ¶ 1(a) (United Nations to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification”).

<sup>83</sup> This is similar to the point made by Shaffer and Ginsburg about the importance of looking at the conditional effects of international law. See Shaffer & Ginsburg, *supra* note 14, at 5.

<sup>84</sup> Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521 (2019).

long ago noted, there is no natural “harmony of interests” to which states are evolving.<sup>85</sup>

Fourth, the social science approach does not view itself as a normative project. While every scholar certainly has normative priors, social scientists are engaged in a positivist enterprise of trying to describe the world as it is, rather than how it should be. International law is itself not viewed as either “good” or “bad”; rather it is a mechanism through which states “do things” together to achieve common goals.<sup>86</sup> Put another way, philosophers remind us that one can never derive an “ought” from an “is”; in the academic division of labor, social science is squarely focused on the “is.”<sup>87</sup> To be clear, this is not to say that normative views play no role in social science. Indeed, scholars’ normative priors influence the projects they pursue, the methods they use, and the way they interpret their results.<sup>88</sup> Good social scientists should be reflexive about these priors, and aware of any biases they might engender. And while the conclusions of social science research can also help inform normative conclusions about what international law ought to be, social scientists have no special expertise here. Normative matters require debate on normative terrain.

Fifth, social scientists, in general, tend to begin with a healthy skepticism about the efficacy of law: the effect of law is not assumed, but must be demonstrated. This skepticism is not only because one should be critical of claimed empirical relationships as a starting point for empirical research, but also because social science research has frequently found that policies do not have their intended effect. For instance, scholarship in development economics has found that many large, directed interventions have no measurable effect on poverty reduction. Scholars familiar with this kind of this research are perhaps more likely to be skeptical of the notion that treaties without enforcement mechanisms are likely to produce profound change in sticky areas like human rights, environmental protection, or poverty reduction.<sup>89</sup>

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<sup>85</sup> See generally PHILIP CUNLIFFE, *THE NEW TWENTY YEARS’ CRISIS: A CRITIQUE OF INTERNATIONAL RELATIONS, 1999–2019* (2020).

<sup>86</sup> IAN HURD, *HOW TO DO THINGS WITH INTERNATIONAL LAW* (2017).

<sup>87</sup> Lawrence B. Solum, *Legal Theory Lexicon 014: Fact and Value*, LEGAL THEORY LEXICON, <https://perma.cc/4JA4-QZRL>.

<sup>88</sup> Cf. Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277 (2015); Eric A. Posner, *Martti Koskenniemi on Human Rights*, in *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI*, *supra* note 65, at 121, 134.

<sup>89</sup> See, e.g., Adam S. Chilton & Eric A. Posner, *The Influence of History on States’ Compliance with Human Rights Obligations*, 56 VA. J. INT’L L. 211 (2016); Daniel Abebe, *Does International Human Rights Law in African Courts Make a Difference?*, 56 VA. J. INT’L L. 527 (2016).

### C. Comparing Social Science and Other Approaches to International Law

Although the social science approach to studying international law begins with a healthy skepticism about the effect of laws, it is of course not the only skeptical approach to studying international law. One major difference with many of the other skeptical approaches on offer is that the social science approach endorses the view that multiple methods can and should be used to tackle the question at hand, so long as it helps with inference. The *AJIL* Symposium of 1999 was built on an assumption that different methodological approaches, captured by labels, would lead to different outcomes. A social scientist's approach to method is different. It would make less sense to run a horse race between quantitative and qualitative methods, for example. Instead, one should pick the methods most appropriate to the problem at hand and move between them to establish propositions. This makes social scientists skeptical about labels. Even the term "empirical legal studies" can be interpreted more narrowly (for example, to refer to quantitative methods) or broadly (to refer to any systematic approach to data).

A second distinction is that social science is committed to a modernist view of knowledge. Facts are to be ascertained and, once established, are considered to be valid until falsified. This is a fundamental distinction with critical theory, which is committed to a critique of objectivity.<sup>90</sup> To be sure, critical scholars have called for conversation with empirical social science. But at the end of the day, some of the critical calls for engagement have tended to place the normative commitments above positive inquiry.<sup>91</sup>

At the same time, there are some commonalities between a social science approach and a critical approach to international law. Both recognize the role of power as an important factor in determining outcomes, for example. But even here there are differences. Critical scholars tend toward Foucauldian rather than material conceptualizations of power. And social scientists do not explicitly incorporate normative orientations into the analysis: whether or not developing countries benefit or not from international law is treated as an empirical question rather than an assumption or a normative commitment to be demonstrated. Critical scholars might accuse social scientists of burying the normative commitments in the posing of questions to be answered; but once the method is deployed, the answers are to be pursued neutrally.

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<sup>90</sup> Posner, *supra* note 88.

<sup>91</sup> Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 149 (2014) ("A collaboration between CRT and social science risks undermining CRT critiques of objectivity and neutrality and potentially limits the theory's ability to combat structural forms of racial inequality?").

## D. The Social Science Approach in Action

International legal scholarship using the social science approach has re-orientated many debates toward concrete questions about the causes and consequences of international agreements and institutions. Not only have these projects explored a wide range of topics, but they have also spurred several high-profile debates within the international legal academy.

