

# International Law

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The study of international law and international relations has flourished in the past decade. This should hardly be surprising. These two disciplines have closely entwined historical roots in the traditional study of interstate relations and diplomacy (Jeffery 2006). The role of international law in international relations has for a least a century been at the heart of some of the most important debates in international relations scholarship. Something of an intellectual wedge was driven between these two disciplines when the social sciences and international relations in particular took a behaviorist turn in the 1940s and 1950s. The normative and doctrinal approach of many legal scholars seemed to have little intersection with the increasingly social scientific concerns of international relations scholars to explain, interpret, and increasingly to predict international politics. For a brief period coinciding with the apogee of structural realism of the 1970s and 1980s, international law was widely viewed as irrelevant to the study of international relations.

The drought of scholarly work linking international law with international relations ended by the mid-1990s. The study of international regimes in the 1970s and 1980s

foreshadowed the current sharp upswing in interest in international law. Not only are scholars increasingly interested in the growing “legalization” of international affairs, they are making tremendous strides in theorizing and documenting the consequences of international legal norms and agreements for our understanding of international affairs more generally. This has led to new fields of inquiry in international relations that were barely apparent two decades ago.

The first section of this essay defines a few key terms and provides some historical background on the relationship between international law and international relations. The second section discusses the major theoretical approaches, from those that highlight material incentives to those that rest on more ideational foundations. The third section discusses international law development – concepts of legalization, judicialization, constitutionalization, and global administrative law. The fourth section reviews theories and empirical studies of compliance with public international law. The final section concludes that theory has become less compartmentalized by “school” and empirical research has become more rigorous over the past decade.

## BACKGROUND

### *Scope and Definitions*

International law can be defined as a body of principles, customs, and rules recognized as effectively binding obligations by sovereign states in their mutual relations. “What distinguishes law from other types of social ordering is not form, but adherence to specific rules of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action” (Brunnée and Toope 2010). International law’s distinguishing feature – that which sets it apart from an institution, practice, or political agreement – is its acceptance in principle as *binding*. Public international law comprises a set of binding rules among *states*. Increasingly we can find instances in which such rules govern individuals (international criminal law and some aspects of the laws of war, for example), but only states (or in some cases, organizations of states) can enter into international legal agreements, or treaties. This binding state-to-state quality distinguishes international law from the broader concept of international institutions, which can include nonbinding practices and which, many would agree, can also include rules and principles devised by nonstate actors (see the chapter by Martin and Simmons in this volume).

Study and research on international law is also distinct from that of international organizations. While intergovernmental organizations are usually based on an international legal agreement (the various bodies of the United Nations are obvious examples), they are also actors in their own right, and are often studied as such. Many international legal agreements give rise to thin or even no international organizational structures whatsoever. An extradition treaty, for example, creates no *international* organization whatsoever. The parties to the agreement decide when and how to carry it out.

Some scholars and practitioners make reference to “soft law.” In international relations, this can have two meanings. One refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior. Or, it sometimes is used to refer to the more hortatory or promotional provisions within a legally binding treaty (Shelton 2009: 69).

International law is found not only in treaties but in the body of *custom* that has developed over time among states. Customary international law is based on state practice, combined with an understanding that such practice has developed into an obligatory norm (*opinio juris*). When a stable practice develops among a sufficiently broad number of states, and when a large number of them view the practice as legally binding, it becomes recognized as a binding principle of international law. *Ius Cogens* norms are considered the most fundamental principles of customary international law, from which derogation is not ever allowed. While no single authoritative list of such norms exist, some examples include prohibitions against aggressive war and crimes against humanity. A similar set of basic norms are sometimes termed *erga omnes* – obligations owed to all. Examples include obligations to refrain from slavery and torture. Legal scholars have also given attention to a growing body of what they refer to as “interstitial law,” that is, the implicit rules operating in and around explicit normative frameworks (Lowe 2000). While an important source of international law in many areas, customary and interstitial international law have been the subject of relatively little attention in international relations, perhaps because they can be difficult to establish empirically and their causal influence is hard to study rigorously (Goldsmith and Posner 2005). Since much of international custom – from the law of the seas to prohibitions against torture to the law of treaties – has now been codified, IR scholars have largely concentrated on treaty law. This article will do the same.

### ***International law in history***

Some form of international system of rules has governed relations between independent political entities for centuries if not millennia. David Bederman argues that there was “a coherent sense among ancient peoples from Near East and Mediterranean traditions that state relations should be conducted in accordance with established norms and values” (Bederman 2009: 115). He notes that ancient law among nations was first and foremost an instrument for order, used to secure not only stable power relations among sovereigns but also to bolster their internal legitimacy. While the prehistory of legal agreements between organized groups of humans has been lost in the mists of history, as early as 2500 BCE evidence can be found of third party arbitration awards regarding arable land among cities, as well as nonaggression pacts (frequently violated) among the same (Altman 2004). Ancient Sumerians concluded “international” agreements regarding dynastic marriage alliances between rulers, arbitration in city-state conflict management, and the laws of travel and extradition for runaway slaves, refugees, and deserting soldiers at the dawn of recorded history (Altman 2009).

It is not the purpose of this article to develop a history of the development of international law. However, many such histories note that international law has roots in the rules and principles developed by the Roman Empire to govern interactions between Roman citizens and citizens of the outside world (*jus gentium*, or the law among peoples, rather than *jus civile*, or the law among citizens of Rome). For centuries – at least until but perhaps well beyond Grotius’s treatise on *The Laws of War and Peace* (Grotius 1962) – international law was widely viewed as grounded in natural law, divine in origin. Of course, as Yasuaki reminds us, “The overwhelming majority of the human species lived in the areas where ‘universal’ natural law had no impact at all. It was only around the end of the nineteenth century that

the European international law actually became valid as universal law of the world in the geographical sense” (Yasuaki 2000). Most international law histories can therefore be considered the history of *European* traditions and structures, developed in the wake of the crumbling Holy Roman Empire, the scourge of repeated wars, and the rise of trade and maritime transportation (Nussbaum 1954; Butler and Maccoby 1928).

## **THEORETICAL APPROACHES**

### ***The Early Twentieth Century***

International law and international relations scholars began an intense, self-conscious dialog in the early twentieth century. One window into this conversation is the implicit debate that took place during the interwar years on the role of international law in reducing violent conflict among nations. In many ways, of course, this was a subset of the more general debate about the role of power, morality, and law that took place among a variety of so-called legal idealists and realists in the 1920s and 1930s. E.H. Carr was one of the most prominent commentators for the latter (and, in fact, is the likely source for the “idealist” label). The “idealists” held in common the notion that progress in international relations post World War I was indeed possible, and would likely be built upon the pillars of international trade, international organizations, and domestic democratic governance (Zimmern 1934; Angell 1911). Many expected international law to play a significant role in the international order of the time. Indeed, as the United States rose to power in the early twentieth century, it found itself with a weak foreign policy structure, but a well-developed notion of the role of law in ordering human affairs. Steinberg and Zasloff argue that it was therefore natural that the United States would see international politics through a legalistic lens, as epitomized by such statesmen as

Elihu Root and Woodrow Wilson (Steinberg and Zasloff 2006).

In many ways, the interwar “debate” between the Idealists and realists has been exaggerated (Simpson 2001). Woodrow Wilson himself spoke publicly of law generally as “subsequent to the fact;” as reflective of rather than transformative of social realities (Wilson 1911). Yet realists such as E.H. Carr emphasized what they saw as naïveté in the hope that international law could contribute much to the post-war peace, much less stave off general war in the 1930s. His work is enlightening as a succinct expression not only of classical realism: “... a state whose interests were adversely affected by a treaty commonly repudiated it as soon as it could do so with impunity ...” (Carr 1964: 169). Carr can also be read as a precursor of critical legal theory. In his discussion of the post-World War I order, he described treaties as devoid of moral content, espoused by those satisfied with the status quo to secure their interests (Carr 1964: 166). High on his agenda was the project of deflating the presumption that international law was particularly moral or legitimate<sup>1</sup> – a message that resonates with critical theory today.

