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Introduction

Legality, interdisciplinarity and the study of practices

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On a given morning from an obscure Saudi Arabian airstrip, the Central Intelligence Agency launches remotely piloted drones to carry out the "lawful" killing of an Al-Qaida leader across the border in Yemen. Thousands of kilometres to the north, the Russian government announces that its submarine has planted a titanium flag on the seabed of the North Pole, bolstering Russia's legal claim to Arctic natural resources. In Brussels, the European Commission unveils its Emissions Trading System (ETS), claiming universal jurisdiction over foreign airlines in order to protect the environment. In London, a commercial plane lands with a family returning from holiday in North Africa, and in the transit lounge the father is detained by border officers claiming his name appears on a US terrorist list. Some 200 miles off the Somali coast, a private security guard keeps a piracy vessel at gunpoint, hired by an international shipping company that claims it has a right to defend itself under international law. At the White House, the president of the United States threatens armed attack against a state in the Middle East irrespective of Security Council authorization because the impugned regime is alleged to have crossed the red line of what legal obligations can tolerate under the law of armed conflict.

These are stories that represent more than random snapshots. They testify to the growing intertwine between international politics and law, and specifically how the notion of "legality" has become an express feature across a wide spectrum of contemporary world affairs. This is a notable development because, traditionally, liberal theories of constitutional rule have construed law and politics as being in opposition and, further still, that law serves as an imagined check on the excesses of state power and authority.[1] It is a dichotomy that is transposed onto the

[1] See Nikolas M. Rajkovic, "'Global Law' and Governmentality: Reconceptualizing the 'Rule of Law' as Rule 'through' Law"(2012) 18 *European Journal of International Relations*

international realm and reflected in a disciplinary division of labor between International Law (IL) and International Relations (IR). This has engendered discrete communities of scholars and professionals each with their own concepts, theories and, perhaps, world views on international reality. As one of the founding figures of IR, Hans Morgenthau, asserted when famously abandoning law in favour of a new discipline, "the political realist maintains the autonomy of the political sphere [and] thinks in terms of interest defined as power . . . the lawyer, of conformity of action with legal rules."[2]

Today, this storied separation between law and power is challenged by recent decades of "rule of law" promotion through international, domestic and global campaigns of good governance. Legality, the once alleged hobby for *Buchrecht* lawyers, now commands substantial and unprecedented currency in world affairs, and the analytical border between law and politics is harder to sustain in disciplinary, empirical and, ultimately, narrative terms.[3] What is more, a "rule of law" imperative seems apparent in the way international political and economic action is frequently performed and contested with reference to varied legal justifications. For instance, the United States and its allies took pains to argue that the 2003 invasion of Iraq was in conformity with prior United Nations (UN) Security Council Resolutions, even after widespread claims of its apparent lawlessness.[4] And while the current scramble for the Arctic – according to some – is a return to Cold War power play, what is most remarkable is how the political manoeuvring of the involved powers is formulated in terms of the norms and procedural mechanisms prescribed by the UN Convention of the Law of the Sea system for presenting territorial claims. As such, this growing use and reference to international legality has not marked the end of strategic struggles in global affairs, but rather shifted the field and manner of play for a plurality of actors which

29–52; Paul W. Kahn, *The Reign of Law: Marbury* v. *Madison and the Constitution of America* (New Haven: Yale University Press, 1997).

[2] Hans J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, 3rd edn (New York: Knopf, 1966), 13.

[3] David Kennedy, *Global Governance? New Thinking About Law and Policy* (Princeton: Princeton University Press, 2015).

[4] See Shirley V. Scott and Olivia Ambler, "Does Legality Really Matter? Accounting for the Decline of US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq" (2007) 13 *European Journal of International Relations* 67–8; Tanja E. Aalberts, "Forging International Order: Inquiring Iraq in the Netherlands 2011" (2012) 42 *Netherlands Yearbook of International Law 2011* 139–75.

now use, influence and contest the way legal rule is and should be used to address global problems.

