1

Introduction

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This book aims at advancing our understanding of the influences international norms and international institutions have over the incentives of states to cooperate on issues such as environment and trade. The different contributions to this book adopt two different approaches in examining this question. One approach focuses on the constitutive elements of the international legal order, including customary international law, soft law and framework conventions, and on the types of incentives states have, such as domestic incentives and reputation. The other approach examines closely specific issues in the areas of international environment protection and international trade. The combined outcome of these two approaches is a more refined understanding of the forces that pull states toward closer cooperation or prevents them from doing so, and the impact of different types of international norms and diverse institutions on the motivation of states. The insights gained suggest ways for enhancing states' incentives to cooperate through the design of norms and institutions.

This introduction begins with an overview of contemporary international law (IL) – international relations (IR) scholarship, to be followed by a short description of the contributions to this book.

IL–IR scholarship

The point of departure of this book is that the disciplines of IL and IR are inexorably interlinked. Neither can be understood properly in isolation. Like every legal system that operates in a specific societal system, international law functions in the international system. International law grows out of the international society: it reflects the particular character of this society, and it also affects the relationships among the actors in this system. At the same time, international law produces norms that influence, if not shape, the behavior of international actors.

Yet IL–IR interdisciplinary scholarship is quite a new phenomenon. Kenneth Abbott's well-known article in 1989 on IR theories and IL[1] is widely considered the harbinger of a wave of cooperation between IL and IR scholars. Anne-Marie Slaughter followed and significantly extended this direction in her 1993 article discussing the historical evolution of the IL–IR relationship since World War II.[2] Her article recommends to IL and IR scholars potential pathways of interdisciplinary research in this field. Indeed, many IL scholars (including most of the IL contributors to this volume) have adopted these recommendations, and a growing number of articles and books that draw on the common ground of these disciplines have been published in recent years.[3] On the IR side, the "move to law" in world politics was particularly manifest in the special issue of *International Organization* in the summer of 2000 that was devoted to the subject "Legalization and World Politics."[4]

Employing IR theoretical tools is of particular importance for IL scholars. Analysis of specific features of the international system is valuable for a proper understanding of the content and role of IL in a given period. Likewise, ascertaining the nature of developments in the international system at large are of great importance for understanding changes in IL and international legal institutions.

Different IR theories offer several sets of factors that motivate the behaviors of states and other actors in the international community. These factors explain the evolution of IL and its specific norms. Consequently, studying IR theories may enable IL scholars to explore why a particular legal concept or rule emerged in a given period (and not earlier, or later) and why alternative legal concepts or rules were discarded. Such theories also explain legal pluralism among different regional legal systems.

IR research may also assist practitioners and judges of IL who apply this body of law to particular factual situations. Application of international rules often requires interpretation which, in turn, frequently necessitates reference to the aim of a particular rule, as well as the historical context

[1] Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 *Yale J. Int'l L.* 335.

[2] Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *Am. J. Int'l L. 205.*

[3] See the many books and articles referred to in Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 *Am. J. Int'l L.* 367.

[4] (2000) 54 *International Organization* (No. 3, Summer).

of its enactment.[5] IR studies may aid agencies of interpretation in ascertaining the factual and theoretical background of particular legal rules or comprehensive legal regimes.

IR theories may also assist IL scholars in anticipating what kind of legal rules are likely to prevail under various circumstances in the future (e.g., if inequality between states increases, or if a bilateral setting is transformed into a multilateral one). IR theories do not predict precisely which rules will be adopted in a given situation but they may well give scholars significant indications of the expected trends and patterns of legal concepts that are likely to emerge in particular settings. Empirical studies are used to study the validity of such IR hypotheses, which have considerable significance for IL scholars.

As noted above, existing international legal concepts reflect to a significant measure the current traits of the international system. This observation should not lead us to under-estimate the dynamic dimension of IL. International legal regimes generally do not aim to reflect accurately and to perpetuate the existing situation in a given community.[6] On the contrary, a basic function of IL is to generate change in the conduct of its subjects and also, occasionally, to modify the relationships among them.[7] IL is often used as an instrument to alter conduct in the international system that is undesirable (either immoral or inefficient). This is the case, for instance, with international treaties that aim to prohibit racial or gender discrimination, or treaties that require signatory states to eliminate various barriers to international trade.

IR theoretical tools may help IL scholars and policy-makers employ IL as a purposive instrument. IR theories often aim to identify the critical factors that explain a particular international conduct (whether desirable or undesirable). Identification of the factors that motivate states to adopt a particular course of action in the normative sphere may indicate to IL scholars what kinds of legal mechanisms are needed to affect states' behavior in a given area. Desirable legal mechanisms, in accordance with IR theories, may include either existing or innovative legal concepts. For instance, certain legal rules may enhance the prospects of international

[5] See Articles 31–32 of the 1969 Vienna Convention on the Law of Treaties, 8 *International Legal Materials* 679.