### ***Post-World War II: International Law in a “Science” of Politics***

Continuing many of the themes developed in the 1930s, the classical realists of the 1940s through 1960s can be read to have understood law as largely epiphenomenal, or worse yet, irrelevant to the more basic forces of international politics. The “science” of international politics was designed explicitly to leave behind the normative wishful thinking of legal idealists, and to describe not the world one might wish, but the world as it actually is. And the lessons of World War II were fairly clear in this regard: power could not be contained by fragile legal tenets. Morgenthau, for example, complained that “the very structure of international relations – as reflected in ... legal arrangements – has

tended to become at variance with and in large measure irrelevant to the reality of international politics” (Morgenthau 1985: 8). The central problem with international law, as he saw it, was its decentralized and essentially unenforceable nature (Morgenthau 1985: ch. 18). The message of the classical realists was pretty clear: nothing of real *importance* in international relations could be achieved through international law. As Raymond Aron put it, “One does not judge international law by peaceful periods and secondary problems” (Aron 1981: 733). At most, the classical realists thought that international law could function in a limited way when the underlying balance of power kept the most violent ambitions of states in check. But shifting power balances exposed international law’s weaknesses and “created opportunities for chaos” (Hoffmann 1987: 166).

Kenneth Waltz’s influential structural realism stripped law, rules, and norms away completely, until the only thing of relevance to a theory of international politics was “structure” – defined as power relations among states in a system of anarchy (Waltz 1979: 70–101). “Structure” thus defined, Waltz admitted, was “certainly no good on detail” (Chapter 2) – which is the status to which he evidently relegated international economic relationships, protection of the environment, and human rights. With these “details” removed from international politics, law became largely irrelevant to the study of international relations. By the late 1970s, the study of international law in the social sciences was nearly moribund.

Nearly, but not completely, and not for long. The realist view of the world raised some uncomfortable theoretical puzzles. One was to explain why such a useless institution as international law existed at all. Surely there were costs involved in negotiating international legal agreements, seeking ratification, and dreaming up ways to fit specific agreements logically under broader normative principles to which many if not most states adhered. Moreover, states seemed for the most part to be guided by the rules they

were negotiating. Morgenthau himself noted that “The great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honor their obligations under international law” (Morgenthau 1985: 112-3). Echoes of this sentiment could be heard years later in the writing of a scholar with realist roots who took the possibility of “international society” seriously. As Hedley Bull wrote, “The fact that these rules are believed to have the status of law ... makes possible a corpus of international activity that plays an important part in the working of international society” (Bull 1977: 136). In these views, we find two openings for theorizing the conditions under which international law can influence the actions of sovereign states; via their interests, and via their shared conceptions of appropriate behavior. Each of these has found expression in recent approaches to the study of international law in international relations

### ***Contemporary Theories***

Resistance to the utter irrelevance of international law has developed in two fairly distinct theoretical traditions in the past two decades. Both “rationalists” – a broad term used here to designate theorists who emphasize instrumental behavior to achieve specific, often material ends – as well as constructivists – broadly, those who believe in the constructed nature of social reality – were intrigued by the puzzle of international law’s very existence. Many wondered whether realism had any theoretical purchase on understanding a world in which rules, norms, dispute settlement procedures, and other law-like structures were proliferating.

One of the most important theoretical developments in international relations to influence later scholarship on international law explicitly eschewed any connection to law per se. The “international regimes” literature, exemplified in a volume edited by

Stephen Krasner, was an effort to understand a world that, while quite obviously anarchic, was nonetheless highly organized (Krasner 1983a). A cluster of scholars in the early 1980s began to work out theories of the formation, transformation, and decline of formal and informal arrangements they referred to as “international regimes,” or rules, norms, and decision-making procedures that shape actors’ expectations and thereby influence relations among other states and between states and other actors (Krasner 1983b: 2). The early regimes literature was theoretically eclectic. It ranged from structural/strategic approaches that linked the rise of regimes with specific power relations among states (Stein 1983; Keohane 1983) most especially with the hegemony, or dominance of a major power, to more “Groatian” approaches that assumed a common social purpose among states and to some extent other actors (Ruggie 1982).

Two distinctive theoretical traditions found in this early regimes literature continue to flourish in the social sciences today. To simplify the matter greatly, they were inspired by the seminal theoretical work of Robert Keohane and to a lesser extent Stephen Krasner on the one hand and John Ruggie and to a lesser extent Friedrich Kratochwil on the other. Keohane’s theory of the demand for “international regimes” spawned a hugely influential research agenda constructed on rationalist/functionalist premises to explain the rise and development of international regimes (Keohane 1983). Strongly influenced by institutional economics, Keohane proposed a “functional” theory of international regimes that analyzed why states would demand such structures, arguing that the existence of rules norms and agreed-upon procedures helped to reduce transactions costs among states, reduce uncertainty, and create focal points around which states could coordinate their behaviors and policies. Some regimes were also theorized to provide information that would assist in developing reputations, thereby reinforcing agreements for states that wanted to benefit from future contracting.

This general functional approach to international institutions has had a tremendous impact on the study of international law in the social sciences, despite the fact that it was not conceived as a theory of international law per se.<sup>2</sup> Many of the same assumptions, concepts, and modes of reasoning could be found in the IR/IL theories that followed. Charles Lipson, for example, concentrated on the focal qualities of international treaties and in particular their explicitness and precision which he and many others argue raises the reputational costs of non-compliance. States use very formal agreements (international law) when they have strong motives to try to overcome cooperation dilemmas; treaties are a way to be explicit and to signal seriousness in a way that distinguishes them from less formal agreements (Lipson 1991). Abbott and Snidal drew on the idea of transactions costs to explain why states would want to develop “hard law” agreements (Abbott and Snidal 2000). A similar rationalist logic characterizes a number of scholar-practitioners as well, from international jurist Rosalyn Higgins to Justice Department legal counsel Jack Goldsmith (Higgins 1994; Goldsmith and Posner 2005). Agreements regarding the law of the seas (Posner and Sykes 2009), trade liberalization, arms control, and even the laws of war (Morrow 2007) have been theorized as areas in which joint gains and the expectation of a future stream of benefit have been theorized in rationalist-functional terms (see below).

Yet, rationalist theories have a number of blind spots that more social constructivist theories have to some extent been deployed to address. For example, it is quite obvious that focal points have to be intersubjectively recognized to be helpful at coordinating behavior. “Law” can only raise expectations of compliant behavior if actors share a mutually constructed notion of its special obligatory status (Brunnée and Toope 2010). Most evidently, the concept of a reputation – the mechanism on which rationalists typically depend for reciprocity and ultimately

compliance – only has meaning when it is constructed by a community of actors about which a specific actor cares.

In constructivist theory, rules and norms are important, not only because they solve problems, but also because they condition actors’ self-understandings, references, and ultimately their behavior. Indeed, rules are crucial in determining who is a legitimate actor in world politics. The basic tenet of sovereign state equality that serves to privilege states as the relevant actors in international law itself is a social construction, and therefore open to contention and redefinition.

Among the original “regimes theorists,” John Ruggie’s work represented and advanced this intersubjective approach. One of his much-cited articles interpreted the postwar set of rules governing international trade, not simply as rules about reciprocity and market access, but in terms of the broader social purpose of achieving employment and income security as well (Ruggie 1982). The trade regime, he noted was governed not only by material power distributions, but also by what actors had come to regard as “acceptable” behavior, and what was acceptable was the product of intersubjective meaning, not coercion or narrow material payoffs alone.