Against this background, the volume examines the notion of *legality* not as a positivist legal study of whether someone or something is in conformity with doctrinal international law but rather as an evolving conceptual nexus between law and politics. Legality may be informed by diverse types and readings of rules applied in various contexts of political struggle. As will become apparent across the ensuing chapters, the volume focuses on the breadth of meanings and rich contestation that the concept of legality today provokes in light of profound transformations taking place in international practices. In this vein, it foregoes the conventional and lexicographical route of seeking to pin down a more perfected definition of the noun "legality" and the adjective "legal," and instead employs a bottom-up and pluralist approach that seeks to survey differentiated meanings, uses and implications of legality across diverse scholarly, institutional and policy settings. This approach overlaps nicely with the recent upturn of interest in the notion of legality[5] where an expanding array of practitioners, institutions and scholars now stake claim to it and often in competing ways. Further, the volume's exploration of legality complements a new generation of literature concerned with the normative boundaries and social construction of legality relative to familial concepts such as non-legality[6] and a-legality.[7]

The various contributions of the book critically interrogate conceptual, theoretical and empirical understandings of international legality through an examination of constitutive *practices* that enhance interchange between law and politics. In this way, a key aim of our volume is to alter the terms of discourse on IL/IR interdisciplinarity by bringing into view the heterogeneous character that "legality" engenders when studying how different actors each seek to frame this concept. As such, the intent is to set in motion more sociological inquiries into the growing hybridity between international law and politics; tracing how perceived boundaries of (inter)disciplinary labour are shaped and reshaped by evolving interpretation, argumentative strategies and epistemic struggles

[5] Scott J. Shapiro, *Legality* (Cambridge: Belknap Press of Harvard University Press, 2011).
[6] Fleur Johns, *Non-Legality in International Law* (Cambridge: Cambridge University Press, 2013).
[7] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013).

over what has become an ever coveted notion of legality for both scholarship and the "real" world out there.

The remainder of this opening chapter will set the stage for a more heterodox exploration, and specifically the practice framework that this volume introduces to IL and IR scholars as an alternative manner of doing research on legality. We start, in the next section, with a brief survey of the canonical and nominal origins of interdisciplinary research between IL and IR and, in particular, how it happened that one-time disciplinary antipodes found common interest in studying the notion of legality. In this context, we reflect on an interdisciplinary conundrum that has since crystallized between clashing disciplinary establishments on the appropriate course of studying law and politics in world affairs. Subsequently, the "practice turn" is introduced to develop a new heuristic framework which, instead of modelling exchange between two presumably homogenized disciplines, focuses on the interrelated processes of social and interpretive contestation as the prime engines of knowledge construction on what legality means and implies across diverse contests of (legal) rule across the globe today. Lastly, in the final part of this chapter, we provide an overview to the three parts of the volume along with brief introduction to each chapter contribution.

I Legality and the challenge of interdisciplinarity

This volume is concerned with the growing interchange between international law and politics and, in particular, the rising salience of legality. In this context, the volume is as much focused on transformations in contemporary global order as it is on the evolving (inter)disciplinary histories between IL and IR scholarship; considering that constitutive changes in one generate feedback loops for how the other is perceived (see Chapters 3 and 6 by Leander and Werner, and Kumar, respectively.). We will now briefly engage this latter scholarly dimension for the purposes of assessing the post–Cold War re-engagement of IL and IR and, specifically, how the concept of legality has migrated from exclusive relevance within IL to a term of increasing centricity and claim for IR scholars. What is noteworthy about this section is the light it casts on recent confrontation between cleavages of IL and IR scholarship over the formalization of interdisciplinary IL/IR research. This flagging of that interdisciplinary conundrum serves as backdrop and primer for our ensuing discussion on the turn to practices when studying international legality.

The present context of proliferating legal claims and contests requires some recollecting that not long ago the question of legality was downgraded to a provincial concern and preserve for marginalized international lawyers. The Second World War galvanized realist theorists, notably Hans Morgenthau and E. H. Carr, to discount international law's faith in normative cooperation and instead constitute an IR discipline centred on the ultimate *reality* of international power.[8] Decades thereafter, disciplinary IR and IL worked within largely separate houses of scholarship where IR endeavoured to construct its science of power,[9] while IL yoked its domain with an emphasis on the integrity of international legal rules and decision making to reinforce law's claimed autonomy and capacity to tame the political.[10]

These scholarly solitudes, however, began unravelling in what was revealed to be the final decade of the Cold War. New approaches, debates and landmark interventions shook foundational presumptions and identities within both the IL[11] and IR[12] disciplines, as dissatisfied theorists challenged – among a number of axioms – the increasingly problematic separation of politics and law for canonical scholarships. Within IR, the rise of constructivism, initiated by the vanguard monographs of Nicholas Onuf and Friedrich Kratochwil, challenged the realist establishment for neglecting the force of international norms and rules and consequently failing to foresee or explain the relatively peaceful collapse of

[8] Morgenthau, *Politics among Nations*; E. H. Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (London: Macmillan, 1946); Marrti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

[9] Stanley Hoffman, "An American Social Science: International Relations" (1977) 106 *Daedalus* 41–60; Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979).