[6] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finish Lawyers' Publishing Company, Helsinki, 1989), pp. 2–5.

[7] On the function of law as an instrument of social change, see Roger Cotterrell, *Sociology of Law* (2nd ed., Butterworths, London, 1992), pp. 44–70.

cooperation in the sphere of environmental protection, and particularly in settings that are susceptible to collective action failure.[8]

The capacity of IL to reshape conduct and relationships in the international system should not be over-estimated. IL, like any other societal institution, has its own limitations. Still, IR theoretical tools may be helpful here in pointing out where new legal rules or institutions are unlikely to generate the desired change.

Interdisciplinary IL–IR scholarship is also valuable for IR scholars.[9] IR scholars investigate the role of IL in international politics. With the rapid increase in international treaties, institutions and tribunals in recent decades, IR scholars attempt to analyze rigorously the impact of these developments on states' behavior, as well as the structural changes resulting from this trend for the international system at large. IR scholars have devoted particular research efforts to exploring the puzzle of compliance with IL.

The distinction between rational choice and sociological analyses constitutes one of the major dividing lines in social sciences scholarship.[10] These paradigms posit different assumptions regarding the motivation for social behavior at large, as well as with regard to the central factors that affect the decision-making processes. Naturally, this theoretical cleavage resurfaces also in IR theoretical literature. As Slaughter shows in the opening chapter, the major theoretical approaches in IR (realism, institutionalism and liberalism) are based on both constructivist and rationalist causal mechanisms. Still, numerous realist, institutionalist and liberal analyses incline to emphasize the rational aspects of these approaches. This trend is also mirrored in most chapters of this book that widely employ the rational theoretical tools. Notwithstanding this, some contributors discuss and highlight the sociological (or "constructivist") approaches in IR theory. This is the case with the chapters written by Anne-Marie Slaughter, Moshe Hirsch, Edith Brown Weiss and Arie Kacowicz.

[8] See, e.g., Eyal Benvenisti, "Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resource Law" (1996) 90 *Am. J. Int'l L.* 384; Moshe Hirsch, "Game Theory, International Law, and Environmental Cooperation in the Middle East" (1999) 27 *Denver J. Int'l L. and Policy* 75.

[9] See, e.g., Robert Keohane, "International Relations and International Law: Two Optics" (1997) 38 *Harvard Int'l L. J.* 487.

[10] See, e.g., Shaun Hargreaves Heap *et al.*, *The Theory of Choice: A Critical Guide* (Blackwell, Oxford, 1992), pp. 62–72.

The contributions in this book

The different contributions to this book set out to examine in what ways, if at all, international norms and institutions shape the attitude of states towards international cooperation.

Anne-Marie Slaughter's contribution opens the book (see Chapter 2) with an overview of the principal theoretical approaches in IR literature and discussion on the interrelationships between international law and international politics. This chapter starts with a concise summary of the three central paradigms that are widely employed in contemporary American political science: realism, institutionalism and liberalism. The brief analysis of the central tenets of each paradigm is accompanied by a discussion on the particular relevance of each of these approaches to international law. These theories suggest various legal strategies as how to resolve particular policy problems (such as wars or trade conflicts).

The interrelationships between IL and IR theories is demonstrated, inter alia, with regard to the centrality of the territory in both traditional international law and the realist paradigm. The UN Charter is presented as an institutionalist response to the fact of state power. From this point of view, the Charter's norms, including sovereign equality and prohibition of use of force, seek to create a fictional world in which power is equalized and shape reality to approximate this fiction. The liberal approach in IR also exerts significant influence on IL. The liberal conception of IL does not consider states as the principal subjects but rather as the agents of individuals and interest groups that states are assumed to represent.

The constructivist approach is analyzed in this contribution and Slaughter emphasizes its distinctive features vis-à-vis the rational approach. The fundamental difference between these approaches is explained with the distinction made by James March and Herbert Simon between the "logic of consequences" (that involves instrumental calculation) and the "logic of appropriateness" (that involves socialization). Slaughter underlines that realism, institutionalism and liberalism rely on both constructivist and rationalist causal mechanisms (but most standard overviews of IR theories privilege the rationalist version of each of the paradigms). Many international lawyers are drawn to constructivism but they can find constructivist or rationalist variants within all three of the major IR paradigms.

Five basic propositions are developed by Slaughter in the second part of this contribution. These propositions are about the role of law in

shaping international politics, the role of politics in shaping international law, the prospects for a new generation of international institutions and the fate of the state. The propositions highlight the significance of power analysis to international lawyers, the difference between legalized and non-legalized rules and institutions, the particular role of soft law in global governance, international regime design and the importance of domestic politics (as well as international politics) for international lawyers.

