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International Relations and International Law

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The American international lawyer is first and foremost a lawyer. She seeks Evidence only for the purpose of resolving a specific problem. She necessarily frames all problems in normative terms, and the basic purpose of law is to legitimate her preferred outcome. Legitimation thus functions beyond the descriptive realm. My understanding is that the archetypal political scientist takes the world as she finds it. A descriptive rather than a problem-solving mindset dictates how evidence is sought, sorted and deployed. Assuming that the international lawyer and the political scientist both invoke interests, reputations and institutional arrangements to articulate their perspectives on state behavior, it is doubtful that these terms mean the same thing to both. For example, take "reputation" which is the least ambiguous (i.e. whose scope can be most readily cabined) of the terms. For a political scientist, it may well be a synonym for such formerly heralded civic virtues as honor, loyalty, or obedience to duty. For an international lawyer, it may mean no more than consistency or predictability. Put another way, the core of the international relations specialist's concern is with the substantive content of "reputation," while that of the international lawyer is with the process we arrive at it. It is thus not overly simplistic to say that the object of the lawyer is to create the reputation, that of the political scientist to describe it. If these professional engagements are to be discharged effectively, both tasks demand some conceptualization of the relationship of inputs and end-products, but it is doubtful that both require the same level of precision in under standing and formulating relevant interactions; that is, in their definition of "causality" or "causation."

And then, there is the ultimate question: does understanding causality matter? Causation is a fascinating intellectual puzzle, and if I believed that it could be systematically approached, the frustrations on route to its circumscription, if not solution, would be worth the effort. But it is doubtful whether the level of specificity of detail seemingly envisaged in Professor Keohane's framing of the problem is helpful to the project of understanding why societies comply voluntarily or otherwise with rules that constrain their behavior. This is an important issue not only with regard to conventions and agreements that are binding because they are "consented to," but to "customary" international law as well. As a lawyer, I am heartened to learn that international relations specialists are willing to concede that states do indeed "comply" with rules and norms. It is the quixotic lawyer, however, who fails to concede in return that state behavior frequently is not regulated by rules or norms, and that their obedience to applicable rules and norms often depends on their status in the hierarchy of international community. For virtually all practical purposes, acknowledging the relevance of factors such as interests, reputation and institutions will offer a more than adequate starting-point for solving the specific problem faced by the lawyer or international relations specialist seeking to understand this behavior. Within these boundaries, our capacity to tolerate the unpredictable is not only part of our job, but may be the only genuinely defensible justification for any social utility that we claim to have.

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The most obvious difference between students of international relations and students of international law arises from the subjects of their inquiry. International relations scholars consider the relations between states. International law considers the norms that govern these relationships (and many other important transactions). Robert Keohane has characterized this as the difference between "realism" and "idealism": what actually *is* done as opposed to what *ought* to be done by states.

When international relations specialists encounter international law, their response has been to ask (as Professor Keohane does in his Sherrill lecture) "how important is persuasion on the basis of norms in contemporary world politics?" Such scholars seldom inquire about the norms themselves, but assume (with Keohane) that all international law rests on "legal agreements" between governments or "treaty rules" made by states. This conception of international law reflects the inter-

national relations community's special interest in *state* action, and corresponds to the political theory of Thomas Hobbes, who derived all legal obligations from contracts between individuals or states. This reduces international law to a single principle, *"pacta sunt servanda."*

Treaties

Few states always respect their treaties. Nor should they, under international law. Just as written contracts bind individuals in some situations, but not others, so states have obligations that override treaties. The statute of the International Court of Justice mentions "international custom," "general principles of law recognized by civilized nations," "judicial decisions" and "the teachings of the most highly qualified publicists of the various nations," as the basis for judicial decisions in accordance with international law, in addition to "international conventions" and "rules expressly recognized the contesting states." Treaties are *evidence* of the law of nations, inasmuch as they reflect a consensus about international norms, but they are not the sole *source* of law, which rests instead on fundamental truths about basic questions of right and wrong.

