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International Legal Positivism and Legal Realism

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Chapter 9
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1. Introduction

The initial encounter between Legal Realism and Legal Positivism in the United States did not go well.[1] During the first half of the twentieth century, Legal Realism came to dominate the legal academy in the United States. Although they shared many assumptions with Legal Positivism, Legal Realists utterly ignored Kelsenian legal positivism, seeing it as a version of the various formalisms that Legal Realism had rejected. HLA Hart's positivism was largely quarantined in jurisprudence courses far from the core of professional training that is the main mission of law schools in the United States.

But twentieth century Legal Realism has itself come to seem rather quaint. Its early practitioners aspired to a social scientific approach, but they lacked the requisite empirical and methodological tools. In the past decade, a New Legal Realism has emerged, and its practitioners are as a group more philosophically sophisticated and more familiar with empirical social scientific methods than were the original Legal Realists. Perhaps as an inevitable by-product of globalisation, some US academics have attempted to apply the New Legal Realism to international law, and since positivism is a far greater force in the academic discourse relating to international law than it is in the domestic context, international law becomes the realm in which a dialogue between the new Legal Realism and Legal Positivism becomes both inevitable and necessary.

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[1] Anthony J Sebok, *Legal Positivism in American Jurisprudence* (CUP 1998) 1–2 (fn.6).

This chapter is a contribution to that dialogue. It begins with two background sections that describe the initial encounter between Legal Realism and Legal Positivism in the US academy and the elements of the New Legal Realism, including examples of New Legal Realist approaches to international law. In a third section, this chapter notes that the New International Legal Positivism (NILP) holds out great promise for specifying the nature of international legal norms and the potential limitations on the efficacy of such norms. With its forthright embrace of the inescapability of uncertainty in law, the NILP adopts a sceptical position very similar to the Legal Realism. However, the NILP still requires a New International Legal Realist supplement in order to provide a fuller understanding of the way in which legal norms interact with non-legal factors and to help us describe, predict and analyse the behaviour of actors in international affairs. At the same time, New International Legal Realists can learn from the sceptical attitude towards sources of law developed by the New International Legal Positivists. The two movements can be symbiotic if brought into closer dialogue. Nonetheless, this section concludes with a dose of pessimism about the capacity of any of the currently available theories of international law to fully assimilate the complexities of both postmodern theory and postmodern global society into a comprehensive theory of international law in the postmodern world.

2. Legal Realism and Positivism

In the United States, the home of Legal Realism, the positivist tradition is largely represented through the work of HLA Hart and various responses thereto.[2] The vast majority of American academics, to say nothing of law students and practicing attorneys, are unfamiliar with the work of Hans Kelsen, and most of those familiar with it have little good to say about it. This section

[2] Sebok treats the legal process school, especially as represented by Herbert Wechsler's 'neutral principles' approach and the originalist movement that followed from it, as a variant of legal positivism. Sebok, note 1 at 113–216.

proceeds in three parts. After a quick review of the basic themes of Legal Realism, the section addresses the reasons why Hans Kelsen's legal theory found no footing on American soil. Finally, the section will briefly address the very different reception that HLA Hart's positivist legal theory received in the world of Legal Realism.

2.1 Elements of Legal Realism

As Brian Leiter has noted, many who write about Legal Realism reject the notion that there is any core coherence to the movement.[3] The movement, if it can be so called, consisted of a diverse group of legal scholars[4] committed to the view that legal decision-making turned on 'something other than, or at least much more than, positive law, legal rules, legal doctrine and legal reasoning as traditionally conceived'. However, there was no consensus as to what that 'something' was.[5]

Nevertheless, intrepid scholars, including Leiter, claim to identify as the twin hallmarks of Realism two forms of rule-scepticism: the view that legal rules are a myth because law consists only of the decisions of courts, and the view that statutes and other legislative creations are too indeterminate to constrain judges or govern their decisions.[6] This may be so because individual rules are indeterminate or because multiple rules are available and legal decision-makers are unconstrained in choosing among them.[7] Brian Tamanaha has summarised Realist perspectives as committed to the views that: 1) the law is filled with gaps and contradictions and thus is indeterminate; 2) every legal rule or principle has exceptions and thus precedents can support different results; and 3) judges decide cases based on their personal preferences and then 'construct the legal analysis to

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3 Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 16.

4 Michael Steven Green, 'Legal Realism as a Theory of Law' 46 *William and Mary Law Review* (2005) 1915–2000 at 1919.

5 Frederick Schauer, 'Legal Realism Untamed' 91 *Texas Law Review* (2013) 749–780 at 756.

6 Green, note 4 at 1917–1918.

7 Schauer, note 5 at 750 (fn. 2).

justify the desired outcome.'[8] Brian Leiter reduces Realism still further to a 'core claim' about judicial decision-making: 'judges respond primarily to the stimulus of facts.'[9]

2.2 Legal Realism and Kelsen's US Reception

The US legal academy's rejection of Kelsen's Pure Theory of Law was over-determined. Kelsen's lack of influence in the United States is best understood as a product of four phenomena that relate only tenuously to the substance of Kelsen's theories. They are: Legal Realism's hostility to anything smacking of formalism; the general view that positivism was too politically anaemic to stand up to the challenges to the rule of law in the twentieth century; the incompatibility of Kelsenian and common law approaches to adjudication; and the nature of US law schools as relatively a-theoretical training grounds for professionals rather than scholars.

First, before Realism arrived on the scene, US legal scholarship had been dominated by a formalist concept of law, which stressed 'the purported autonomy and closure of the legal world and the predominance of formal logic within this autonomous universe'.[10] Realism defined itself in opposition to this idea of law,[11] and Kelsen's approach must have appeared to the Realists to be a version of the formalism that they had just energetically rejected and were in the process of eliminating from legal pedagogy and legal doctrine.