These insights have influenced a broad range of constructivist theorizing about international law. Christian Reus-Smit, for example, argues that rules and norms are important because they “condition actors’ self-understandings, references and behavior...” (Reus-Smit 2004: 3) Or as Friedrich Kratochwil put it, “Law is always more than simply an instrument of regulating present interferences and the inevitable conflicts among self-interested actors; ... it is one of the primary means of making sense in individual and collective life” (Kratochwil 2009: 56) The reciprocity on which law depends for its existence – its very character as obligatory – “can only exist when actors collaborate to build shared understandings ...” (Brunnée and Toope 2010: 7). Reciprocity in this view is deeper than a series of contracts for mutual

advantage. It is fundamental for the construction of communities of mutual obligation.

In contrast to the more rationalist approaches, constructivists emphasize how rhetoric, deliberation, and persuasion influence actors' preferences. When actors debate the content, interpretation, and application of international law, they simultaneously engage in activities that potentially feed back into their understanding of their identities and therefore their preferences. Many scholars of international law insist that legal discourse is distinctive in this regard. Christian Reus-Smit claims, for example, that legal discourse differs from extra-legal discourse because it structures the discussion toward multilateralism, obligation, and legal justification (Reus-Smit 2004: 5). Legal discourse, relying as it does on rules, facts, precedents, and agreements, is a way to structure discussions that encourage actors to internalize broadly accepted principles rather than narrow conceptions of interest (Johnstone 2003). The central issue for constructivists is how actors come to accept certain rules and the international legal system itself as legitimate. For it is the legitimacy of these rules, and the extent to which they are widely viewed as "fair," that helps to explain their importance in international affairs.

A broad range of scholarship has had an important presence in law schools, but has had a weaker influence in international relations or political sciences departments, or in the social sciences more generally. Critical legal theory, for example, became a fairly well-developed school of thought in the 1970s, at about the time that regime theory was developing. Critical legal theory developed from a radical left ideology, but in fact has much in common with realist theories of international relations (aside from the assumption of state centrism, which it does not particularly espouse). Along with realists, critical legal scholars generally viewed law in general and international law in particular as indeterminate; its general provisions hardly dictated necessary outcomes, and there was a lot of room for manipulation.

Critical legal scholars generally agree with the realists that international law almost always operates to favor the powerful, wealthy, and dominant elites of any society.

The two branches of critical legal studies that are most relevant to international affairs include postcolonial studies and feminist theory (see the chapters by Zehfuss, and Sjoberg and Tickner, in this volume). Historical critical legal theory offers a strong critique of international law in the context of colonial and postcolonial studies. Marti Koskenniemi describes the role of international law – and, in particular, international lawyers – in legitimating the categories of "civilized" versus "uncivilized" while at the same time striving in an honorable if paternalistic fashion to protect the latter from the worst forms of exploitation by such private entrepreneurs as Cecil Rhodes (Koskenniemi 2002). More generally, critical legal scholars are concerned with "the management of the non-European world by international law and institutions" (Anghie 2005: 246). They insist that international law be analyzed not only from the point of view of its *generators*, but from the vantage point of the peoples who were in fact *subject* to it. Critical legal scholars such as David Kennedy come to the conclusion that law in general and international law specifically rarely delivers on its hyped-up promises, for example, in the human rights arena (Kennedy 2004).

Feminist theories of international law echo the thrust of critical theory above, only the focus is on the public and the patrimonial nature of the international legal system, and hence its systematic silencing of issues of concern to women (Buss and Manji 2005). As in other areas of international relations, feminist theorists stress the disempowerment of women, in this case via "the role of the legal system in creating and perpetuating the unequal position of women" (Charlesworth et al. 1991: 613). In particular, the feminist critique is that public international law is just that – *public* – and is construed as relating to the male world of states rather than the "private" world of women's issues

(Charlesworth et al. 1991: 627). Using human rights law as an example, feminists argue that the emphasis on such public acts as free speech and political participation, while important, hardly challenge the true rights abuses that women suffer daily in their private lives: a lack of reproductive autonomy, battery, rape, and prostitution to name but a few (Stetson 1995).

While distinctive theoretical strands of international law scholarship can certainly be discerned in the literature, increasingly, empirical researchers are problem driven and use a combination of these theoretical insights to guide their inquiry. Much research attempts theoretical synthesis (see the chapter by Checkel in this volume) or at least displays declining respect for sharp theoretical boundaries (Simmons 2009a). Long-standing theoretical traditions continue to inform research. But today's realists are more likely to stress international law's ephemerality rather than its utter irrelevance to international politics (Downs et al. 1996; Goldsmith and Posner 2005), and some acknowledge the possibility that international law might influence state behavior – even in wartime – by theorizing and testing for its possible influence in their research (Valentino et al. 2006). The “irrelevance” of international law to international politics no longer has the status of a self-evident truth among realist theorists. Meanwhile, theorists of such processes as legalization and judicialization draw on both functionalist and constructivist insights in explaining thickening international legal structures and institutions (Sandholtz and Stone Sweet 2004). Critical scholars are more explicitly normatively driven, but come to conclusions that would hardly surprise their conservative realist counterparts. One of the most gratifying aspects about the research on international law and international relations is that debates over meta-theoretical orientations have to some extent become muted in the interest of going after genuine puzzles (Simmons 2010), to which we turn in the following section.

## CENTRAL PUZZLES: INTERNATIONAL LAW DEVELOPMENT

### *The “legalization” of international relations*

International relations scholars seem to have (re)discovered not only that world politics are *organized*, but also quite *legalized* toward the end of the 1990s. The creation of the International Criminal Court, the apparently growing authority of the European Court of Justice, and the development of dispute settlement procedures within the WTO all seemed to signal that perhaps the post-Cold War years would indeed be a period of intense legalization of international affairs. At a minimum, these developments drew scholars' attention to the nature and extent of variation in regarding legal arrangements.

To explain patterns of legalization, Kenneth Abbot and his co-authors have proposed a multidimensional continuum ranging from an ideal-typical “highly legalized” setting to a weakly legalized, or even non-legalized, one. They distinguish three “elements” of legalization: obligation, by which they meant the extent to which “state or other actors are [legally] bound by a rule or commitment”; precision, or the extent to which “rules unambiguously define the conduct they require”; and delegation, or the extent to which third parties have been “granted authority to implement, interpret, and apply the rules; to resolve disputes, and (possibly) to make further rules” (Abbott et. al., 2000: 401).

Many scholars have used this framework to understand the varying density of legalization across time and space. Drawing on functionalist logic, Kenneth Abbot and Duncan Snidal argued that “international actors choose to order their relations through international law and to design treaties and other legal arrangements to solve specific substantive and political problems” (Abbott and Snidal 2000: 421). They hypothesized that hard law was especially useful (and therefore



predicted) when actors wanted to make strong credible commitments, where the actors faced high transaction costs, and when they anticipate problems arising from incomplete contracting. On the other hand, soft law arrangements were rationally preferred, Abbott and Snidal surmised, when it would be politically costly to get states to agree, and when actors were uncertain about the consequences of an agreement in the future. While Abbott and Snidal claimed their approach “combines the rational incentives associated with ‘contracts’ and the normative considerations associated with ‘covenants’” (Abbott and Snidal 2000: 455), their explication clearly has its theoretical heavy foot in the rational world of contracting.

The framework on which the legalization project is based resonates with a number of rationalistic studies about the nature and especially the form of international legal agreements. The obverse of obligation is flexibility, and a number of studies have sought to use a rationalist framework to explain why it is that governments enter into binding agreements, only to design them with huge loopholes through which they can escape their obligations? Barbara Koremenos notes that such an apparent contradiction reflects states’ efforts to cope with uncertainty, which is rife in international cooperation problems (Koremenos 2005). States cannot predict the effects that various random shocks will have on the distribution of benefits from a particular agreement. The larger the variance in these shocks, more likely states are to include renegotiation clauses (though, curiously, not escape clauses) in international agreements (Koremenos 2005). The extent and conditions of legal obligations are also influenced by uncertainty in Milner and Rosendorff’s model of international trade agreements. In their case, the uncertainty arises from domestic reactions to trade conditions; the less sure governments can be about how a trade agreement will affect domestic political demands, the more likely they are to assent to optimal escape clauses (Rosendorff and Milner 2001).