The contribution of **Kenneth Abbott and Duncan Snidal** to this volume (Chapter 3), the result of a joint project undertaken by these two scholars of IL and IR (respectively), focuses on the dynamics of cooperation and legalization. It analyzes three alternative pathways to promoting cooperation among states and other international actors: the Framework Convention Pathway, the Plurilateral Pathway and the Soft Law Pathway.

The Framework Convention Pathway directs the involved parties to begin with a legally binding agreement with broad participation but shallow substantive commitments, and to deepen the substantive content over time. This dynamic pattern is well known in the sphere of international environmental protection. Prominent examples are the 1985 Convention for the Protection of the Ozone Layer, the 1992 Convention on Climate Change and the 1979 Convention on Long-Range Transboundary Air Pollution.

The Plurilateral Pathway suggests the institution of cooperative regimes that gradually increase the number of participating parties. Here the recommendation is to begin with a legally binding agreement with deep substantive commitments but limited membership, and then to expand membership over time. The prerequisite to expansion is, of course, that the cooperative regime be beneficial to potential members; if this condition is met, the regime's very existence will enhance incentives to join. The well-known example for such a dynamic is the establishment and enlargement of the European Community.

Finally, the Soft Law Pathway focuses on increasing legalization of the cooperative regime, mainly in terms of strengthening the legally binding nature of the relevant obligations. This Pathway directs the parties to begin with an agreement containing significant substantive commitments with wide participation, but which is not legally binding, or is only weakly binding, and then gradually to strengthen the legal obligations over time. The development of the universal human rights legal regime (from the 1948 Universal Declaration to the 1966 Covenants and subsequent treaties) well illustrates this pathway.

Abbott and Snidal note that certain pathways are associated with particular IR theories and they discuss several such theoretical connections. Still, their conclusion on this point is that individual pathways are "not tightly tied" to a particular understanding of international cooperation. Finally, the authors explore some factors that lead international actors to follow one of the three pathways. These factors include the nature of the problem (e.g., various types of uncertainty), the relative power of the involved parties (e.g., governments or NGOs) and the institutional arena in which the efforts to further international cooperation are taken.

Eyal Benvenisti (Chapter 4) examines the role of international judges and arbitrators in pushing states towards more efficient norms. He argues that such judges and arbitrators enjoy a unique opportunity to guide states into adopting more cooperative courses of action, and that they often make use of that opportunity. According to Benvenisti, the opportunity is provided by the doctrine of customary international law. This doctrine has often served as a reliable proxy for determining the efficient behavior for all states to follow, enabling international tribunals and other actors to impose sanctions on free-riders or others seeking to deviate from the efficient norm. But the proxy fails when global or regional conditions lead states to pursue inefficient behavior. In such situations, international tribunals can push states toward new, more efficient Nash equilibria. Tribunals do so by inventing what they portray as custom. A judicial declaration of one equilibrium as legally binding is likely to lead all players to modify their activities to conform to the judicially-sanctioned equilibrium. This equilibrium will thus become the new practice, the new custom.

The argument developed in this chapter is that the judicial authority to nudge states toward efficient equilibria exists in international law, and is often used by tribunals. When state practice fails to follow efficient modes of behavior, international adjudicators inform themselves directly or indirectly on the best available science to attain efficient norms. Judges in international tribunals therefore have a unique role in the advancement of international law. They have the genuine opportunity to translate science into law, on the pretext of "finding" customary international norms. They have in fact an authority, grounded in customary international law, to invent new custom.

George Downs and Michael Jones (Chapter 5) explore the impact of reputational costs on states' incentives to cooperate and comply with international obligations. Reputation is positively related to compliance. Because developing states have relatively worse compliance records

than developed states – due to their fewer administrative and financial resources, their instability and their susceptibility to external shocks – developing states are more susceptible to reputation costs than developed states. Downs and Jones argue that the worry that developing states will become increasingly marginalized from the benefits of multilateral agreements is not corroborated by the evidence, and they seek to explain this phenomenon.

Their quest leads them to develop a case for multiple reputations, rather than a singular one. States distinguish between defections according to their timing and the types of agreements involved. Just as states might have different levels of reliability in connection with treaties in different areas, they can also have a variable record for reliability in connection with different treaties in the same regulatory area if they contain different amounts of ambiguity, require widely differing levels of resources from states in order to carry out or are subject to different political and economic shocks. As a result, the reputational consequences of a state's non-compliance in connection with a given agreement tends to be bounded. Other states will revise their estimates of its reliability but only in connection with agreements that they believe (1) are affected by the same or similar sources of fluctuating costs, and (2) are valued the same or less by the defecting state. This explains why, despite the assumption in the traditional theory that states have a unitary reputation, it is virtually impossible to find in the literature examples of a state's defection from an agreement in one area (e.g., environment) jeopardizing its reputation in other areas (e.g., trade and security). The bounded or segmented nature of reputation also helps account for why states often have widely divergent reputations in different spheres.

