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Edited by Jeffrey L. Dunoff and Marka A. Pollack

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PART I

Introduction: Setting the Stage

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International Law and International Relations: Introducing an Interdisciplinary Dialogue

Jeffrey L. Dunoff and Mark A. Pollack

A casual observer might expect that international lawyers and international relations scholars would share overlapping research interests and scholarly agendas. In fact, for several decades prior to the Second World War, practitioners in both fields pursued common interests in the making, interpretation, and enforcement of international law. As a matter of disciplinary history, however, World War II served as a watershed event, largely discrediting international law among political scientists as “realist” theorists rejected the notion that international law could serve as a meaningful constraint on states’ pursuit of the national interest. Over the next four decades, international relations (IR) and international law (IL) scholarship developed along separate and rarely intersecting tracks. Legal scholars sought to emphasize law’s autonomy from politics, and focused on identifying, criticizing, or justifying specific legal rules and decision-making processes. For their part, political scientists seldom referenced international law as such, even when their topics of interest, such as international cooperation and international regimes, overlapped in clear ways with international law.

The mutual neglect among international law and politics began to ebb only with the end of the Cold War and the increased salience of international rules and institutions. In 1989, legal scholar Kenneth Abbott published a manifesto calling for interdisciplinary scholarship on international law and encouraging legal scholars to draw upon recent political science scholarship. Over the next decade, a growing number of legal scholars began to ask new questions about the design and workings of international law, drawing on both theories of international relations and on qualitative and quantitative methods imported from political science. By the early 2000s, political scientists in turn “rediscovered” international law, a development marked most clearly by the publication of a special issue of *International Organization*, the leading journal in the field, devoted to understanding the causes and consequences of the “legalization” of international politics.

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One decade later, we see a wealth of cross-disciplinary scholarship, in which political scientists are applying new tools to the study of legal phenomena, legal scholars continue to import insights from political scientists, and a growing number of scholars engage in genuinely interdisciplinary analysis. Yet, the interdisciplinary nature of this scholarship and its fragmentation by issue areas – such as trade, human rights, criminal, and humanitarian law – have meant that few scholars have paused to take stock of what we have learned over the past two decades, aggregate empirical findings across disciplines and issue areas, draw lessons, and chart an agenda for future research.

This volume aims to fill this scholarly void. Our goal is not to celebrate uncritically the rise of international law and international relations (IL/IR) as an approach, but to assess critically the value-added (if any) of IL/IR to our understanding of international law, as well as to identify IL/IR's lacunae, biases, and blind spots. In doing so, we are particularly interested in two potential sources of value-added: conceptual and empirical. In conceptual terms, we detail the ways in which concepts from the various strands of international relations theory have been imported and adapted to the study of international law, and we explore whether they add analytical leverage to existing theories of IL. We also review and evaluate the "new empiricism," a large body of scholarship that uses systematic qualitative and quantitative data about international law and state behavior to test propositions about the making, interpretation, and enforcement of international law. The contributions to this volume will highlight both of these developments, exploring not only how scholars have *theorized* international legal issues but also the *empirical evidence* that IL/IR scholarship has brought to bear on these questions over the past two decades.

The remainder of this introductory chapter sets the stage for these explorations. We begin with a brief overview of IL/IR's emergence as an interdisciplinary field of study. In this context, we offer some reflections on the "terms of trade" between the two disciplines found in seminal IL/IR scholarship. We suggest that those terms have been largely unidirectional, with political science/IR providing much of the theoretical content and (to a lesser extent) epistemological and methodological guidance of IL/IR scholarship, and with IL *as a discipline*¹ contributing primarily a deep knowledge of legal doctrine, institutional design and processes, and dispute settlement mechanisms.

We next examine some of the interdisciplinary tensions sparked by IL/IR scholarship. Like virtually all efforts to bridge distinct disciplinary traditions, IL/IR writings have sparked a sustained backlash, particularly among some international lawyers. We examine three sources of these disciplinary tensions: different substantive

¹ Here, we distinguish IL as a discipline from individual legal scholars, many of whom have formal IR training and have been among the pioneers and leaders in the field. Our claim is not that the legal scholars have played a small role in IL/IR, but that both legal and political science scholars have drawn primarily upon the tools of IR in such scholarship.

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theories and ideas about the nature and role of theory, different epistemologies, and different conceptions of international law associated with the two disciplines. Consideration of the issues that underlie disciplinary tensions sheds light on the promise and the limits of interdisciplinary work, and identifies key issues to be addressed in future research.

In the final part of this introduction, we provide an overview of the volume's organization and contents.