Lawrence Helfer and his co-authors develop a similar argument about uncertainty to explain derogations in international human rights treaties, which they argue are a response to domestic political uncertainty, enabling governments facing serious domestic threats to buy time to confront crises while signaling to various external or domestic audiences “that rights deviations are temporary and lawful” (Helfer et al. 2011). Alexander Thompson finds good support for the proposition that uncertainty helps to explain flexibility in the international law relating to climate change (Thompson 2010). In short, uncertainty has been a key explanation for variance along at least one of Abbott et. al.’s (2000) three dimensions of legalization: the extent and nature of legal obligation.

There are some trends in world politics that the functionalist vision advanced by the legalization project has a hard time explaining. One is the spatial variation in the phenomenon: why so much legalization in Europe but not in East Asia, for example? Miles Kahler tries to grapple with this in his discussion, but ultimately accepts that the Association of Southeast Asian Nations’ (ASEAN’s) fairly recent acceptance of certain processes such as third party adjudication of territorial disputes supports “demand driven” or possibly “strategic” explanations for Asia (Kahler 2000). Another puzzle, from this perspective, is the growth of the international law in the area of human rights. While in some loose sense “demand driven,” it is certainly hard to understand why rational self-interested states would find it in their interest to create binding international agreements to treat their own citizens with respect. Beth Simmons argues that it might have been more “functional,” from the point of view of state demand, to contract to maintain mutual silence in this issue-area (Simmons 2009a). And yet the legal regime for international human rights has increased and hardened substantially over the course of the past five decades.

The approach forwarded by the Legalization Project drew fairly immediate fire. The idea

of studying legalization struck legal scholars as a peculiar self-created puzzle that “it presupposes that a legal void is coming to be filled, without properly questioning whether that void existed to begin with” (Klabbers 2009: 8). Moreover, its narrow rationalist, formalist, and liberal approach drew criticism from constructivists in both law and the social sciences. Most irksome was the project’s effort to single out three dimensions of legalization, an exercise that seemed arbitrary and not well justified to critics. Martha Finnemore and Stephen Toope argued that legalization was not in any sense dependent on precision or delegation, and pointed to entire areas of law governed by vague principles of “equity” and whole international legal regimes such as human rights that involve very little delegation at all (Finnemore and Toope 2001: 747–8). What the project really missed, according to these scholars, was a good grip on obligation as a subjective sensation. For these critics, the focus on formal agreements unnecessarily bureaucratized the notion of law and stripped it of its central claim on human action: acceptance of its legitimacy.

### ***Judicialization and delegation***

If explaining legalization proved to be a bite too big to chew, it has been somewhat more tractable to explain a related phenomenon: international judicialization. One of the most conspicuous developments in international law in the past few decades has been the emergence of authoritative third party bodies to help to settle international legal disputes among states, and sometimes between states and individuals (Alter 2011; Romano 1999; Spelliscy 2001). Examples of new international judicial institutions include those with a functional remit, such as the International Tribunal for the Law of the Sea and those with little more than a “quasi-judicial” (non-litigious, nonbinding) character, such as the recently acquired powers of the Committee on Economic Social and Cultural Rights to

hear and render views on complaints of individuals alleging noncompliance by their governments with their treaty obligations. It is always possible to dismiss these developments as window dressings, but that raises its own puzzles: Why bother creating international tribunals? And why take the risk of an adverse decision and bad publicity, should one rule against you?

The judicialization of international politics has been explained in several different ways. One theme is to note that domestic politics are increasingly judicialized (Tate and Vallinder 1995), and we should therefore not be surprised to see these domestic forms of politics spreading to the international system. Some scholars attribute this global judicialization to economic liberalization, which introduces new actors, increases demands for transparency, and extends the market for legal services globally (Kelemen and Sibbitt 2004; but for a critique, see Levi-Faur 2005).

Judicialization is central to the development of governance institutions more generally. Alec Stone Sweet has developed a theory that links judicialization to the interests of pairs of state actors, but his account links the process of deciding specific cases to the development of international norms. Blending elements of rationalist theorizing with constructivist ideational elements, he views judicialization as an essential aspect of normative development and change. Conflicts develop out of dyadic state interactions, and states have a strong interest in developing rules for the settlement of these disputes. Judicialization involves two disputants and a “resolver” whose narrow purpose it is to settle the dispute at hand, but whose broader social purpose includes the reproduction and reinforcing of broader norms of rule interpretation and behavior. At root, this is a functionalist account: the dyadic form “generates a massive functional demand for dispute resolution in the form of rule interpretation” (Stone Sweet 1999: 154). As in most traditional functionalist accounts, states turn to third parties because they want to continue to enjoy the benefits of contracting with other

states. Stone Sweet relies on “identity” arguments to make this point: the parties have to understand their interests as being served by pursuing a common interest, and not as exclusively competitive with other states. “Resolvers” in turn are characterized as strategic: they try to choose solutions to disputes within the “overlapping bargaining space” of the disputants. (Stone Sweet 1999: 156). In the process, however, the “resolver” responds to and generates social change.

Rational functionalist logic does seem to dominate the empirical research explaining the turn to third party dispute settlement. In some accounts, the logic of turning to an authoritative third party flows from domestic politics. For example, Christina Davis finds that democratic governments turn to third party dispute settlement at the WTO when executives face relatively protectionist legislatures. Under these circumstances, using the dispute settlement panels of the WTO allows a leader to appear to be “doing something” to stand up to protectionism without responding with protectionist measures of their own (Davis 2012). Beth Simmons makes a similar argument about domestic dysfunctionality to explain the resort to third party arbitration to settle territorial disputes (Simmons 2002). While they deal with completely different issues, these studies share a logic that sees the turn to international dispute settlement as a strategy states adopt to circumvent the problems associated with divisive politics at home.

Others locate the impulse to delegate not in internal politics, but to external bargaining pressures. The trend in the international law of investment is an interesting example of judicialization as the results of hard-nosed bargaining: capital exporting companies are lobbied by international firms to demand international arbitration clauses in their investment agreements, and tend to get more stringent delegation from capital-importing countries in weak negotiating positions (Allee and Peinhardt 2010; Simmons 2011).

The example of investor protection draws attention to the fact that there are varieties of

judicialization, with varying consequences for law development and law compliance. Keohane and his co-authors were careful to distinguish between two ideal types of “judicialization” (Keohane et al. 2000): on the one hand, transnational adjudication is much more independent from the interests of the disputing parties, and tends to be relatively easy for individuals and other actors to access. On the other hand, state-to-state dispute resolution bodies tend to be characterized by a low degree of independence from the disputants, and are harder for nonstate actors to access whether as parties or “friends of the court.”

Scholars disagree about the extent to which international courts can effectively act independently from states. International legal scholars have advanced impressionistic notions, largely drawn from the European experience, to claim that independent tribunals are quite likely to be effective in settling disputes among states (Helfer and Slaughter 1997). However, legal realists Eric Posner and John Yoo contend that “independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence *prevents* international tribunals from being effective” (Posner and Yoo 2005: 7). Posner and Yoo argue that there is a narrow set of circumstances in which states find “independent” tribunals useful: when the tribunal can provide neutral, credible information about the law or about some set of facts that would be difficult otherwise to obtain. Only when states want to settle a legal problem, and have an interest in such information, do Posner and Yoo acknowledge that international courts are likely to play a useful dispute settlement role.