Political scientists often study elites, who seek to acquire and maintain power by invoking and manipulating international law to support their interests. This "instrumentalist" approach reflects a familiar facet of human nature. People often take the law as they find it, to serve their private agendas. Structure the rules correctly, and such private interests will serve the public good, or at least inhibit excessive private depredations. This was the doctrine of Madison in the *Federalist*, following Adams, Montesquieu and Cicero before him. International relations theory suggests how to manipulate rules and "regimes" to control the operation of "politics" among states. Multilateral treaties provide a tempting vehicle through which social scientists may impose their theories on reality.

International lawyers and political scientists converge in this desire to influence the real world. They also share a "scientific" interest in clarity and quantification, through which their disciplines build credibility in the academy. Treaties serve the dual role of providing concrete objects of study, and solid vehicles for influencing future doctrine. International relations studies offer lawyers most when legal scholars engage in ersatz legislation. Lawyers need theories of human behavior to legislate effectively, which they borrow from political scientists' ideas about human nature in international relations.

Human Nature

International law grows out of human nature, and above all the overwhelming human need for approval. People value their reputations, not just to facilitate future transactions, but also (and more importantly) as an independent good. People like to be well thought of. This explains why governments in China and the former Soviet Union (for example) care so deeply about Western criticism when there is no prospect of intervention or any substantial material consequences. Criticism is harm enough in itself. Yet to suffer criticism one must hear it. The single greatest constraint on international relations, beyond the bare balance of military power, is the profile of its public critics—the people whose voices are heard in discussing the actions of others.

The founders of international law as a modern discipline considered their subject to consist in explicating the law of nature, as applied to states. Grotius, Pufendorf and Vattel described what would be just, and generals applied their strictures. Monarchs hired famous scholars, ostensibly for advice, but also to influence the course of future scholarship. Scholars provided the most detailed and articulate description of international law, which politicians read and followed. The teachings of the most highly qualified publicists formed the relevant community of opinion, and government deferred to their holdings.

Criticism is not all that governments fear. They also worry what other governments will take offense at. Obvious rules of right, wrong and fairness determine this to some extent, but well-known writings and conventions also play a role. Rules governing prisoners, envoys and prizes all developed largely through the writings of European publicists. Any government seeking to manipulate law to its own advantage must consider not only the obvious strictures of fairness, but also what has been written on a given issue, and which writings had the greatest effect. International law as such often has less influence on state action

than states' perceptions of what opinion leaders will criticize as violations of international law.

Realism

How states and others experience the constraints imposed by international law will vary depending on the sources and nature of the rules involved. The "realist" test of such rules is not whether law "persuades" states (as Robert Keohane would have it) but rather which norms actually influence behavior. The more widely accepted the rule, and the more clearly stated, the more likely that powerful states and their officers will defer to public opinion.

"Realist" scholars who deprecate the importance of rules, and stress the centrality of "interests" in all state actions, make their arguments more true, simply by stating them, because stating such views alters the climate in which government officers make their decisions. Similarly, "idealist" scholars who discuss the content of international law and assume its relevance, improve the likelihood that states will obey the law, simply by disapproving of those that do not. The more established the scholar or public figure who pontificates about international law or international relations, the greater the likely influence on state practice.

People want to be good, to think well of themselves, and for others to approve. This means that "instrumentalists," seeking to manipulate international relations, will have to take into account what people believe to be right and wrong—the ultimate sources of international law. Such beliefs are manipulable, within limits, but determinate. People or states with shared interests can create their own interpretive communities, to reinforce self-interested misconceptions, but their discourse will be normative, even when it is insincere.

Effectiveness

Normative discourse is most effective when it clarifies rules that actually apply, or creates a climate of acceptance for rules that may (or may not) apply in fact. This is not the same as legitimacy. "Legitimate" rules actually apply. "Effective" rules may not actually apply, but are widely accepted anyway. Effectiveness is evidence of legitimacy, but not conclusive. Situations often arise in which all nations will benefit from a given rule. This makes the rule legitimate and usually effective too. But groups of nations may sometimes impose rules for their own benefit, which are the illegitimate product of "effective" normative discourse.