Second, Kelsen's theory failed political litmus tests because, although Kelsen personally supported parliamentary democracy, his desire to produce a pure theory of law required him to avoid connecting the system of law to any substantive political theory.[12] As early as 1946, Gustav Radbruch declared that positivism had

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8 Brian Tamanaha, *Beyond The Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010) 1.

9 Leiter, note 3 at 21.

10 Hanoch Dagan, 'The Realist Conception of Law' 57 *Toronto Law Journal* (2007) 607–660 at 611.

11 Dagan, note 10 at 612.

12 Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie L Paulson, Stanley L Paulson (trs), Clarendon Press 2002) 3.

rendered the German legal profession defenceless against laws with arbitrary or even criminal content.[13] Lon Fuller, one of the most influential philosophers of law in the United States during Kelsen's lifetime, concluded that legal positivism had helped pave the way for the Nazi seizure of power. In a 1954 essay, Fuller wrote that the Nazis 'would never have achieved their control over the German people had there not been waiting to be bent to their sinister ends attitudes towards law and government that had been centuries in the building'. These attitudes included being 'notoriously deferential to authority' and having 'faith in certain fundamental processes of government'.[14] In a 1958 exchange with HLA Hart, Fuller declared positivistic philosophy incompatible with the ideal of fidelity to law.[15] At a time when fascism and totalitarianism posed genuine threats to the ascendancy of democracy as the global model for governance, Kelsen's theory did not seem to US academics to provide a sufficiently robust defence of democracy or for sufficient safeguards against abuses of the law by fascist or totalitarian governments.

Kelsen faced and continues to face two additional problems in the United States legal academy relating to issues of pedagogy and the nature of legal education. The first problem is that legal education in the United States is a form of professional training. Students did not – and still often do not – come to law school in search of enlightenment. They come in order to get the skills, the professional credentials and the contacts that will enable them to succeed in their chosen profession. Theorising about the nature of the law occurs at the margins of the law school experience, with most students taking only one or two classes during the course of their legal educations that focus on jurisprudence. In addition, common law legal education is a very practical affair, in which the students engage intensively with the case law. Kelsen's highly abstract and theoretical approach to the law could not have been

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[13] Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' 1 *Süddeutsche Juristen-Zeitung* (1946) 105–108 at 107.

[14] Lon L Fuller, 'American Legal Philosophy at Mid-Century' 6 *Journal of Legal Education* (1954) 457–485 at 466–485.

[15] Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 *Harvard Law Review* (1958) 630–672 at 646.

more alien to the way in which US students are inculcated into legal doctrine. Untethered as the Pure Theory of Law is to any concrete examples drawn from familiar cases or even statutes, it had almost no chance of appealing to students in US law schools.

Given the development of legal education in the United States as a form of professional training, with jurisprudence sequestered in a tiny corner of the curriculum, Kelsen's approach was unlikely to have much appeal for US lawyers-in-training. Although the recent Carnegie report on legal education faults law schools for focusing on teaching doctrine at the expense of ethical formation,[16] students actively resist the latter and crave the former. Even if students were inclined towards theory, most do not arrive at law school with the sort of analytical skills that would enable them to understand, much less appreciate, Kelsen's Pure Theory of Law.

2.3 Legal Realism and Hartian Legal Positivism

Until relatively recently, Legal Realism and Legal Positivism were routinely viewed in the American academy as incompatible.[17] Brian Leiter has argued otherwise.[18] It may be that the two jurisprudential approaches, while perhaps not incompatible, are concerned at their core with different questions. Legal Positivism attempts to explain what law is, and Legal Realism attempts to understand how judges decide cases – in particular how they decide the relatively rare 'hard case'.[19] If that is so, then Legal Realism exists as a supplement to Legal Positivism, illustrating how law works at the margins (or penumbra) of clear legal rules whose 'core' meaning is routinely enforced and adhered to.[20] However, some defenders of Legal Realism argue that the effect of its insights into the nature of law and legal processes cannot be so

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16 William M Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey–Bass 2007) at 144.

17 Leiter, note 3 at 59.

18 Leiter, note 3 at 80.

19 HLA Hart, *The Concept of Law* (OUP 1961) 136–147; Karl Llewellyn, 'Some Realism about Realism' 44 *Harvard Law Review* (1931) 1222–1264 at 1239.

20 HLA Hart, 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review* (1958) 593–629 at 607–608.

constrained. As Frederick Schauer has recently observed, '[d]etermining whether and when [Legal Realism's] genuinely non-traditional and destabilizing version of law's operation is true is an empirical question, the pursuit of which is an important part of future research in the Realist spirit'.[21]

3. Elements of the New Legal Realism

In an American legal academy in which it has long been a cliché to observe that 'we are all Realists now',[22] one might wonder why there would be a need for a revival of Legal Realism. In fact, the label New Legal Realism (NLR) seems to refer to two distinct movements, one of which might be a subset of the other. One branch of NLR takes up the Legal Realist project, narrowly defined, as one concerned with what judges do, but the new Legal Realists are far more proficient in empirical research methods and thus can far better assess the interplay of law, politics and judicial personality. More broadly understood, NLR is the methodological successor to Legal Realism: it applies social scientific and empirical methods to all of the subject matters with which legal academics concern themselves and offers solutions with an eye to promoting progressive social change.

3.1 Inheritance from (Old) Legal Realism

Both variants of NLR see themselves as building on original Legal Realism by using social science to advance legal knowledge. Thomas Miles and Cass Sunstein describe NLR as 'an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets'. They view this project as a realisation of Karl Llewellyn's goals for Legal Realism.[23] In particular, Miles and Sunstein discuss a body of work that

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21 Schauer, note 5 at 780.

22 Laura Kalman, *Legal Realism at Yale: 1927–1960* (University of North Carolina Press 1986) 229; Green, note 4 at 1917.