Downs and Jones suggest that the existence of segmented or multiple reputations mitigates the reputational costs that the traditional theory predicts for developing states. Because states have learned to pay attention to the importance as well as the nature of the underlying stochastic shocks that caused the non-compliance, developing states can suffer a severe reputational loss in connection with a particular regional trade or security treaty and still preserve a good reputation in connection with others in the same area that they value more. The limited reach of reputational implications, however, also portends drawbacks for developing states. While it limits their liability, it also limits the protection they can count on reputation affording them from the opportunistic defection of developed states. This is especially bad in the case of treaties that regulate private or club goods. The fact that reputational consequences only extend to other

partners that the defecting state is believed to value the same or less means that the developed state will suffer a reputational loss only among other developing states. Since this could be a very small penalty, it is unlikely that the hope will be realized of reputation leveling the playing field between rich and poor states more than institutionalized compliance mechanisms.

Edith Brown Weiss's contribution (Chapter 6) analyzes the empirical data of a comprehensive research project on compliance with international treaties and highlights various compliance strategies employed in different spheres of international law. The first section presents three paradigms that serve as starting points for analysis. The Classical Paradigm assumes that countries join an international treaty when doing so is expected to promote their interests. Consequently, countries generally comply with international agreements and if not, sanctions are the preferred strategy to induce compliance. The power in the Network Paradigm is organized non-hierarchically in networks that include many important participants in addition to states. Compliance in this paradigm is a dynamic process and it varies among agreements and countries. The individual is the key participant in the Individualist Paradigm and compliance in this paradigm focuses primarily on educating and mobilizing civil society and pressurizing governments (and other actors) to abide by their international obligations. Compliance strategies that concentrate on transparency and capacity-building help empower individuals, NGOs and other non-state actors to comply.

Following a discussion of several propositions regarding compliance with agreements, Brown Weiss analyzes the employment of three principal compliance strategies: (i) transparency (or sunshine) methods that include national reporting, on-site monitoring, etc; (ii) positive incentives that include special funds for financial and technical assistance; (iii) coercive measures that include sanctions and various penalties. Brown Weiss examines the employment of these strategies in accordance with the particular profile of the contracting parties. Two dimensions have particular importance in this respect: intention to comply and capacity to comply.

Analysis of data resulting from the above research leads the author to the following conclusions regarding the desirable mix between the three compliance strategies: (i) If states have both the intent and the capacity to comply, transparency methods are particularly effective to induce compliance. (ii) If states intend to comply but lack the capacity, positive incentives are especially important to enhance compliance (transparency methods may also be important for such states). (iii) If states do not

intend to comply but have the capacity to comply, targeted coercive measures may be useful (transparency methods may also exert pressure to comply in this category). (iv) If countries are weak both in intent and capacity, all compliance strategies are relevant.

An examination of non-environmental treaties along these parameters reveals different trends of compliance strategies. The threat or occasional use of sanctions is the primary means to induce compliance in the GATT/WTO system. International agreements concerned with human rights and with labor are more associated with compliance strategies that focus on transparency methods. Arms control agreements widely utilize transparency methods.

Overall, states are increasingly focusing on the negotiation, design and implementation of measures to enhance compliance. Generally, states' use of all of the compliance strategies described above is increasing. In particular, there is a growing emphasis on transparency methods and positive incentives that build the capacity of states to comply. These changes are explained by the author as a result of the increasing number of states in the international system and growing number of developing states who often lack the capacity to comply with international treaties. Positive incentives assist these states to comply. In some cases, developing states do not accord high priority to compliance and positive incentives may also assist them to shift their priorities towards compliance. Finally, as the non-hierarchical Network Paradigm revealed, there is also a growing role for civil society in securing compliance with international agreements. Consequently, the increasing trend of transparency measures can be targeted to enhance civil society's capacity to promote compliance.

The contribution of **Moshe Hirsch** (Chapter 7) also deals with the subject of compliance but the focus here is on the likely repercussions of globalization upon compliance. The central question is whether globalization will enhance or lessen compliance with international norms? In order to address this question, the author first identifies the major factors that prompt states to observe or violate their international obligations. Two distinct social sciences paradigms provide two different answers to the question of what are the factors that motivate or hinder compliance with international norms. The rational choice model and the sociological approach posit different assumptions regarding the motivation for social behavior in general, and regarding the central factors that affect the decision-making process.

Many proponents of the rational choice model in IR theory consider numerous settings in the international system as "collective action"