[10] See Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933); Gerald Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957) 92 *Recueil des Cours* 5–128.

[11] James Boyle, "Ideals and Things: International Legal Scholarship and the Prison-house of Language" (1985) 26 *Harvard International Law Journal* 327–359; David Kennedy, "Primitive Legal Scholarship" (1986) 27 *Harvard International Law Journal* 1–98.

[12] Richard K. Ashley, "The Poverty of Neorealism" in Robert O. Keohane (ed.), *Neorealism and Its Critics* (New York: Columbia University Press, 1986), 255–300; Friedrich V. Kratochwil and John Ruggie, "International Organization: The State of the Art on the Art of the State" (1986) 40 *International Organization* 753–75; Susan Strange, *States and Markets* (London: Pinter Publishers, 1987); Alexander Wendt, "Anarchy Is What the States Make of It: The Social Construction of Power Politics" (1992) 46 *International Organization*, 391–425.

the Soviet Empire.[13] Similarly, in IL, the international thrust of Critical Legal Studies led by the critiques of David Kennedy and Martti Koskenniemi confronted a positivist tradition that denied reflexive inquiry into the embedded politics of international law.[14]

These intra-disciplinary challenges re-cultivated scholarly terrain by questioning the narrow prerogative mainstream IR had asserted over international politics and power, and IL similarly claimed over the notions of international law and legality. As such, the late 1980s to mid-1990s marked the beginnings of a momentous upheaval for not just the boundaries of geopolitical order, but also in how pioneering voices had questioned a seemingly clear-cut division of scholarly labour and knowledge pertaining to how international life was parcelled between international politics and international law.

It was at this juncture that liberal IR and IL scholars came to advance the term "interdisciplinary."[15] A signature feature of that interdisciplinary call was its novel and architectonic narrative that IL and IR scholars were not divided but "cohabit the same conceptual space."[16] Concurrently, invitations were issued for its "rediscovery" and the formulation of a "dual agenda" across the disciplines.[17] In the decades that followed, a remarkable breadth and extent of scholarship ensued attempting to define, explore and even contest this claim of interdisciplinary cohabitation by academic communities, which for decades had consciously identified themselves as

[13] Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989); Friedrich Kratochwil, *Rules, Norms and Decisions* (Cambridge: Cambridge University Press, 1989); See also: R. Koslowski and F. Kratochwil, "Understanding Change in International Politics: The Soviet Empire's Demise and the International System" (1994) 48 *International Organization* 215.

[14] Roberto M. Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1983); David Kennedy, *International Legal Structures* (Baden Baden: Nomos, 1987); Martti Koskenniemi, *from Apology to Utopia* (Helsinki: Lakimiesliiton Kustannus, 1989).

[15] Francis A. Boyle, *World Politics and International Law* (Durham: Duke University, 1985); Kenneth Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 *Yale Journal of International Law* 335–40; Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 *European Journal of International Law* 503–38.

[16] Slaughter, "International Law in a World of Liberal States," 503.

[17] Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 *American Journal of International Law* 367–97; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *American Journal of International Law* 205–39.

vocationally distinct. What proved discursively powerful and mobilizing was how that interdisciplinary frame stressed overlapping labor between what "lawyers, political scientists and policymakers" do.[18] This spatial imagery of closeness aimed to transform the scholarly and institutional horizon of international research,[19] by cultivating the imperative for theoretical exchange and a cross-fertilization of methods.[20]

In practice, however, that landmark assertion of cohabitation has proven easier to preach than practice, with the drive for cooperation hindered by the rooted nature of disciplinary traditions, conceptual vocabularies and the difficult intellectual labour of generating shared understandings of law and politics as well as legality and power.[21] For instance, the attempt by liberal IR scholars to bridge onto legal research, via a renowned framework on the "legalization" of world politics,[22] proved convincing with much IR scholarship because its institutionalist re-narration of international law steered away from internal questions over law's conceptualization and meaning (see Epilogue in Chapter 13 by Dunoff).