23 Thomas Miles, Cass Sunstein, 'The New Legal Realism' 75 *University of Chicago Law Review* (2008) 831–854 at 831.

attempts, through empirical, quantitative investigation, to specify the effect of judicial 'personality' on legal outcomes, as well as the institutional contexts that encourage or constrain the effects of judicial temperament of legal outcomes.[24] While the research is not yet advanced enough to establish robust conclusions, this scholarship indicates that, for the most part, judicial 'personality' comes into play only in the 'hard cases,' either because judges are constrained by law in most cases to rule in certain ways regardless of their political or ideological orientations, or because the members of the judiciary are so similar to one another in outlook, training and core values that they tend to all exercise their discretion in the same way, while a body more representative of the general population might produce a greater variety in outcomes.[25] The former explanation tames Realism; the latter leaves it untamed.[26]

More broadly understood, NLR employs both legal theory and empirical approaches in order to both explain doctrine and promote legal solutions to public policy dilemmas.[27] Thus, in a volume of essays on behavioural law and economics, which Daniel Farber termed a new form of Legal Realism,[28] Cass Sunstein collects some essays on the effects of heuristics and biases in legal decision making,[29] but most of the contributions take on legal problems beyond judicial decision-making, such as contract formation, stock market analysis, vaccination decisions, jury awards, redistributive effects of legal rights, nuisance law, risk regulation, legal

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[24] Miles, Sunstein, note 23 at 834.

[25] Miles, Sunstein, note 23 at 845.

[26] 'Tamed' and 'untamed' are Frederick Schauer's terms for a Realism that only affects outlier (hard) cases and a Realism that goes to the core of all legal decision-making processes. Frederick Schauer, note 5 at 749.

[27] Howard Erlanger et al., 'Foreword: Is it Time for a New Legal Realism?' 2005 *Wisconsin Law Review* (2005) 335–363 at 337.

[28] Daniel Farber, 'Toward a New Legal Realism' 68 *University of Chicago Law Review* (2001) 279–303.

[29] Mark Kelman, Yuval Rottenstreich, Amos Tversky, 'Context-Dependence in Legal Decision Making'; Jeffrey J Rachlinski, 'A Positive Psychological Theory of Judging in Hindsight' in Cass Sunstein (ed.), *Behavioral Law and Economics* (CUP 2000) 61–95, 96–116.

bargaining dynamics, and tax.[30] As Farber notes, like the Legal Realists, the behavioural law and economics approach seeks 'to use the social sciences to understand the behaviour of legal decision-makers and the effects of legal rules'.[31]

While Brian Leiter has called into question claims that Legal Realism actually engaged in empirical research drawing on the social sciences,[32] NLR insists on doing legal scholarship from the bottom up and from the top down simultaneously by making use of empirical research as well as qualitative methods and theoretical insights developed in the social sciences.[33] If nothing else, it seems that NLR is grappling with the challenges of introducing specialised knowledge and methodology into legal discourse in a more systematic way than did old Legal Realism.[34]

NLR also associates itself with a progressive politics, based on the naive hypothesis that social scientific inquiry into the efficacy of political structures would yield a progressive critique of those structures.[35] With its combination of empiricism, a call for the incorporation of social scientific methods into legal scholarship, and its progressive politics, NLR seems at times like a rebranding of the Law and Society movement, as both NLR and Law and Society have been associated with the University of Wisconsin,[36] and NLR invokes both pragmatism and the Law in Action approach, which is also related to Law and Society.[37]

3.2 The New International Legal Realism

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30 See range of essays in Sunstein, note 29 at 116–186 and 211–421.

31 Farber, note 28 at 303.

32 Brian Leiter, 'Legal Realisms Old and New' available at: http://ssrn.com/abstract=2079810 (accessed XXX) 8.

33 Erlanger, note 27 at 339–340.

34 Erlanger, note 27 at 341–342; Miles, Sunstein, note 23 at 831.

35 Erlanger, note 23 at 344.

36 Four of the six co-authors and co-organisers of the *Wisconsin Law Review*'s special issue on NLR were professors of the University of Wisconsin at the time.

37 Erlanger, note 23 at 356–357. Two of the three editors of a large anthology of Law in Action articles, Stewart Macauley and Elizabeth Mertz are also University of Wisconsin law professors and key players in NLR. Stewart Macauley et al., *Law in Action: A Socio-Legal Reader* (Foundation Press 2007).

Just as NLR can be divided into a narrow and a broad version, the New International Legal Realism (NILR) comes in two very different strains. The first is Rationalism, which ranges from a law and economics to a behavioural economics of international law. But various normative theories associated with international relations – Liberalism[38] and Constructivism[39] –as well as international legal theories ranging from Harold Koh's Transnational Legal Process[40] to Paul Schiff Berman's Global Legal Pluralism,[41] could also be viewed as qualifying as variants of Legal Realism in international legal theory.[42]

3.2.1 Rationalist International Legal Theory

While NLR draws broadly on social scientific methodologies derived from fields like history, anthropology, sociology, and psychology, Rationalist international legal theory, developed by scholars like Eric Posner, Jack Goldsmith, Oona Hathaway and Andrew Guzman, supplements Chicago-school law and economics with behavioural law and economics while retaining assumptions associated with traditional International Relations realism.[43] While Rationalism has its roots in NLR, there are subtle differences in the

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[38] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004); Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' 51 *International Organization* (1997) 513–553.

[39] Nicholas Greenwood Onuf, *Making Sense, Making Worlds: Constructivism in Social Theory and International Relations* (Routledge 2013); Alexander Wendt, *Social Theory of International Politics* (CUP 1999); Friedrich V Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP 1989).

[40] Harold Hongju Koh, 'Transnational Legal Process After September 11' 22 *Berkeley Journal of International Law* (2004) 337–354; Harold Hongju Koh, 'Transnational Legal Process' 75 *Nebraska Law Review* (1996) 181–207.