The empirical work to support these claims of the effectiveness of international judicial institutions has been relatively unsystematic. For one thing, not nearly enough care has been given to conceptualizing and measuring

“effectiveness” in this context. Posner and Yoo advance three “highly imperfect” measures: “compliance,” “usage,” and “overall effectiveness” to try to establish that independent courts are no more effective than ones that are more controlled by states (Posner and Yoo 2005: 28–9). We will have more to say on compliance below, but note here that there is a growing literature on compliance with the decisions of international arbitral and/or adjudicative bodies (Paulson 2004). But because of the serious problem of designing research that takes good account of the processes whereby states choose judicial dispute settlement (these processes vary, but all involve some form of consent), it is hard to draw strong inferences about the impact of international tribunals on dispute settlement. There seems to be a growing recognition that international courts cannot be completely independent from states; if judges are concerned that their decisions be implemented, they must to some extent anticipate how the executives and legislatures in the countries concerned will implement their decisions (Carrubba et al. 2008; Busch and Pelc 2010).

Debates about the nature of international courts and their relationship with states have spawned research into judicial behavior at the international level. Much of this literature is clearly inspired by the domestic literature on courts and judicial behavior. The general finding that international judges – no less than domestic judges – can behave strategically has opened up research into how international judges are appointed and whether they can be considered mere puppets of state actors. Consistent with their realist perspective, Posner and de Figueredo run regressions that suggest judges of the International Court of Justice favor the states that appoint them, as well as states at or near their own developmental level (Posner and de Figueredo 2005). But it is hard to know whether this constitutes “bias” since there is no clear yardstick for a “fair” decision. Erik Voeten comes to a completely different conclusion about international judicial behavior when it

comes to cases decided by the European Court of Human Rights. In that context, he found fairly convincing evidence that judges did indeed have policy preferences over rights (and, in fact, judges from previously socialist governments were more likely to rule *against* their governments than in their favor) but that judges do not use the tribunal to make larger, geopolitically relevant points (Voeten 2008). Voeten also finds that governments choose judges for the ECtHR that reflect their preferences for EU expansion (Voeten 2007), but this is not to say that these judges rule in a nationalistic way or are beholden to their appointers.

### ***Global constitutionalism and Global Administrative Law – Solutions to Global Governance?***

Globalization and its consequences have had a tremendous impact on the way that scholars are thinking about international law. Several concerns arise: the international legal system is growing increasingly complex, with law and jurisprudence developing at various levels of governance (global, regional, national) and across distinct issues areas (trade, human rights, the environment). International law is traditionally state-centric, yet modern problems raise issues of how to regulate the activities of nonstate actors. International law has traditionally not been especially transparent; that is, diplomatic traditions have influenced its development, and participation by stakeholders has hardly been a traditional core concern. Several research programs have developed – primarily in legal academies – in the past decade to address some of these issues. I discuss them in this section under the headings of constitutionalization, global administrative law, and private governance.

Regional experience with supranational law has led to some significant differences between Europeans and the rest of the world with respect to the possibilities of a more coherent and consistent international legal

system (Weiler and Wind 2003). While American scholars are quick to note the limits of international law and Asian voices are scarcely heard in the IL/IR literature, Europeans have begun to theorize and to assess the extent to which "... international law is increasingly starting to look like the sort of legal order we are familiar with from our domestic legal systems" (Klabbers 2009: 11). As law has become more fragmented across legally defined issue areas, is it possible to articulate a more coherent set of principles for ordering the international legal system? A constitutional order is one that spells out relationships of authority among political institutions, how those institutions are to be controlled, and the fundamental rights of individuals vis-à-vis those public authorities. Moreover, "Constitutionalism promises to settle the score once and for all, by giving either *jus cogens* priority, or trade, or human rights, or *erga omnes* principles" (Klabbers 2009: 18).

Two branches of literature have developed: a normative literature that analyzes the problems of a fragmented international order, and an empirical literature that – much like the legalization literature discussed above – that tries to assess the extent to which a constitutional order is developing or, in fact, already exists (Klabbers 2009: 4). International relations scholar have noted what might be called "constitutional bargains" associated with the end of great wars (1815, 1914, and 1945) after which great powers design international institutions in their own interests, locking other states into these structures, and yet creating stability in a "hegemonic" fashion by institutionalizing rules of the game (Ikenberry 2001). Legal scholars claim that constitutionalism has recently been on the rise around the world (Ackerman 1997). Joseph Weiler argues that this is a response to globalization, the erosion of state sovereignty, and the attendant need to regulate the activities of nonstate actors – all of which seem to have put the credibility of the international legal system under some stress (Weller 2009).

Where do scholars look for evidence of a waxing global constitution? The United Nations Charter is the usual candidate, by virtue of its attention to broader governance issues, to defining community membership, and to setting up a hierarchy of values (Fassbender 1998). The Universal Declaration of Human Rights (UDHR), sometimes in conjunction with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, is sometimes said to resemble and indeed to function as an "International Bill of Rights" (Gardbaum 2008). As the Security Council has taken actions in the name of peace and security that impinge on the rights of individuals (the maintenance of individuals on terrorist blacklists, for example), some scholars believe it has become urgent to think through the principles that govern the relationship between international authority and individual rights. Moreover, there is the question of the proper relationship between *international* legal authority and *regional* legal authority. The European Court of First Instance's 2005 decision<sup>3</sup> that the EU is bound by international law as decided by the Security Council certainly does pose "constitutional" questions of the highest order.

Others point to governance within issue-specific functional areas as evidence that international law is becoming more "constitutional" in nature. Deborah Cass argues that the decisions of the appellate body of the WTO, for example, reflect growing attention to what one might term constitutional principles: concerns about democracy and governance, constitutional design, fairness, and allocation of policy responsibility (Cass 2005). Others disagree, and indeed are puzzled by debates of "the WTO's (non-existent) constitutional features" and believe the debate over constitutionalism reflects anxieties about the status of international law rather than its real characteristics (Dunoff 2006).

The desirability of a constitutional moment for international law is hardly universally

embraced, of course. If something as foundational as an international constitution is developing, this raises serious concerns for the way in which a robust international constitutional structure is adopted. One critique focuses on the contribution that a global constitution in principle makes to the democratic deficit posed by international law more generally. Indeed, Buchanan and Powell warn against the process of international law's slow accretion of constitutional status, charging that "public constitutional deliberation and popular choice has been conspicuously absent" from the process (Buchanan and Powell 2008: 346). Democratic theorists chafe at the easy assumption that self-governance at the local level can be preserved without a significant if not Herculean effort at "contextualization, interpretation, and vernacularization by self-governing peoples" (Benhabib 2009). Perhaps it is best modestly to conclude, as does Andrew Hurrell, that if the international legal system is indeed constitutionalizing, it will at most evolve toward a "common law constitution" – one that is likely to be identified over time rather than ratified *in toto* (Hurrell 2007).

On a more quotidian level, globalization has led to some very practical problems that demand the attention of scholars. The rapid growth of international and transnational regulatory regimes with administrative components and functions governing activities – from banking and finance (Büthe and Mattli 2011) to labor standards (Macdonald and Macdonald 2006) to the investment decisions of the World Bank (Fourie 2009) – has created an accountability deficit in the growing exercise of transnational regulatory power. One response has been an effort to document and theorize the development of "global administrative law ... comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and

legality, and by providing effective review of the rules and decisions they make" (Kingsbury et al. 2005: 17). By concentrating on what they view as the more technical administrative side of governance, this approach hopes to downplay the role for grand (and controversial) global values, and concentrates on how international institutions make the decisions they do (Klabbers 2009: 28). The study of global administrative law is related to concerns among normative social scientists about the extent to which international law is compatible with acceptable levels and modes of accountability generally (Buchanan and Powell 2008).

## COMPLIANCE WITH INTERNATIONAL LEGAL AGREEMENTS

One of the greatest growth sectors in the study of international law and international relations in the past decade has been on the questions of compliance and effectiveness. Dogged by the realist challenge to show that international law and institutions matter to outcomes we may care about (Mearsheimer 1994–95), and the growing recognition even among international legal scholars that there are limits to international law's influence on state behavior (Goldsmith and Posner 2005), scholars have devoted tremendous attention to designing research that can address the question of whether international agreements facilitate anything more than shallow cooperation; that is, do they influence states to behave in ways or to take policies that they might otherwise not have done, were it not for the existence of an international legal norm (Downs et al. 1996)? And does it matter whether a given state has explicitly subscribed to these norms through ratification?