Yet, while that ontological short-cut resonated with the behaviouralist leanings of many in the liberal IR academy,[23] it left the legalization agenda having underexplored the concept of law beyond a quite general Kantian idea that law's purpose and effect involved promoting *rule-oriented* conduct.[24] This sparked controversy in the IL academy over whether that institutionalist narrative had reduced the politics of international law to the managerialism of rule compliance.[25] In sum, the proposed conceptual

[18] Slaughter, "International Law in a World of Liberal States," 503.
[19] See Andrew Abbott, "Things of Boundaries" (1995) 62 *Social Research* 857–82.
[20] For a recent overview of IL/IR research in this tradition, see Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2013).
[21] Tanja E. Aalberts, "The Politics of International Law and the Perils and Promises of Interdisciplinarity" (2013) 26 *Leiden Journal of International Law* 503–8.
[22] See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, "The Concept of Legalization" (2000) 54 *International Organization* 401–10.
[23] Robert O. Keohane, "Twenty Years of Institutional Liberalism" (2012) 26 *International Relations* 125.
[24] Nikolas M. Rajkovic, "Rules, Lawyering and the Politics of Legality: Critical Sociology and International Law's Rule" (2014) 27 *Leiden Journal of International Law* 331–52.
[25] Martti Koskenniemi, "Miserable Comforters: International Relations as New Natural Law" (2009) 15 *European Journal of International Relations* 395 at 405–11. See also: Philip Allott, "Review of Books" (2010) 80 *British Yearbook of International Law* 409–22 at 416–22; J. Crawford, "International Law as a Discipline and Profession" (2012) 106 *Proceedings of the American Society of International Law* 471 at 473.

manoeuvre of tweaking or re-inventing nouns as strategy for interdisciplinary breakthrough provoked turf disputes over the actual meaning and proprieties of alleged "bridging" terms, such as norms, rules, institutions, legitimacy, interdisciplinarity and even legality itself.[26]

What is more, methodological approaches often aggravated disciplinary friction because engagements with politics and law regularly invoked essentialized definitions (e.g., what power *is* or what law *is*) as the alleged foundation point for interdisciplinary research.[27] This came, however, at the price of bracketing out canonical perspectives and cleavages integral to both fields.[28] As such, the historic and institutional separation of IL and IR communities has not merely shown resilience but, crucially, fed an *a priori* mode of interdisciplinarity based on the unilateral extension of disciplinary research agendas and theoretical models.[29] Consequently, some have made forays into notions of politics, power or the "rule of law" as residual factors to explain global outcomes, while others have transfigured legal norms into variables for empirical testing.[30] The result has been a regimented pattern of interdisciplinary "debate," involving either convenient methodological alliances or proclamations about the impossibility of crossover owing to inherently different languages and teleological purposes. Further still, questions have now arisen on the epistemic compatibility between what political scientists and lawyers *do*, which has even led to a call for "counter-disciplinarity" as an intellectual barricade.[31]

Part of the struggle over interdisciplinarity has deeper epistemic roots that are worth bringing into view, albeit summarily at this stage. It relates to an intellectual legacy, which both IR and IL scholars habitually reproduce via seemingly natural references to law and politics as antipode domains. The key but often forgotten point is that these scholarships

[26] Jan Klabbers, "The Bridge Crack'd: A Critical Look at Interdisciplinary Relations" (2009) 23 *International Relations* 119–25.

[27] Friedrich Kratochwil, *The Status of Law in World Society* (Cambridge: Cambridge University Press, 2014).

[28] Wouter G. Werner, "The Use of Law in International Political Sociology" (2010) 4 *International Political Sociology* 304–7.

[29] Jan Klabbers, "Counter-Disciplinarity" (2010) 4 *International Political Sociology* 308–10.

[30] For example: Beth A. Simmons, "From Ratification to Compliance: Quantitative Evidence on the Spiral Model" in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013), 43–60.