[41] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

[42] Terminological confusion seems unavoidable. The international law and international relations theories that I am discussing here as a variant of Legal Realism are all clearly distinguishable from and in many cases a reaction against the International Relations realism that has dominated the field in the United States since the middle of the twentieth century.

[43] Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008); Jack L Goldsmith, Eric A Posner, *The Limits of International Law* (OUP 2005).

methodological recipe that lead the NILR to have dramatically different political valences than NLR.

While NLR is clearly a progressive movement, NILR is politically diverse, and given the left-wing tilt of the legal academy generally and of international legal scholarship in particular, this diversity puts NILR on the conservative end of the scholarly spectrum. For example, Eric Posner and Miguel FP de Figueiredo used classic NLR methods to demonstrate that justices of the International Court of Justice (ICJ) exhibit bias towards their own countries, their countries' allies and to countries that are, in some respect, similar to their own countries.[44] Posner then follows up with an argument that, as a result of this exhibited bias, the ICJ has experienced a decline in its institutional legitimacy, resulting in a smaller docket consisting of less momentous cases.[45] Posner applies classic Legal Realist methods in service of a revisionist scholarship at odds with the progressive agenda of both classic Legal Realism and NLR.[46]

Rationalist international legal theory focuses on states as the relevant actors[47] assumes that states are unitary actors[48] and that states for the most part pursue their self-interest in the conduct of their international relations.[49] This new Rationalism benefits from

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[44] Eric A Posner, Miguel de Figueiredo, 'Is the International Court of Justice Biased?' 34 *Journal of Legal Studies* (2005) 599–630.

[45] Eric A Posner, *The Perils of Global Legalism* (University of Chicago Press 2009) 144–145.

[46] Oona Hathaway, Ariel Lavinbuk, 'Book Review: Rationalism and Revisionism in International Law – Jack L Goldsmith, Eric A Posner, *The Limits of International Law*' 119 *Harvard Law Review* (2006) 1404–1443 at 1406–1407.

[47] Goldsmith, Posner, note 43 at 3; Guzman, note 43 at 17.

[48] Guzman, note 43 at 19; Hathaway, Lavinbuk, note 46 at 1432.

[49] Guzman, note 43 at 17; Goldsmith, Posner, note 43 at 13.

the long-delayed[50] dialogue between international legal theorists and international relations theorists within the US academy.[51]

The great advantage of the Rationalist approach to international law is its parsimony.[52] The Rationalist model has very few working parts; it takes into account only a few variables and thus seeks to transform international legal theory from a descriptive into an explanatory and predictive model.[53] While Rationalists acknowledge that non-state actors play a role in international affairs, they do not consider the role of non-state actors to be so significant that Rationalist theory needs to take non-state actors into account in order to explain and predict the course of international law.[54] Rationalist models thus do not account for sub-state units, multinational corporations and transnational NGOs.[55]

Rationalists are generally committed to treating states as unitary actors.[56] Rationalist theory associates the preferences of states with states' 'leadership',[57] which usually means the leaders of the states' executive branch of government, since that branch has the dominant role in formulating foreign policy. Rationalist theory thus downplays the importance of competing factions within the executive branch, nor does it devote much attention to legislative input into international law-making or foreign policy decision-making. Some Rationalists assume that domestic courts can and should play no role in shaping international legal rules or compliance with such rules.[58] Finally and not surprisingly,

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50 Oona Hathaway, Harold Hongju Koh, *Foundations of International Law and Politics* (Foundation Press 2005); Stephen Krasner, 'International Law and International Relations: Together, Apart, Together?' 1 *Chicago Journal of International Law* (2000) 93–99 at 93.

51 Emilie M Hafner–Burton, David G Victor, Yonatan Lupu, 'Political Science Research on International Law: The State of the Field' 106 *AJIL* (2012) 47–97 at 48.

52 Guzman, note 43 at 21.

53 Hathaway, Lavinbuk, note 46 at 1424.

54 Guzman, note 43 at 8–9; Goldsmith, Posner, note 43 at 4–5.

55 Goldsmith, Posner, note 43 at 5; Guzman, note 43 at 21.

56 Guzman, note 43 at 19.

57 Goldsmith, Posner, note 43 at 6; Jack L Goldsmith, Eric A Posner, 'The New International Law Scholarship' 34 *Georgia Journal of International and Comparative Law* 463–484 at 472.

58 Posner, note 45 at 207–225.

Rationalism assumes rationality. 'Rationality' here means that states are guided by their perceived self-interest and not by legal norms, which Rationalists treat as a product of state interests.[59]

Rationalists set out to improve the discipline of international legal scholarship by establishing standards of methodological and empirical care. Thus like NLR, Rationalism seeks to improve on the methodological rigor with which Legal Realism is practiced. Rationalism has clear scientific – or at least scientistic – ambitions. It aspires to 'frame claims as testable hypotheses'.[60] In order to do so, it self-consciously simplifies the world of international relations of international law.[61] It sweeps aside suggestions that states might be motivated by considerations other than self-interest, as well as the perhaps more significant challenges associated with the maddeningly complex processes whereby states identify and pursue their interests.

3.2.2 Normative Realist Theory

In this short chapter, it is impossible to do justice to the wealth of fresh theoretical approaches that have recently emerged in international legal scholarship. What unites the approaches addressed here under the rubric of normative NILR is a two-fold rejection of Rationalism. First, normative NILR rejects the assumptions that states are unified, rational actors and that one can either describe international relations or predict behaviour by focusing exclusively on state action. Second, normative NILR theorists view legal norms as having an independent valence that affects the choices of legal decision-makers. In short, normative NILR looks beyond the maximisation of self-interest in order to explain how various actors behave on the international stage. As we shall see in the discussion below, while NILR is in some ways compatible with positivism, most NILR theorists are traditional Legal Realists who believe that non-legal factors play a very large role in the formation, interpretation and (selective) enforcement of

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59 Goldsmith, Posner, note 43 at 13.