In parallel with the discussion of theories of international law above, it is possible to distinguish two general clusters of theories of law compliance: theories of material pressures, and theories that depend primarily

on ideas, identity arguments, and persuasion. It may be also useful to distinguish theories that locate the primary source of compliance pressure at the interstate, transnational, and local levels. It is essential to reiterate, however, that few actual accounts of compliance are clean examples of one causal mechanism. Most draw on both material pressures as well as nonmaterial influences. Many span more than one level of causal analysis. Moreover, almost all recognize different compliance mechanisms have varying relevance across a variety of issue areas.

### ***Material “enforcement”: from international coercion to domestic constraints***

Perhaps the most common theory of compliance with international law is most closely aligned with realist thinking: compliance depends on the willingness of states to enforce agreements, using material pressures if necessary. This is the case especially if the issue-area at stake is one regarding which governments are likely to renege on (arms control, prohibitions on the use of torture, trade liberalization). In the absence of material pressures to comply, we are only likely to see compliance based on a coincidence of interests (Goldsmith and Posner 2005) or very shallow compliance at best (Downs et al. 1996). Examples of state-to-state efforts to use material pressures to enforce international law include the use of authorized retaliation by the dispute settlement panels of the WTO, the linkage of trade to legal human rights practices, and enforcement actions authorized (or not) by the United Nations Security Council. The basic theory is simple: unless states face significant costs, they will violate the law if it is in their interest to do so. The approach predicts better compliance rates, other things being equal, where states face a credible threat of material punishment for their transgressions by their peers or international organizations.

Surprisingly few studies of international law compliance rely exclusively on state-to-state coercion to explain international law compliance. In the nineteenth century, Krasner characterizes the enforcement of international law as episodic and based on various forms of retaliation. He argues, for example, that toleration of religious minorities primarily resulted from a concern about retaliation against one’s own nationals and not out of respect for treaties protecting their rights (Krasner 1999: 82). Studies of the laws of war have found that international norms that are not enforced – for example, norms proscribing the intentional killing of civilians – are likely to be sacrificed to military exigencies, an outcome not affected by international law. Valentino et al. found that the intentional killing of civilians was correlated with the strategy chosen to prosecute the war, but not influenced at all by ratification of the relevant treaty for the time period under question. (Valentino et al. 2006). Realists have long asserted that “most human rights practices are explained by coercion or coincidence of interest” (Goldsmith and Posner 2005: 262); consequently, early quantitative studies of human rights agreements that found little improvement in rights practices upon their ratification *assumed* that this was because they were unlikely to be enforced (Hathaway 2002). Emelie Hafner-Burton infers state-to-state enforcement is important for compliance with international human rights norms from an observed correlation between trade agreements with stringent human rights provisions and rights improvements (Hafner-Burton 2005), although the nature of these agreements is likely highly endogenous to rights programs in the “target” country in the first place. One tantalizing possibility is that states use multilateral forums to manipulate sanctions to enforce international law. James Lebovic and Erik Voeten for example have shown that resolutions of the Human Rights Commission are linked with reductions in aid from the World Bank (Lebovic and Voeten 2009). State-to-state enforcement is certainly an important

part of trade law under the WTO dispute settlement panels, and while the decisions of these panels enjoy extremely high rates of compliance, these rates are not plausible linked to material coercion. There seems to be no clear relationship between the magnitude of retaliation and the likelihood of compliance with a WTO panel.

One twist on coercion models assumes that states *want* to expose themselves to external enforcement. The assumption of credible commitment theory is that many states are unable to enjoy the “joint gains” implied by international agreements precisely because their potential partners do not know if they will carry them out. Incentives to misrepresent true intentions aggravate the contracting problem. Almost all theories of credible commitments rest on the assumption of time-inconsistent preferences: it may be rational in time  $t$  to promise to behave according to an agreement, but in time  $t+1$  it is likely that one or both parties will face incentives to renege on the agreement. One way to reduce these incentives is to increase costs a government will face if it reneges on an agreement. By tying their hands, governments may be able to conclude profitable contracts that would have been difficult to conclude in the absence of high *ex post* violation costs. Enforcement in such models is a desirable feature of agreements that facilitate the realization of joint gains. Several scholars have argued that agreements that contain monitoring, arbitration, prosecution, or dispute settlement mechanisms are efforts to make commitments more credible by ramping up *ex post* costs. Examples include peace agreements that create international “audience costs” (Fortna 2003) the International Criminal Court (Simmons and Danner 2010), bilateral investment treaties (Elkins et al. 2006), territorial agreements with provisions that tend to tie the parties’ hands by raising *ex post* costs (Mattes 2008), and the more institutionalized provisions of some alliance pacts (Long et al. 2007).

Overall, the coercion hypothesis dominates the international relations literature

largely by default. Theories that posit that international law is weak because it is not enforced are likely to *assume* the converse: material coercion increases compliance. The indeterminacy of the decades-long debate about the effectiveness of sanctions – even in the unlikely event that states decide to bear the burden of imposing them (Hovi et al. 2005) – should cast some doubt on the easy assumption that international material coercion alone increases compliance with international law. Scholars and observers, of course, have long recognized that with few exceptions enforcement – from military action to economic sanctions to diplomatic hardball – itself is costly. If we want to think of adherence to international law as an “international public good,” then no one actor is likely to want to bear the burden, and, as realists and others have noted, interstate enforcement of all kinds is likely to be under-supplied. Indeed, the observation that states rarely use available enforcement mechanisms to enforce international legal norms (Chayes and Chayes 1995) – even in such important areas as arms control – has led to a search for other plausible explanations for compliance with international norms.

The dominant rationalist rival to the compliance-by-coercion theory is the theory of *self-enforcing* agreement. Most international norms are not, in fact, enforced though the pressure of third parties or the explicit sanctions of a treaty partner. Rather, they are enforced simply by the threat of withdrawing from the agreement itself, and the risk of losing or reducing the future flow of benefits, not by third party sanctions. Reciprocity and reputation are the key enforcement mechanisms. Robert Keohane’s early theories of compliance with international regimes followed this logic (Keohane 1984). Since “enforcement” depends largely on reciprocity, this framework is useful for explaining stable trade agreements (Goldstein et al. 2007), some aspects of the laws of war, where militaries risk retaliation in kind (Morrow 2007), and obligations whose violation might provoke negative market reactions, as is plausible



in the area of monetary affairs and investment (Simmons 2000).

Theories of self-enforcing agreements and especially those based on reciprocity and the value of a reputation for compliance for purposes of contracting have inspired a rich empirical literature, much of it in the area of war fighting and security. James Morrow's study of eight different subissue areas, including aerial bombardment, armistice/ceasefire, chemical and biological weapons, treatment of civilians, protection of cultural property, conduct on the high seas, treatment of prisoners of war, and treatment of the wounded suggests that reciprocity is key to establishing stable compliance with international norms on war-fighting, and that treaties play a special role in facilitating this reciprocity (Morrow 2007). He argues that treaties clarify what is, and what is not acceptable behavior, which allows adversaries in war more precisely to respond to violations in kind. Alliance commitments may have self-enforcing features as well, that work largely through reputational mechanisms. Douglas Gibler produces evidence that governments (note: not "states") that abrogate their alliances are less likely to be able to negotiate alliance relationships for the rest of their terms, making it harder to deter potential aggressors (Gibler 2008). Alliance treaties tend to be "self-enforcing agreements" in that the *ex post* consequences of abrogation entail very real risks to national security into the future. Consistent with this view, Leeds and Savun found that states do not abrogate alliance agreements lightly, but typically when they experience a drastic change in circumstances from those prevailing when the treaty was ratified (Leeds and Savun 2007).