Perhaps, most prominent, has been a debate over the effectiveness of international human rights agreements. In an important book on the topic, Beth Simmons produced evidence that human rights commitments tended to be observed when they were supported by domestic constituencies.<sup>92</sup> It has been followed by many other studies that also show the importance of domestic constituencies.<sup>93</sup> But it was contested with another important contribution by Eric Posner, which argued that we are in the “Twilight” of international human rights.<sup>94</sup> Notably, both scholars made empirical arguments using similar data to try and assess whether international human rights treaties can be shown to produce changes in the human rights records of countries that sign them. Although they reached different conclusions, they argued that social science should be the way the debate is resolved. This debate has continued to produce active disagreements between international law scholars and political scientists.

As another example, social science approaches have produced a number of debates about the efficacy of international dispute resolution. In seeking to understand when international courts might be effective, Tom Ginsburg and Richard McAdams put forward a coordination theory to explain the caseload of the International Court of Justice.<sup>95</sup> They argued that the evidence suggested that international courts could be effective in resolving certain kinds of problems, even without the power to impose sanctions for non-compliance.<sup>96</sup> In contrast, Eric Posner and John Yoo surveyed a broader set of international courts and argued that they were likely to succeed only when they were “dependent” on appointing

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<sup>92</sup> BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

<sup>93</sup> See, e.g., Katerina Linos & Tom Pegram, *What Works in International Human Rights Institutions?*, 111 *AM. J. INT'L L.* 628 (2017).

<sup>94</sup> ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

<sup>95</sup> Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *WM. & MARY L. REV.* 1229 (2004).

<sup>96</sup> *Id.*

states.<sup>97</sup> This argument generated responses that put forward a more nuanced theory about the conditions for successful international courts.<sup>98</sup>

There have also been debates on topics such as whether countries comply with WTO agreements, why countries sign bilateral investment agreements, and the influence of regional organizations on international regulation. We view these debates as a sign of a healthy field, in which evidence is subjected to multiple analyses and interpretations. The result is a step-by-step process of scientific discovery.

### E. The Limits of the Social Science Approach

Although there are many advantages to the social science approach, there are at least two limitations that we would be remiss to not mention. A first limitation is that positivist social science has, in general, been subjected to massive criticisms within the philosophy of science.<sup>99</sup> Data is not self-creating, and normative considerations can creep into the identification of measurement of data, as can the underlying concepts that motivate research questions. No doubt, these general critiques apply to social science work on international law as much as other fields. Careful scholarship and scholars must be skeptical about methods and their application.

The question is whether this critique should lead us to reject the approach. From our point of view, as social scientists, we think of positivist social science as a “research program” deploying a common set of assumptions, with the goal of explanation. The key question in replacing a research program is whether a better approach is possible.<sup>100</sup> The advantage of a social science orientation is that decisions on conceptualization and measurement are themselves to be made transparent. Social science practices seem to us to be superior to any alternative. Further, the idea that knowledge is provisional invites attempts to disprove propositions. Falsifying particular studies is a sign of progress, not a reason to reject a research program.

A second limitation is that social science may not provide immediate answers as to how to navigate the rapidly changing world. Many areas of international cooperation are currently in a moment of transition. Among the issues that are transforming the world are the return of the state, the climate crisis, a reduction

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<sup>97</sup> Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

<sup>98</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Tom Ginsburg, Response, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005); KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* (2014).

<sup>99</sup> See, e.g., MARTIN HOLLIS, *THE PHILOSOPHY OF SOCIAL SCIENCE* 76 (1994).

<sup>100</sup> Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 91, 116 (Imre Lakatos & Alan Musgrave eds., 1970).

in global integration, and the rise of demands for indigenous recognition. The rise of China is no doubt a preeminent development that has profound challenges for international law.<sup>101</sup>

The general approach of positivist social science may provide help tackling these issues, but there is a critical caution that must be observed. Positivist social science looks backward to existing data. It will then assess the patterns to see how they comport with theory and will put forward conditional propositions about the research questions asked. But, if one seeks to apply existing models and findings to new phenomena and configurations, one needs to take external validity seriously. This means closely considering the conditional effects of current findings and speculating on how changing international configurations affect these underlying conditions. While we are not confident that the world in ten or twenty years will look the same as it does today, we do believe that this kind of rigorous, cautious, and skeptical approach is necessary for international law to continue to make progress as a field.

#### IV. CONCLUSION

Oppenheim thought that the science of international law should be practiced by those “who are imbued with the idealistic outlook on life and matters.”<sup>102</sup> In contrast, we hope that the social science of international law will continue to be normatively restrained, empirically informed, and more skeptical than the international law scholarship of the past.

Additionally, we hope that international legal scholars continue to build bridges between the practice of international law, the legal academy, and other social science departments. International agreements and institutions pose a range of topics worthy of research, institutions require legal expertise to fully understand, and the social sciences are continually developing new methods to improve the credibility of research. In short, we hope that others will continue to join the effort to bring social science approaches to the study of international law.

In a parallel field, Professor Ran Hirschl made a similar call for interdisciplinarity when he proposed moving from “Comparative Constitutional Law” to “Comparative Constitutional Studies.”<sup>103</sup> Hirschl’s call was for the integration of social science and law to understand a dynamically changing field. International legal studies should follow this trajectory to better understand the promise and limits of international law.

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<sup>101</sup> CAI, *supra* note 74.

<sup>102</sup> Oppenheim, *supra* note 1, at 355.

<sup>103</sup> RAN HIRSCHL, *COMPARATIVE MATTERS* (2014).