60 Goldsmith, Posner, note 57 at 466.

61 Robert Hockett, 'The Limits of Their World' 90 *Minnesota Law Review* (2006) 1720–1790 at 1724.

international legal rules. Normative NILR also provides useful insights into the limits of Rationalist NILR.

As its normative NILR critics note, Rationalists generally promote the advantages of their understanding of international law vis-à-vis other theoretical models based on their model's superior ability to predict state behaviour with respect to international law.[62] In practice, however, Rationalism has not established itself as a useful predictive tool, in part because the Rationalist model often simply assumes rather than establishes that states are self-interested, rational actors.[63] Rationalists renounce all assumptions as to the interests that drive state conduct and acknowledge that generalisation is hazardous.[64] Sometimes states are driven by pursuit of security; sometimes by pursuit of prosperity. Rationalist theory cannot tell us when one interest will prevail over another or if we can even know what interest is driving foreign policy.[65] As a result, Rationalists run into difficulties because they are no better at identifying states' interests than are international legal scholars who adopt normative theories. Even when Rationalists focus on particular case studies, they can offer only 'reasonable conjectures' about state interests.[66]

In addition, NILR scholarship rebuts the Rationalist assumption that states are the only relevant actors in international affairs by detailing the range of international agreements and both international and domestic adjudications to which entities other than states have been parties,[67] while also noting that customary international law, including customary human rights and humanitarian law can bind private actors, such as corporations.[68] More generally, much of NILR theory recognises that individuals,

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62 Hathaway, Lavinbuk, note 46 at 1424; Goldsmith, Posner, note 57 at 473.

63 Paul Schiff Berman, 'Book Review Essay: Seeing Beyond the Limits of International Law – Jack L Goldsmith, Eric A Posner, *The Limits of International Law*' 84 *Texas Law Review* (2006) 1265–1306 at 1271.

64 Goldsmith, Posner, note 57 at 474.

65 Hockett, note 61 at 1729–1730.

66 Goldsmith, Posner, note 57 at 475.

67 Jordan J Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion' 51 *Virginia Journal of International Law* (2011) 977–1004 at 978–985.

68 Paust, note 67 at 987.

acting singly or in association with others, play in the 'formation, reaffirmation, and termination of international law'.[69]

In its quest for parsimony, Rationalism can simplify the world of international relations and international law beyond recognition.[70] Robert Hockett characterises the dangers of Rationalism as leaving us with:

> [A] world of fetishized, black-boxy Scrooge-states, incomprehensibly seeking in large part to eat one another, calculating and gaming with those and with cognate objectives in view, constrained by no more than the weapons that others possess all while 'empt[il]y, happ[il]y' or mendaciously speaking as if the routines and mere memoranda of understanding that emerge from this contest were law.[71]

Rationalists justify their focus on states as the relevant actors in international law on the ground that doing so in no way hinders them from developing testable theses that can help predict conduct in the realm of international affairs. However, Rationalism has yet to make any testable predictions, and its critics maintain that it is incapable of doing so in its present form.[72] On the other hand, while critics of Rationalism point out the dangers of a predictive model that derives from assumptions that may not completely reflect the complexities and subtleties of international relations, those same critics acknowledge that their own more complex models do not so readily generate testable hypotheses and lack predictive force.[73]

As a result, NILR, in its two variants, is an incomplete theory of international law. Rationalism purports to create working models that can both explain and predict state behaviour, but its models are so fundamentally flawed as to be of limited value. Moreover, as normative NILR recognises, by focusing exclusively on states, Rationalism tells only part of the story of international law's

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69 Paust, note 67 at 1001.

70 Kal Raustiala, 'Refining the Limits of International Law' 34 *Georgia Journal of International and Comparative Law* (2006) 423–444 at 424.

71 Hockett, note 61 at 1722 (quoting Goldsmith, Posner, note 43 at 267).

72 Hathaway, Lavinbuk, note 46 at 1425.

73 John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' 52 *International Organization* (1988) 855–885 at 885.

development and impact. Normative NILR provides a far richer descriptive model of the interaction of the various actors relevant to an understanding of the workings of international law, but that very richness prevents normative NILR theorists from articulating a coherent approach. Focused like Rationalists on the extent to which international law is an efficacious force in the world, their models for identifying the mechanisms through which laws are made and distinguished from non-legal rationales for behaviour remain underdeveloped.

4. Overlap and Divergence in International Legal Realism and International Legal Positivism

On the surface, NILR and the NILP seem like irreconcilable movements. To the extent that NILP is committed to the Kelsenian project of a Pure Theory of Law, its project is unsullied by the political, contextual, sociological, psychological, economic, and ethical considerations that go the heart of NILR. And yet, there are ways to put the two approaches to international law into conversation with one another. Just as Legal Realism adopted positivist assumptions regarding the nature of law and of legal authority, the assumptions informing NILR put it far closer to positivism than to natural law theory. Where the two approaches diverge, that divergence is best understood as a product of the very different questions that they pose. NILP, like classical international legal positivism and legal positivism more generally, attempts to ascertain what law is and whence legal norms derive their authority. NILR, while informed by positivist notions about the derivation of legal norms, is far more dedicated to the question of, to borrow a title from a leading NILR practitioner, how international law works.[74]

4.1 Elements of the New International Legal Positivism

[74] Guzman, note 43.

One hesitates to even acknowledge NILP's existence, as it is difficult to identify the adherents of the movement. In promoting formalism in law-ascertainment, Jean d'Aspremont does not offer a defence of legal positivism as a whole. D'Aspremont gives two main reasons for resisting the conflation of positivism and formalism. First, formalism is but one of many tenets of positivism, not all of which he is willing to embrace. More importantly, even among themselves, positivists cannot agree on how to define and delimit their approach to the law.[75] For the purposes of the discussion to follow, we will treat formalism as to law-ascertainment as a component of NILP while acknowledging that the approaches are related but distinct.