The self-enforcing nature of much international law is perhaps best illustrated by commercial norms and agreements. In the area of trade, the role of reciprocity is thought to be so strong that there is no realistic option to compliance; no state would want to risk withdrawal from the network of liberalizing treaties that (presumably) have done so much to further market integration in goods and

services over the past several decades. Indeed, although recent experience demonstrates that multilateral trade agreements are difficult to reach, compliance tends to be high. Judith Goldstein and her co-authors have shown that there has been "enough" compliance with the various treaty obligations to make a marked positive impact on bilateral trade (Goldstein et al. 2007). Moreover, there seems to be a good deal of consensus that while some 90 of all adopted decisions of WTO involve a finding of a violation, in practically every case the violator complies with the decision of the panel (Wilson 2007). Why such a high compliance rate, especially given that many of these cases that escalate to a formal panel decision are politically "hard" cases to solve (Guzman and Simmons 2002; Davis 2012)? Daniel Kono's study of how trade dispute settlement mechanisms facilitate reciprocity provides a potential answer (Kono 2007). He argues that defiance of WTO decisions inflicts too heavy a reputational toll. It is not the threat of retaliation as much as a loss of potentially rich contracting arrangements that inspires states to comply with their trade agreements.

Most international norms and agreements do not, of course, have strong external enforcement mechanisms. Some international legal norms, such as human rights, do not even involve international reciprocity in any clear way (Simmons 2009). Increasingly, research on compliance reflects the possibility that some of these norms are enforced primarily through *domestic* rather than through international mechanisms. A growing research stream now focuses on the domestic "audience costs" associated with noncompliance with international law. The notion that international legal commitments engage domestic audiences has reoriented some of the theoretical literature toward domestic and comparative politics. Xinyuan Dai theorizes that "toothless" international institutions' legal agreements sometimes inform electorates that governments are pursuing policies they do not perceive to be in their interest. Dai theorizes that compliance

with international agreements is enhanced through new information, generated by treaty bodies and monitoring systems, that inform and empower domestic voters to punish governments for actions of which they disapprove (Dai 2007). When a potential pro-compliance constituency is large (which is not always the case, even in democratic polities), and when an international agreement sheds significant new information on the government's record of compliance, a government will have strong electoral reasons not to violate international agreements. Dai's theory sheds light on why it is that *liberal* democracies are often better treaty compliers: they are populated by large numbers and dense networks of citizens with extensive interests in predictable and harmonious transnational relationships (Gaubatz 1996; Slaughter 1995) who are in a position to "punish" their governments electorally. But to the extent that the electoral "enforcement" mechanism is blunted or anticompliance groups dominate electoral politics, the pressure on states to comply will diminish.

Finally, nonstate national and transnational organizations can play a role in "enforcing" international law by virtue of their ability to manipulate the material incentives of decision makers. Elizabeth Desombre's study of compliance with international environmental and labor laws in the international shipping industry stresses the exclusion of corporations from certain "club goods" such as port access (DeSombre 2006). She notes that despite the economic pressure to cut corners and violate agreements, the ability of port states, international labor unions, intergovernmental fishery organizations, and high-standard industry actors to exclude violators associated with particular flags of convenience has helped to nudge some of the worst polluters toward at least partial compliance. Since environmental protection is a regulatory policy that involves a broad array of nongovernmental actors, it is not surprising that models stressing the civil society and interest aggregation abound. Patrick Bernhagen proposes a model in which business organization, structural strength, and

information asymmetries predict low compliance with multilateral environmental agreements (MEAs) in general, and the 1992 UN Framework Convention on Climate Change in particular (Bernhagen 2008). In several studies, nongovernmental organizations have been shown to be important to compliance outcomes, via lobbying and monitoring functions (Bernhagen 2008; see also Gulbrandsen and Andresen 2004). One key to compliance in the environmental area has been to understand the incentives of public and private actors, and the ways in which they interact.

### ***Ideational Approaches: Legitimacy, Identity, Persuasion, and Socialization***

A second class of mechanisms offered for explaining compliance with international law rests on its *legitimacy* as a social institution. Legal scholars emphasize the elevated status of legal commitments, which raise the reputational stakes associated with noncompliance (Guzman 2002; see also Schachter 1991). This special quality of international legal obligations may be due to the fact that they are embedded in a broader system of socially constructed interstate rule-making, normatively linked by the principle of *pacta sunt servanda* – the idea that agreements of a legally obligatory nature must be observed. Customary international law seems to carry a strong presumption of legitimacy; after all, one criterion for identifying custom in the first place is the criterion of *opinion juris* – the widespread sense that complying with a particular rule is "obligatory."

While enforcement theories typically assume the pursuit of material interests or office seeking (as posited by the analyst), constructivists tend to view law as more than a way to improve payoffs; it embodies norms which reflect the social meanings and purposes of the relevant community. Rules and norms are important because they "condition actors' self-understandings, references, and

behavior ...” (Reus-Smit 2004).. As such, they become a key focal point for discursive struggles over legitimate political agency and action and critical resources in the international politics of legitimacy. International law has a special place in the array of social norms, some constructivists argue, because it shapes the justificatory politics that ultimately inform official actions.

Some empirical work is beginning to test arguments about the power of perceived legitimacy of international legal obligations to explain state policies and behavior. Judith Kelley’s empirical work stresses the principled commitment of states to comply with their legal obligations associated with the International Criminal Court, and finds an impressive rate of compliance with those obligations, despite very material pressure by the George W. Bush administration *not* to cooperate with the ICC (Kelley 2007). She argues that a strong commitment to the rule of law highly conditions any general claims about the overall “compliance pull” of treaties generally. Consistent with normative theories of behavior, the “tug” is strongest for those polities that place the highest value on the rule of law.

The notion that international law may have more legitimacy than other kinds of commitments has been recently subjected to empirical investigation at the individual level of analysis as well. Michael Tomz has recently used survey evidence to test the proposition that there are more significant “audience costs” (reputational repercussions) associated with law violation than with an otherwise similar behavior that does not violate international law (Tomz 2008). Just what gives rise to any potential audience costs is unclear, but one prime candidate is the legitimacy of a legal obligation: a sense on the part of survey respondents that international legal commitments are somehow more compelling than run-of-the-mill policy pronouncements.

The legitimacy of international legal norms is also reflected in some studies of compliance with international judicial and quasi-judicial bodies. Arguably, compliance with a

legal decision of an authoritative body has a different *social meaning* than compliance with the demands of an adversary. (Simmons 2002; Allee and Huth 2006). Sara Mitchell and Paul Hensel use a selection model to demonstrate empirically that governments are more likely to comply with the decisions of an authoritative third party than they are with an agreement reached on their own (Mitchell and Hensel 2007). These findings illuminate how the legal context potentially shapes the meaning of actions: deferring to legal authority signals a law-abiding character, while deferring to an adversary signals nothing but weakness. This is a powerful demonstration of the need to marry rational accounts with subjective understandings of behavior.

If discourse and ideas inform politics, then law compliance is explicable in terms of what actors come to believe and value. Compliance with rules can be enhanced through efforts at socialization, or what Kathryn Sikkink and Thomas Risse define as the process by which principled ideas become broadly accepted norms. Once they are internalized, these norms can lead to changes in interests, values, and even identities, which in turn ultimately shape state behavior (Risse et al. 1999).