[31] Martti Koskenniemi, "Law, Teleology and International Relations: An Essay in Counter-disciplinarity" (2012) 26 *International Relations* 3–3; Klabbers, "Counter-Disciplinarity," 308–10.

have inherited a binary and philosophical dilemma, which is not unique to their inter- or even intra-disciplinary disputes. Rather, the modern world owes that binary legacy and, consequently, conundrum to the philosophical heritage bequeathed by René Descartes, following his pivotal assertion that the known world is separable between thought (*res cogitans*) and the world, which was "real" and material (*res extensa*).[32] A good part of the dispute between IR and IL scholars over interdisciplinarity has been perpetuated by what is a Cartesian trap: what knowledge should be designated *universally* as real or, in other words, what knowledge deserves our distinction of being relevant in the absolute versus peripheral. Descartes' legacy has reverberated strongly across and within the disciplines of IL and IR seeing that materiality or, specifically, how the imperative of ascertaining genuine "reality" has been a pervasive concern for scholars as they have attempted to justify the social relevance of their intellectual projects to both themselves and the world at large (see Chapter 2 by Kratochwil).[33]

Against the background of this dilemma and its reverberation in many contemporary IL/IR projects, this book sits at the intersection between rival calls for and against interdisciplinarity. On the one hand, we emphasize the need to explore the various links between international politics and law in a world where profound political and economic transformations make more nuanced understandings of the "international" warranted. On the other hand, we share the voiced concerns that the nominal bridge of "interdisciplinarity" risks collapse from the weight of turf disputes that the term has provoked between vested institutional scholarships.[34] The question we face then is: how to move on? How to advance the study of international law and politics beyond what has become an interdisciplinary conundrum?

II Rethinking practices and boundaries

This volume departs from the observation that the dynamics between law and politics are not merely altering the inter-state order but are, in fact, reconstituting the geographic scales and patterns of the global political

[32] Rene Descartes, in C. Adam and P. Tannery (eds.), *Ouevres De Descartes*, V. Vii (Paris: J. Vrin, 1964).
[33] See David Kennedy, "The Disciplines of International Law and Policy" (1999) 12 *Leiden Journal of International Law* 9–133.
[34] Klabbers, "The Bridge Crack'd."

economy. As such, this volume seizes upon these material forces of transformation and re-constitution to provoke needed critical reflection on scholarly investigation of international politics and law. The scale of this reflection is not simply empirical, but, crucially, aims to question formal conventions of knowledge production and disciplinarity that have been guiding international thought, research and teaching for well more than five decades.[35]

We believe the time is ripe to evolve interdisciplinary scholarship beyond the repertoire of essentialized definitions and *a priori* theorizing that has informed much orthodox IL/IR scholarship, and encourage greater heterodoxy via conceptual and social research on what communities of actors and scholars are *doing* and *saying* with legality whether that be in international criminal law (Chapter 8 by Schotel), foreign policy (Chapter 9 by Powell and Strug), environmental standards (Chapter 10 by Buenger) or lawfare (Chapter 11 by Ranganathan) – to name only a few examples. As such, each chapter of the volume advances an exploration of the concept of "legality" not via the safety of disciplinary reductionism or *ex ante* theorizing, but with grounded scrutiny of how the concept of legality is variously construed in and through international practices.

In this way, our pursuit of a new interdisciplinary approach draws its inspiration and insight from the so-called "practice turn" that originates in social theory[36] and more recently has found purchase with constructivist IR theorists keen to elaborate an earlier interdisciplinarity, which the linguistic turn of Onuf and Kratochwil had emphasized vis-à-vis practice enacted by and through language.[37] This is far from saying that the notion of practice is a new object of inquiry for either discipline, but

[35] Kratochwil, *The Status of Law in World Society*, 26–49.

[36] Theodore R. Schatzki, Karin Knorr Cetina and Eike Von Savigny (eds.), *Practice Turn in Contemporary Theory* (New York: Routledge, 2001); Bent Flyvbjerg, *Making Social Science Matter* (Cambridge: Cambridge University Press, 2001); John Dewey, "The Influence of Darwinism on Philosophy" in John McDermott (eds.) (Chicago: Chicago University Press, 1981); Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" 38 *Hastings Law Journal* 805.

[37] See Ludwig J.J. Wittgenstein, *Philosophical Investigations*, *3rd edition* (London: Prentice-Hall, 1958); Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989); Friedrich V. Kratochwil, *Rules, Norms and Decisions": On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991; Iver B. Neumann, "Returning Practice to the Linguistic Turn: The Case of Diplomacy" (2002) 31 *Millennium* 627–51.