I. THE RISE, FALL, AND REBIRTH OF IL/IR SCHOLARSHIP

As this volume takes stock of a large body of interdisciplinary IL/IR research, it is useful to begin with a brief discussion of the historic split and recent rapprochement between the disciplines of international law and international relations. Although some readers will be familiar with this trajectory, it provides a valuable backdrop to our discussion of the canonical calls for IL/IR research. Our analysis of these important works, in turn, sets the stage for our discussion of the disciplinary tensions associated with IL/IR writings.

A. *The Birth of International Relations and the Disciplinary Break*

Although the discipline of international law is hundreds of years old, the academic field of international relations is of much more recent vintage. The birth of IR as a distinct academic field is often linked to the establishment, in 1919, of the world's first chair for the study of international politics at the University College of Wales, Aberystwyth (Schmidt 2002). At this time and into the inter-war era, the disciplines of international law and international relations overlapped substantially. Leading voices in both fields argued that the spread of democracy and development of international institutions could replace war and power politics with something akin to the rule of law. However, this era of disciplinary convergence ended with the cataclysm of World War II. The war prompted many leading political scientists to reject the "idealism" associated with inter-war scholarship (Kennan 1951: 95; Carr 2001). These so-called realists argued that, in the absence of centralized enforcement mechanisms, international agreements could not meaningfully constrain state action, particularly as states generally retained the ability to auto-interpret and apply treaty provisions (Morgenthau 1948).

Hence, during the early postwar years, political science was prominently marked by influential and sustained critiques of international law, resulting in the marginalization of the study of international law within the discipline, particularly in the United States.² These tendencies were reinforced by a "neorealist" (or "structural

² The disciplinary estrangement was not as pronounced in the United Kingdom, where an influential "English school" highlighted law's importance in international affairs (Bull 1977).

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realist”) literature that viewed international outcomes as a product of the distribution of capabilities and power across states (Waltz 1979). The neorealist approach was widely understood to leave “no room whatsoever for international law” (Slaughter Burley 1993: 217; but see Steinberg 2013) and strengthened the dominant realist claims that international law is inconsequential and epiphenomenal.

Realism’s hostility to international law had two important consequences. First, it led to a decades-long mutual estrangement between the two disciplines, as a generation or more of political scientists accepted and taught as conventional wisdom that international law could not significantly impact international affairs. Second, realism’s prominence would eventually spark a series of theoretical moves and empirical inquiries in both disciplines that had the effect of reconceptualizing the relationship between international politics and international law. These developments have been ably described elsewhere (Slaughter Burley 1993; Keohane 1997); for current purposes, a thumbnail history will suffice.

B. International Law: Responding to the Realist Challenge

Realism posed a powerful challenge to international lawyers’ self-understanding of their field. In response, some scholars retreated to ever more technical analysis of legal texts and doctrines. But others addressed directly the realist challenge by seeking to demonstrate international law’s practical relevance to the world of international affairs. In so doing, these scholars reconceived, in various ways, the relationship between international law and politics. As Slaughter explains, these efforts involved three central analytic moves: “First, all [the efforts] sought to relate law more closely to politics. . . . Second, as part of this mission, all redefined the form of law, moving in some measure from rules to process. Third, all reassessed the primary functions of law. Whereas rules guide and constrain behavior, . . . processes perform a wider range of functions: communication, reassurance, monitoring and routinization” (Slaughter Burley 1993: 209).

One of the most influential and enduring of these responses was originally known as “policy oriented jurisprudence” but today is more commonly called the “New Haven School.” Pioneered by the interdisciplinary team of Myres McDougal and Harold Lasswell, the New Haven School understands law as an ongoing process of authoritative and controlling decision. Decisions are “authoritative” insofar as they are in conformity with community values and expectations; they are “controlling” insofar as they are supported by sufficient bases of power to secure consequential control. These scholars view international law as purposive: it is designed to promote a world public order dedicated to the promotion of human dignity. New Haven scholars shared the political realists’ insight that understanding state power is critical to understanding state behavior. However, they rejected claims that power was the only or predominant value that international actors pursue; they also seek wealth, enlightenment, well-being, skill, respect, affection, and rectitude. Hence, the New

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Haven scholars emphasized the importance and efficacy of the international legal system, understood in terms of “the realization of values rather than the restraint of behavior” (Falk 1970).