Compliance is enhanced in this view when actors become socialized to comply. Socialization can mean three kinds of processes in this literature. In a crude sense, actors (state elites) can be “socialized” through a system of rewards and punishments (Schimmelfennig 2005). This form of socialization shades into incentive-based inducements discussed above. More subtly, actors can be encouraged through various cues indicative of social acceptance or approbation to bring their practices in line with international standards. Ryan Goodman and Derek Jinks refer to this as a process of *acculturation* by which they mean the “general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture” (Goodman and Jinks 2004). Acculturation involves “social costs” associated with

shaming or shunning as distinct from the more material costs associated with overt coercion. These pressures may lead to superficial compliance with international norms as reflected in treaty obligations, not necessarily the internationalization of norms as deeply held values (Strang and Chang 1993). Institutional sociologists touted the (nonmaterial) power of “world society” to generate and diffuse norms of behavior that mimic accepted scripts of modernity – encouraging countries on the periphery to display outward forms in conformity with the institutions and forms of leading states of the Western world – without internalizing the values behind these forms (Cole 2005; Wotipka and Ramirez 2008; Hafner-Burton and Tsutsui 2005).

Acculturation can be contrasted with a more fundamental form of socialization, often referred to in the literature as normative *persuasion*. Persuasion depends on the power of argumentation and deliberation as distinct modes of social interaction which when successful changes what an actor values and sometimes even his or her very identity (Risse 2000; Johnston 2001). Jeffrey Checkel defines persuasion as “a social process of interaction that involves changing attitudes about cause and effect in the absence of overt coercion” (Checkel 2001). He argues that persuasion is more likely to play an important role in explaining compliance behavior when elites do not have deeply held priors, and they are therefore open to new ways of thinking about issues.

Whether because of their persuasive function or their information-providing function (or both), constructivists often agree with rational theorist that pressures applied by (often transnational) civil society tend to pressure or persuade governments to comply with international legal standards and obligation. Sally Merry’s transnational ethnography of the role of transnational actors provides a rich description of how the process of persuasion and communication operates transnationally (Merry 2006). Transnational human rights ideas become part of local social movements and local legal consciousness

through the work of individuals who have one authentic foot in the local culture and the other in the transnational world of United Nations conferences, meetings and workshops. These individuals play a crucial role Merry’s felicitous phrase in “translating global principles into the local vernacular” (Merry 2006). This is a two-way form of communication, often supporting new ideas and identities at the local levels but also educating the global community about the local realities on the ground.

### *Capacity Constraints*

Sometimes neither incentives nor ideas are the primary determinant. Brief mention should be made of the very real capacity constraints that many governments face when they try to comply with their international legal obligations. Vast swathes of international law, of course, do not typically encounter capacity constraints: nearly all of customary international law requires states to recognize principles (the 12 mile territorial limit from one’s coastline) or to refrain from particular actions (genocide), but by its nature makes no demands that large numbers of states have the capacity to respect. Much treaty law (the “first generation” of human rights that limit government interference with free expression spelled out in the International Covenant on Civil and Political Rights; the requirement established under the auspices of the WTO to reduce import quotas) is of the same quality. Where international law calls for governments to refrain from particular policies, their capacity to comply is usually not at stake.

International law appears to have become increasingly demanding over time – in terms of the bureaucratic capabilities, technical sophistication, and resource base needed to comply. Compliance with international environmental requirements is a clear example. Accordingly, early studies emphasized a lack of capacity as one of the most serious barriers for compliance with international environmental accords (Weiss and Jacobson 1998). Capacity constraints have also been important

compliance hurdles in the provision of positive rights such as basic health care for children, as required by the Convention on the Rights of the Child (Simmons 2009: ch. 8). European law has long stressed the capacities of some states to “keep up” with their obligations. In a study of 6,300 violations of European law, Tanja Börzel and her colleagues have found that bureaucratic inefficiency helps to account for much of the variance in compliance (Börzel et al. 2010). As international law becomes more demanding of state bureaucracies and resources – for example, as norms shift from nonintervention in the affairs of other states to a “responsibility to protect” foreign civilians in humanitarian crises – we can expect capacity constraints to become an increasingly important explanation for noncompliance.

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Despite the temptation to contrast so-called “ideational” theories with “rationalist” ones, the complementarities are striking. Like rationalists, constructivists recognize that reputation surely matters to governments and their constituencies, but reputational concerns themselves are hardly exogenously given constructs; they are the result of intense socialization among state elites within a particular region (Lutz and Sikkink 2000). Game theorists posit such concepts as “common conjectures” that facilitate reciprocation, but what are common conjectures but commonly shared assumptions about certain basic principles or beliefs about how the “game” should be played (Morrow 2007)? Beth Simmons explicitly combines both rationalist (treaty as legal leverage) and constructivist (treaty as an educative device) approaches when she discusses the influence that ratified human rights conventions may have on domestic political organization and mobilization (Simmons 2009). Habermasian theories of communicative action (Risse 2000) have something in common with the Chayes’ notion of “jawboning” (Chayes and Chayes 1993). Theorists of law compliance have

been borrowing from one another’s conceptual toolkits for years. That few any longer feel obliged to declare an exclusive theoretical affiliation has largely promoted theoretical rigor, not undercut it.

## CONCLUSION

Two broad theoretical approaches have done most to advance the study of international law as a social science in the past decade: constructivist theories and rationalist theories of rules and behavior. The former has its roots in the recognition that norms and norm-governed behavior generally play an important role in human relations, and that there was no reason to think that this role should end abruptly at the water’s edge. The latter grew out of the “neo-functional” theories of international institutions pioneered by Keohane in the 1970s. Both approaches have given rise to a broad range of fruitful research that has moved the theoretical but especially empirical frontiers well beyond that of earlier decades. Today, it is still possible to see the influence of these two areas of theorizing studies of international law and international relations, but the most interesting work draws insights from both.

The literature on international law and international relations has developed both theoretically and empirically in the past decade. Theory has become less compartmentalized even as it has become more rigorous. Empirical testing has gained a tremendous amount from decades of data collection by governments, nongovernmental organizations, and teams of scholars. The frontier of research now seems to be at the nexus of international law, international relations, and domestic politics and legal systems. New research is beginning to explore the globalization of law into domestic contexts, but at the same time the differentiated ways in which international rules are absorbed and resisted by local political, social, religious, and legal traditions. Another frontier

for research is presented by the slow fading of the sharp distinction between international law and more informal forms of international governance. International governance is a product of both interstate agreements but also the myriad understandings, procedures, and standards that develop between states and private actors and among private actors (operating in the shadow of states) themselves. Not only can the public international law scholarship be faulted for being too state-centric, but scholars of “global governance” should think about the international legal context in which private groups operate. It is surprising during a time when international law is flourishing that a recent collection of essays on global governance had not a chapter, not a subheading, not even an index entry on international law (Avant et al. 2010).

The most significant feature of the new research is the pervasive assumption that legal institutions are worthy of scholarly study. In international relations, space has opened up as realism has lost its near monopoly position of decades past. Critical legal theory has also probably run its course, although it has left many valuable insights in its wake. This is not to say that there is not some quite intelligent and insightful work in these traditions. It is only to say that both of these approaches from very different ideological perspectives failed to inspire young researchers who could hardly square the dour messages of the law’s irrelevancy on the one hand and its essentially tragic nature on the other hand with what anyone with eyes could observe: actors from the largest to the smallest nations, in the regulation of everything from human rights to tax coordination; from land mines to investment agreements were turning to law or law-like instruments to nurture their identities and/or to achieve their objectives. International law was an empirical reality that was not melting away, and indeed seemed to enjoy a huge boost from the end of the Cold War. Much needed explaining – from the sprouting of regional trade agreements to a new global institution

with the power individuals for war crimes. The new attitude seems to be that skepticism, too, no less than “idealism,” has empirical burdens to bear. The past two decades have demonstrated the value of taking these burdens seriously.

## NOTES

1 For this position, many thought of him as an apologist for Nazi Germany. See the preface to *The Twenty Years’ Crisis*

2 For example, despite his focus on international rules and norms, Robert Keohane’s work never explicitly engaged international law until 1997 (Keohane 1997). For a review of the literature in international institutions that has been influenced by rational functionalism, see the chapter by Martin and Simmons in this volume.

3 Case T-306/01 *Yusuf and Al Barakaat v Council and Commission* [2005] ECR II-3533 and Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

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