Principled beliefs have as much impact on international relations as mere interests because they provide the framework through which interests express themselves. What elites want out of life reflects what they believe a good life to be. How elites act in their dealings with others reflects what they believe that others will think of what they do. Effective normative discourse depends on these background realities. To manipulate international law one must understand its sources. Instrumentalists will not be effective until they understand the power of norms.

To suppose that instrumentalism and normative thinking are two optics, each incomplete without the other, mistakes their true relation, which is hierarchical. "Realists" and "idealists" operate at two different levels of consciousness. Idealism contains realism within it. Talking in instrumentalist terms, while often true, cheapens the conversation. Disputes about international law (which are equally true), improve the participants. The purpose of international institutions should be to support the open, free and independent discourse that produces legitimate effective legal norms.

Conclusion

The fields of international relations and international law diverged because some doubted the efficacy of norms in the international arena. After decolonization, the Second World War, and two centuries of European revolutions such doubts betray a very shallow sense of history. Once the power of ideology is admitted, its sources must be examined. Truth, and the semblance of truth about justice have tremendous influence over human behavior, but public consensus is decisive. People care what people say, which explains the power of international law.

There can be no cooperation without norms, no laws without a sense of justice. International law coordinates international behavior by providing the framework through which private

interests express themselves. Much more than the positive law of states, international law evades definitive interpretation. This gives scholars a considerable voice in its development, and corresponding influence over international affairs. Their discourse helps to shape the perceptions of governments, to create new constraints on those pursuing international goals. What a shame it would be if scholars squandered this influence in a discussion of tactics and state interests without considering the rules that make sense of public lives, and bring order to international affairs.

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International Law and International Relations: Beyond Intrumentalism And Normativism

In his paper on "Two Optics" in International Relations and International Law, Robert C. Keohane discusses two approaches to the role that international law plays in international politics or decision-making: the instrumentalist optic and the normative optic. The instrumentalists maintain that the interests of States determine whether they obey international law or not. According to instrumentalism, "states only accede to rules that they favor, and they comply because such conformity is convenient." Under this optic, states, especially powerful ones, will modify, reinterpret or breach international law rules if such rules operate against their national interests. Observance is demanded by power and interests rather than by other determinants. The normativists, on the other hand, emphasize legitimacy of positive rules and the causal effect such rules have on State behavior.

Keohane believes that both optics "seem necessary; neither is sufficient." Instead of concentrating on differentiating between instrumentalism and normativism, Keohane focuses on "analyzing how the normative optic depends on, but goes beyond, the instrumental one." What really matters in that analysis is a chain of three nodes on causal pathways "that seem essential to any coherent account of how rules relate to state action: interests, reputation, and institutions." I agree that neither instrumentalism nor normativism is in itself sufficient to illustrate the complexity of what causes a State to behave in one way or another. However, it remains questionable whether the mere construction of a synthesis of these two approaches is enough. I sense something is missing, as in many other treatments. After all, we need a fuller answer to the question why, how and to what extent State behaviors are affected by international norms.

I. Compromised Wills of States as the Intrinsic Factor

Keohane, like many other contemporary international lawyers and political scientists, continues to neglect the decisive role of compromised State wills in the relationship between State behavior and international law (by State "will" I mean the combination of both national intent and national capability.) It is less a question that international law is law and has binding force upon its subjects—mainly States. Then, what gives international law its legal or normative character and how does it acquire its binding force? If we carefully observe the reality, it would not be difficult to find that it is the same sovereign States whose conduct international law is intended to regulate that formulate international law and give it a legal character with binding force. In other words, the wills of different States, after a compromising process, meet to create international law in the form of common standards of State conduct for the common good. Such wills determine that international law is created to be observed and enforced and thus necessarily has a causal impact upon State behavior.

Law is a set of standards of conduct representing and originating from the will of the State, having legally binding force, and enforceable under the guarantee by a certain mechanism. No law is separable from the will of the State. This concept of law would cover both domestic law and international law. Needless to say, international law is made and enforced in a way different from that in which domestic law is made and enforced, and the legal validity of the two systems of law must necessarily be demonstrated in different modes. At the international level, the State is not only the subject of rights and obligations in international law, but also the participant in for-