NILP differentiates itself from classical international legal positivism for two reasons: new theoretical challenges arose, and the world changed. Classical international legal positivism developed at a time when it did not have to respond to Legal Realism or Critical Legal Studies, as these movements focused their energies primarily on national legal systems. In the past forty years or so, as Jörg Kammerhofer and Jean d'Aspremont have noted, critical approaches found their way into the literature on the nature of international law.[76] At the same time, international relations theory and some international legal theory began to take note of the significance of non-state actors in world affairs and began to conceptualise international law in ways that did not treat states as the sole or even the main relevant actors. These new conceptions of international law and international relations began to call the assumptions of classical international legal positivism into question.

In articulating the characteristics of NILP, Kammerhofer and d'Aspremont accept *arguendo* a narrative, according to which classical international legal positivism was done in by its own limitations – its focus on states and on the need for state consent to create binding rules of international law.[77] NILP thus adapts the fundamental positivist doctrine – that law is a human creation to be

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[75] Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 25–27.

[76] Kammerhofer, d'Aspremont, Chapter 1.

[77] Kammerhofer, d'Aspremont, Chapter 1 at 5.

evaluated based on its pedigree rather than in respect to moral or ethical values – to a world in which law-creating authorities and processes can be diverse, overlapping and contested. This complicates the positivist project but also adds to its potential as a descriptive and predictive theoretical model.

NILP is also distinguished from its classical predecessors in its forthright acknowledgement that the battle against uncertainty is unwinnable, and in so doing, it adopts sceptical attitudes towards legal rules that are very similar to those that inform legal realism, although NILP focuses on a narrower set of sources of uncertainty in law. NILP poses problems for which it can provide no solutions in its own terms. NILP elaborates on mechanisms for determining what the law is, but determining how legal norms and non-legal norms interact to shape the behaviour of actors in international affairs is beyond the scope of the NILP project.[78] For example, Jean d'Aspremont acknowledges that his formalist approach to the ascertainment of law does not reach issues of interpretation. Moreover, even with respect to law-ascertainment, d'Aspremont acknowledges that, because of the indeterminacy of language, 'formalism inevitably brings about some indeterminacy.'[79] Jörg Kammerhofer's approach helps us to understand the various types of uncertainty that bedevil our attempts to identify legal norms, but even if we try to address such uncertainty through a 'utopian' act of will and adopt the Kelsenian *Grundnorm* theory, ontological uncertainty will persist.[80]

As a result of these insights, NILP confronts a familiar, postmodern world. It does so with a sophisticated version of philosophical scepticism while working within a tradition that is for the most part simply modern, as opposed to post-modern. In some ways, NILP's inheritance from classical Legal Positivism creates tensions with versions of NILR that have their own inheritance of Legal Realism's hostility to anything that smacks of formalism and to any approach to legal theory that attempts to

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78 D'Aspremont, note 75 at 10–11.

79 D'Aspremont, note 75 at 15, 139.

80 Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Approach* (Routledge 2010) 240.

bracket out legal from non-legal reasoning. There is nonetheless a great deal of overlap in the worldviews of NILP and NILR writers.

4.2 Divergence: Rationalism and the Limits of International Law

To the extent that variants of Rationalism deny law any independent valence and insist that states comply with international law only when doing so accords with the states' perception of their self-interest, NILR and NILP cannot be reconciled.[81] Similarly, to the extent that NILP dismisses arguments sounding in pragmatism, political expediency, effectiveness or *Realpolitik* as not legal in nature,[82] even if NILP recognises that non-legal arguments may be relevant to legal outcomes, it rules out any possible dialogue between the two approaches, unless the parties agree that NILR is a sort of extra-legal supplement to NILP approaches.

But NILP also highlights the weakness of Rationalism to the extent that Rationalism treats law not only as largely irrelevant but also as largely fixed. Jean d'Aspremont correctly notes that Rationalism has not had much success in the realm of international legal theory, even if it is accorded a more respectful audience in international relations theory.[83] Rationalism asks what motivates states to comply or to fail to comply with legal obligations, but it rarely takes into consideration the complexities involves in determining what those legal obligations are. In some ways, NILP takes the lessons of the 'untamed Realism' of the Critical Legal Studies movement to heart far more than does NILR. NILP more thoroughly acknowledges the epistemological and ontological uncertainties that confound our attempts to identify legal norms.[84]

4.3 Overlap: Normative Theory and the Future of International Law

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[81] Jack Goldsmith and Eric A Posner embody this variant of NILR. Goldsmith, Posner, note 43.

[82] Kammerhofer, note 80 at 26, 28, 34.

[83] D'Aspremont, note 75 at 103.

[84] D'Aspremont, note 75 at 3–4.

NILR and NILP may be most united in a question that seemed to divide traditional Legal Realism for earlier variants of legal positivism. Both are interested in the problem of uncertainty in international law. NILR looks beyond the law to economic theory, politics, history and culture in order to explain the ways in which legal norms arise, develop, and harden into rules or lapse into something akin to positive morality. NILP seeks to identify the sources of uncertainty and through both theoretical and legal mechanisms, reduce uncertainty in the law wherever possible.

A formalist approach seems to limit the possibility that uncertainties might arise by disfavouring certain types of authority on which parties might seek to rely in order to create uncertainty where formal rules are otherwise clear. However, d'Aspremont defines the concept of 'law applying authorities' broadly to include 'who[]ever, as a matter of social practice, members of the group … identify and treat as 'legal' officials'.[85] While d'Aspremont gives priority to written instruments in the ascertainment of legal rules,[86] those written instruments must be understood in light of actual practice.[87] But d'Aspremont seeks to bring the potential cacophony to order with the aid of his version of Hart's 'social thesis,' which is informed by the philosophy of language.[88] Ultimately, criteria of law ascertainment are to be looked for in the 'the converging practice of law-applying authorities'.[89] In short, the existence of legal rules requires both formal (preferably written) evidence and some regularity of observation. D'Aspremont avoids specifying the required degree of regularity, beyond the statement that a *feeling* among law-applying authorities that they are applying the same criteria is required.[90] Here, the distance between NILP and NILR seems to be little more than a matter of where one places the emphasis in the interplay between words and deeds in the creation of legally binding obligations.