Other international legal scholars similarly generated new understandings of international law that focused less on how or whether rules constrain states in the absence of coercive enforcement mechanisms and more on the various ways that law empowers states and facilitates pursuit of national and collective interests. For example, Louis Henkin (1979) argued that international law provides the “submerged” rules of international relations, creates “justified expectations,” and facilitates cooperation in the pursuit of common objectives, whereas Abram Chayes and others in the “international legal process” school produced materials demonstrating international law’s effects in specific circumstances, such as the Cuban Missile Crisis (Chayes 1974; Chayes, Ehrlich & Lowenfeld 1968). In these and other efforts, lawyers self-consciously responded to the realist critique of international law’s relevancy by attempting to demonstrate law’s connections to and influence on international affairs.

C. Political Science: Developing Alternatives to Realism

Realist claims also triggered a series of developments in political science. One important development came from political scientists who studied “international organizations.” As detailed by Kratochwil and Ruggie (1986: 755), scholars in this field shifted their attentions from the formal arrangements and objectives of international bodies to actual decision-making processes. Over time, this focus became more generalized to overall patterns of influence that shaped organizational outcomes. The next critical analytic move in this development was to reconceive the field of “international organizations” as the study of “international regimes,” understood as “principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area” (Krasner 1982: 185). In detailing the various ways that international regimes condition and constrain state behavior, this approach challenged important realist claims. Regime theory attracted a number of young scholars, and, by the 1970s and 1980s, it was “one of the most vibrant and exciting areas of general international relations theory” (Slaughter Burley 1993: 218).

Roughly contemporaneously, Robert Keohane and others began to draw on rational choice premises to develop a “functional” theory of international regimes that understood regimes as a product of states’ rational pursuit of their own self-interests (Keohane 1984). Keohane argued that regimes enhance the likelihood of state cooperation by reducing transaction costs, generating information, reducing uncertainty, and increasing expectations of compliance.

Another important perspective with roots in the early regimes literature came to be known as constructivism. Kratochwil and Ruggie’s (1986) focus on the intersubjective understandings associated with the rise and evolution of international regimes

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invited approaches that were more sociological and contextual, and less materialistic and strategic. These authors, and other constructivists, view international law as a reflection of social purpose. International legal rules thus shape understandings of interests, perceptions of legitimate behavior, and the nature of justificatory discourse in international affairs (Ruggie 1998; Wendt 1999; Brunnée and Toope 2000; Reus-Smit 2004).

Finally, by the early 1990s, liberalism had emerged as a distinctive and coherent theory of international relations. Liberalism emphasizes the primacy of societal actors, argues that states represent a subset of domestic society, and claims that the configuration of independent state preferences determines state behavior (Moravcsik 1997). This approach focuses “on the demands of individual social groups, and their relative power in society, as a fundamental force driving state policy,” and, ultimately, world order (Moravcsik 2013).

Each of these theoretical approaches is analyzed in more detail in the individual contributions to Part II of the volume. For now, the critical point is that a series of analytic developments and intellectual dynamics internal to each field created the conceptual tools and scholarly space for researchers in each discipline to draw upon insights associated with the other. At roughly the same time, external events – in particular, the end of the Cold War and the apparent revitalization of many international legal norms and institutions – raised numerous research questions of interest to scholars from both fields, resulting in several high-visibility calls for interdisciplinary IL/IR research. As these seminal papers provide useful insights into the underlying assumptions, characteristic modes of thought, and dominant lines of inquiry of the newly emerging IL/IR field, we examine them in some detail.

D. *The Canonical Calls for IL/IR Research*

For current purposes, the rebirth of IL/IR scholarship begins with publication of Kenneth Abbott’s *Modern International Relations Theory: A Prospectus* (Abbott 1989). This seminal piece opens with a description of the “estrangement” between IL and IR, and argues that the ascendance of regime theory and related theories of international cooperation “offers a long-overdue opportunity to re-integrate IL and IR” (338). Abbott urges international lawyers to become “functionalists” rather than “formalists,” and argues that IR provides conceptual approaches and tools for doing so. Deliberately designed to “inform (and entice)” IL scholars, the article provides clear and concise explanations of key IR concepts, including a variety of collective action problems and theories of economic and political market failures.

Four years later, Anne-Marie Slaughter Burley published “International Law and International Relations Theory: A Dual Agenda” in the *American Journal of International Law*, perhaps the field’s preeminent journal. “Dual Agenda” reviews in considerable detail the postwar trajectory summarized above. The article then details an “institutionalist” agenda focused upon “the study of improved

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institutional design for maximally effective international organizations, compliance with international obligations, and international ethics” (Slaughter Burley 1993: 206). Significantly, “Dual Agenda” then takes a step that *Prospectus* does not; it serves as both an introduction to, and a critique of, IR approaches. The paper argues that “[i]nstitutionalism, however formulated, remains theoretically inadequate in many ways” (225), including by its inability to analyze either domestic state–society relations or transnational relations among non-state actors. Given the rise of many areas where non-state actors are critical, including international human rights law, transnational litigation and arbitration, and the regulation of transnational business, Slaughter urges use of an alternative framework.