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85 D'Aspremont, note 75 at 203, citing Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) 142.

86 D'Aspremont, note 75 at 12.

87 D'Aspremont, note 75 at 13.

88 D'Aspremont, note 75 at 200.

89 D'Aspremont, note 75 at 201.

90 D'Aspremont, note 75 at 201.

Timothy Meyer provides a sort of soft Rationalist NILR perspective (he calls his approach 'institutionalist') on d'Aspremont's work.[91] Much of Meyer's review is appreciative of d'Aspremont's contributions to our understanding of law ascertainment, but Meyer rejects d'Aspremont's distinction between law and non-law based on formal indicators and argues that informal signalling mechanisms grant states flexibility and enhance opportunities for international cooperation.[92] Where NILP attempts to identify and categorise ambiguity in legal rules, Meyer's NILR recognises that ambiguity has its uses. Relying on behavioural studies, Meyer contends that parties inclined to be law-abiding and risk averse are more likely to comply with fuzzy rules than with strict ones, as they go out of their way to avoid even the appearance of non-compliance.[93] In addition, Meyer expresses concern that legal formalism can inhibit dynamism in international law, and without such dynamism, international law would remain powerless over non-state actors and over realms of law (such as international criminal law and international humanitarian law) where law's efficacy is greatly reduced if it cannot regulate the conduct of non-state actors.[94] But here too, the difference might just amount to a matter of emphasis. As Meyer acknowledges,[95] d'Aspremont's social thesis incorporates the sort of dynamism that his formalism seemingly undercuts.

Indeed, Meyer brings NILP and institutionalism together through the shift from traditional legal positivism's focus on the intent on the states that were bound by international law to a focus on the *expectations* of what d'Aspremont calls law-applying authorities.[96] Meyer restates d'Aspremont's thesis in institutionalist terms:

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91 Timothy Meyer, 'Review Essay: Towards a Communicative Theory of International Law – Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*' 13 *Melbourne Journal of International Law* (2012) 921–939.

92 Meyer, note 91 at 933.

93 Meyer, note 91 at 933.

94 Meyer, note 91 at 933–934.

95 Meyer, note 91 at 934.

96 Meyer, note 91 at 936.

> [I]nternational law is most likely to be effective in generating behavioral change, not when states act out of a sense of legal obligation, but rather when there are shared expectations about the kinds of obligations created by an instrument and what the instrument requires of states.[97]

NILP may distinguish itself from classical international legal positivism by the extent to which it acknowledges the limitations of what can be accomplished through an analysis of law as such. NILP practitioners are constantly reminding their audience that their subject matter is law and legal analysis alone. Kammerhofer repeatedly advises against methodological syncretism in legal analysis, which he believes would hinder scholarly cognition.[98] This is not to discount the importance of other factors that might affect the behaviour of legal decision-makers, but NILP insists on drawing clear lines between legal and non-legal analysis.

In fact, NILP requires assistance from non-legal analysis because it concludes that legal analysis alone cannot resolve legal issues. For example, Jörg Kammerhofer concedes at the conclusion of his monograph on *Uncertainty in International Law* that there is no possible way of remedying uncertainty through the mechanisms of legal positivism.[99] If the goal is to create a world in which the application and enforcement of legal norms is stable and predictable, NILP requires a supplement, but that supplement is not legal analysis. NILR can provide the necessary supplement, but in order to do so, it needs to develop a more robust appreciation for the uncertainty in legal norms that NILP identifies, rather than treating legal norms as established facts from which international legal actors depart because they value non-legal considerations over adherence to legal norms. Just as NILP is in need of a Realist supplement, NILR needs NILP, as Jean d'Aspremont puts it, 'for the sake of the ascertainment of international legal rules and the necessity to draw a line between law and non-law'.[100]

Still, one might wonder, if NILP cannot provide any sort of legal certainty with respect to the specification of legal rules, how its project could be of use. NILP has the great advantage of bringing

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97 Meyer, note 91 at 936–937.
98 Kammerhofer, note 80 at 201, 210.
99 Kammerhofer, note 80 at 240.
100 D'Aspremont, note 75 at 5.

seriousness and rigour to the analysis of how we ascertain legal rules and identify legal norms. But a rigorous inquiry into these questions yields only uncertainty, meaning that ultimately the question of how norms are to be interpreted, what norms are applicable to a specific legal question, or how to adjudicate differences in cases of overlapping and seemingly contradictory norms cannot be answered exclusively with the tools for legal analysis that NILP provides. Nevertheless, legal questions are decided, and Legal Realism suggests that such decisions have more to do with extra-legal factors than with legal positivism's ultimately futile attempts to reconstruct legal norms through recourse to legal analysis alone.

The answer might depend on the pervasiveness of legal uncertainty. There may be no ultimate answer to the question of how legal norms are to be recognised, interpreted or reconciled, but there may be an answer *for us*. That is, given an actual dispute and a set of possible outcomes, we may be able to reach a consensus in many cases, purely on the basis of proper legal analysis, as to the proper outcome. NILP is extremely useful in these cases, and then the challenge is to specify the extent of the world of easy cases. Jean d'Aspremont defends the usefulness of establishing 'elementary indicators as to what is law and what is non-law'. He also notes that indeterminacy is reined in through the social practice of law-applying authorities.[101] Nonetheless, for 'untamed' versions of NILR, which would treat all controversies as 'hard cases', whether or not legal analysis leads to clarity or ambiguity is irrelevant, as cases are ultimately decided on non-legal grounds.