“Dual Agenda” argues that liberalism takes account of many factors excluded by institutionalism, including the role of non-state actors, and political and economic ideologies. The paper sets out the core assumptions of liberal theory and argues that liberal approaches can inform a rich IL/IR research agenda. Slaughter Burley optimistically concludes that “[t]he prospects for genuine interdisciplinary collaboration, to the benefit of both disciplines, have never been better” (1993: 238).

On the IR side, the key publication marking the arrival of IL/IR scholarship was a special symposium issue of *International Organization* devoted to “Legalization and World Politics.” The symposium was rooted in, and justified by, the empirical claim that international affairs were undergoing a strong, albeit uneven, “move to law,” and the contributions to this volume seek to generate “a better understanding of this variation in the use and consequences of law in international politics.” Unlike the seminal articles in legal journals, the Legalization symposium is not an explicit call for others to engage in interdisciplinary work. However, the prominence of the authors and journal clearly communicated the message that international legal phenomena were worthy of sustained scholarly attention by political scientists.

For current purposes, two elements of these groundbreaking contributions stand out. First, although virtually all of the early articles purport to call for a wide-ranging encounter between, if not synthesis of, IL and IR, in at least one important respect the papers misrepresent themselves. In fact, virtually all of the early papers emphasize some elements of modern IR theory and pointedly ignore or underplay others. Specifically, the canonical works reviewed above are, without exception, strongly rationalist in their orientation. This rationalist focus led to a corresponding underemphasis on alternative approaches, notably constructivism. The failure to meaningfully engage constructivist approaches represents a missed opportunity; these approaches would, in time, contribute significantly to the IR/IL literature.³ Moreover, the rationalist approaches largely rest on highly instrumental conceptions of international law that triggered a backlash among many international lawyers, as

³ Indeed, the authors of the canonical calls subsequently highlighted the contributions of constructivist approaches (Slaughter 2000; Abbott 2004–2005).

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discussed more fully in Section II.C. below, which explores competing conceptions of international law at play in both disciplines.

Second, virtually all of the early IL/IR writings urge the application of methods or theoretical approaches from one discipline to questions posed by the other discipline. Although in principle either of the two disciplines could be the source of the theory or methods, in practice international law and international relations have not been similarly situated. Rather, the intellectual terms of trade have been highly asymmetrical, with most IL/IR writings involving the application of international relations theories and methods to the study of international legal phenomena.

For example, although Abbott's *Prospectus* claims that "IL and IR have much to contribute to each other," it quickly becomes clear that the two disciplines' respective contributions are quite distinct: "The opportunity to integrate IL and IR stems . . . from the analytical approaches, insights and techniques of modern IR theory, which can readily be applied to a variety of legal norms and institutions. . . . For its part, IL can offer modern IR scholars an immense reservoir of information about legal rules and institutions, the raw material for growth and application of the theory" (1989: 339–40). Slaughter's paper presents much the same argument. Although calling for a "dual agenda" might imply that each discipline should contribute to the other, Slaughter is clear that she is presenting a dual agenda for lawyers, based on both institutionalist and liberal IR theory (Slaughter 1993: 206–07).

The Legalization volume follows a similar path. The volume's organizers claim that their framework is "able to unite perspectives developed by political scientists and international legal scholars and engage in a genuinely collaborative venture" (Abbott *et al.* 2000: 387). Yet, once again, to be "collaborative" is not necessarily to contribute equally. The Legalization issue's introduction notes that international law has "chronicled and categorized th[e] 'move to law' but has largely failed to evaluate or challenge it." The authors claim that "approaches from political science should be more helpful in explaining the puzzle of uneven legalization" (Abbott *et al.* 2000: 388), and the paper thereafter focuses on political science explanations of international legalization.

In short, in each of these canonical statements – and, to a large extent, in the subsequent literature – the intellectual terms of trade have been highly unequal, consisting primarily of the application of the theories and methods of political science as a *discipline* to the study of international law as a *subject*.⁴ The contributions to this volume can be read, in part, as an inquiry into whether better integration of the various contributions of IL and IR is desirable, or possible. For current purposes,

⁴ For a recent example, see Hafner-Burton, Victor, and Lupu (2012), who argue that "[l]arge gains from collaboration are most likely where the research tools from political science can be combined with the important substantive and procedural expertise of international lawyers. . . ."