4.4 International Law and the Challenge of Postmodernism

While both NILR and NILP pride themselves on their cognisance of certain developments in postmodern theory, it is not clear that international law as a field has really come to terms with the challenges of the postmodern world. It may well be that the consequences of postmodernism are simply too destabilising to incorporate into an approach to law. There is nothing new under

[101] D'Aspremont, note 75 at 141.

the sun. Postmodern insights were anticipated in earlier thinkers, going back at least to Heraclitus. If postmodernism is reduced to a radical form of scepticism, one can accept the claim that Hans Kelsen's positivist theory is the epitome of postmodernism.[102] But there are aspects of postmodernism that are far more threatening to the NILP (and NILR) project.

To the extent that one can generalise about 'postmodern theory,' it is safe say that postmodernism is a response to both the intellectual tradition of structuralism and to the influence of technology on historical consciousness and self-conceptualisation.[103] Postmodernism is generally suspicious of master historical narratives and grand theories of the human sciences. This skepticism is an abreaction against the teleology and optimism that came to be associated with Enlightenment rationality, especially as forms of rationality also became associated with twentieth century crimes against humanity.[104]

While structuralism in linguistics and anthropology claimed to have uncovered the systems of binary oppositions that underlie all manners of communication, deconstruction is a form of ideology-criticism that focuses both on the distortions created by our mental habit of thinking in binaries and on the hierarchical and discriminatory nature of binary oppositions. Deconstruction challenges legal theory especially forcefully, because binary oppositions (legal–illegal, guilty–innocent, binding–non-binding, written–oral, timely–late, substantive–procedural) are the very stuff of legal systems. Law students are taught to diagram doctrinal areas through decision trees, each branch of which is a binary opposition. Still, while a systematic deconstruction of international law and the international legal system has not been attempted, critical approaches to international law do incorporate the scepticism attendant to deconstruction to challenge both binary

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[102] Kammerhofer, Chapter 5 at 1.

[103] Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press 1984) 3.

[104] Ernst Breisach, *On the Future of History: The Postmodernist Challenge and Its Aftermath* (University of Chicago Press 2003) 16–17; Joyce O Appleby, Lynn A Hunt, Margaret Jacob, *Telling the Truth about History* (Norton 1994) 205–206.

oppositions and the hierarchies that are dependent on the binary oppositions on which the international legal order rests. To the extent that NILP insists on the usefulness of strict oppositions between the legal and the non-legal, between writings and conduct, and between formal and informal processes, it swims against a postmodern tide. What does international legal positivism look like in a world where *il n'y a pas de hors-texte*?[105]

Post-structuralism also challenges the opposition of structure and agency. Poststructuralist New Historicists, for example, speak not of relationships of power and domination but of 'the circulation of social energy'.[106] This postmodern perspective is a product of our awareness that we, as human actors, are buffeted by natural forces that we do not completely understand and cannot control and by technological forces that we have created and yet also cannot control. Technological forces are products of human agency, yet they can become far more powerful than any individual will. Certain institutionalist forms of NILR have come to recognise that institutions develop a dynamic of their own, becoming what Pierre Bourdieu called both 'structured structures' and 'structuring structures'.[107] For the most part, however, while normative NILR expands the players who may interact in international legal processes and develops complicated models for their interactions, NILR has not worked out a post-structural theory of the dialectic of structure and agency in international affairs. NILP, with its focus on generation of norms, often brackets questions of structure and agency, as well as the crucial issue of power, which is at the centre of Foucaultian post-structuralism.

It is therefore unclear that either NILP or NILR truly grapple with the theoretical and real-world challenges of the post-modern world. Postmodernism is not a theoretical construct foisted upon an unsuspected world; it responds to real-world stimuli. In the case of

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[105] Jacques Derrida, *Of Grammatology* (Gayatri Spivak (tr.) Johns Hopkins University Press 1976) 158.

[106] Stephen Greenblatt, 'The Circulation of Social Energy' in Stephen Greenblatt, *Shakespearean Negotiations: The Circulation of Social Energy in Renaissance England* (University of California Press 1988) 1–20 at 6.

[107] Pierre Bourdieu, Outline of a Theory of Practice (Richard Nice (tr.) CUP 1977) 72.

international law, those stimuli include the proliferation of international actors, international law's pluralist nature, and the advent of technologies, ranging from cyber-attacks to bitcoins, that blur, or in some instances, erase distinctions between virtual and actual phenomena. But postmodernism also challenges us to interrogate and ultimately move beyond the binary oppositions that are the building blocks of the ways in which we construct our understandings of legal systems. It challenges us to think in new ways about what we might call the circulation of legal energies through overlapping systems and connections and also to think about resistances, which may be structural or volitional, to the flow of legal energies through the network of connections.

5. Conclusion

One can easily imagine a new generation of international legal scholarship in which the distinctions between realism and positivism become unimportant compared to the enormous overlap in perspective among scholars who see themselves as working in the two supposedly divergent traditions. Both NILR and NILP have abandoned the exclusive, and in some cases even the primary, focus on states as the relevant actors in international legal affairs. While NILP continues to favour some version of formalism, in which the focus of scholarship is on relatively traditional, hard-law sources, those sources are understood in a sophisticated manner that accounts for law generation processes that encompass the entire realm of social interactions that informs norm creation domestically and internationally. Most forms of NILR recognise the importance of formal legal rules, but NILR approaches can help positivists add new nuance to their understanding of the social processes underlying the creation of legal norms. While NILR's indebtedness to Legal Realism's enthusiasm for social scientific and empirical approaches can only help it to enrich the methodology of international legal scholarship, NILP provides a philosophical rigor that will protect the field from a form of empirical fetishism. In any case, increased cross-disciplinary interaction can only enhance our understanding both of

international law and of the role international legal scholarship in not only explaining but also in helping to shape international legal rules and rule-making processes.